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ABSTRACTS

Features

Zimbabwe's 2008 elections and their implications for Africa

Simon Badza

Using Zimbabwe's recent harmonised elections as an example, this paper argues that instead of being the necessary or ideal democratic tools for non-violent positive political transition in most young democracies of Africa, elections can be manipulated to prevent changes to an undesirable status quo. This is most likely if some strategic state institutions perceive their deeply entrenched positions and interests to be threatened by such necessary changes. It also argues that the harmonised elections have divided the Zimbabwean society, SADC, the African Union and the United Nations. Lastly, it also argues that flawed elections undermine prospects for democratic transition and consolidation in SADC and Africa. The SADC Principles and Guidelines are regarded

as the key criteria for evaluating the harmonised elections. The paper recommends that credible democratic elections are the only viable solution to Zimbabwe's current crises.

Chinese arms destined for Zimbabwe over South African territory: The R2P norm and the role of civil society

Max du Plessis

This paper discusses the recent litigation initiated by civil society groups involving a Chinese vessel which attempted to discharge a consignment of arms in Durban destined for the government of Zimbabwe. The author considers the litigation as an example of the emerging norm of the 'responsibility to protect' which has recently been developed within the United Nations, and he argues that the decision by the South African government to grant a permit for the transport of the arms over South African territory for Zimbabwe offended against the responsibility to protect (R2P) norm.

Elections and conflict resolution: The West African experience

Ismaila Madior Fall

The battle for democracy on the African continent has been long and arduous. In many African countries the absence of democracy was first experienced as political authoritarianism, enforced by quickly constituted regimes mostly characterised by their totalitarianism; their intent was to dominate practically the whole lives of their citizens, and not to tolerate any serious opposition to their aims and objectives. Under the pretext of needing to build fledgling nations, or to foster social and economic development, the political powers in charge showed little respect for civil liberties or the right to object. The seriousness of elections and their role in conflicts – and thus conflict resolution – in West Africa, can only be understood against the background of the role of elections as a primary source of conflict within these states. This paper outlines and explores that background.

The implementation of the African Charter on Democracy, Elections and Governance

Ibrahima Kane

Since the fall of the Berlin Wall and the end of Eastern Europe's totalitarian regimes, a consensus seems to have emerged, worldwide, for the introduction of new standards into international standards, commonly called 'democratic clauses'. The aim of these clauses is to promote the emergence of and contribute to the development of states based on respect for certain democratic principles in the world, particularly in Africa. However, the impact of these standards and principles seems to have been relatively limited. As a continent which, in 45 years, has experienced almost 85 coups d'état, as well as one-party regimes, states hooked into the 'sacrosanct' principle of non-interference in internal

affairs, dictatorships known as among the worst in the world, and which was the theatre, between 1963 and 1998, of nearly 26 armed conflicts which affected about 61 per cent of its population, Africa urgently needed to call on these standards and principles in order to promote the return to peace, security and stability in certain of its regions.

**'God willing, I will be back':
Gauging the Truth and Reconciliation Commission's
capacity to deter economic crimes in Liberia**

Rosalia de la Cruz Gitau

Liberia's civil conflict spanned over two decades, causing incalculable damage in its wake. In 2005 the Government of Liberia established a truth and reconciliation commission (TRC) to address crimes committed during the war, to act as the sole adjudicator of war crimes in Liberia. It is the first TRC in the world with a mandate to prosecute economic crimes. Hence, the success of the TRC greatly affects prospects for peace in Liberia, and approaches to transitional justice the world over. However, several factors seriously threaten the efficacy of the TRC, including a weak legal framework for addressing economic crimes, internal power struggles at the TRC, lack of resources, and exclusion of public participation in the TRC process. The author argues that economic crimes are a principal cause of Liberia's civil conflict, and that post-conflict efforts aimed at addressing these crimes are insufficient. She also discusses the administrative impediments that prevent the TRC from effectively deterring the commission of economic crimes. The author concludes by offering recommendations to the TRC that will strengthen its capacity to execute its mandate.

Essays

**The conundrum of conditions for intervention
under article 4(h) of the African Union Act**

Dan Kuwali

The definition of the AU right of intervention, in its present formulation, is problematic and implementation is contentious. The question of how to determine the 'deterioration' threshold after which a situation ceases to be a matter essentially within the domestic jurisdiction of a state has not yet been settled. The various thresholds for intervention in article 4(h) are subjective given that the justice of warfare is such that one side's heroes are regarded as the other side's war criminals; there is still a lack of consensus on what constitutes genocide; and it is debatable if intervention, which is invariably reactive, would be effective in bringing perpetrators of crimes against humanity to justice. The AU right of intervention is potentially a pro-sovereign doctrine with the aim of reinforcing states' responsibility to exercise their sovereignty. To realise this intention

of the framers of the AU Act, there is a need to broaden the definition of the thresholds for purposes of intervention – or to put it starkly, prevention – while maintaining the international definitions for purposes of prosecutions.

Terror in the backyard: Domestic terrorism in Africa and its impact on human rights

Cephas Lumina

Although Africa has a long history of terrorism and a number of countries continue to experience acts of terrorism particularly in the context of conflict, scant attention has been paid to its impact on human rights. This paper seeks to contribute to an understanding of the impact of domestic – rather than international – terrorism on human rights in Africa. The article has a dual focus. First, it provides a brief overview of the human rights impact of acts of domestic terrorism in Africa and second, it examines state responses to domestic terrorism with the aim of assessing the implications of these responses for human rights.

Nuclear Africa: Weapons, power and proliferation

Gavin Cawthra and Bjoern Moeller

This paper examines the rather limited African experience of nuclear weapons, and the implications of global nuclear weapon possession and proliferation – and responses against it – for Africa. Because there is a contingent, but not necessary, relationship between civil nuclear power and nuclear weapons, it also touches on civil nuclear issues in Africa, and the implications of uranium production. Since the only country in Africa that has actually developed both nuclear energy and nuclear weapons is South Africa, much of the focus is on that country. As a result of its prowess in this field, South Africa also inevitably leads African diplomacy on nuclear governance issues. Before turning to African implications, however, it is necessary to contextualise these issues in the global framework.

Complementarity and Africa: The promises and problems of international criminal justice

Max du Plessis

The idea of an International Criminal Court (ICC) has captured the legal imagination for well over a century. It became a reality on 18 July 1998 with the adoption of the Rome Statute of the ICC, which entered force on 1 July 2002. After being in existence for just over a year, by November 2003, the court had received more than 650 complaints. A range of organisations and individuals that submitted the first complaints to the prosecutor seem to have fundamentally misunderstood the ICC; to have placed a false hope in the

court as a means to provide them justice. The truth is that the court's jurisdiction is limited temporally – it can only exercise jurisdiction on events after 1 July 2002 – and its jurisdiction is limited substantively – it can only consider the most serious crimes of international concern, being genocide, crimes against humanity and war crimes – and until a proper definition of aggression is agreed upon by state parties, it cannot consider complaints about the crime of aggression. Furthermore, the court's jurisdiction is limited geographically. In the case of state parties, the court can exercise jurisdiction over their nationals wherever they may be in the world. But for non-state parties – like the US – the court can only exercise jurisdiction if the guilty American commits his or her crime on the territory of a state party. It is therefore critical to understand the topic that is at issue in this paper: complementarity. Complementarity is perhaps the key feature of the ICC regime. It is thus vitally important to appreciate its significance, and in so doing, to understand both the promises and problems of international criminal justice as exemplified by the ICC.

Zimbabwe's 2008 elections and their implications for Africa

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FEATURES

Zimbabwe's 2008 elections and their implications for Africa

Simon Badza*

Introduction

The Principles and Guidelines Governing the Conduct of Democratic Elections of the Southern African Development Community (SADC 2004) aim at enhancing transparency and credibility of elections and democratic governance as well as ensuring the acceptance of election results by all contesting parties. They are also meant to prevent election conflicts that potentially threaten constitutional stability in the region. As such, when Zimbabwe pioneered the application of some of these principles and guidelines in its 2005 parliamentary and senatorial elections, there was euphoria and optimism for better future elections in the entire region. Unfortunately this euphoria and optimism lasted only up to the controversial harmonised elections that Zimbabwe conducted on

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29 March 2008 and the subsequent controversial one-candidate presidential election run-off of 27 June 2008 that resulted in the disputed re-election of the incumbent with an unprecedented 85 per cent of the vote. Consequently Zimbabwe has been under a de facto government since 28 March 2008 that continued to the time of writing this paper.

Using Zimbabwe's recent harmonised elections as an example, this paper argues that instead of being the necessary or ideal democratic tools for non-violent positive political transition in most young democracies of Africa, elections can be manipulated to prevent changes to an undesirable status quo. This is most likely if some strategic state institutions perceive their deeply entrenched positions and interests to be threatened by such necessary changes. It also argues that the harmonised elections have divided the Zimbabwean society, SADC, the African Union and the United Nations. Lastly, it also argues that flawed elections undermine prospects for democratic transition and consolidation in SADC and Africa. The SADC Principles and Guidelines are regarded as the key criteria for evaluating the harmonised elections. The paper recommends that credible democratic elections are the only viable solution to Zimbabwe's current crises.

To begin with, the harmonised elections are unprecedented in Zimbabwe's election history. They comprised presidential, house of assembly, senatorial and local government elections, all held on one day. These were the first elections to be conducted outside direct control of the registrar general who, in the past elections, was always suspected of vote rigging in favour of the incumbent. They were the third elections to be conducted under some of the SADC Principles and Guidelines. Strikingly, they were the first elections in post-colonial Zimbabwe in which the incumbent lost control of the House of Assembly to the opposition. They were also the first elections in which the presidential winner had to receive a majority of 50 per cent plus one vote, with the possibility of a second round within 21 days. It was equally unprecedented that Robert Mugabe disqualified the first round as being neither free nor fair, thus implying that the only free and fair elections are those that he wins.

According to the final House of Assembly election results that include those of the by-elections in three constituencies (Gwanda South, Pelandaba/Mpopoma and Redcliff) ZANU-PF won 99 seats, the MDC-T 100, the MDC-M 10 and there was one independent seat. ZANU-PF won 30 of the Senate seats, the MDC-T 24, and MDC-M 6. There are a total of 93 senatorial seats: 60 contested senatorial seats, the 2 seats of the president and deputy president of the Chiefs' Council, 10 seats for the provincial governors, 16 for the chiefs and 5 for presidential appointees. In the first-round presidential poll, which did not produce a clear winner, Robert Mugabe won 43,2 per cent, Morgan Tsvangirai 47,9 per cent, Simba Makoni 8 per cent and Langton Towungana the remainder. In the controversial one-candidate presidential election run-off of 27 June 2008 the incumbent 'won' 85 per cent of the votes.

Zimbabwe's general political characteristics

A unique party-state political system

Zimbabwe has a unique party-state political system with superficial trappings of political pluralism. It subscribes to the traditional Westphalian principle of absolute state sovereignty. It is mostly guided by the dictates of environmental determinism (realism/*realpolitik*) both at home and abroad. It tolerates opposition politics and credible democratic institutions and processes only to the extent that the deeply entrenched position and interests of the incumbent party and leader are not threatened. In revolutionary terms, the incumbent party and leader are the vanguard and the vanguard of the vanguard respectively. There are no visible distinctions among the state, the incumbent party and leader. Consequently most if not all institutions of government are perceived to be instruments at the service of the party-state. As such their independence, impartiality and credibility are increasingly suspect, particularly during critical processes such as elections. Consideration of just two state institutions, namely the Zimbabwe Elections Committee (ZEC) and the judiciary, are indicative of the growing perception among some Zimbabweans that they are not trustworthy.

The Zimbabwe Elections Commission

In principle the ZEC is an independent statutory body. But notwithstanding the fact that its five commissioners were drawn from both the incumbent party and the main opposition nominations, the ZEC's autonomy and impartiality have been based on rhetorical claims rather than practical evidence. It is perceived as being biased in favour of the incumbent and as such lacking the legitimately expected necessary levels of professionalism and public confidence. The implausible manner in which it managed the harmonised elections is indicative of serious institutional weaknesses that compromised the credibility of the election results. Consequently there is a growing conviction, especially among the opposition and civil society, that as currently constituted and on the basis of its performance record, the ZEC is not yet able to manage credible democratic elections in Zimbabwe.

The judiciary

Zimbabwe's party-state system compromises the fundamental democratic principle of separation of powers among the key arms of the state that include the executive, the judiciary and the legislature. The independence of the judiciary has increasingly been compromised, especially since the emergence of the opposition MDC in 1999. Its performance record during the harmonised elections confirmed the lack of independence and autonomy of the judiciary. In fact, it is perceived to be unconditionally accountable to the executive, at the expense of upholding the rule of law.

During the election campaigns, the judge president had urged all Zimbabweans to accept the elections results, and stated that the courts were ready to play their part in ensuring that peace and the right of individuals enshrined in the Constitution of Zimbabwe were given legal expression before, during and after the elections (*The Herald*, 15 April 2008:1). Furthermore, in the period immediately before the election day, the courts dismissed the credibility of the concerns jointly expressed by the opposition parties regarding clear indications that the election context facilitated vote rigging. After the polls, the opposition MDC (Tsvangirai) made several unsuccessful High Court applications, including one to compel the ZEC to release the presidential poll results. Other High Court applications by the opposition to nullify results from the 'recount' were dismissed with costs. In fact, the ZEC's decision to proceed with a 'recount' regardless of a High Court ruling to the contrary, further confirms the weaknesses of the judiciary. The judiciary then interfered even more directly by invalidating the withdrawal by opposition MDC-T from the presidential election run-off of 27 June.

The role of other state institutions

The effectiveness of the judiciary also depends on the support of state security and law enforcement agencies. The Zimbabwean Republic Police is known for its occasional selective application of the law and political policing in an environment in which vibrant civil society and opposition politics are criminalised. Throughout the elections the police applied the notorious Public Order and Security Act, 2002 (Act 1 of 2002) selectively and often disregarded court rulings, thus stifling the opposition MDC-T and perceived 'hostile' civil society organisations. In addition, although the police force advocated 'zero tolerance' and 'violence-free elections', only the polling day itself was relatively peaceful. The immediate post-polling day period was marked by many reported cases of political violence throughout the country, especially in rural areas and on the remaining white-owned commercial farms, as well as some urban high-density residential suburbs. Most perpetrators of this political violence got away with impunity. Furthermore, the presence of the service chiefs at the official launch of the presidential election run-off campaign by Robert Mugabe on 25 May 2008 clearly contributed to discrediting the elections. For example, during the run-up to the polling day, the service chiefs had intimated that they would only accept the victory of President Mugabe. One army chief of staff even 'told' soldiers to 'rally behind their Commander-in-Chief' (*The Saturday Herald*, 31 May 2008:1). This was blatant intimidation of both the electorate and opposition candidates.

Some negative effects of the party-state system have been convincingly illustrated by the active partisan role played by these agencies during the elections. This was exacerbated by the fact that the top leadership of these agencies comprise mostly veterans of the liberation war, with significant historical attachments to the incumbent party and leader. Indeed, it would have been naive to expect these forces to ignore the threat of political change.

The post-11 March 2007 political climate

Although the historic harmonised elections can be generally understood within the broad context of the increasingly tense and pervasively polarised political climate that prevailed since the formation of the MDC in 1999, the occurrence of political violence on 11 March 2007 is particularly significant for defining the context within which the harmonised elections were conducted. On that day some opposition MDC officials, including Morgan Tsvangirai, Nelson Chamisa, Sekai Holland and Grace Kwinjeh, as well as some of their supporters were brutally assaulted while in police custody. This was followed by a suspect wave of petrol bombings in selected police stations countrywide.

Perturbed by the situation, the SADC heads of state convened an extraordinary meeting in Dar-es-Salaam, Tanzania, to find an urgent solution. In its subsequent declaration, the SADC summit called for lifting of all forms of sanctions against Zimbabwe, an economic rescue package for Zimbabwe and a SADC sponsored inter-party dialogue that was to be facilitated by South Africa's President Thabo Mbeki. The inter-party talks resulted in Constitutional Amendment number 18 which provided for the harmonisation of the elections, including the posting of results at polling stations. It also moderated the Public Order and Security Act and the Access to Information and Protection of Privacy Act, 2002 (Act 5 of 2002), thus creating a slightly better election environment. The hope was that Zimbabwe's harmonised elections would be credible. In retrospect, they were not.

Economically and socially, the harmonised elections took place within a climate of unprecedented economic crisis coupled with dire social ramifications that Zimbabwean authorities have mostly blamed on natural and exogenous factors that include drought and 'smart sanctions'. The suspension of balance of payment support by the World Bank and International Monetary Fund also compounded the crisis that was evidenced by serious shortages of foreign currency, hyperinflation (then pegged at 160 000 per cent), currency speculation, a lack of discipline and poor service delivery in the financial services sector. The formal economy has to all intents and purposes been replaced by the more vibrant informal economy which now employs nearly 80 per cent of the formerly unemployed people. Nearly one quarter of the population is in the Diaspora as economic or political refugees. The country is also facing severe food shortages and approximately 80 per cent of the people are living far below the poverty datum line (set at US \$0,30 per day). The average life expectancy is estimated at 34 years for men and 36 years for women. The infant mortality rate is also one of the highest in the world, as is the antenatal maternity mortality rate. HIV/AIDS has also claimed its heaviest toll among the poor and the unemployed. Against this background the harmonised elections seemed to provide the ideal opportunity for peaceful change.

The media and propaganda as election tools

A vibrant media is a necessary bridge between the government and the people. Indeed, in a working democracy it is the watchdog over the performance of the government, for it enhances public information, enlightenment and confidence. Unfortunately, due to its political culture of restrictive media policies, Zimbabwe does not yet have such a media. The state media have a clear anti-opposition editorial policy which was stepped up to propaganda levels during the harmonised elections, particularly after polling day.

Admittedly, the opposition parties could place their advertisements in the state papers, on television, and on the national radio, which seemed to indicate government compliance with SADC election principles and guidelines. However, on the voting day and indeed the days that followed Zimbabwe Broadcasting Holdings became merely a mouthpiece of the ZEC during the announcement of the ‘meticulously’ verified results.

Throughout the election period, the incumbent evidently monopolised prime time and space in the state media and used it as election propaganda instruments. Immediately after the polling day the state media insinuated that Morgan Tsvangirai was begging ZANU-PF for a position as vice-president and claimed that Tsvangirai had called upon the United States to invade Zimbabwe. It also alleged that it had a ‘very disturbing document’ purportedly written by the secretary-general of the MDC-T, insinuating that teachers, who are normally recruited as polling officers, had been bribed to rig elections against Mugabe (*The Herald*, 14 April 2008:1). The state media also portrayed the MDC-T as the sole perpetrator of political violence.

Clearly, the partisan role of state media during the harmonised elections underscores its critical role in consolidating the party-state system. Admittedly, while most local privately owned and largely foreign based media in Zimbabwe and outside seemed to be biased in favour of the opposition and generally have an anti-Mugabe editorial policy, the state media should have been more objective during the elections as a matter of principle.

Therefore, the harmonised elections took place against the backdrop of worsening economic and social hardship, political tension, perceptions about bad governance, human rights abuses, erosion of the rule of law, rampant corruption and a tendency towards authoritarianism (Sachikonye 2004). There was also declining levels of state legitimacy and an increasingly adversarial relationship between the government of Zimbabwe and the West led by the US, United Kingdom, Australia, New Zealand, the white Commonwealth countries and the European Union. Zimbabwe’s ruling elite were also under targeted sanctions from these Western countries. The elections also took place after the post-Kenya election conflict that influenced the content of the joint statement by the service chiefs on 28 March 2008 in which they called for the upholding of peace and tranquillity during and after the elections, possibly as a pre-emptive move

against potential reaction by the opposition. However, post-polling day developments convincingly contradict the 'noble' intentions of the joint statement.

Accreditation of foreign observers and media

The selection and accreditation of foreign observers and media, based on the subjective principles of 'reciprocity', 'objectivity' and 'impartiality' in their relationship with Zimbabwe, did not improve the credibility of the elections. In the words of the Minister of Foreign Affairs: 'Clearly those who believe that the only free and fair elections is where the opposition wins, have been excluded since the ruling party, ZANU-PF, is poised to score yet another triumph' (*The Herald*, 7 March 2008:1). A total of 47 regional and sub-regional organisations as well as countries from Africa, Asia, the Americas and one European country (Russia) were invited to attend. Most observer teams prematurely declared that the historic elections were free and fair, on the basis of the situation immediately before and during the polling day.

Approximately 300 foreign journalists applied to cover the elections but the Zimbabwe authorities suspected that some of them were 'uninvited observers and security personnel' from hostile countries. The Permanent Secretary in the Ministry of Information and Publicity said that the government of Zimbabwe was aware of 'the machinations to turn journalists into observers', and stressed that the accreditation was accompanied by close scrutiny since the issue of media accreditation was as much an information issue as it was a foreign policy and security policy issue (*The Sunday Mail*, 16–22 March 2008). State media houses from countries whose observer teams had been accredited received preference.

Some election irregularities

The elections were marred by many irregularities, despite a temporary decline in inter-party violence, accessibility to no-go areas for the opposition and relatively fair state media coverage during the run-up to the first round voting day. Obvious irregularities included the following: The voters' roll was in shambles and the ZEC contravened the Electoral Act by failing to provide contesting parties with a hard copy of the voters' roll in a timely manner; there were disproportionately high numbers of polling stations in rural constituencies compared to the densely populated urban constituencies; there was a lack of timely information on the maps of new constituency boundaries; the suspect decision on the eve of the elections to use Presidential Powers (Temporary Measures) (Amendment of Electoral Act) (Number 2) Regulations of 2008 to provide for the presence of the police officers inside polling stations – this also contravened agreements from the inter-party talks; the individual statements by the service chiefs intimating that

they would only accept a Mugabe victory; Mugabe's statement that the opposition would never govern Zimbabwe in his lifetime; inequitable use of state media; political violence; selective application of the law; and biased accreditation of foreign observers and media. This was compounded by delays in releasing election results; the long litigation processes; the vote recounting as well as the suspicious arrest of election officials and some newly elected opposition parliamentarians; raiding of opposition MDC-T and Zimbabwe Election Support Network offices; arrest of the MDC-T leader and secretary-general, which all contributed to discrediting the elections.

The discrepancies in the Hatcliffe constituency, ward 42, are a telling example of the election flaws: out of a total of 24 678 voters, 8 500 were registered as 'normally resident' in block number 081083 according to the voters' roll. However, this block had no buildings. Also, stand number 10108, measuring 300 square meters, had over 70 registered voters (*The Standard*, 30 March 2008:1).

Clearly, the opposition participated under protest with Morgan Tsvangirai stressing that even if the ZANU-PF conceded that the MDC-T had won, the elections would still have not been free and fair.

Political violence and other election-related incidences

The actual first round voting day was peaceful and calm. Most polling stations opened and closed as scheduled; most voters managed to cast their ballots as the queues were relatively short; and the police assisted those who needed help. However, some voters were turned away for a number of reasons that suggested a poor voter education campaign, one that had been handled exclusively by the ZEC. There were only isolated reports of incidences of political violence.

After the announcement of the House of Assembly and Senate poll results, increased incidences of political violence were reported, mostly by private media. The violence occurred especially in the rural areas and the remaining white-owned commercial farms. Initially most of the victims were supporters of the opposition MDC-T and there were also reports that liberation war veterans were occupying the remaining white-owned commercial farms. Jabulani Sibanda, speaking on behalf of the 'freedom fighters', stressed that 'Zimbabweans had a right to their land, minerals, natural resources and if need be, their freedom to choose their leaders' (*The Saturday Herald*, 5 April 2008:1).

At the time of writing this paper, the opposition claimed that more than 50 of its supporters had been killed while over 40 000 people had been internally displaced (according to a report on 8 May 2008 by the Agriculture and Plantation Workers Union).

The ZANU-PF on their part claimed that its militants were targets of political violence for which it held the MDC-T responsible. After the harmonised elections the Zimbabwe Association of Doctors for Human Rights reported that they had treated more than 200 victims of political violence, mostly from the rural areas. Moreover, the figure continued to increase every day as the presidential election run-off date approached.

SADC involvement

As was stated above, SADC has been actively involved in the Zimbabwe situation. Indeed it may be held partly responsible for the post-election situation that is prevailing in Zimbabwe. In response to what turned out to be an election crisis, the late Zambian President Levy Mwanawasa, as SADC chairperson, convened an extraordinary summit meeting of SADC heads of state and government on 12 April 2008 to consider the Zimbabwe issue. Robert Mugabe and Thabo Mbeki did not consider this necessary, and that alone is suggestive of differences and potential cracks within the regional body regarding the Zimbabwe question.

In its subsequent communiqué, the summit commended the government of Zimbabwe for conducting the elections in a peaceful environment while the people of Zimbabwe were also lauded for the peaceful and orderly manner in which they conducted themselves before, during and after the polls. It noted the briefing by the delegation from the government of Zimbabwe and formally endorsed the Mbeki position that a presidential election run-off was necessary. At the subsequent SADC meeting in St Louis, Mauritius, Thabo Mbeki's continued position as SADC mediator in Zimbabwe was re-affirmed. However, Mbeki was criticised for a perceived lack of impartiality. The African National Congress, South African Communist Party and Democratic Party of South Africa all condemned the ZEC's performance. Botswana and Zambia, too, openly criticised the ZEC's handling of the election results and both refused to accept Robert Mugabe as the legitimately elected president of Zimbabwe. Botswana went so far as to boycott the subsequent SADC meeting in South Africa at which Robert Mugabe still held the status of Zimbabwean head of state.

SADC's insistence on quiet diplomacy is largely based on the perceived fear of political destabilisation, and the threat of war by 'spoilers', as well as distorted notions of Pan-African solidarity and a traditional non-coercive approach to conflict resolution. This approach of seeking some change without a regime change is premised on SADC's various state-centred protocols and treaties, and especially articles 7 and 8 of the SADC Mutual Defence Pact (2003), which stipulate the principles of sovereignty and non-interference. From their actions, it is clear that Zambia and Botswana are more committed to strengthening the democratic culture in the SADC region than other member states. Both countries seem to be guided by the principle that says: 'Stand with

anybody that stands right. Stand with him while he is right and part with him when he goes wrong.’

South Africa admittedly played a positive mediation role in Zimbabwe, based on the hope that an undisputed election result could be attained even after the harmonised elections. That was never to be. To the dismay of many observers, President Thabo Mbeki continued to urge unconditional patience and restraint. In pursuance of ‘quiet diplomacy’ South Africa tried to prevent the UN Security Council from placing Zimbabwe on its agenda and together with China, Vietnam and Russia it vetoed a UN Security Council proposed resolution on Zimbabwe, to avoid ‘complicating the situation that had not yet even reached the Kenya scenario’. Contrary to the position of the ANC, Mbeki insisted that the situation in Zimbabwe was a normal election process and not a crisis (*The Sunday Mail*, 13–19 April 2008). Clearly the South African government has remained solidly behind Robert Mugabe despite disapproval from many observers in Zimbabwe, the region and beyond. Naturally, the effectiveness of Thabo Mbeki’s mediation is increasingly being doubted especially by the suffering Zimbabweans.

Civil society involvement

Throughout the election period more civil society activities were taking place outside than inside Zimbabwe, where peaceful protest and solidarity marches were not allowed. These occurred especially in South Africa, Zambia, the US and the UK. A number of Zimbabwean civil society organisations also demonstrated at the Mlungushi International Conference Centre in Lusaka, Zambia, the venue of the SADC extraordinary summit, where they protested against the undue delay by the ZEC in the release of the presidential poll results. Civil society organisations also joined the MDC’s call for Thabo Mbeki to step down as SADC mediator after his inexcusable comment that there was ‘no crisis in Zimbabwe’. This was an indication of Mbeki’s perceived failure to remain impartial in his role as mediator. The Zimbabwe Election Support Network was also actively involved in voter education until government barred all organisations other than the ZEC from undertaking such activities. Like the Centre for Peace Initiatives in Africa, the Network placed election observer teams throughout the country. The Women’s Coalition through its ‘woman can do it’ campaign played an important role in encouraging women’s participation as candidates. Inside Zimbabwe, civil society was extremely constrained throughout the elections.

The verdict of observer teams

Ironically, according to almost all the accredited observer teams the 29 March 2008 elections were peaceful, transparent, free and fair and therefore a genuine reflection

of the will of the people of Zimbabwe. They commended the people of Zimbabwe for upholding the peace during the polling day, notwithstanding what they regarded as 'minor problems' regarding the voters' roll and largely isolated cases of political violence on that occasion. The East Africa Community team even said that they were looking forward to citing Zimbabwe as a good example in the African region, while the Zimbabwe Lawyers for Justice stated that the pre-election period was tranquil and peaceful and that campaigning had been conducted in accordance with the SADC Principles and Guidelines. They added that in terms of democratic development, the election saw Zimbabwe rising higher in its democratic record, probably unparalleled in sub-Saharan Africa. According to the Pan-African Parliament: 'On the overall, the basic conditions of credible free and fair elections as contained in the AU Declaration on principles of Governing Democratic Elections in Africa (2002) were reflected in the Zimbabwe harmonised elections, thus far' (*The Herald*, 1 April 2008:1). However, the Pan-African Parliament did express concern over the delay in the announcement of results.

There were some election observer teams that expressed concern over certain negative aspects while acknowledging the positive aspects relating to the elections. These teams include the Electoral Institute of Southern Africa and Centre for Peace Initiatives in Africa. The Electoral Institute of Southern Africa found the electoral process in Zimbabwe to have been 'severely wanting' and in its preliminary report of 31 March 2008 questioned the transparency and credibility of the election. They argued that the huge surplus of ballot papers tended to fuel a climate of suspicion, which was reinforced by the lack of transparency about the issuance of about 8 000 postal ballots for the police officers who voted ahead of the polling day (*The Zimbabwean*, 3–9 April 2008:1–2). On 11 April 2008 it issued another statement in which it 'noted with deep concern a number of developments that ... can seriously undermine the credibility of the already contested electoral process. These developments also have the potential to throw the country into a grave political crisis and ultimately exacerbate the suffering of the people of Zimbabwe ...' (EISA 2008). This proved to be a prophetic statement.

Apart from commending Zimbabweans for showing political maturity and upholding peace before, during and after the polls, the Centre for Peace Initiatives in Africa stated that it regarded the elections as crucial in bringing about unity and reconciliation in Zimbabwe. It called upon all political parties to respect the election results, urging the winners to uphold good governance through the immediate establishment of a government of national unity and reconciliation and to enact a people-driven constitution which would lead to a new dispensation. It called upon the SADC initiative on Zimbabwe to continue after the elections till it reached a logical conclusion and urged the observer missions to remain on the ground until a government of national unity had been formed to avoid giving false reports that might discredit the polls. It urged the ZEC to speed up the announcement of results to allay anxiety of Zimbabweans, stating

that while people were patient a delay could lead to violence. This also proved to be a prophetic statement.

The UN Security Council meeting

On 29 April 2008 the United Nations Security Council held a special session on the situation in Zimbabwe. European and Latin American members wanted to send a special UN envoy to the country but this was successfully blocked by South Africa. The MDC-T delegation managed to brief the UN Security Council about the humanitarian concerns in Zimbabwe. However ZANU-PF denounced both the attitude of the UN Security Council and the MDC-T which it described as sinister, racist and colonial. The UN Secretary-General expressed a deep concern over the delayed presidential poll result announcement and warned that the situation could deteriorate. He also expressed frustration with the repetitive statement by regional leaders that the rest of the world had no role to play and emphasised that 'the credibility of the democratic process in Africa could be at stake' (*New York Times*, 17 April 2008). He added that international observers had to be present for the presidential election run-off. After a meeting with Tsvangirai on 21 April in Accra, Ghana, UN Secretary-General, Ban Ki-Moon, urged intervention by the UN and AU. The UN had already sent an envoy, assistant secretary-general for political affairs, Haile Menkerios, to Harare.

Despite concern expressed over the election conflict in Zimbabwe by Croatia, Belgium, Britain, France, the US, EU and G-8, the UN Security Council failed to agree on a draft resolution sponsored by Britain and the US that sought to impose sanctions against Zimbabwe that included an arms embargo, asset freezes and travel bans against 13 top Zimbabwean officials that the two countries have accused of being responsible for election-related political violence. Nine countries voted for the resolution, five voted against it (including South Africa, Vietnam, Russia and China who are veto-wielding members) and one country abstained. It was a diplomatic victory for the incumbent in Zimbabwe.

The AU also expressed concern over reports from Zimbabwe, adding that it would send more observers for the run-off. In addition 40 prominent African personalities, including former UN Secretary-General Kofi Anan and retired presidents, had written to President Mugabe asking for assurances that the run-off election would be free and fair (*The Standard*, 15–21 June 2008). But, notwithstanding the recommendation to the government of Zimbabwe by the Pan-African Parliament and the SADC election observer teams that no presidential election run-off should be conducted, it did in fact take place. Furthermore, the AU summit of heads of state and government that met on 30 June did not reject Robert Mugabe as Zimbabwe's president-elect. Instead, it simply stressed the need for continued mediation by President Thabo Mbeki and the need for

a unity government. This raises doubts regarding the prospects for credible democratic elections in Africa.

The harmonised elections and SADC election principles and guidelines

The SADC election principles and guidelines include full citizen participation in the political process; freedom of association; political tolerance; equal opportunities for all political parties to access the state media; equal opportunities to vote and be voted for; the independence of the judiciary; impartiality of electoral institutions; acceptance and respect by political parties of the election results proclaimed to have been free and fair by competent national election authorities in accordance with the law of the land; and regular intervals for elections as constitutionally provided for. They also include the mandate and composition of SADC Election Observer Missions, a code of conduct for election observers, and the responsibilities of member states holding the elections (Oosthuizen 2006:304–305). These principles and guidelines complement the AU declaration on democratic elections. Clearly, while the first round of the elections was in line with some of the SADC Principles and Guidelines, the subsequent presidential election run-off deviated from not only these principles, but also from those set out in the AU declaration.

Implications for Africa

Regardless of Zimbabwe's pioneer status in adopting some of the SADC Principles and Guidelines Governing the Conduct of Democratic Elections, the 29 March 2008 harmonised elections were discredited because of many inexcusable irregularities and institutional weaknesses that characterise deeply flawed elections in general. These elections certainly did not meet the criteria for a free, fair and credible reflection of the democratically expressed will of the people of Zimbabwe. The violence accompanying the harmonised elections has left the Zimbabwean people deeply traumatised and divided. SADC, Africa and even the UN were also left divided.

However, there are some positive developments that have flowed from these elections: The recognition given to the MDC by some African governments, SADC, the AU and the UN (especially the Security Council) is noteworthy and may signal not only the possibility of the democratisation of African diplomacy, but also a possible paradigm shift from the failing 'quiet diplomacy' to 'effective diplomacy'. It also shows that international relations may no longer be exclusively state-centric. The involvement of foreign powers such as the US, UK, China and Russia also signals the continuation of competition for influence and strategic resources by the major powers. However, SADC's apparent lack of political will and capacity to effectively prevent the escalation of the situation in

Zimbabwe undermines the efficacy of 'African solutions to African problems'. Inevitably, it may eventually necessitate, or at least fail to prevent, intervention by actors who are more willing and more capable, and who fall outside the SADC circle.

Undeniably, Zimbabwe's harmonised elections have tarnished the reputation of SADC, a region that was traditionally regarded as stable and democratising and one that attracted investors and tourists alike. The Kenya-style 'power-sharing arrangement', inevitable and necessary as it might be in the circumstances, could set a precedent for those countries in the region and beyond with a weaker democratic culture, which could stifle the democratisation process in the entire SADC region and render it unstable. The failed democratic election processes in the Kenya and Zimbabwe have also undermined the prospects for credible democratic elections as a non-violent mechanism for positive political transition in Africa as a whole. In short, the elections have shown that starting democracy in Africa may be easier than consolidating it. Zimbabwe's 'blocked transition' is likely to continue unless the political players adhere to true democratisation.

Recommendations

Africa should guard against treating power-sharing arrangements as the panacea for election conflicts. Under a new people-driven democratic constitution with clear separation of powers and a justiceable bill of rights, a credible democratic election is the only viable solution to the Zimbabwe situation. It should result in an all-inclusive democratic government in which no single party is equated with the state. The election should adhere strictly to the SADC Principles and Guidelines. In addition, defence and security forces as well as semi-autonomous quasi-security organs such as liberation war veterans and the youth militia should be constitutionally barred from interfering with any election process. Constructive engagement with the international community is, accordingly, critical. Foreign observers should be invited on a credibility basis and should arrive before the elections and stay till a fair outcome is secure. Adequate funding is also necessary. It is critically important that election management institutions be independent and objective. 'Pan-African' solidarity should serve the interests of the people. It may be necessary to set up an international tribunal for perpetrators of election-related crimes against humanity. Finally, quiet diplomacy should have clearly stipulated benchmarks and be linked to a fixed time frame.

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Chinese arms destined for Zimbabwe over South African territory: The R2P norm and the role of civil society

Max du Plessis*

Introduction

In this paper a description is provided of the recent litigation involving the Chinese vessel the *MV An Yue Jiang* which attempted to discharge a consignment of arms at the Durban harbour in April 2008. That this consignment of arms attracted any attention was due in large part to the early warning and mobilisation of civil society and the media who reported, to the dismay of concerned South Africans and Zimbabweans, that the arms were destined for the Zimbabwean Defence Force. More alarming was the news and subsequent acknowledgment by the South African government that the government's National Conventional Arms Control Committee had issued a permit which allowed

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the arms to be transported over South African territory for delivery to the Zimbabwean Defence Force. This behaviour of the South African government proved not only to be unlawful, but also offended against South Africa's commitment to the responsibility to protect norm. Under the new concept of an international 'responsibility to protect', adopted unanimously by world leaders (including Thabo Mbeki) at a UN world summit in New York in 2005, states agreed to act appropriately to prevent the commission of serious human rights violations in another state, if that state was unwilling or unable to protect its own people.

As the paper will demonstrate, the responsibility to protect norm, or R2P as it has come to be known, is a lens through which one might view and judge a nation's response to atrocities committed in other states. It is also increasingly clear – and the Chinese ship case is proof of this – that the norm's best and sometimes only champions will be civil society groups and individuals who insist on holding their governments accountable to the moral standards that the norm entails.

The responsibility to protect norm

While the United Nations Charter in 1945 proclaimed in the first line of its preamble that the aim of the UN was to save 'succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind', the organisation and its members have not been able to secure that goal. Indeed, if anything, the second half of the 20th century was marked by deadly conflict and the resultant loss of millions of lives.¹

Africa, sadly, has been home to much of this devastation. Indeed, one of the reasons advanced for transforming the ineffectual Organisation of African Unity into the African Union was because of the perceived failure of the OAU to respond to serious conflicts between member states (see El-Ayouty 1994:180). Furthermore, in the fight for independence several of Africa's leaders led their newly liberated nations into totalitarianism and further bloodletting, with the OAU doing little to put a stop to this African malaise (see Packer & Rukare 2002:367). It did not help that the OAU found itself caught between superpower rivalries during the Cold War; the ideological clashes led to debilitation of the OAU as it failed to respond adequately to civil wars that were fuelled by East/West interests (in Angola and Mozambique, for example).

The same debilitating effect of the Cold War was at least part of the UN's failure to fulfil its lofty promise of saving generations from the scourge of war. The organisation's ability to respond appropriately to prevent wars and protect civilians was severely curtailed by posturing between the United States and the Soviet Union: in short, only those conflicts that did not concern the direct strategic interests of either were addressed within the UN.²

The end of the Cold War provided the UN with greater scope to act as an institution through which collective international action could be taken in response to global security threats and to protect those in greatest need. However, the perennial principles of sovereignty and non-interference continue to hamper the world community's ability to respond to the commission of massive and serious violations of human rights.

The UN was created to be a body dedicated to achieving peace through collective security. Instead, the principles of sovereignty and non-interference³ continue to prevent collective responses that would avert massive human rights abuses, genocide, ethnic cleansing and crimes against humanity. One need look no further than the current crisis in Sudan where concern shown by African and Arab states about respect for the sovereign rights of Sudan – notwithstanding the overwhelming evidence of the government's role in atrocities – continue to severely limit actions to protect civilians in the Darfur region (see further Du Plessis & Gevers 2006:88).

It is thus clear that one of the central obstacles facing the UN is 'the tension between national sovereignty and a lack of international will to protect vulnerable populations' (Pace & Deller 2005:16). During the UN millennium summit in 2000, the then UN Secretary-General, Kofi Annan, challenged member states to address dilemmas posed by humanitarian crises where intervention to protect human lives and the deference accorded to state sovereignty are in conflict. In an attempt to confront this challenge, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in September 2000. The ICISS introduced the term 'responsibility to protect' in its report entitled *The responsibility to protect*, that was published in December 2001.

The concepts put forward in the report bring clarity to the issues of when the UN must refrain from acting out of respect for state sovereignty and when it must take action to protect human rights. The recommendation quickly received support within the UN. Kofi Annan was one of the many public figures who embraced the responsibility to protect as a way for the international community to respond to a future Darfur. After consultations with governments and UN officials and with input from many civil society organisations, the Secretary-General published his 2005 report entitled *In larger freedom: towards development, security and human rights for all* (UN 2005) in which he called on governments to embrace the 'responsibility to protect' as a basis for collective action against genocide, ethnic cleansing and crimes against humanity.

Both the responsibility to protect report and the Secretary-General's report emphasise the need for governments to take action against threats of massive human rights violations and other large-scale acts of violence against civilians. The norm upon which the reports rely has the following principles (UN 2005; see also Evans 2006):

- The primary responsibility to protect lies first and foremost with each individual state (in recognition of the fact that sovereignty includes not just rights, but also responsibilities)
- A recognition that, if individual states are unwilling or unable to protect their citizens from genocide, war crimes and crimes against humanity, the responsibility to protect shifts to the international community
- The international community's responsibility is a continuum of measures, including diplomatic, humanitarian and other methods, to help protect civilian populations
- A recognition that, if these measures are insufficient, the Security Council has the right to take action under the Charter of the UN, including enforcement action if so required

As a result of the Secretary-General's recommendations, the emerging norm of the responsibility to protect was for the first time openly debated by the General Assembly (Pace & Deller 2005:24). The Secretary-General made it clear that the issue was not merely about the use of force; it was also about a normative and moral undertaking requiring a state to protect its own civilians. If a state fails to do so, the international community must apply a range of peaceful diplomatic and humanitarian measures, with force to be employed only as a last resort.

The UN General Assembly convened a world summit in September 2005 in New York to reassess and reaffirm the fundamental goals of the UN and to commit to strengthening the UN to meet these goals. The General Assembly debates demonstrated growing support for the normative aspects of the responsibility to protect norm by governments and civil society in all regions. Argentina, Canada, Chile, Guatemala, Mexico, Rwanda, South Africa and the United Kingdom were some of the influential governments that insisted on a meaningful commitment to the responsibility to protect.⁴ The summit outcome document, unanimously agreed by the more than 150 heads of state and government present and meeting as the UN General Assembly, unambiguously picked up the core principles of the responsibility to protect norm as first articulated by the ICISS in its responsibility to protect report and thereafter supported by the Secretary-General in his larger freedom report. Its language speaks to a duty borne of a common humanity, and a duty which must in appropriate circumstances receive precedence over the all too often abused excuse of non-intervention on account of state sovereignty.

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity ... The international community, through the United Nations, also has the responsibility ... In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance

with the Charter, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity ...⁵

The commitment expressed at the 2005 world summit has been taken up by the Security Council. On 28 April 2006, the Security Council made its historic first official reference to the responsibility to protect in resolution 1674 on the Protection of Civilians in Armed Conflict in which it 'reaffirms the provisions of paragraphs 138 and 139 of the World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. And this was followed by a further resolution in August 2006 specifically invoking this in the context of the ongoing conflict in Darfur. The Security Council passed resolution 1706 which called for the rapid deployment of UN peacekeepers in Sudan and refers explicitly to the responsibility to protect by reaffirming the provisions of resolution 1674 on the protection of civilians in armed conflict and the provisions of paragraphs 138 and 139 of the 2005 United Nations world summit outcome document (Evans 2008).

The R2P norm in action

One must distinguish between R2P and the idea of humanitarian intervention. The basis of the traditional meaning of 'humanitarian intervention' is coercive military intervention for humanitarian purposes, a good example being the NATO intervention in Kosovo (see Henkin 1999:824; Charney 1999:835; Chinkin 1999:841; Cassese 1999:23).

R2P, on the other hand, is about much more than military intervention, although that might be justified in extreme cases such as Rwanda or Srebrenica where it is the only way to stop atrocities. Its focus is on preventive action as early as possible. That might occur through support to states that are struggling with situations that threaten to turn into conflicts in which genocide or like crimes are likely. R2P recognises that a variety of political, diplomatic, legal and economic responses might be necessary to hopefully prevent atrocities.⁶ These responses might at first be persuasive, ranging from economic incentives, offers of political mediation or legal arbitration, but in appropriate circumstances might become stronger, including coercive measures such as economic sanctions, threats of political and diplomatic isolation, and threats of referral to the International Criminal Court for investigation.⁷

Action by whom?

The responsibility to protect norm is relevant at three levels, or calls for action from three actors: In the case of individual states, R2P means the responsibility to protect their own citizens, and to help other states build their capacity to do so. For international organisations,

including the UN and regional bodies like the AU, R2P means the responsibility to warn, to generate effective prevention strategies, and when necessary, to mobilise effective reaction. For civil society groups and individuals, R2P means the responsibility to focus the attention of policy makers on what needs to be done, by whom and when.

The AU is the obvious vehicle through which the R2P norm might be given effect on the continent. While there is much more work that the AU could and should do to show meaningful and sustainable commitment to the R2P norm, it is important to acknowledge that the institutional means for effective prevention of humanitarian crises have been put in place. The primary body responsible for the establishment of peace on the continent is the AU Peace and Security Council,⁸ which is modelled on the UN Security Council. It has been tasked with decision making on conflict prevention, management and resolution, and is described as a ‘collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa’ (art 1 of the Protocol). To this end the Council may authorise peace missions and recommend to the Assembly that the AU intervene in certain situations where grave crimes (such as crimes against humanity, war crimes and genocide) are being perpetrated (art 7).⁹ The establishment of the Peace and Security Council thus provides a clearly defined mechanism for determining which situations represent a serious threat to legitimate order and the steps necessary to restore peace and stability to those states, in close co-operation with the UN Security Council (art 7(r)).¹⁰ So that its aims might be achieved, an African Standby Force has been created for deployment on the instructions of the Council,¹¹ a continental early warning system has been set in place ‘to facilitate the anticipation and prevention of conflicts’ (art 12) and a panel of the wise (made up of ‘five highly respected African personalities from various segments of society who have made outstanding contribution to the cause of peace, security and development on the continent’) (art 12(2)) has been constituted to advise the Council ‘on all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa’ (art 12(3)).

Naturally, for the AU to put this elaborate infrastructure to work in the service of peace, security and development requires political commitment from AU member states. There have been notable successes, in particular in the crisis in Burundi (ICG 2008), and more recently the involvement of Kofi Annan and a distinguished team of other African leaders who had been mandated by the AU to mediate in response to the alarming situation in Kenya after allegations of a rigged national election in December 2007. What is more, in the case of the Kenya crisis the R2P norm was invoked as a guideline for those involved. Gareth Evans (2008) described it as follows:

After allegations of a rigged national election in the last days of 2007, an explosion of very overtly ethnic-related violence broke out in which over 1,000 were killed – including dozens in a church-burning incident horribly reminiscent of Rwanda thirteen years earlier – and some 300,000 displaced

within a few weeks, before a mediation team led by Kofi Annan was able to negotiate a political settlement that dampened the violence. They did so against the background of the Secretary-General Ban being very quick to characterize the situation as an R2P one; his newly appointed Genocide Adviser, Francis Deng, being very clear in warning political and community leaders that they could be held accountable for violations of international law committed at their instigation in urging them to ‘meet their responsibility to protect the civilian population’; and Archbishop Emeritus Desmond Tutu being very explicit in a widely published opinion article that ‘what we are seeing in Kenya is action on a fundamental principle, the Responsibility to Protect.’¹²

There were other cases, however, where the AU and African leaders have been less respectful of the R2P standards they unanimously adopted at the UN world summit in New York in 2005. In cases where the AU or its member states fail in their responsibility to take diplomatic, humanitarian and other steps to protect civilian populations, it is vitally important that the R2P norm be regarded as the responsibility of non-governmental organisations, the media and civil society in general. That much has been made clear in respect of Zimbabwe, where the work of regional civil society organisations has been central to a meaningful response to the serious and ongoing human rights violations directed at the civilian population by the Zimbabwe African National Union – Patriotic Front (ZANU-PF) regime. It was all the more important because of the puzzling response to the crisis by the region’s powerhouse, South Africa. Instead of using its political and economic position to pressurise the Zimbabwean state, South Africa has mollified and protected a regime that is widely regarded as illegitimate. Indeed, in the words of a South African high court judge in a recent decision regarding the rights of farmers in that country, South Africa has done little more than ‘quietly acquiesce’ in the face of widespread human rights violations in Zimbabwe.¹³

The Chinese ship case

The analysis, early warning and mobilisation that civil society may so effectively marshal in support of the responsibility to protect the norm have recently been displayed in the so-called Chinese ship case.¹⁴ It involves the problem that faced civil society groups and their lawyers¹⁵ when a ship laden with arms for Robert Mugabe’s beleaguered government was turned away from South Africa in April. The Chinese vessel – the *MV An Yue Jiang* – was anchored outside Durban harbour awaiting clearance to dock and discharge six containers of weapons destined for the Zimbabwe Defence Force.

The South African Litigation Centre (SALC)¹⁶ was instrumental in bringing the legal action before the Durban High Court. The SALC helped assemble the legal team, strategised with them on how best to bring the challenge and assembled the documentation, much of it

confidential, that was used as the basis for the application. The Anglican Bishop of KwaZulu Natal, Rubin Phillip, and former head of the religious organisation Diakonia, Paddy Kearney, were cited as applicants, acting in the public interest, in the matter.

Given the post-election crisis in Zimbabwe, it appeared highly irresponsible of the South African authorities to permit these weapons to be transported through South Africa and delivered to Zimbabwe, thus adding to the conflict and violence already taking place in that country. At the time the ship arrived in Durban it was already common knowledge to all – with perhaps the exception of President Mbeki – that the ZANU-PF regime was doing everything possible to subvert the election results which would have showed that it had lost the election. The regime had embarked on a campaign of military-sponsored violence against the opposition, in order to intimidate people into voting for Mugabe in a run-off election. As recent events have shown, even that run-off election has become a sham – with Morgan Tsvangirai having to pull out of the election because of the violence and oppression perpetrated on the Movement for Democratic Change supporters up to the polling day.

It was thus alarming when the media began to publish reports on 16 April 2008 that the *MV An Yue Jiang* was about to enter the Durban harbour amidst rumours that it was carrying arms for Zimbabwe. Both the local and international media investigated and published subsequent reports which brought the following information to light:

- The vessel is owned by the parastatal Chinese Ocean Shipping Company
- The vessel had been anchored at Durban Harbour's outer anchorage from 10 April 2008
- The ship was carrying cases of weaponry and ammunition in six containers, and the delivery address was the Zimbabwe Defence Force, Causeway, Harare, and the point of origin on the cargo manifest was Beijing, China
- At a media briefing on 17 April 2008 the government communications head, Themba Maseko, said 'We are not in a position to act unilaterally and interfere in a trade deal between two countries. South Africa is not at all involved in the arrangement: it's a matter between the two countries. It would be possible, but very difficult for South Africa to start intervening and say that we will not allow the vessel through.' He added that '[a]ll that South African authorities can do is to make sure that all proper administrative processes' are followed

In view of the troubling response from the South African government – consistent with its general approach to the Zimbabwe crisis – it was clear that court action was the only means by which the arms shipment might be stopped. The application that was launched was intended to stop those arms being transported across South Africa to Zimbabwe at a time when the volatile situation in that country suggested that they might be used to

maintain the illegitimate rule of the Mugabe regime in Zimbabwe, defeat the legitimate aspirations of the Zimbabwean people as reflected in the recent election, and be used to oppress the people of Zimbabwe.

The legal basis for the application was the National Conventional Arms Control Act, 2002 which requires persons involved in the conveyance of conventional arms through or over the territory of the Republic or its territorial waters to any other place or destination outside the Republic, whether or not such conventional arms are offloaded, to be in possession of a conveyance permit issued in terms of section 14(2) of the Act.

The newspaper reports made it clear that when the *MV An Yue Jiang* entered South African territorial waters it did not possess such a permit and the introduction of the arms into South African territorial waters was accordingly unlawful. Furthermore, the conveyance permit that was then issued by the South African National Conventional Arms Control Committee was issued unlawfully, in disregard of the provisions of the Act that require the Committee to ensure compliance with the policy of the government in respect of arms control and adherence to international treaties and agreements to which South Africa is a party.

As far as granting of permits to persons who wish to trade in conventional arms, which includes the conveyance of such arms over or through South African territory, is concerned, the Act requires that the Committee must inter alia avoid contributing to internal repression, including the systematic violation or suppression of human rights and fundamental freedoms, and must avoid transfers of conventional arms to governments that do so.¹⁷

The application was brought in the public interest (as contemplated in section 38(d) of the Constitution of the Republic).¹⁸ It was argued that it was not in the interests of South Africa and its people that arms should be permitted to be conveyed over or through the territory of South Africa where the overwhelming probability was that they would be used in Zimbabwe to contribute to internal repression and the systematic violation of human rights and fundamental freedoms. Given that the Act requires that in considering applications for permits the Committee must safeguard the national security interests of the Republic and those of its allies, that aim could not be served by permitting actions that would contribute to the ongoing troubles in Zimbabwe.

By the early afternoon of 18 April, the legal team had finalised the application. The matter was set down for a hearing before Madam Justice Kate Pillay for 17:00 that afternoon. After an hour of deliberations, an interim order was issued by Judge Pillay with the following terms:

- (a) Suspending the operation of the conveyance permit issued ... under the National Conventional Arms Control Act 41 of 2002 as read with the

Regulations promulgated thereunder on 28 May 2004 in Government Gazette No R 634, authorising the conveyance of six containers of arms discharged from the MV 'An Yue Jiang' ... ; and

- (b) Ordering that the [freight forwarding company] is prohibited from in any manner whatsoever taking delivery of and/or conveying the consignment of goods contained aboard the MV 'An Yue Jiang' and described in the Arrival Notification dated 10 April 2008 under the description '3080 CASES ... ARMS'... ; and
- (c) Ordering that the [Port Captain for Durban] and [the National Port Authority] are prohibited from in any manner whatsoever permitting the consignment of goods ... from being removed from the precincts of Durban Harbour.

Events after the court order was granted

Approximately an hour after the court order was granted, the MV *An Yue Jiang* weighed anchor and began to move in an easterly direction, apparently moving out of South African territorial waters so that the court order could not be served on it.

Civil society organisations (the Open Society Initiative for Southern Africa (OSISA), together with SALC), were then instrumental in further regional efforts that ultimately prevented the arms being offloaded in any southern African port. This included alerting the public to the fact that the ship was heading for Mozambique, activating civil society networks in Mozambique, and contacting legal counsel there. Before the ship had even entered Mozambique's waters Mozambique's transport workers federation declared that they would not transport the arms and Mozambique government authorities ultimately stated that they would offer no assistance to the ship. The ship then reversed course, sailing along South Africa's coast, and SALC called on the SA Defence Force to use its law enforcement powers to stop the passage of the ship through South Africa's territorial waters.

On the basis of information that the ship was bound for Angola, but that it might refuel in Namibia, OSISA and SALC alerted civil society partners in Namibia and Angola to try to prevent offloading and transfer of the arms in those countries. In Namibia, the Legal Assistance Centre prepared papers for a court challenge in anticipation that the ship might dock there. Various civil society protests were held and church leaders spoke out against it, as did trade unions. In Angola, OSISA's office supported efforts by a number of different grantees to obtain court orders refusing permission for the ship to dock. Although they were unsuccessful in this effort, they did get court authorisation for inspection of the cargo that was offloaded to ensure that it did not contain arms. Again church leaders, trade unions and civil society made their opposition known. Angolan

government authorities, in response to civil society and diplomatic pressure, allowed the ship to dock and to offload construction cargo that had always been intended for the port of Luanda, but refused to allow the discharge of the arms cargo.

The ship left Luanda around 6 May 2008, not having offloaded any arms cargo, but having taken on board fuel and supplies for its crew. It then headed in a southerly direction along the Namibian and South African coast and from there apparently returned to China.

Conclusion

Peace making and conflict prevention are goals which have been articulated by the UN and given regional expression by the AU. What is clear is that within these often delicate strategies, human rights standards have come to play an essential role. The violation of these norms serve as predictors of conflict, and the norms themselves have given rise to a developing obligation on governments known as the responsibility to protect. Today, when there is a conflict or potential conflict somewhere on the planet, the language of human rights is employed to demand action or to scrutinise inaction.

Ultimately, the reason for invoking the language of human rights is a moral one. The Chinese ship case showed that southern African civil society and media are serious about the responsibility to protect norm. This was done first through court action to secure an outcome that – given Pretoria’s bizarre conduct in respect of Zimbabwe – would otherwise not have been possible. Then, through sustained mobilisation of trade unions and churches, diplomatic and public pressure ensured that the arms were not offloaded along the southern African coastline. As SALC’s director – Nicole Fritz – put it: ‘It was a demonstration of solidarity between South African human rights organisations and the people of Zimbabwe. This, really, is what compelled all involved.’

Notes

- 1 For damning criticism backed up by examples, see Robertson (2006).
- 2 See Pace and Deller (2005:15). Much of the discussion that follows on the rise of the responsibility to protect norm relies on the comprehensive account provided by these authors.
- 3 Flowing from the UN Charter’s self-limiting provision in article 2(7) which states that ‘Nothing should authorise intervention in matters essentially within the domestic jurisdiction of any State’.
- 4 Those states that showed opposition because they feared that it would codify humanitarian intervention included Belarus, Cuba, India, Pakistan, Russia and Venezuela (Pace & Deller 2005:25).
- 5 As quoted in Evans (2006). See further Responsibility to Protect – Engaging Civil Society 2007.
- 6 A good example was the creation of safe havens in northern Iraq after the Gulf war. Displaced Kurds hostile to Saddam were massing there, and the Security Council passed resolution 688 calling for humanitarian relief efforts, but the US, Britain and France went further and invaded Iraq to establish protected enclaves.
- 7 The referral would take place pursuant to article 13(b) of the Rome Statute of the International Criminal Court (1998) read with Chapter VII of the UN Charter. For an example of such a call in relation to

- Zimbabwe (and with reliance on the responsibility to protect norms) see the suggestion made in *The Economist* (2008).
- 8 Constituted in terms of the Protocol relating to the establishment of the Peace and Security Council of the African Union (the Protocol) (AU 2002) ratified by South Africa on 15 May 2003 (for a discussion, see Strydom 2003:59).
 - 9 Article 7 gives effect to article 4(h) of the AU's Constitutive Act, which provides for the right of the AU to intervene in a member state, pursuant to a decision by the Assembly, in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.
 - 10 On co-operation with the UN Security Council, see article 17(1) and (3) of the Protocol.
 - 11 See article 13 of the Protocol (AU 2002) and the Policy Framework for the Establishment of the African Standby Force and Military Staff Committee (AU 2003). See further Strydom (2003: 71–76).
 - 12 For information on Kenya and the responsibility to protect norm see ICG (2008).
 - 13 *Von Abo v Government of the Republic of South Africa and others* Case No 3106/2007, Transvaal Provincial Division, Judgment of 24 July 2008, par 112.
 - 14 Formally, *Bishop Rubin Phillip and Another v National Conventional Arms Control Committee and Another*, Case No Durban and Coast Local Division, High Court, Order granted 18 April 2008.
 - 15 The author was one of the advocates representing the applicants in the Chinese ship case.
 - 16 For information on SALC's work see <http://www.southernafricalawcenter.org/>.
 - 17 The relevant section of the Act is section 15, which sets out guiding principles and criteria and provides that when considering applications for licences to convey arms the Committee **must** inter alia: 'assess each application on a case-by-case basis; *avoid contributing to internal repression, including the systematic violation or suppression of human rights and fundamental freedoms; avoid transfers of conventional arms to governments that systematically violate or suppress human rights and fundamental freedoms; avoid transfers of conventional arms that are likely to contribute to the escalation of regional military conflicts, endanger peace by introducing destabilising military capabilities into a region or otherwise contribute to regional instability; adhere to international law, norms and practices and the international obligations and commitments of the Republic, including United Nations Security Council arms embargoes; take account of calls for reduced military expenditure in the interests of development and human security; avoid contributing to ... crime; and avoid the export of conventional arms that may be used for purposes other than the legitimate defence and security needs of the government of the country of import*' (emphasis added).
 - 18 Section 38 of the Constitution is the 'standing' provision which describes which persons are entitled to enforce the rights contained in the Bill of Rights. The section reads as follows:
 38. Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

 - (a) anyone acting in their own interest;
 - (b) anyone acting on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interest of its members.

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Elections and conflict resolution: The West African experience

Ismaila Madior Fall*

Introduction

The battle for democracy on the African continent has been long and arduous. In many African countries the absence of democracy was first experienced as political authoritarianism, enforced by quickly constituted regimes mostly characterised by their totalitarianism; their intent was to dominate practically the whole lives of their citizens, and not to tolerate any serious opposition to their aims and objectives. Under the pretext of needing to build fledgling nations, or to foster social and economic development, the political powers in charge showed little respect for civil liberties or the right to object.

When a leaden silence was not imposed on the political opposition, there were often sham elections in which the final results were known from the start and the powers that be won

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by an overwhelming majority. In fact, the first changeovers of political power between parties only started taking place around the 1990s, almost 30 years after independence. Indeed, the absence of democracy on the African continent has mostly been experienced in the lack of transparent and competitive elections and the consequences that ensued, such as a lack of an opposition, the monopoly on power by those in government, the non-replacement of class and political elitism.

The democratic opening up of the political spectrum in the 1990s was generally characterised by the appearance of structures able to organise electoral processes independently. The fierce battles have centred on presidential elections and have been waged by those in power and their opponents, supposedly revealing, as promoted by these electoral commissions, the wishes of the authorities to promote free, sincere and democratic elections. Much hope was invested in these new structures as the supposed new guardians of democracy.

More than 15 years later it should be possible to assess the results, which not surprisingly show a wide variety, in line with national experiences of the democratisation process. There are some very fortunate cases where electoral commissions managed to successfully exercise their supervisory mandate, but there are also less fortunate cases, and then also more worrying cases where the electoral commissions largely failed to fulfil their mandates, compromised their credibility and created serious obstacles for the political climate in general.

Almost two decades after the launch of democratic transitions, the objectivity of particularly presidential elections are still not guaranteed and are in fact likely to lead to crises. In West African countries elections have for the most part become the primary obvious sources of conflict. During the preparation period leading up to the election, during the election itself, or when the results are announced tense relations often end in confrontation, threatening political stability and peace. These generally stem from political players who do not agree with the rules governing the electoral process or the modalities surrounding the organisation of the elections, or from candidates who are unhappy with the outcome of the elections and contend that the results do not reflect the will of the voters.

Obviously, the particular circumstances and situations vary from one country to the next: some countries, such as Ghana, Mali and Benin, have managed to agree on the rules and modalities governing the organisation of elections, but in others, such as Burkina Faso and Senegal, the lack of agreement about the rules of the electoral process has led to boycotts by the opposition. Some countries such as Togo have managed to avoid a crisis which could affect the electoral process and end in violent confrontation by means of political negotiations to reach consensus by all the participants. In still other countries the rules of the electoral process were redefined during discussions held between all parties during a post-conflict period – this happened in the Côte d'Ivoire, Liberia and Sierra Leone.

In an effort to settle electoral matters in the West Africa Region, ECOWAS adopted a protocol on democracy and good governance in which it formulated general principles to serve as guidelines for the electoral process. It was hoped that this would preserve democracy and social order.

However, the seriousness of elections and their role in conflicts – and thus conflict resolution – in West Africa, can only be understood against the background of the role of elections as a primary source of conflict within these states.

Presidential elections as a primary source of conflict

In West Africa elections seem to have become a source of conflict to an ever increasing extent. The conflict that often accompanies the electoral process could occur at the beginning of the process, when the rules are still being defined, or after the electoral event, during the course of vote counting and announcement of results.

Before election day

It is often when the rules of the electoral game are being defined that the first signs of discord and political crisis become noticeable. Strife could surface when the eligibility criteria in order to run for the presidency are defined. Although enshrined in most constitutions, the principles governing the right to run for president, happily respected in most states, have at times been subject to restrictions aimed at excluding some candidates. This both frustrates the excluded hopefuls and their supporters, perverting the spirit of democratic competition and creating a climate of tension that could escalate into armed conflict.

Such a situation occurred in the Côte d'Ivoire where the exploitation of the issue of nationality was used to exclude Alassane Ouattara from standing as a candidate during the presidential elections of 2000. It was certainly a factor that contributed to the Ivorian civil war. It is a widely accepted requirement – generally not negotiable – that a candidate for the highest office hold the nationality of the state he or she intends to lead, found in most Western constitutional systems. However, when biased and aimed at excluding a certain candidate, it could become a highly contentious issue that threatens the political stability of a country.

This is what happened in the case in Côte d'Ivoire, when the concept of 'ivorianness' tainted constitutional legitimacy. With regard to the question of nationality, article 35 of the 1999 Ivorian constitution holds that candidates to the presidency must be of Ivorian descent, and have both Ivorian mothers and fathers. They can never have revoked their

Ivorian nationality and should never have acquired another nationality. They must have resided in the Côte d'Ivoire for an uninterrupted period of five years preceding the date of the elections, and have lived in the country for an effective total of ten years (this does not apply to Ivorians chosen to represent the state at the headquarters of international organisations or multinational corporations, nor to political exiles).

While these conditions are acceptable, they were used to invalidate the candidacy of Alassane Ouattara, using a highly debatable technical argument during the presidential elections of 2000. Alassane Ouattara was a member of the *Rassemblement des Républicains* (RDR, Rally of Republicans), and the Supreme Court accused him of having a 'dubious nationality' and excluded his candidacy, stating that documents he presented, including those based on his place of birth, his certificate of nationality, his declaration of non-revocation of the Ivorian nationality, and notably those concerning the nationality certificate of his father and mother and their civil status and the declaration under oath that he had never acquired another nationality, were 'all questionable'. The candidacy of Emile Constant Bombet of the *Parti Démocratique de la Côte d'Ivoire – Rassemblement Démocratique Africain* (PDCI/RDA, Democratic Party of Côte d'Ivoire – African Democratic Rally) was also rejected because of his involvement in a pending court case. The result was that the candidates of the two main parties – the RDR and the PDCI – were excluded from the electoral contest on the basis of very controversial arguments.

Other factors have also been used to keep opponents from the electoral contest. In Togo, for example, the candidacy of Sylvanus Olympio was rejected in 1992 because he had failed to submit a tax certificate of compliance, and again in 1997 because he had not complied with the medical procedures stipulated in the Constitution.

In both these countries the questionable exclusion of candidates from taking part in presidential elections created tensions which escalated to violence and degenerated into civil war in the case of the Côte d'Ivoire. These confrontations between the political protagonists were only resolved by regional mediation after causing havoc and extreme human insecurity.

After election day

There are very few countries in West Africa where all the players in the political game recognise and accept the results of an election. On the whole the results are contested by the opposition and obviously challenges about the validity of the results lead to tension in the political game, creating latent or open conflicts. There are numerous examples: In the Côte d'Ivoire the presidential election of 2000 was followed by violent protests which brought Laurent Gbagbo to power. In Togo, the last presidential election was the object of violent protests which ended in regional mediation and the formation of a government of unity. The 2007 Senegalese presidential election witnessed the victory

of Abdoulaye during the first round, a challenge by the opposition which led it to a boycott of the general elections and holding of a national conference with civil society organisations since 1 June 2007. The results of the Mali presidential election of 2007, during which General Toure was re-elected during the first round, have been challenged, too. In Nigeria, judgment is pending in two appeals brought by Buhari and Atiku, two opposition party candidates, against the election of President Yar'Adua.

Apart from Benin and the Manu River countries, which are emerging from conflict, there is not a country in West Africa today where election results have not been contested. Even Mali and Senegal, countries in which previous elections had been exemplary, today have to deal with post-election crises.

Given that electoral crises are such a constant factor and so persistent in African politics, it is not surprising that attention is focused on efforts to prevent and solve them.

Responses to the electoral crisis

There have essentially been two types of responses to the electoral crisis: the first is at state level and consists of setting up electoral commissions to regulate the elections and the second at ECOWAS level, consisting of the adoption of the protocol on democracy and good governance and the institution of an electoral assistance unit to regulate electoral processes in the West Africa Region.

The responses at state level: the electoral commissions

The response to the electoral crises was to distance the government powers from the management of the electoral process or at least weaken their hold on the process. This led to the emergence in Africa and in West Africa in particular of autonomous or independent national electoral commissions (such as *la Commission Electorale Nationale Autonome* (CENA, National Independent Electoral Commission) or *La Commission Electorale Nationale Indépendante* (CENI, National Independent Electoral Commission)).

These electoral commissions have certain traits in common, and their differences generally stem from each country's particular history of democratisation, its legal tradition and the relationship with the political forces which themselves have allowed for the creation of an electoral commission.

On the whole, efforts are made to ensure consensus with respect to the nomination of the members of the electoral commissions. The definition of the 'profile' of the members of the electoral commissions entail either nominating only members who are not politically engaged, or the opposite, thus involving only those who are defined by

their political allegiances. In other words, the neutrality or balance expected from the electoral commission is achieved in one of two ways:

- Deliberately taking into account the political element, but avoiding the risk of bias by ensuring a fair representation of the political powers. This position is followed in many countries like Benin, Côte d'Ivoire and Mali, where the government, parliament and political parties nominate members of the electoral commission
- Excluding any political element, by not only totally excluding members of any political party, but also requiring that members not even personally favour any particular party. In West Africa, the Senegalese legislation is one of the very few which excludes on principle the involvement of political players as members of the commission

Generally speaking, the powers or prerogatives of the electoral commissions concern two main issues, namely their grasp of the electoral process itself and their influence on it and second, the effectiveness of their powers, or more precisely, the powers required to impose sanctions based on violations of the electoral law. The debates around the electoral commissions are mostly about these two issues. The credibility of a commission depends on whether the legislation in place would accord or prevent it from using such powers. In countries such as Benin, Nigeria, Ghana and Burkina Faso, the electoral commissions have the highest powers to run the electoral process. These electoral commissions are autonomous institutions that do not depend on any other public entity such as the government or parliament. The general task of each commission is the preparation for and organisation of the elections, as well as the centralisation of the results from the ballots, which will then be at the disposal of the jurisdiction responsible for the election (constitutional court or supreme court). In some Anglophone countries the electoral commission is also responsible for keeping an eye on the everyday life or workings of the political parties. In some countries, such as Senegal and Mali, the electoral commission has the task of controlling and supervising the elections but it is the task of the home office to organise them.

The powers and prerogatives of the Côte d'Ivoire Independent Electoral Commission are a fair representation of those of a number of electoral commissions in West Africa and will therefore be discussed in more detail: this commission prepares, controls and supervises the elections. It determines where voting stations should be set up, is qualified to print the ballot papers and also selects and trains officials manning the voting stations. The commission consists of three permanent staff members, namely a president and two secretaries, while the rest are nominated by the commission, and by the candidates or political parties. The commission also makes decisions on who qualifies as voters, a prerogative which belongs to the judiciary in most countries (for example Benin). The authorities also consult the electoral commission on the date of elections and of the start of the election campaign.

The Côte d'Ivoire commission takes all the necessary measures to ensure all candidates are treated fairly with regard to equal access to official press organs (written, radio or audiovisual) through the *Commission Nationale de Communication Audiovisuelle* (CNCA, National Commission of Audiovisual Communication). In some countries this function is fulfilled by a media regulatory body, which is responsible for ensuring equal access by all opinion makers to the media. In fact, the existence of such a body would be reason enough to remove this function from the electoral commission and so make equality of treatment for all candidates more likely. The Ivorian commission is further tasked with announcing the results of all elections, with the exception of presidential election or referendum results. The announcements regarding these two are the responsibility of the Constitutional Council.

The electoral commissions which have been set up in almost every country in Africa, are first and foremost a way of making elections more transparent, and constitute in this sense a democratic asset, if only in principle. For a long time many countries have only experienced sham elections, in which results were known beforehand and the party in power often received more than 90 per cent of the votes. The creation of electoral commissions is fitting in a context where the hope is cherished of not only the establishment of a true multiparty system, but also of ending to all electoral fakery or fraud.

Against this background, the actual election events have to be analysed to determine whether electoral commissions have succeeded in their aims. However, the results are fairly uneven. Just as 'democratic experiments' have not always been convincing in all the states, the attempts to rehabilitate the electoral process have not at all times met with success. One could almost say that it is the fate of the electoral commission to act as a barometer, a means to measure the success (or failure) of the democratic experiment. This is illustrated by the following three groups of cases.

The success stories

The Benin Autonomous National Electoral Commission (CENA) is undoubtedly one of the organs on the African continent which can boast of its success. This institution has most harmoniously come to fit into a democratic transition, with all acknowledging its exemplary performance. Its arbitration of the ballots has never been seriously challenged, and the Beninese political players seem to have 'assimilated' it well. Legitimacy is therefore not an issue.

This did not come easily, for the CENA did experience some difficulties. The first of these was the nagging problem of funds allocated by the authorities, for typically of this type of institution, it is dependent on the government for the resources needed to fulfil its mandate. In 2006 and 2007 the issue of the prompt allocation of funds was raised,

and a number of observers felt the authorities had not shown the desired concern for this issue. Members of the CENA also criticised the transport arrangements for all the electoral equipment required at interior regions of the country. In addition, the CENA experienced some internal conflict in 2007, linked to procurement of tenders by its president, which resulted in his dismissal just four days before the first electoral round took place. However, despite these difficulties the Benin CENA has been successful in bringing about the rehabilitation and transparency of the electoral process and the country has not experienced any post-election crisis as a result of an election since the electoral commission was put in place.

The same could be said of the Ghana electoral commission. It too dealt well with the various electoral processes initiated in the country, even if it too complained of the relatively limited funds at its disposal. From the information on the electoral processes in Ghana it is clear that there is a recurrence of the difficulties of getting the electoral material to its destination and that there is thus a need to develop a decentralisation policy to deal with this problem. Nevertheless, the legitimacy of the electoral commission is largely acknowledged, to the point where it would certainly be possible to call its management of the elections a success.

Ambiguous results

The cases in this category are those whose organs responsible for the supervision of the elections managed to deal fairly well with several crises (despite the usual grievances about lack of sufficient funds for their functions).

In the case of Mali, the crisis started the day after the 1997 ballot was cast. At the time the electoral commission had the right by law to organise the elections and announce the results. Due to lack of experience, this commission faced a great deal of indecision about how to manage the ballot process. The ensuing chaos somewhat tainted the second term of the head of state at the time. However, Mali learnt from this unfortunate experience and solved the matter by moving the function of organising elections to the state – more precisely to the home office and the election delegation – and the electoral commission now only supervises the elections and guarantees their regularity. The equivocal nature of the Mali experience is due to the uneven character of its electoral trajectory.

The Ivorian electoral commission equally deserves a qualified vote of confidence, and it is also expected to continue its work as part of the ongoing process resulting from the 2007 Ouagadougou Agreements. The commission is burdened by the particular Ivorian political context in which political ‘arrangements’ tend to be substituted for legal norms – and it is the Independent Electoral Commission which pays the price. It has become hostage to a rather unpredictable political game in which the rationale of the law and legal process are subordinated to the machinations of the political game, which end with

a precarious stability and short-lived alliances and is unlikely to lead to legitimisation. The most important lesson learned from the Ivorian situation is the way it reveals the relationship between the general political context and the development, in terms of its legitimacy, of the supervisory organ of the elections.

The Senegalese CENA, which has replaced the Observatoire National des Elections (National Elections Observatory), has managed to overcome several of the problems that its predecessor organ faced in the past. It has become a permanent fixture and survived as an institution, in the process also acquiring sanctioning powers. Again, as in the case of other countries, funding is still an issue. In fact, only two weeks before the ballot was to be cast for the presidential elections of February 2007, the CENA still had not received the necessary funds to carry out its work, (the 15 January 2007 deadline for releasing the funds was not adhered to). In addition, after these elections the Senegalese electoral system suffered a serious crisis of confidence, which resulted in a boycott of the legislative elections of June 2007 by almost all of the opposition parties. At the heart of the controversy was the electoral roll, whose administration had been managed by the CENA. The deadlock in the political dialogue was bound to impact on the credibility of the Senegalese CENA.

The failures

Of all the electoral commissions it is the Nigerian electoral commission which has faced the most serious crisis. According to almost all the monitors, the organisation of the 2007 presidential elections was a total disaster. Even the authorities alluded to this. Why this was the case is yet to be explained, for from the perspective of its status and privileges, the Nigerian commission would seem to be one of the organisations best placed to assume an independent role. At present, however, the Nigerian commission is a discredited organisation, a situation from which it will be difficult – albeit not impossible – to recover.

The ECOWAS response

In order to prevent electoral crises, the ECOWAS adopted the 2001 Protocol on Democracy and Good Governance and created an electoral assistance unit.

The protocol was signed in Dakar on 21 December 2001 and was aimed at supplementing the so-called Lomé Protocol on the mechanism for conflict prevention, management, resolution, peacekeeping and security which had been adopted in December 1999. Although more indirectly, it is also linked to other instruments adopted as part of the same ECOWAS or a larger pan-African framework, including the following:

- Article 58 of the ECOWAS Treaty (1993), which relates to ‘the maintenance of peace’ in the broader sense

- The OAU Declaration on security, stability, development and co-operation in Africa (held in Abuja on 8 and 9 May 2000)
- The declaration by the OAU on the reaction of the OAU when faced with unconstitutional changes of government (OAU 2000a)
- The African Charter on Human and People's Rights (OAU 1981)
- The Harare Declaration adopted by the Commonwealth states (1991)
- The Cotonou Declaration adopted by the Fourth International Conference on New or Restored Democracies (2000)

The protocol consists of three chapters, with most of the content being devoted to the principles, as set out in chapter 1. Chapter 1 provides first for what the authors call the principles of constitutional convergence. This concerns a series of constitutional conditions considered by the protocol to be common to the ECOWAS member states, which in fact illustrate the 'political' aspect of economic (which is the initial purpose of the Community) integration. Conditions include the principle of the separation of powers, respect for the rights of parliaments and their members, the independence of the judiciary, guarantees of lawyers' freedom, the transparency of elections and zero tolerance for any form of unconstitutional accession to power. The state must remain neutral on religious matters and political opposition must be free. The protocol accepts that each state may adopt a system of financing political parties. Furthermore, ECOWAS member states are enjoined to ensure the unfettered exercise of public liberties, and to ensure that former heads of state enjoy a special status, particularly with regard to freedom of movement.

Within the framework of the ECOWAS region, demanding that states show respect for the principles of democracy, and attempting to define democratic principles and standards with regard to electoral matters were both ambitious and voluntarist, not to mention a novelty in Africa. For a very long time constitutionalism was considered exclusively an affair of states. The organisation and functioning of political regimes, the means of access to power and the principles governing elections were traditionally the domain of government. Regional integration and international organisations took care to avoid interference in these matters, presumably out of respect for the sovereignty of states and the principle of non-interference in their domestic affairs. The focus was therefore on economic and development issues. After the fall of the Berlin wall, universally advocated state democratisation imperatives on the whole forced regional or continental integration organisations to lay down democratic principles to which members were expected to conform. In developing countries this was intensified by statements by donors and Western countries that democracy was a precondition for the provision of aid. It is within

this context that organisations such as ECOWAS and the African Union formulated constitutional and democratic principles which carry sanctions for non-compliance (a matter which could be problematic). Clearly, however, ECOWAS has most certainly taken matters furthest with the proclamation of democratic principles to be promoted and complied with within the West Africa Region with the Protocol on Democracy and Good Governance.

It is very clear from this protocol that ECOWAS realised that no substantial reform of the electoral act could occur in the six months preceding an election without the consent of a large majority of the political players. The state's electoral roll would have to be kept up to date and its accuracy guaranteed, and the monitoring organs would have to be truly independent. Further, the results of the polls would have to be respected by all the political stakeholders. The protocol encourages a spirit of fair play as well as guarantees for the safety of participants after publication of the results. In the longer term polls would have to be held at regular and foreseeable intervals, albeit with the help and monitoring of ECOWAS.

In theory, non-compliance with the principles set out in the protocol implies that sanctions should be applied, set out in the one-page second chapter. These sanctions could include the following, application depending on the seriousness of the contravention:

- The refusal to support any applicants nominated by a state which ignored its commitments, for elective posts in international organisations
- The refusal to hold an ECOWAS meeting on the territory of the state in question
- The suspension of the said state from any leadership position in ECOWAS

However, during the period that sanctions were applied, ECOWAS would continue to monitor, encourage and support any efforts by the suspended member state to return to a normal, democratic and institutional order.

The inclusion of such an arrangement is informative, showing that while the authors of the protocol were anxious to promote democratic values, they were realistic enough not to lose sight of the difficulties encountered by a state in the pursuit of such ideals and with international commitments to uphold. Like any other legal instrument, the protocol might prove to be completely or partially impossible to implement in practice. These implementation difficulties include relevance to international treaties, interference in the sovereignty of states and the pre-eminence of a constitution over the protocol.

However, the protocol provides both a good foundation and a starting point for a legitimisation of standards adopted with regard to the elections in the West Africa

Region. That this could prove to be feasible is likely in view of the success achieved in this area elsewhere on the continent, and notably in the SADC region, where the harmonisation of electoral standards and practices has indeed been realised.

Clearly the protocol is more concerned with principles of democracy than sanctions. Apart from the principles of constitutional convergence the protocol provides for aid and assistance by ECOWAS to members states for running of elections, in line with the practice of the organisation first initiated in the 1990s. Chapter 1 further includes explicit directives on electoral matters, such as for observer missions to member states (it must be made up of persons whose independence is above any suspicion, women must be included, members must have a general idea of the terrain before being deployed, and it must produce a report after completion of its task).

It is obvious from the other aspects that the protocol deals with – amongst others the role of the armed forces, police and security forces, the importance of the rule of law and respect for human rights and good governance and the welfare of women, children and the youth – that ECOWAS realised that elections were only one, albeit an important, aspect of conflict that arose in the period leading up to elections or directly after the announcement of results.

The electoral assistance unit was instituted by the head of political affairs of the ECOWAS Commission. Its mandate is to observe the electoral process, at the request of the state concerned. The response to the electoral assistance unit has been mixed. In some cases it has achieved good results, and has even been able to avert a major electoral crisis, as happened in Guinea Bissau during the presidential election in 2006. However, other states criticise the way the observation missions function, by either arriving late or never being critical, even when other observers are.

However, the electoral assistance unit does contribute to the legitimacy of electoral processes in countries in the region, even if it does at times give the impression that it is present simply to lend credence to electoral results (while they are in fact not credible).

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The implementation of the African Charter on Democracy, Elections and Governance

Ibrahima Kane*

Since the fall of the Berlin Wall and the end of Eastern Europe's totalitarian regimes, a consensus seems to have emerged, worldwide, for the introduction of new standards into international standards, commonly called 'democratic clauses'. The aim of these clauses is to promote the emergence of and contribute to the development of states based on respect for certain democratic principles in the world, particularly in Africa (OAU 1990; OAU 1994), America (Organisation of American States 2001), Asia and Europe (Council of Europe 2000).

The democratic clauses are a set of rules and mechanisms which states are invited to include in their internal legislation, particularly their constitutions, so that, individually or collectively, they may combat possible threats to their democratic systems. Mainly, these regulations and mechanisms are aimed at

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- Ensuring respect for democratic standards, human rights and the rule of law in general incorporated into state constitutions, pivotal principles for the functioning of any democratic state;
- Implementing independent monitoring procedures for the effective application of these standards and principles in the states in question
- Involving civil society in the management of the state (*res publica*)
- In the most appropriate manner, punishing any violation of these clauses, particularly by excluding those who undermine the principal democratic standards and principles, from any participation in the process of restoring the democratic state (Piccone 1997:25)

However, the impact of these standards and principles seems relatively limited, for as Professor Piccone (1997:2) notes, ‘the majority of such democracy clauses ... are political commitments rather than formally binding obligations under international law, making enforcement problematic’ .

As a continent which, in 45 years, has experienced 85 coups d’état (78 of them between 1961 and 1997 (Van der Linde 2001; Adeyanju 1997)), as well as one-party regimes, states hooked into the ‘sacrosanct’ principle of non-interference in internal affairs, dictatorships known as among the worst in the world,¹ and which was the theater, between 1963 and 1998, of nearly 26 armed conflicts which affected about 61 per cent of its population, Africa urgently needed to call on these standards and principles in order to promote the return to peace, security and stability in certain of its regions. It particularly needs to speed up the democratisation² of the societies (AU 2004:12) and communities comprising it.

The continent’s political leaders has since 1990 for the first time begun to recognise the need for more active participation of the African populace in the process of managing their countries, and to agree ‘to further democratise [their] societies and consolidate democratic institutions in [their] countries’. At the same time they reaffirmed their right to ‘determine their democratic systems, in all sovereignty, based on their socio-cultural values and taking into account their realities as regards the need to ensure development and fulfilment of the fundamental needs of the populace’ (OAU 1990, par 10).

Several years later, they declared that they were satisfied that ‘friendly relations between [their] people as well as peace, justice, stability and democracy meant that the ethnic, cultural, linguistic and religious identity of all [their] people, including minority nations, [were] protected and that conditions favourable for the promotion of this identity [had been] created’ (OAU 1994, par 4). Thereafter the OAU (1999 – Algeria decision) took a series of decisions to galvanise African leaders into making an effort towards

democratising their countries. This was done before the Constitutive Act of the African Union could entrench this wish by forcing member states ‘to promote and protect human and peoples’ rights, to consolidate democratic institutions and culture, to promote good governance and the rule of law’ (AU 2000, preamble), ‘to promote democratic principles and institutions, the participation of the people and good governance’ (AU 2000, art 3, par g) and to condemn and reject unconstitutional changes of government (AU 2000, art 4, par p).

From February 1990,³ it also agreed to supervise elections in member states in order to ensure that democratic principles were implemented and particularly that the will of the population was respected. It is a sign of the times that the well-known principle of non-interference in the internal affairs of states has been replaced by the principle of non-indifference of the organisation to the internal situation of member states, particularly in conflict situations. In such an event the AU could thus intervene directly without seeking any authorisation from the member state concerned.⁴

This democratic ripple was however overtaken by the re-emergence of coups d’état, rigged elections, and the violence which accompanies them, at start of the 21st century (Van der Linde 2001 & Adeyanju 1997, quoted by Saugweme). To put an end to these practices and implement its new approach, the African Union implemented two important strategies: The first was the revision of its standards and setting up of penalty measures in terms of a coercive diplomacy consisting of measured and targeted pressure and interventions (OAU 2000b:10). An example is the 15 member states of the Economic Community of West African states (ECOWAS), which have since 2001 been involved in a process of ‘legalisation’⁵ of the norms of democracy which many members adopted in 1991 (the ECOWAS protocol).⁶ The second strategy was the mobilisation of specialised African institutions on electoral questions and civil society organisations with the aim of promoting dialogue between players involved in elections, establishing norms and standards which could be applied to the management of electoral processes, reinforcing the skills of African experts involved in the management of elections and drawing up a draft declaration on democracy, elections and governance, to be submitted to the heads of state and government of the AU.⁷

The culmination of these efforts was that a treaty of the same name was drawn up four years later and adopted by the AU (2007a). The Charter comprises some 50 articles and deals with the obligations of states in the following areas:

- Democracy, the rule of law and human rights
- Democratic elections, institutions and culture
- Unconstitutional changes of government

■ Political, economic and social governance

At institutional level it schedules the setting up of new procedures for the settlement of disputes connected with contested elections and unconstitutional changes of government, and new mechanisms through which political and or judicial bodies can intervene.

Normative benefits of the Charter on Democracy

The result of efforts expended over some 20 years with a view to taking up the political, economic and social challenges of Africa, the Charter on Democracy promotes values which African states have undertaken to ‘implement and carry out as a vision for establishing the objectives’⁸ which they have set themselves in the fields of democracy, elections and governance.

Although it does not contain a precise definition of the concept of democracy⁹ and does not refer specifically to the African Charter of Human and Peoples’ Rights, at first sight, the Charter on Democracy seems to combine minimalist and hard-line approaches of the Western concept of democracy (Ferguson 2002:5–6).

In its minimalist version, democracy in effect places more emphasis on voting and the electoral process, which varies from one country to another. The hard-line approach, in contrast, relies on the existence of structured institutions as well as a body of norms and rules, which allows it to survive attacks to which it might be subjected. However, the ideal is ‘a more in-depth process of political development which should establish democratic values and culture in all parts of society’ (UN 2002:4), and which must ultimately allow for the ‘preservation and promotion of the dignity and basic rights of the individual, ensuring social justice, promoting economic and social development of the whole, reinforcing society’s cohesion as well as national peace and creating a climate conducive to international peace’ (Inter-Parliamentary Union 1997, par 3).

In this sense the Charter on Democracy adds value, for a study of the will of its authors shows that they specified the contents of citizens’ rights and broadened its fields of application, the aim being to ban from the continent all practices deemed to be incompatible with the values it promotes and in this way contribute to the emergence of a true democratic culture.

Democracy, rule of law and the right of individuals

Compared to the African Charter of Human and Peoples’ Rights (the African Charter), which one can consider to be the founding document of the current system for the

promotion and protection of individual rights on the continent, the Charter on Democracy does not change the obligations of African states with regard to the rights of the individual. It repeats certain undertakings to which the states already subscribed to¹⁰ and attempts to deepen and specify the contents and range of others.

To this end:

- It requires that exercising the right of people to freely determine their political status, and their right to choose the means of economic and social development (OAU 1981, par 1) should be done while ‘respecting the constitutional order’ (AU 2007a, art 5). In addition, it specifies that any constitutional revision must be done by means of consensus or a referendum (AU 2007a, art 10, par 2), and refers to the interpretation of the African Commission on Human and Peoples’ Rights (the African Commission) of the provision, namely that ‘taken in its political sense ... the right of peoples to self-determination refers mainly to the management of their “internal and local affairs” and their citizen participation in national life on an equal footing, without this implying any territorial division which could occur in violation of the territorial integrity of the contracting states’ (African Commission 2007, par 26)
- It extends the benefit of guaranteed rights to ‘ethnic and migrant minorities’, which are not formally legal categories specifically protected in the Charter on Rights and particularly to ‘any other marginalised and vulnerable social group’ (AU 2007a, par 8, par 2)
- It uses the concepts ‘lasting development’ and ‘human safety’ to enjoin African states to take the economic, social and cultural rights of their citizens into account when they draw up and implement economic and social programmes. This perspective is particularly interesting in view of the AU definition of human safety as ‘the security of the individual with regard to the satisfaction of his basic needs. It also includes the development of the social, economic, political, environmental and cultural conditions necessary for survival and the dignity of the individual, including the protection of and respect for human rights, good governance and ensuring that each individual is guaranteed the opportunities and choices for his complete development’ (AU 2005, art 1)

Democracy, elections, democratic institutions and culture

If there is a matter which the Charter on Democracy has treated with vagueness, it is without a doubt that of elections. This is a significant omission for national laws generally determine the intervals for elections, which means that in modern times the choice of the people on who should lead a country has always been the most reliable barometer

of the good health of their democratic system. The electoral period, preceded as it is by electoral battles, in fact informs the degree of maturity of citizens concerned and the difficulties associated with the concrete implementation of democratic principles in the political and social context of states.

Elections

Elections may be regarded as the main ‘ritual’ in democratic societies by means of which citizens periodically renew their commitment to the norms and institutions which embody the democratic state. However, in independent Africa, elections have always been a major issue for political leaders. It is without doubt for this reason that the Charter on Democracy has attached a number of guarantees to the organisation of this ritual, amongst others that it be supervised by the AU.

Elections must be organised regularly by states, and the governments must also agree to accept that

- They are the basis for authority of any representative government
- Their regularity is a key factor in the process of democratisation and good governance, rule of law, maintenance and promotion of peace, security, stability and development
- They contribute to the prevention, management and settlement of conflicts
- They are organised
 - in a free and transparent manner
 - on the basis of democratic constitutions and in accordance with the relevant legal instruments
 - according to a system of separation of powers, and in particular the independence of the judiciary
 - at regular intervals, as set down in national constitutions
 - by impartial electoral non-exclusive institutions, which are competent and have well-trained staff with sufficient logistical means to carry out the task (AU 2002a, par II; see also AU 2007a, art 17)

Before the start of each election, the contracting states must negotiate with ‘the legally recognised political parties’ and ‘the other political players’ about adopting a code of conduct by means of which they will promise ‘to accept the results of the elections or to contest them by exclusively legal means’ (AU 2007a, art 17, par 4).

In the implementation of the principles governing peoples’ rights, the rights and obligations of the citizen-electorate, candidates and political parties, the states have a not insignificant

margin for maneuvering, in the sense that they are only reconfirming their agreement to hold regular elections and to ensure that (AU 2007a, art 17, par 2(3)) the access of the parties and candidates to public media during the electoral period are fair.

The participation of the AU in the process is done through the Department of Political Affairs of the Commission. In fact, the state party which organises an electoral consultation is obliged to inform the executive body of the AU about the dates of the elections and to invite them, at least two months before the start of the elections (AU 2002a, par V(3)), to send an observer mission to that country (AU 2007a, art 19).

Upon receipt of an invitation, the Department of Political Affairs appoints an exploratory mission in the relevant country, whose main aim is to check that ‘the necessary conditions exist, and the environment is conducive for the holding of transparent, free and fair elections’ (AU 2007a, art 20). If this is not the case, the Commission may decide not to follow up on the invitation (AU 2002a, par V(5)). Once the invitation is accepted, a memorandum of understanding is signed with the Commission, in accordance with the principles of the Declaration of the OAU and ‘the relevant laws of the host state’ (AU 2002a, par V(1)). In principle, this memorandum should allow the observer mission to perform its activities freely in the state’s territory and to enjoy the active co-operation of the national institutions in charge of matters to do with elections (AU 2007a, art 2).

The Department of Political Affairs must place the necessary material and human means for their proper management at the disposal of the observation mission. In particular, it must ensure that the electoral battles are conducted ‘in an objective, impartial and transparent manner’ (AU 2007a, art 21, par 4). At the end of the electoral consultation process, the observation mission draws up a report which it submits to the chairman of the Commission within a reasonable period. A copy is sent to the politicians from the contracting state. The chairman also prepares a report on the election and the follow-up activities suggested by the observer mission, which is then communicated to the member states of the AU and made public (AU 2002a, par VI(h)).

Finally, thanks to the Unit and the Fund for Support of Democracy and Electoral Assistance created by the Charter on Democracy, the Commission may support those contracting states who seek aid and advice on administrative, judicial, material and technical aspects of the organisation and holding of electoral consultations (AU 2007a, art 18). Such assistance is necessary to allow states who are learning about democracy to familiarise themselves with these new practices and to subscribe permanently to the dynamic of political pluralism.

Democratic institutions and culture

Any democratic system worthy of the name relies on operational institutions, particularly state authorities or bodies, security forces, political parties, independent and accessible

media, as well as an active civil society which is able to play its role of monitoring the action of public authorities. This is why the Charter on Democracy acknowledges the important role played by these participants in the strengthening of democratic culture on the continent, even if it remains very vague as to the exact contribution they could make in moving African societies towards democracy, and the tangible actions which states should undertake to implement their conventional obligations with regard to these participants.

Democratic institutions

Apart from the constitutional civil authority, the armed forces and security forces (AU 2007a, art 14, par 1) and the legal institutions (AU 2007a, art 14, par 2 and 3) specifically mentioned, the Charter on Democracy resorts to the notion of the public institution, the outlines of which are not clearly defined, in order to establish which institutions are able to play an effective role in the building of a culture of democracy. According to the Charter, a public institution means any organisation which ensures and supports 'the promotion of democracy and constitutional order' (AU 2007a, art 15, par 1) and the independence and autonomy of which are guaranteed by the constitution of the contracting state.

The role of the state in the functioning of these institutions is relatively limited since it is confined to the creation, granting of adequate means and monitoring actions which they are supposed to perform, to ensure they are carried out in terms of their missions (AU 2007a, art 15). The exception is the armed forces and security forces which are subject to the strict control of civil authorities (AU 2007a, art 14, par 1).

Democratic culture

With regard to the promotion of democratic political culture, states are required to

- Draw up a legislative and political framework which allows for the development of democratic culture (AU 2007a, art 11)
- Implement programmes and activities designed to strengthen democratic practices. In this regard they are asked to 'create legal conditions conducive to the development of organisations of civil society' (AU 2007a, art 12, par 3)
- Integrate civic education on democracy and peace into academic programmes (AU 2007a, art 12, par 4)
- Establish and maintain political and social dialogue promoting transparency and confidence between political participants (AU 2007a, art 13)

Unconstitutional changes of government

This is the key innovation of the Charter on Democracy, even if the notion of the unconstitutional change of government is an improved version of that of ‘an unconstitutional interruption of the democratic order or the alteration of the constitutional order’ as set out in the Inter-American Democratic Charter (Organisation of American States 2001, art 12, par 4). It was introduced to the African continent for the first time at the OAU’s Algeria Summit in 1999¹¹ with the aim of preserving the constitutional order of contracting states and particularly to put an end to the seizing of power by the army or other non-state groups.

Complementing the Declaration on the framework for an OAU response to unconstitutional changes of government, adopted in 2000,¹² the Charter on Democracy specifies that ‘any amendment or revision of constitutions or legal instruments which affect the principles of democratic changeover’ also constitutes an unconstitutional change of government. The latter wording was preferred to ‘the amendment and revision of constitutions and legal instruments in violation of the spirit and letter of constitutional provisions by the incumbent government in order to remain in power indefinitely’ used in the second draft revision because of the opposition of many African heads of state and the government at the Banjul Summit in June 2006.

Methods of monitoring the application of the Charter

These are of two kinds, namely those on the application of the general provisions of the Charter and those which are specific to unconstitutional changes of government.

Application of the general provisions

In order to implement its provisions, the Charter on Democracy relies on two types of participants, namely state organisations and bodies of the AU.

State institutions

The Charter says nothing about state organisations which are called upon to play a major role in its implementation. However, on reading paragraph 1 of article 44, this could include the following

- All state institutions involved in drawing up and adoption of national laws, like the executive, parliament, national institutions in charge of the promotion and protection of peoples’ rights and electoral matters

- State media which should play an important role in the popularisation of the principles and rules of the Charter on Democracy;
- Political parties, who do not only participate actively in the laws-making process and monitoring of the activities of the authorities, but, and particularly, who are the privileged players of the democratic game

For the rest, one of these state organisations must assume responsibility for drawing up the report which the contracting state submits to the Commission of the AU every two years on the measures, legislative and otherwise, which it has taken to implement its agreed undertakings. However, in view particularly of the AU's new philosophy of promoting the most extensive co-operation possible between national players on democratic matters, one could consider that this report will entail substantial collaboration between public and private participants.

Bodies of the African Union

This will be mainly the AU Commission and the Peace and Security Council (PSC).

The African Union Commission

The Commission intervenes at both continental and sub-regional levels.

At continental level, the Commission is the central authority for co-ordination of the actions for implementation of the Charter on Democracy (AU 2007a, art 45(a)). In this capacity, it will

- Assist states in identifying the criteria for the Charter which they must apply in performing their contractual obligations. This will amongst others enable them to promote a common understanding among states of their contractual obligations and the practical details of their implementation
- Monitor the application of decisions taken on unconstitutional (AU 2007a, art 44, par 2(d)) changes and encourage contracting states to 'create conditions favourable for democratic governance on the African continent' (AU 2007a, art 44, par 3(b))
- Thanks to the Unit and the Fund for the Support of Democracy and Electoral Assistance, it will be possible to supply contracting states with every technical assistance and the resources they require to organise proper elections
- Send a copy of the state progress report to the other bodies of the AU and co-ordinate assessments on the implementation of the Charter

- Prepare and submit a summary report on the implementation of the Charter to the Union's Conference. This report will serve as a basis for the implementation of 'appropriate measures for handling matters raised by the report' (AU 2007a, art 44, par 2(b)).

At the level of regional economic communities (RECs), the role of the AU Commission will be to

- Encourage member states of the RECs to ratify the Charter and implement it
- Identify a focal point in each REC, for the co-ordination, assessment and follow-up of the application of the Charter, and particularly to encourage civil society organisations to participate in this process. One can suppose that this will certainly be done at the level of the co-ordination committee created by the Protocol on relations between the AU and RECs (AU 2007b, art 7, par 2(b)) (the REC Protocol), which is the appropriate framework for discussions and decisions on the implementation of the Charter at the level of African regions

The role of the Peace and Security Council in the event of an unconstitutional change of government

Each time a politico-legal crisis within a member state fits one of the situations specified by article 23 of the Charter on Democracy or more generally when a situation could compromise the development of the democratic political and institutional process or the legitimate exercise of power (AU 2007a, art 24), the PSC is called to manage it as follows:

- Together with the chairman of the AU Commission (AU 2002b art 7, par 1), it must rapidly begin 'preventive diplomacy' (AU 2002b, art 6, par b) actions, and if necessary offer its services to the political players, attempt reconciliation or conduct in-depth enquiries on the matter
- If these political initiatives fail, the party concerned is immediately suspended from its right to participate in the activities of the AU (AU 2007a, art 26, par 1; UN 2002 art 7, par 1(g)) and a period of six months is then granted to the perpetrators to restore constitutional order (OAU 2000b:5). The sanctioned contracting party is still bound by the constitution, particularly its relevant provisions concerning individual rights (AU 2007a, art 26, par 2), and the PSC is obliged to maintain diplomatic relations with this party in order to bring about the re-establishment of this suspended or abolished constitutional order as quickly as possible (AU 2007a, art 26, par 3)
- If in spite of everything no progress is made, a new system of penalties, which requires the co-operation of member states, regional groups, the UN as well as the rest of the

international community/the donor community (OAU 2000b:5) is introduced, this time by the Assembly of the AU (AU 2007a, art 25, par 6)

The PSC must ensure that the people behind such an event do not take part in the elections which will be organised once the problem has been resolved and, even more importantly, do not take up positions of responsibility in 'political institutions' of the state in question. They may not be granted asylum by any of the Union's member states. If they should arrive in the territory of one of these members, that state must apply the principle of universal jurisdiction to them, which means that they must be tried and extradited to the country requesting their return or in which the crime has been committed (AU 2007a, art 25, par 8 and 9). In addition, the Charter specifies that they could also be tried before 'the relevant court of the Union' (AU 2007a, art 25, par 5).

As important as these key provisions of the Charter on Democracy are, their implementation will pose serious problems which will not, however, be insurmountable provided that the institutions and bodies for supervision of the treaty use it as a living instrument and are resolute in their determination to build open democratic societies.

Obstacles to the application of the Charter on Democracy

The application of such a delicate treaty, particularly in the light of its incompleteness, the vagueness of the terms used by the authors, the ineffectiveness of the organisations tasked with monitoring its implementation, and particularly the fragility and hostility of the current political, economic, social and cultural environment of the continent, can only lead to difficulties for which African leaders, if they wish for the values promoted in the Charter on Democracy to take root in Africa, must find pragmatic solutions.

From the normative point of view

First of all, in a treaty looking to 'roll back the frontiers of sovereignty on a matter concerning a domain reserved for states ... [and create] Democracy an essential principal of international law and international relations' (Ngarhodjin 2007), the absence of legal definition, or at least clear criteria for identification of the state of the democratic system is regrettable. It is even more significant that nowhere in the text of the Charter on Rights is 'the right to participate freely in the management of public affairs' (OAU 1981, art 13) mentioned as a basic right of Africans.

Admittedly, in article 2 the Charter on Democracy specifies the objectives it is pursuing and the principles on which it depends. But it seems that it would have been useful, in

such an essential text, to specify the connection of the citizen to democracy and the permanent nature of the process of building it in order to give it a universal hallmark.

Just like the Inter-American Democratic Charter (Organisation of American States 2001, art 1), and the Universal Declaration on Democracy (Inter-Parliamentary Union 1997), the draft democratic charter examined at Brazzaville in June 2006 took an interesting step in this direction by making democracy ‘a fundamental right’ (art 4) of humans which states should respect,¹³ but this was rejected by member states at the time of the final negotiations which took place in Addis Ababa in May 2006. The inclusion of such a provision would have meant that each time a party state failed to keep its contractual obligations, that citizens would have had recourse to the Commission or the African Court of Human and Individual Rights to force the state to fulfil its obligations. This would have contributed to the credibility of the argument that all the provisions of the Charter on Democracy should be invoked before national and regional courts (see Eborah 2007). Moreover, this is provided for in the ECOWAS Protocol, according to which ‘every individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument for human rights’ (ECOWAS 2001, art 1, par (h)).

In addition, if, as the Universal Declaration on Democracy had specified (inter-Parliamentary Union 1997, par 2), the Charter on Democracy had stated that democracy is an ideal to be pursued and a means of government to be applied according to the terms setting out the diversity of cultural experiences and particularities *without breaching the internationally recognised principles, norms and rules*, it would then have allowed those bodies responsible for the application of the Charter to express themselves better on the nature of certain political regimes on the continent.¹⁴ In this way they would also have been better able to assist the citizens of a particular country to make use of the continental treaty to force their leaders to respect the letter and the spirit thereof.

In the second place, it needs to be pointed out that actual application of certain rules relating to the organisation of elections could be highly problematical. For example, what would be the use of asking the state to create and strengthen an ‘independent and impartial’ electoral body, if the latter enjoys the confidence of only some of the political parties involved in the electoral battle? Or basing acceptance of the results of the ballots on a simple code of conduct without clear legal statutes, if it wasn’t signed by all political parties? Those responsible for writing the charter should have been inspired by the ECOWAS Protocol (2001, art 3) which is more specific on the measures which the state should take in the sense that ‘the bodies in charge of elections *should be independent and/or neutral and have the confidence of players and protagonists of political life*’ and that if necessary, it should organise appropriate dialogue with a view to establishing the nature and form of the relevant bodies.

The ECOWAS Protocol is also more specific than the Charter on Democracy on the matter of respecting the will of the people, which is often problematic on the continent. The Protocol (2001, art 9) states that ‘the defeated political party and/or candidate should, within the period and manner set down by law, yield power to the regularly elected political party and/or candidate’.

One could also blame the authors of the Charter on Democracy for having left out important factors which are found in the ECOWAS Protocol and which contribute to the success of organising transparent and peaceful elections, namely:

- The existence of a reliable and stable system of civil status (ECOWAS 2001, art 4) and electoral lists drawn up in a transparent and reliable manner, and which may be consulted at any time by voters¹⁵
- Recourse to civil society organisations to train and raise the awareness of the populace about the holding of ‘peaceful elections free from violence or crisis’¹⁶
- The banning of any kind of harassment of the candidate or party which lost the election, or its supporters (ECOWAS 2001, art 20)

With regard to the observation of the election, the steps recommended by the Charter on Democracy contain all the ingredients of its ineffectiveness for a number of reasons:

- The Union’s participation in any election observation is entirely dependent on the goodwill of the state on whose territory the elections are taking place. If a party or candidate does decide to rig the election, the latter may purely and simply send an invitation to the AU Commission one month before the start of the election and block any participation by the regional organisation. This is what happened during the general elections in Kenya in December 2007, with devastating results.
- The rules surrounding the functioning of the observer missions do not guarantee total impartiality because there are no clear criteria for the selection of its members. This is particular relevant for rules dealing with conflict of interests.
- The Charter does not specify how the support fund should be financed, nor its function. One can imagine that, like all aspects on the financing of interventions by the AU with regard to peace and security, this Fund will be at the mercy of the whim of foreign donors. Elections are such a sensitive issue for current African political regimes that it would be hopeless to allow the success of election observer missions to rely on co-operation with Western countries, as this again would depend on the priorities of donors: The United States and the United Kingdom would for example probably prefer to give resources for observing Zimbabwean general elections that for those of the Comores.

- In the current budgetary context of the Union, the Chairman of the Commission would find it difficult to finance observer missions, the size of which would amongst others depend on the importance of the election, the political situation in the country, its surface area and the level of development of its political institutions. The resources necessary for the implementation of the observer objectives could be considerable. It is accordingly a matter of urgency to settle the issue of the financing and operation of the Fund by AU bodies, because without an adequately financed Fund, the organisation would find it impossible to fulfil its task.
- Both the duration of observer missions and time allocated for presentation of their report are very vague¹⁷ and could give rise to political scheming.

From this point of view, the rules which apply at the level of the ECOWAS are much clearer:

- The decision to participate in observing the election in a member country is taken principally by the chairman of the Commission of the ECOWAS (2001, art 12), as is that to aid and assist the country in question.
- However, the chairman is obliged, before a general election is held in a member state, to send an exploratory information mission there. The purpose is not only to gather information about the general political situation of the country, but also about the candidates or political parties. The exploratory mission should meet and hold discussions with all parties as well as government authorities and other interested organisations and institutions in order to assess the state of preparedness for the elections. This information is placed at the disposal of the observer or supervisory mission (ECOWAS 2001, art 13) which is always headed by 'an independent person of a nationality different to that of the state in which the elections are being held' (ECOWAS 2001, art 14, par (1)).
- Members of the mission, who are subject to an obligation of discretion, may cooperate with civil society organisations and hold discussions with other observer missions at the same election, but must decide on the terms and conditions of their deployment together with the appropriate bodies of the host nation.
- The members of the mission must stay until the announcement of results and prepare a report to the Commission chairman, the structure of which is set by the Protocol,¹⁸ to be filed within two weeks after the end of the mission (ECOWAS 2001, art 17(1)).
- The chairman sends the report, together with its personal observations, to the ECOWAS Mediation and Security Council, which will draw up recommendations for the electoral party or for the action that has to be taken (ECOWAS 2001, art 18) by the voting bodies of the regional organisation.

In the third place, regarding the role of the army and security services, the principles contained in the ECOWAS Protocol on the whole seem more in line with the democratic spirit than those contained in the Charter on Democracy. According to the ECOWAS Protocol (2001, section IV) the army and security forces of a democratic society should be

- Republican and at the service of nations, that is to say they should defend independence, the territorial integrity of the state and its democratic institutions
- Ensure that the law is respected, should maintain order and should protect goods and persons
- Used, if necessary, for tasks of national development

As citizens, personnel of the armed forces and security forces should enjoy all rights granted to other citizens, naturally subject to those obligations associated with their status. But it is obligatory that they be apolitical, and similarly that they are answerable to the regularly constituted civil authorities. The state must ensure that security forces ensuring the safety of goods and persons do not use their weapons to disperse non-violent demonstrations, nor treat individuals in a cruel, inhumane or degrading manner.

From the institutional point of view

With the current state of operation of the AU, it is not certain that its Commission can fully accomplish the role which has been assigned to it by the Charter on Democracy for particularly two reasons:

It does not have the necessary human and financial resources to support the states which ask for it. For example, the Unit responsible for election observer missions at the level of the Commission's Department of Political Affairs only has about ten people to cover all the actions associated with the preparation, organisation and follow-up of elections in the 53 member states. Under these conditions how could the Commission in good conscience examine the reports which the contracting parties should submit to them every two years as required by the Charter on Democracy and make the appropriate recommendations to the Conference on actions which the states should take in order to comply with the letter and spirit of the treaty?

- It does not have the political and legal means to ensure that the contracting states are more respectful of the measures drawn up by the Union in terms of its sphere of responsibilities.

- Under these conditions, asking the chairman of the Commission to co-ordinate its actions with those of the other bodies of the AU, particularly those bodies responsible for the application of treaties and the appropriate national structures, is the best way of blocking any assessment of progress made in the implementation of the Charter on Democracy. These periodic assessments are fundamental, because they are the means by which one can truly know if the democratic values and culture have become entrenched at all levels of society.

At the level of the RECs, the actions required by the Charter on Democracy will not be easy to undertake. Neither ECOWAS (which has already adopted a similar treaty) nor the West African Economic and Monetary Union will be prepared to invest in the promotion of the Charter on Democracy and particularly not to collaborate with civil society organisations.

As far as unconstitutional changes of government are concerned, measures like bringing the perpetrators of these acts before the relevant court of the AU, taking disciplinary action against a state in which an unconstitutional change occurred, or even getting states to sign extradition agreements for the perpetrators are likely to be difficult to implement:

- There is as yet no court with the necessary powers within the AU and on the continent
- Apart from coups d'état and the intervention of mercenaries or armed groups within a member state, which are immediately punished by the AU, the refusal to relinquish power to the winner of the election or constitutional or legislative revision which damage the principles of democracy will be difficult to penalise, quite simply because the Charter on Democracy requires that the AU first exhaust diplomatic and political means of recourse. The example of the presidential election in December 2007 in Kenya shows to what extent such decisions in a context of chaos can be contrary to the results sought by the Charter on Democracy

The speed of the reaction by the bodies of the Union is also a determining factor in the effectiveness of the system which is in place. Firm intervention by the incumbent chairman and by the chairman of the Commission, taken the day after the decision by the Togolese military not to hand over power to the person appointed by the Constitution to occupy the post of President of the Republic after the death of President Gnassingbe Eyadema in February 2005, persuaded the PSC to meet two days afterwards in order to establish the disciplinary action to take (Adjovi 2005:4–5).

Conclusion

With the adoption and forthcoming application of the Charter on Democracy, the 'Western' era of democratisation of African societies seems to have begun. The process

will be fairly long and strewn with obstacles of all kinds, but it will end with the emergence of new societies whose basic courses and choices will be determined, from now on, by the majority of people who constitute these societies.

In this regard one is tempted to compare the continental text on democracy with the African Charter on Human and Peoples' Rights which was disparaged, as it was adopted, as being a document to soothe the consciences of dictators which were so widespread on the continent at the time. In the work dedicated to him, the late Keba Mbaye wrote that 'the editors (had) contented themselves in many scenarios with living in a dream world. The purpose of this technique ... was to avoid alarming the representatives of the states and to make way for a dynamic action by the African Commission on Human and Peoples' Rights' (Mbaye 2002:198). Twenty-five years after the formation of the African Commission the facts proved him right because the main continental body for the protection of individuals' rights, through its jurisprudence and activism, made the continental treaty into a living document to which Africans are increasingly resorting to defend themselves against their states.

One can then hope that the bodies of the African Union called to play a fundamental role in its popularisation and implementation, will always, with their respective actions, manage to make the collective will of African states prevail to work towards the improvement and consolidation of democracy on a continent which has suffered greatly from human stupidity.

One must also hope that active involvement of civil society in mobilising the African populace around the values which the Charter promotes, will change the order by propelling matters associated with democracy to the top of the list of concerns of African leaders.

Notes

- 1 In particular, the regimes of the Jean-Bedel Bokassa in the Central African Republic, Marshal Mobutu Sese Seko in Zaire, Kamuzu Banda in Malaw, Ahmed Sékou Touré in the Republic of Guinea, Sani Abacha in Nigeria, Mengustu Haile Mariam in Ethiopia, Moussa Traoré in Mali and, more recently, Charles Taylor in Liberia.
- 2 The word 'democracy' was absent from the Charter of the OAU.
- 3 The date on which, at the invitation of President Said Mohamed Johar, the interim president of the Comores, it sent a three-person team to observe the elections.
- 4 If a member state was guilty of war crimes, crimes against humanity and genocide (art 4(h) of the Constitutive Act).
- 5 Hawkins and Shaw (2005:2) define legislation as follows: '[L]egalisation constitutes one form of institutional change and can be defined as a process in which institutional rules become more *obligatory* and *precise* and in which institutional parties received more *delegated* authority to interpret, monitor, and implement these rules.'
- 6 See the Ecowas Protocol (Ecowas 2001) which goes back to almost all the principles contained in the declaration of the same name, which was adopted in 1991.

- 7 See the Preamble of the Declaration of the African Conference on Democracy, Elections and Governance held in Pretoria, South Africa, on 7–10 April 2003, at the request of the Independent Electoral Commission of South Africa, together with the Commission of the African Union and the African Association of Electoral Institutions. The Conference was attended by more than 350 delegates.
- 8 See 'The ascendancy of shared value in the African Union Government' in Ex. CL/390 (XII) – b annex page 1.
- 9 By way of comparison, American states made the choice of democratic representation which they are obliged 'to promote and defend' (Organisation of American States 2001, art 1), the essential components of which are 'respect for human rights and basic freedoms, access to power and the exercising of this power subject to the rule of law, the holding of periodic elections, which are free and fair and based on universal secret suffrage, as an expression of popular sovereignty, the multiple system of parties and political organisations as well as the separation and independence of public powers' (Organisation of American States 2001, art 3).
- 10 Particularly articles 4,6,7,8 (1) and 10(3) of the Charter on Democracy.
- 11 According to the OAU (1999) 'The Conference ... decides that member states whose governments have acceded to power by unconstitutional means after the Harare Summit, should restore constitutional legality before the next Summit, failing which the OAU will take disciplinary measures against these governments until democracy is re-established'.
- 12 The Declaration on the framework for an OAU response to unconstitutional changes of government (OAU 2000a:4) defines unconstitutional change in terms of four criteria:
 - A military coup d'état against a legitimate government
 - The overthrow of a legitimate government by a group of mercenaries
 - The overthrow of a legitimate government by armed dissident groups and rebel movements
 - The refusal of an incumbent government to hand over power to the winning party after free, fair and regular elections
- 13 By comparison, the Inter-American Charter states that 'the peoples of America have the right to democracy and their governments have the obligation to promote and defend it' (Organisation of American States 2001).
- 14 Such as the case of Jamahirya Ilbyenne and the Kingdom of Swaziland, where constitutional provisions expressly ban political parties.
- 15 Article 5 of the ECOWAS Protocol (2001) even requires that political parties and voters participate in their preparation.
- 16 See ECOWAS Protocol (2001, art 8). Paragraph III(e) of the Declaration of the OAU seems much too vague in that it requires the state 'to promote civic education and the education of voters to democratic values and principles, in strict co-operation with groups of civil society and other concerned stakeholders'.
- 17 During the recent elections in Zimbabwe, the Zimbabwean authorities made it very clear to the observer missions that their mandate came to an end once voting offices had closed. This was aimed at preventing them from observing whether vote counting was rigged.
- 18 According to article 16, par 3, it must above all contain information on what the mission has been able to observe itself, testimonies collected, its assessment of the manner in which the election took place compared to national laws and 'the universally accepted principles in electoral matters' as well as recommendations 'with a view to improving future elections and observer missions'.

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‘God willing, I will be back’: Gauging the Truth and Reconciliation Commission’s capacity to deter economic crimes in Liberia

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Introduction¹

Dubbed the Great War, Liberia’s civil conflict spanned more than two decades from 1979–2003 (Levitt 2005), and caused incalculable damage in its elongated wake. Social, political and economic structures in Liberia were left in ruins, between 200 000 and 300 000 people died as a result of the conflict, and upwards of one million persons were displaced (Loden 2007:297). Human rights atrocities of unimaginable depravity were abundant and 40 per cent of the women in Liberia are survivors of conflict-related sexual violence (American Refugee Committee). Extracting Liberia from this vicious cycle of violence is but one motivation for achieving successful post-conflict reconstruction. Bordering as it does Sierra Leone, Guinea and Côte d’Ivoire, Liberia’s conflict threatens

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the stability of the whole region. Similarly, a destabilised Liberia poses a threat to international security as a potential breeding ground for international criminal activities and terrorist acts. Undoubtedly, a sustainable remedy for post-conflict relief must be sought. Confronted with such devastation, determining what caused the war and how to prevent it from recurring, is at the forefront of national and international recovery activities in the small West African nation.

This paper examines economic crimes as a principal cause of Liberia's civil conflict. This paper argues first, that as a catalyst of the war, economic crimes warrant significant attention and must be deterred; second, that as the sole authority addressing economic crimes in the context of the conflict, the Truth and Reconciliation Commission-Liberia (TRC-Liberia) is not as effective a deterrence generating mechanism as it needs to be. However, prioritising these issues could overcome this shortcoming. This paper will briefly explore the economic motivations of the Great War in order to establish the relationship between cash and conflict in Liberia. It will also illustrate that the TRC cannot effectively prevent the commission of economic crimes because of four major institutional impediments.

Economic plundering as a cause of the Great War

Liberia's legacy is one of leadership that regarded the state as its personal piggy bank. From the founding of the state as a refuge for American slaves, descendants of this group have controlled the country's resources to the exclusion of the majority of the indigenous population. After some 150 years of self-rule, two per cent of Americo-Liberian descendants still dominate Liberia's political and economic landscape (Ofuately-Kodjoe 1994). The blurred line between public office and private advancement has continued under more recent leaders. President William Tolbert (1971–1980), whose family were prominent rice plantation owners, increased rice prices to such an extent that it led to the first popular resistance against the government. This dissidence presented an opportunity for taking over for the country's next self-appointed president, Samuel Doe (1980–1989). However, Doe blatantly used public funds for his private use, whilst the country descended into financial ruin. This chaos in turn paved the way for yet another opportunist – Charles Taylor. Taylor stole an estimated \$100 billion from the country through his monopoly on mobile phone services, ship licensing, timber and rice imports, among other profit-making schemes (*New York Times* 2003 and Coalition for International Justice 2005). Even the transitional government (2003–2006) took its bite. From the inception of the state in 1847, public coffers have been pilfered to the point where the resource-rich country with only 3,5 million inhabitants has been forced to rely on international assistance for foodstuffs.

All indicators point to a rather bleak existence for the ordinary Liberian: the average life expectancy is 42 years, assuming one is able to overcome one of the world's highest infant mortality rates of 15% (UNICEF 2008), the average income is just \$130 per annum

(World Bank 2006) and unemployment is a staggering 85 per cent (WFP). Liberia did not always have low-income country status and was in fact classified as a middle-income country prior to 1980 (World Bank 2008). Much of the deterioration is the result of the conflict over the country's vast resources and the subsequent mismanagement and endemic corruption of these riches. Opportunists have taken advantage of popular discontent and have fought to gain control of resources under the guise of redistribution. Each new establishment then repeated the cycle of theft, popular discontent and replacement leaving Liberian society fractured, unstable and at war.

World Bank economist Paul Collier (1999) contends that what motivates groups to conflict is profitability. He identified four groups that stand to gain the most from conflict, namely opportunistic businessmen, criminals (especially thieves), traders (especially primary commodity exporters), and rebel organisations (especially the upper echelon of the organisations). Liberia's modern presidents all fit into these categories: Tolbert was a primary commodities exporter, Doe was a rebel leader, and Taylor was a convicted felon in the United States before founding a rebel organisation and proving himself to be an opportunistic businessman.

Since the control of resources was a major motivation for the incitement and continuation of Liberia's conflict, the objective of the TRC now is to promote national peace, security, unity and reconciliation, in part by investigating those economic crimes that fuelled the unrest (TRC Act, art IV. sec (a)). The International Technical Assistance Committee (ITAC), a three-member group of consultants from various countries and backgrounds, was commissioned by the TRC-Liberia to define economic crimes, for the Commission's use towards its mandate. ITAC suggested the following definition, which was accepted by the TRC²:

Any act, committed by any person, corporation, agency, entity, or organisation, whether public or private, that leads to the large-scale theft, conversion or misappropriation of wealth, be it in the form of cash, securities, natural resources, infrastructure, equipment, or anything else that can confer a financial benefit, belonging by legal right to the government of the people of Liberia, or to any subsection thereof, and not to a private individual, for private or political ends.

Major industries in Liberia include timber, telecom, shipping, rubber and logistics. Theft of rubber plantations, illegal or illicit timber and shipping concessions, systematic land grabs, and manipulation of telecom services can fall under the ITAC definition. The TRC Act does not define economic crimes and the ITAC definition is supposed to be a non-binding guideline to assist commissioners in the interpretations of the TRC Act, particularly during the trials. By the fall of 2007 there was little knowledge of, or agreement on ITAC's definition within the Commission.

There is furthermore no internationally agreed-upon definition for economic crimes and hence no external guidance that would make it possible to reconcile the TRC definition with accepted international norms. In a workshop discussion on combating economic crimes, the UN Asia and Far East Institute (UNAFEI) conceded that there was a ‘generally recognised difficulty of giving an exact definition of economic crime’, and that for the sake of convenience ‘[the TRC] should simply define economic crime as “...offences which cause or risk causing substantial loss”...’ (UNAFEI 2004:1, citing the report of the European Committee on Crime Problems on economic crime of the Council of Europe). This vague definition provides little guidance to the TRC-Liberia, whose definition of economic crimes already accounts for the scale of losses. The approach suggested in the UNAFEI report is to address the effect of economic crime, rather than the crime itself. It notes that a common trait of economic crimes is that laundering of illicit gains is inevitable and states that ‘... it appears that the trend with economic crime of this generation is to launder all the proceeds at the end of the day; therefore, there is a need to investigate economic crime focusing also on the possibility of money laundering’ (UNAFEI 2004:1). The UN has four conventions which address money laundering,³ and Liberia is a signatory to them all. However, laundering is the effect of criminal economic activity and not the cause. While it is arguably worthwhile for the Liberian government to facilitate the prevention of money laundering in the future, investigating money laundering would do little to describe the breadth of profit-related crimes committed in Liberia during the conflict.

The UN Office on Drugs and Crime (UNODS) similarly concedes its inability to define economic corruption. In its report entitled ‘Economic and financial crimes: challenges to sustainable development’, it states that ‘... the overall extent of the phenomenon is difficult to determine, owing in part to the lack of a clear and accepted concept’ (UNODS 2005:1). The UNODS solution is to group economic and financial crimes together, referring to them broadly as ‘any non-violent crime that results in a financial loss’ (UNODS 2005:1).

An alternative approach to defining the issue has been to address certain types of crimes that appear economic in nature. The Council of Europe, for example, shies from directly defining economic crimes, and lists a series of violations that qualify as economic crimes, such as corruption, money laundering and cybercrime (Council of Europe).

Finally, even if an internationally recognised definition for economic crimes existed, the Liberian experience was unique. Economic crimes, such as e-mail scams that the Nigerian government is keen to quell, differ significantly from the exploitative economic crimes that were committed against the civilian population of Liberia. The TRC-Liberia needs to tailor its definition to the experiences of the victims of the Great War.

The advent of the TRC-Liberia

On 18 August 2003 a comprehensive peace agreement (CPA) was signed, bringing to a close the Great War. Article XIII of the CPA called for the establishment of a truth and reconciliation commission, which passed into legislation by an Act of Parliament in 2005.

That the TRC was a political compromise comes as no revelation for policy makers and practitioners (Lamin 2007:238). Thirteen peace accords had already been negotiated between 1990 and 1996, and all of them had failed (Conciliation Resources 2008). It was of great importance for those facilitating the peace process to emerge with at least a cease-fire agreement in place. The International Center for Transitional Justice published a report documenting the CPA's negotiation process and the way in which the warring parties exploited the desperation of their counterparts and how peace talk participants effectively blackmailed each other to get what they wanted:

a faction representative who was insistent on winning certain ministries in the government but found himself blocked, used the shelling for leverage ... the opposing parties at the talks then granted that faction what it wanted (Hayner 2007:14).

The content of Liberia's final CPA also shows that its signatories were preoccupied with avoiding punishment. An obvious omission from the terms of the CPA and its mandate is any explicit call for punishment of human rights or war crimes violators. Rather, there were explicit calls to dismantle the judiciary during the transitional period, until after the elections (CPA, art XXXV(1)(e)) and an express recommendation of general amnesty for the CPA signatories (CPA, art XXXV(1)(b)). Suspending the judiciary and the laws that establish judicial order, made the TRC the de facto sole entity charged with addressing the crimes of the war set out in the CPA. Not even the subsequent Sirleaf-Johnson government has moved to truncate the TRC's status by creating an institute to address crimes committed during the Great War. The elections have come and gone and there is yet to be a formal adjudicatory body in Liberia to address war crimes. Even if legislation were enacted to establish such an institution, it is doubtful if the justice system would have the capacity to handle the resultant caseload. In essence, therefore, the TRC was intended to be, and currently acts as, the only Liberian institution addressing the atrocities of the Great War.

Why the TRC-Liberia falls short of deterring the commission of economic crimes

Although the functions of truth commissions vary according to the unique experiences of each country, a common attribute is that they are intended to be both restorative and preventive. According to Rotberg (2000:3, 6) 'There is an assumption that a society

emerging from an intrastate cataclysm of violence will remain stable, and prosper, only if the facts of the past are made plain'. Implicit in the act of coming to terms with the past is looking forward to social stability in the future. The restorative and deterrence functions of truth commissions are, hence, mutually reinforcing, with restoration undertaken as a means of deterring a recurrence of future socially destabilising acts. Therefore, if the Liberian TRC is to fulfill its intended functions as a truth commission, it must not only incorporate the restorative justice processes in its activities but also ensure it deters the recurrence of the crimes within its purview.

The measure of success of transitional justice policies is the preclusion of a return to the previous state of instability, with truth commissions serving as a popular tool in transitional justice to realise sustainable peace. This implicitly means that such institutions seek to deter future acts of instability. 'Never Again' may be a rallying call of many truth commissions around the world (Rotberg 2000:3) but actions are needed to achieve such an end. Truth commissions have varied approaches, such as naming and shaming violators (for example El Salvador), public testimonies (for example South Africa) or encouraging community participation in generating accountability (Amnesty International 2007:63).

Whether the TRC Liberia is capable of fulfilling its role, depends to some extent on the economics of crime and punishment.

In his Nobel-prize winning work, entitled *Crime and punishment: an economic approach*, Becker (1968) sought to address and defeat arguments that criminal activity was irrational by demonstrating that criminals generally rationalise their criminal activity, weighing the severity and certainty of punishment against the potential gain of committing the criminal act. Severity refers to the nature of the potential punishment, whereas certainty relies on the capacity of the punisher, usually the state, to execute the punishment. According to Phillips (1973:66) 'The offense rate and the certainty of punishment depend on the factors causing crime, the resources devoted to apprehension and conviction, and the severity of punishment'. If this role is delegated to a truth commission, it would obviously need substantial backing and funds to succeed.

The TRC-Liberia functions in a collapsed state. Liberia lacks the requisite apparatus to conduct those procedures necessary to fairly prosecute a perpetrator, such as identifying potential perpetrators, investigating their involvement, and exacting punishment in a satisfactory way. The lack of state support places added pressure on the TRC to affect deterrence within its limited capacities.

Legal framework

The TRC's inability to deter economic crimes rests in part on its current legal framework as outlined by the TRC Act. By summer of 2007, the Commission commenced policy

guideline discussions with national and international civil society, in order to clarify the TRC's mandate. These discussions remain unresolved. One aim of the guidelines would have been to ensure that all perpetrators of economic crimes are not given blanket amnesty.

The TRC's mandate requires the investigation of gross human rights violations, violations of international humanitarian law and abuses, including massacres, sexual violations, murder, extra-judicial killing and economic crimes committed during the period of January 1979 to 14 October 2003 (TRC Act, art III(4)(a)). Its lifespan is two years, but four three-month extensions are permitted (TRC Act, arts IV(5) and (6)). The TRC has the power to recommend amnesty for the perpetrators of crimes within its purview excluding 'violations of international humanitarian law and crimes against humanity in conformity with international laws and standards' (TRC Act, art VII(g)). Similarly, the TRC has the power to recommend prosecution (TRC Act, art VII(j)(iv)). The TRC must submit a final report which contains inter alia its amnesty recommendations to the National Legislature (TRC Act, art X(43)). The government of Liberia must thereafter implement the recommendations of the TRC and must show good cause in the event of non-compliance (TRC Act, art X(48)).

In the summer of 2007, a working group comprised of one representative from the Human Rights Section of the United Nations Mission in Liberia (UNMIL), one from the International Center on Transitional Justice, and two TRC staff members, met a number of times to discuss the drafting of the TRC's policy guidelines. The objective of the working group was to ensure a measure of conformity among the commissioners when interpreting the TRC Act by providing interpretive guidelines for the statute. Prioritised in the working group's discussions was the interpretation of the amnesty and prosecution clauses. At these meetings it was acknowledged that the mandate of the TRC was broad and subject to a variety of interpretations which threatened the conformity in the commissioners' interpretations.

The TRC Act makes the granting of amnesty for economic criminals likely, which further compromises deterrence since this weakens both the severity and certainty of punishment. Of the crimes within the TRC's purview only economic crimes undoubtedly qualify for amnesty since economic crimes do not currently violate international humanitarian laws or qualify as crimes against humanity. Such violations of international humanitarian laws and crimes against humanity are excluded from amnesty appeals in conformity with international laws and standards, as dictated by the Geneva Convention. Therefore large-scale theft of property will on the whole fall within the TRC purview as these are not crimes against humanity. Furthermore, the International Criminal Court, which is charged with prosecuting war crimes, cannot prosecute economic warfare, economic exploitation or any corporate crime committed in the name of profit seeking which happens to lead to disaster, starvation, injury, death

or pillaging of resources, despite widespread agreement on the role that economic crimes play in creating and exacerbating conflict (ICC).

Organisational capacity

In addition to its inadequate formal mandate, the TRC does not have the investigative capacity to deter economic crimes, either. Of its team of investigators, none had any formal training in economic crimes in line with the ITAC definition. To date only one economic crimes training session has allegedly occurred and this was conducted by a delegation from the Nigerian Economic and Financial Crimes Commission.

In view of the lack of any change in Liberian and Nigerian economic crimes, it had little notable effect. Such a lack of training has yielded lacklustre results and investigators remain confused as to what constitutes an economic crime. Whereas some TRC investigators consider economic crimes to be illicit financial accounting, others see it as the misuse of Liberia's natural resources. Investigators cannot distinguish between an economic crime and a financial crime and it is uncertain whether such a distinction will ever be drawn and hence whether financial crimes should be included in TRC investigations.⁴ The investigators saw a copy of the ITAC definition of economic crimes for the first time in June 2007.

That the TRC's own internal investigation team is having such difficulty grasping what constitutes an economic crime illustrates not only the complexity of the crimes but similarly how confused the general population is likely to be about such acts. In the absence of a clear understanding of what an economic crime is, it is difficult to imagine how the investigators will go about investigating such activities, particularly as it is unlikely that it will fall under the purview of the TRC, even if these crimes are within its mandate.

Power struggles

Internal power struggles and strained relations with donors have hampered the TRC's productivity and, by extension, its capacity to prevent further crimes from being committed. Formally, the TRC-Liberia is comprised of nine presidential-appointed commissioners who are charged with realising the TRC's mandate. Although the TRC has a formal decision-making mechanism, it tends to take place informally. Within the TRC, all politically relevant decisions are made by the nine commissioners, who have an equal say in the decision, while the Chairman's role is one of mediating disputes and framing discussions. He does not have a policy-making role. The commissioners meet every Tuesday behind closed doors.

Decisions about the TRC are taken by the International Contact Group Liberia (ICGL). This group is comprised of the TRC, some of its donors as well as important actors in

Liberia's post-conflict reconstruction process.⁵ The ICGL meets every Thursday, also in private sessions.

The TRC conducts a number of activities in the process of fulfilling its mandate. Its trademark public hearings for example require a great deal of organisation and logistical support beforehand. Statement takers, research teams and investigators have to be hired and trained, and adequate security arrangements to protect participants have to be made. The TRC also organises publicity campaigns, which are vital to its work for without public awareness, there would be no public participation by potential participants who live all over Liberia and the world.

Until March 2007, commissioners were responsible for executing the daily activities at the TRC by default. Each commissioner was in charge of a thematic topic of activities that occurred during the Great War, such as activities relating to economic crimes. This meant that commissioners were involved in all stages of the TRC's daily processes, from research to investigations to locating witnesses. This eventually resulted in personal domains of activity which lead to in-fighting over resources such as vehicles, office supplies and authority. The work of the TRC's highly qualified and enthusiastic staff was severely affected by the hostilities resulting from this power struggle, particularly as they were discouraged from communicating with each other despite the overlapping nature of their work. Not surprisingly, this caused a significant downwards trend in TRC productivity. One former international consultant noted that during its first 18 months nothing happened at the TRC (Loden 2007). Indeed, time was short and the clock ticking, but the sense of urgency by the international community was not matched by the TRC.

In March 2007 the ICGL decided that structural adjustment was needed if the TRC was to fulfil its ambitious mandate in time. The result was a division of labour of TRC activities and increased intervention by the ICGL in the form of specific deadlines for certain documents and the suspension of additional funding until such deadlines were met. The tensions that existed within the TRC, and between the TRC and its donors prior to this arrangement,⁶ were further exacerbated by the new dispensation, which shifted power away from the commissioners. Daily operations of the Commission became the domain of the TRC secretariat, headed by Nathaniel Kwabo, the executive secretary. He was responsible for all administrative tasks associated with running the TRC, such as logistics (pooling of vehicles, procurement of fuel for vehicles, and the generator that ran the TRC, purchasing office supplies, etc) and accounting. Allegations of internal corruption circulated within the TRC, particularly with regard to the allocation of procurement contracts. The weak oversight of the Commissions' resources and the disorder of logistical operations did mean that opportunities for the misuse of goods and services were rife.

The increased involvement of the ICGL fostered resentment: On the one hand donors felt that they had bought themselves some authority, but the commissioners regarded

themselves as representing Liberia and advocated national ownership over the work and final product of the TRC. Such ownership relied on their being able to make their own decisions about how the TRC operated. National sovereignty was a constant issue and donor scepticism and commissioner hostility lead to tensions and a stifling atmosphere. It got to a stage where it was unclear whether co-operation between these opposing camps was attainable.

Resource constraints

Decision making at the TRC was further constrained by serious lack of funds and financial dependence on the donor community. According to an European Union assessment report published in February 2007 the TRC was in a state of 'management dysfunctionality and financial crisis'. The TRC originally estimated that its total budget over two and a half years would be \$14 million (Daxbacher 2007:5, 18). The ICGL and other donors thought this figure was unrealistic and demanded a re-drafting of the budget, which called for an additional \$5,7 million (TRC 2007). By the end of the summer 2007 there were doubts that this amount would be enough to enable the TRC to realise its mandate. An additional concern was whether the TRC's donors would ever provide the proposed funding.

Donors had in the past cut off TRC funding: the ICGL refused to fund the TRC's activities in the absence a budget, a final work plan, and a programming emergency phase proposal overview being submitted. The TRC complained that accomplishing such tasks required money, if only to purchase fuel for the generators that lit the office and to pay its employees. Indeed, TRC employees often had to wait long period for back pay. On 11 July 2007 dozens of statement takers stormed the TRC headquarters demanding that they receive their back pay. This event was widely publicised in the media, since a press conference was taking place in the building at the time. The incident highlighted obvious gaps in the TRC's ability to provide adequate security for its participants and further tarnished its reputation.

In addition to the headquarters in the capital of Monrovia, the TRC also had eight regional offices, each staffed by a regional co-ordinator and an assistant regional co-ordinator. With their small staff complements, no resources and no support from headquarters, the regional offices are ill-equipped for their task of furthering the TRC mandate. In some cases there are no 'offices': in Gbarnga, Liberia's second largest city and a site of intense conflict during the war, the TRC's two staff members were housed in the national electoral commission offices. Nor did the staff have computers or transport and they had very few resources for conducting research. Capacity to reach the devastated population to gather statements or distribute awareness materials was negligible.

Liberia's judiciary offers little in terms of support for the Commission's mandate and fostering deterrence. The Liberian judiciary barely has access to Liberian codified and case

law. The politically precarious position of both the National Transitional Government of Liberia and Ellen Johnson-Sirleaf's administration has made the prosecution of war criminals too risky to pursue. Even the international community has resisted the impulse to pursue punishment of the Great War's principal architect, Charles Taylor. Rather than being tried in Liberia for war crimes against Liberians, he is being tried at The Hague for crimes he committed in Sierra Leone.

Given its lack of resources to conduct research, create a secure environment and punish perpetrators, the TRC-Liberia's ability to deter the commission of economic crimes is demonstrably weak.

Exclusion of public participation

The TRC is not sufficiently engaging the public's help in deterring economic crimes. Of the 1 500 statements that had been analysed by the TRC's staff by June 2007, only one reported an incident of economic crimes. The war's impact was widespread and it is likely that more of the persons who have made statements had witnessed criminal economic activity. This means that the general population is either too intimidated to report their experiences or are unable to articulate their experiences. Either way, the TRC's outreach activities should remedy these problems. Outreach materials could encourage victims to speak out by promoting a culture of tolerance for victims and intolerance for perpetrators of such crimes and the TRC could circulate educational materials on economic crimes to enable the public to identify them. The TRC could also better publicise its witness protection programme. Such strategies have been met with moderate success with victims of sexual violence who have to overcome intense social stigma to discuss their experiences publicly. Similarly, victims who accuse prominent members of Liberian society of certain criminal acts run significant risks. However, the TRC purports to be in a position to offer protection to these victims and they can claim such protection in terms of the TRC Act (art VIII(26)(m)). The majority of Liberians have little education and few are literate, which means that they find it difficult to grasp what economic crimes entail – a situation exacerbated by the fact that it is a concept so complex that it lacks an internationally agreed-upon definition. It is thus likely that Liberians have experienced economic crimes that meet the ITAC's definition, but have difficulty identifying them as such.

Society's role in preventing future criminal economic behaviour is crucial for an effective deterrence campaign and society is in a unique position to shape future behaviour. In a country with a defunct judiciary, the certainty and severity of punishment is limited in preventing devious acts, but if Liberian society is unable to identify economic crimes, the perpetrators will never be held accountable for such activity. Without formal or informal structures, the capacity to identify and punish economic crimes is weakened for unlike corporal crimes, economic crimes are technical, complex, and not intuitively identifiable. The TRC has made no effort to circulate a working definition of economic

crimes to the Liberian population or even within its own administration. The first step in cultivating social accountability is to sensitise the public to the fact that such activities are indeed crimes.

Arguably, most damaging to the TRC's ability to prevent the commission of economic crime is its public image. Because it was portrayed as an adjudicatory body, the public expects the TRC will make good on its implicit promise to bring justice to victims of the war but such expectations are detracting from its potential as a deterrence mechanism.

One of the most widely distributed images of the TRC is of a person standing before a panel of what appear to be three judges, elevated on a podium. The image is reminiscent of a formal trial where justices preside over court proceedings. However, truth commissions are not formal judiciaries charged with prosecuting perpetrators. The circulation of such an image to a mostly illiterate population creates the expectations associated with formal prosecution, with the accompanying expectation of justice in the form of punishment. Although it does have some authority to recommend prosecutions, financial and political constraints make it highly unlikely that these recommendations will be pursued formally, especially in a timely manner.

In addition to the misrepresentation of its functions through its awareness materials, the capacity of the TRC to prevent crimes from being committed is further undermined by its damaged credibility. By the summer of 2007, the TRC had engaged in a mass public awareness campaign that proved effective in making the public aware of its existence and mandate. Monrovia's are generally aware of the TRC and outreach efforts in rural Liberia have been well executed. However, the creation of a large audience has in turn heightened the expectations of the public, ultimately allowing for the possibility of widespread disappointment. From the initial mass awareness campaign in 2005, the 18 months of stagnation that followed incubated the notion that the TRC was all talk and no action. The TRC has received rather damaging publicity during this period that nothing has come of its role as a distributor of justice. The question then is how likely is the institution to function effectively in its role as a deterrent. A further question is how likely is public support and participation in these circumstances. Such support and participation is crucial to the TRC's ability to deter economic crimes. If the public does not believe that the Commission has any powers to effectively sanction economic crimes, and the Commission remains the sole authority investigating these crimes during the war period, then the public will realise that impunity prevails.

Recommendations

Despite its various shortcomings, the TRC is in a position to improve its performance. First, greater attention must be paid to the drafting of the policy guidelines. The

working group mentioned above should prioritise discussions about the notable absence of punishment for economic crimes. This shortcoming sends the wrong signal, namely that perpetrators of economic crimes will get amnesty – that is if their cases are even heard by the TRC.

Similarly, the TRC needs to address its own administrative incapacity in dealing with economic crimes. Investigators need to know what the ITAC definition for economic crimes means in practice; statement takers need to be trained to put the right questions to probable victims of economic crimes; and commissioners need to prioritise the discussion of economic crimes. All this can be done for little to no money and there are a number of organisations that are willing to conduct economic crimes training workshops for the TRC.⁷ The Commission should be taking advantage of such offers.

In addition to strengthening the laws and activities addressing economic crimes, the Commission needs to find ways to overcome mounting tensions both within the Commission and between the Commission and the ICGL to ensure increased co-operation. In early 2007 commissioners attended a Tubmanburg Commissioner Retreat. According to a EU technical expert based at the TRC-Liberia headquarters ‘there existed animosity amongst TRC commissioners with characteristic cliques and disrespect for leadership authority’ (Daxbacher 2007:18) before this retreat, but these tensions seemed to have been largely resolved after the retreat. Informal meetings should be organised among TRC staff, and between the commissioners and the ICGL in addition to formal meetings.

Third, the TRC needs to start thinking innovatively about overcoming its resource gap. Given its contentious relationship with donors, and the range of activities it needs to conduct to fulfil its mandate, it is vital that it manages to procure resources. Rather than trying to apply or appeal for more donor funds, however, the TRC should capitalise on its existing partnerships and attempt to channel its activities through these networks. In July 2007, the TRC presented a partnership proposal to implementing agencies in which it requested assistance with recovery work in Liberia. Specifically, the proposal asked that these agents help distribute TRC materials and transport TRC staff outside Monrovia to gather statements through their existing relief activities. Proposals that take into account funding and inter-agency relation constraints should be supported and encouraged by the TRC and the international community.

Lastly, the TRC needs to better engage the public. Not only should a mass sensitisation about economic crimes be undertaken, but the TRC should also be encouraging the formation of social capital. Greater attention should be paid to its publicity material and the TRC should not create an image of itself as a formal adjudicator since that is a role it cannot fulfil.

Conclusion

The TRC-Liberia economic crimes mandate is an ambitious attempt to address the causes of Liberia's war. The TRC must overcome its problems and use its position to realise this end. This is within the Commission's grasp, but only if it takes remedial steps soon. The final report is the lasting legacy of any Commission and will be the measure against which the world will judge whether the \$7 million spent was wasted or well worth it. The capacity of the TRC to effectively address economic crimes will have resounding effects in the transitional justice community. Thirty-four truth commissions have been established in 28 countries around the world (Amnesty International 2007). These institutions rely on lessons learned from their predecessors and counterparts. The TRC Liberia is in a position to not only leave a peaceful legacy to Liberians, but to the whole world.

Notes

- 1 The author spent ten weeks working for the Truth and Reconciliation Commission in Liberia in the Monrovia office, where she kept a daily research log. This paper includes observations that reflect her experience.
- 2 The TRC-Liberia has hired an economic crimes consultant to jump-start their programme and it is likely that a review of the ITAC definition will form part of the process. However, as there is no certainty about when, or whether, this will happen, the definition as it stands is used.
- 3 UN Conventions against (i) illicit trafficking in narcotic drugs and psychotropic substances; (ii) transnational organised crime; (iii) corruption; and (iv) [for] suppression of the financing of terrorism.
- 4 Nigeria's EFCC makes such a distinction. Whereas economic crimes are criminal activities whose negative consequences directly affect the economy of the nation, financial crimes are criminal activities that have a direct relationship with money and monetary instruments, and which are intended to bring undue financial reward to the offender (Ohanyere 2007).
- 5 The members of the ICGL are the European Union, United States, Nigeria, Economic Community of West African States (ECOWAS), African Union, Germany, Sweden, United Kingdom, Ghana, United Nations Mission in Liberia (UNMIL), and TRC commissioners and/or the executive secretary.
- 6 Employees, commissioners and consultants repeatedly noted that tensions at the Commission were high from the outset.
- 7 I had numerous informal consultations with international non-governmental organisations such as the American Bar Association, the American Refuges Commission, and International Alert about potential training.

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**Angola's legislative elections:
Time to deliver on peace dividends**

Paula Cristina Roque

Stabilising the Eastern DRC

Henri Boshoff

AFRICA WATCH

Angola's legislative elections: Time to deliver on peace dividends

Paula Cristina Roque*

The first post-war elections in Angola, held on 5 September, saw the MPLA (*Movimento Popular de Libertação de Angola*, Popular Movement for the Liberation of Angola) ruling party consolidate its power by winning an overwhelming 82% of the vote against UNITA (*União Nacional para a Independência Total de Angola*, National Union for the Total Independence of Angola), PRS (Partido de Renovação Social or Social Renewal Party) and FNLA (*Frente Nacional de Libertação de Angola* or National Front for the Liberation of Angola). Millions of Angolans peacefully voted for new parliamentary representatives and a new cycle of political participation in a country ravaged by decades of destructive and merciless civil war. Through a carefully designed campaign of intimidation and propaganda that reinforced an existing culture of fear, through the manipulation of the media, the co-opting of traditional authorities and political opponents, the MPLA

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reduced the opposition to a residual political force. The National Assembly will be dominated by the ruling party, which secured 191 seats out of 220, UNITA managed a mere 16 seats (down from 70), the PRS increased its representation by 2 to 8 seats, the coalition *Nova Democracia* managed 2 and the FNLA will only have 1 representative.

Angolans essentially voted for peace, security, and the hope of economic participation. The country's first experience with multi-partyism in 1992 led to the resumption of hostilities between UNITA and the MPLA, and the purges and revenge killings against civilians that followed left deep scars on the population. Angolans learned then that voting for the 'wrong' party could have serious implications. Although the MPLA government, UNITA and all the other political parties agree that the future lies in multiparty electoral politics, true reconciliation has not yet occurred and the country remains divided.

The demobilisation of UNITA combatants was completed by 2004 but their effective reintegration has yet to occur. During the resettlement phase of internally displaced persons and ex-combatants, communities often rejected these groups, which consequently became more marginalised, reducing their chances for socio-economic reintegration still further. This was compounded by government's reluctance to decentralise power, and the absence of national development and poverty reduction strategies. The rhetoric from the opposition in the provinces was that 'order without justice is only maintained through force'. In the absence of a parliament that has strong representation from the opposition, with different parties providing leadership for fractured communities and different ethnic groups, the possibility of creating credible avenues to peacefully channel grievances disappears.

Given the past history of antagonisms based on identity, class and ethnicity, the MPLA's absolute victory is bad for democracy in Angola. Peace was a result of the military defeat of UNITA in 2002, and there has been little incentive for the MPLA government to address the root causes of the conflict and to promote true reconciliation through the integration of those who lost the war, or by the formation of inclusive national forums from civil society, or the encouragement of broad-based political debate in order to create the conditions for transparent, just and accountable governance. The potential for violence is still a reality, with millions of small arms in the hands of the civilian population, which refuses to disarm while a culture of fear and distrust among communities persists. This highlights another important fact, that the security provided by the government and the armed forces continues to be perceived as partisan, that the justice system and other forums for the resolution of conflict have so far been not provided the necessary recourse for the ordinary population.

Another important result of these elections is that the Government of Unity and National Reconciliation, formed in 1997 as part of the Lusaka Protocol and taking into account

the results of the 1992 elections, will no longer exist given that UNITA has been voted out of office. The main pillars of the reconciliation framework will therefore no longer be applicable under the MPLA's majority rule. UNITA will cease participating in the administration of the country, the Joint Political and Military Commission that supervised the disarmament, demobilisation and reintegration process and monitored the peace process will come to an end, and it will lose the cabinet seats it held in several ministries.

The constructive political debate that occurred in the run-up to the elections among the political actors and with civil society created important intersections and social bridges necessary to a functioning democracy. However, because the opposition declared that the process was fraught with irregularities, particularly in Luanda, the legitimacy of this new government might be questioned by those constituencies that felt that their interests and needs were not considered.

In the capital, logistical problems led to chaos and an unscheduled second day of voting. Luanda was considered the most unpredictable of all the provinces in terms of how the 2,3 million voters – 21 per cent of the electorate – would vote, mostly because of rising frustration among the impoverished masses (70 per cent of the inhabitants of the capital) most exposed to the lavish wealth of the elite. Hundreds of polling stations never opened because they were missing ballot papers, urns and other materials, while several others opened only after a delay of five hours. The PRS, FNLA and PDP-ANA (*Partido Democrático para o Progresso de Aliança Nacional de Angola*, Democratic Party for the Progress of Angolan National Alliance) voiced their concerns, stating that the disorder in the capital was purposely created, especially in the densely populated neighbourhoods that were opposition strongholds, such as Quilamba Quiaxe, Sambizanga, Viana, Ramiros and Palanca. UNITA accused the government of deliberately creating the chaos in those voting areas where the MPLA was not expected to win a majority.

In addition, the majority of the population is yet to receive any peace dividend. Angolans have seen little significant change since the end of the war and the majority find themselves living in poverty with no hope of a job outside of subsistence farming (from which 85 per cent of the population make a livelihood). Communities are still resorting to selling charcoal and firewood in order to afford one or maybe two meals a day. The economic boom propelled by the oil industry has not been used to address these levels of extreme poverty, which contrast starkly with the \$41 billion in revenue brought in by the oil industry in 2007. Disparities in wealth make Angola one of the most unequal countries in the world, ranking 16th from the bottom (at 162 out of 177) in the UNDP's Human Development Index for 2007.

During its campaign, the MPLA made ambitious promises to fight poverty, create 12 000 jobs, build a million new homes and tackle corruption. The general belief was that if the ruling party was voted out of office the reconstruction boom would end and

chances for economic participation be reduced. The government will now have the opportunity to keep its promises by taking steps radically to reduce the imbalances in income, opportunities and wealth distribution so that the poorest segments of society start to benefit from the country's rapid economic growth.

However, does this landslide victory of the MPLA over the opposition give the government the will to promote sustainable socio-economic development as well as free and democratic institutions? Is Angola going to address conflicting values and the allocation of resources through the democratic debate or will unattended root causes of conflict return to add another problematic dimension to the political theatre of peace?

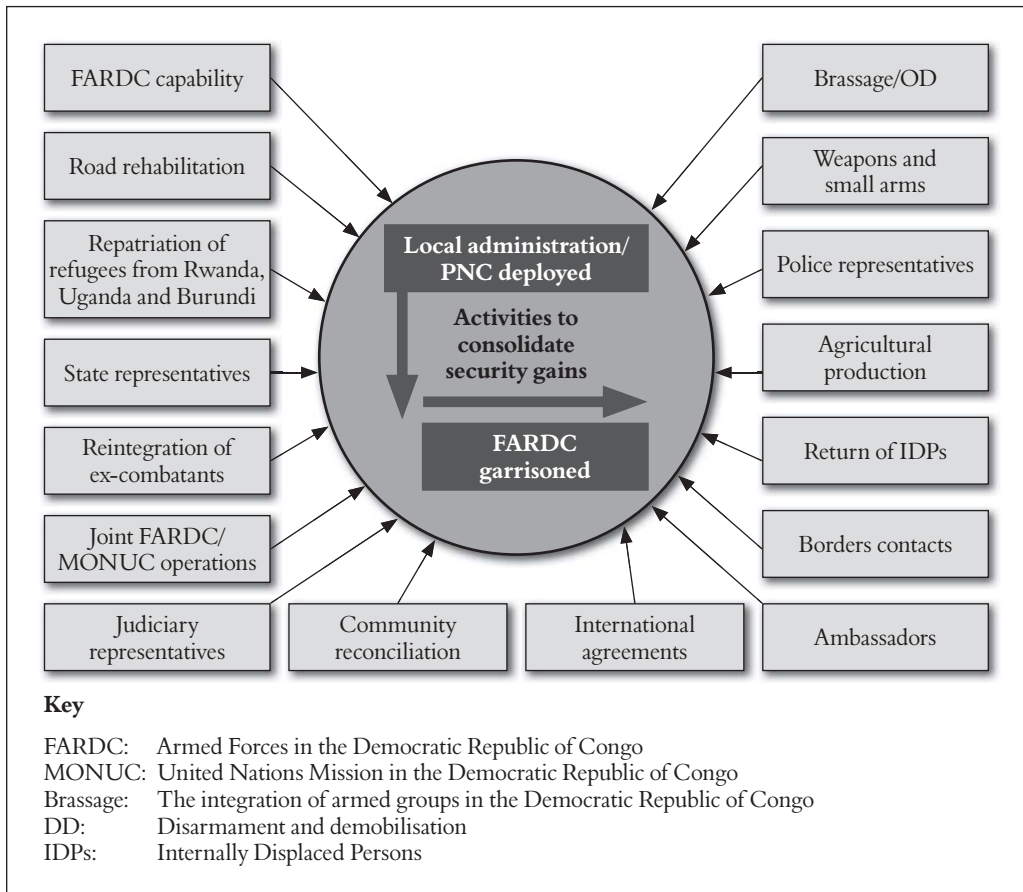
Stabilising the Eastern DRC

Henri Boshoff*

The stabilisation of the Eastern Democratic Republic of Congo (DRC) is based on the implementation of the Goma and Nairobi agreements, supported by the stabilisation plan of the United Nations Mission in the Democratic Republic of Congo (MONUC). The aim of the stability core programme is to help stabilise the Eastern DRC and protect civilians by improving the security environment and extending state authority. To achieve this MONUC and its partners will support the government of the DRC with the containment of armed groups, to put in place basic elements of state authority and ensure the return of refugees and IDPs, and so improve regional relations, too.

The plan is summarised in the following diagram¹:

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Figure 1 Concept of stability core programme

The plan will focus on the following areas:²

Containment of armed groups

- Members of armed groups will enter brassage or disarm/demobilise as a result of sensitisation, community pressure and negotiations
- FARDC capabilities will improve as a result of training, mentoring, garrisoning and quarter mastering
- Armed groups will collapse as a result of joint FARDC/MONUC offensive actions

Improved state authority

- National police units will be deployed and given the means to discharge their duties as a result of a support package

- Members of the judiciary will be deployed and given the means to discharge their duties as a result of a support package
- State representatives will be deployed and given the means to discharge their duties as a result of a support package

Return of refugees and internally displaced persons

- Responsibility for sensitive refugee issues will be handed over to their areas of origin and reintegration and reconciliation will commence as a result of household and community support packages
- IDPs will return to their areas of origin and reintegration will commence as a result of household and community support packages
- Ex-combatants will reintegrate economically and socially as a result of community-based schemes
- Community tensions will lessen as a result of reconciliation and SALW programmes
- Household incomes will increase as a result of purchases of local agricultural goods and road rehabilitation

Improved regional relations

- Ambassadors will be exchanged between the DRC and Rwanda as a result of advocacy
- Relations will improve as a result of confidence-building measures
- International agreements including the Stability Pact and Nairobi Communiqué will be implemented as a result of advocacy and support for JVM/JMG and other mechanisms

One must be optimistic about this plan but also recognise the following risks:

- Rapid and simultaneous roll-out of the stabilisation plan in specific communities will be nearly impossible because it has too many separate sections that need to be implemented by too many partners
- There is insufficient capacity among partners, particularly in remote locations, to implement the multiple sub-components

- Government buy-in will be inadequate, particularly among local authorities and national security organs
- Implementation of the stabilisation plan could end up exacerbating tensions between communities which receive support and those that do not
- Because of current stove-piping, MONUC will be unable to co-ordinate the civilian and military components at the strategic and operational levels
- Because of amongst others delays in recruitment, MONUC will be unable to deploy enough appropriate staff in the field to co-ordinate and implement the stabilisation plan
- Donors will lose confidence in the process and withhold the required funding

The fighting that has occurred since mid August 2008 between FARDC and General Laurent Nkunda's rebel forces has already put some strain on this plan. The demobilisation, disarmament and reintegration (DDR) plan, which forms part of the Amani process, has not been successfully implemented because of ongoing fighting between the signatories of the Nairobi and Goma agreements ever since the two agreements were signed. The completion of the DDR and security sector reform (SSR) processes is crucial. As Tawanda Hondora, Deputy Director of Amnesty International's Africa Programme, put it: 'Reform of the army is not just a desirable military activity, it is a pre-condition for peace and stability in the DRC. While demobilisation is an essentially civilian project, and army reform a military initiative, there is a fundamental link between the successes of both. One cannot succeed without the other.'

The components of the stabilisation plan clearly show that the DDR of all armed groups and the reform of the military and police is a precondition for the successful implementation of the plan. This includes capacity building within the FARDC and the police force (PNC). MONUC, the government of DRC and the international community has embarked on several projects to build the capacity within the security sector with the focus on FARDC and the PNC.

For the reform of the FARDC, the roundtable on SSR of 25 February 2008 adopted the installation of a Congolese co-ordination plan to study the contributions to the programme of dissuasion for the army. It also adopted the programmes already in progress, in particular the training of FARDC battalions by MONUC and the training and equipping of the general-purpose engineering units, as well as the control of manpower through a biometric census. MONUC successfully completed the pilot phase of the Mission's main training project in March 2007 and the graduation of a FARDC integrated battalion. MONUC has also delivered two additional basic training programmes for 12 FARDC

integrated battalions. In spite of logistical deficiencies and the lack of FARDC weapons and equipment, the second main training project was successfully completed, with the units entering service in the FARDC integrated brigades.

MONUC expects to conduct similar courses for the rest of the year and intends to enhance the training programme with supplementary training courses to develop the operational effectiveness and planning ability of FARDC officers. The introduction of mortar and engineering courses into the programme will enhance specific combat-support capabilities. This training and capacity building is crucial because most of these battalions must be deployed in North and South Kivus, supported by MONUC, to implement the stabilisation plan.

Notes

- 1 Author's interview with MONUC official, 14 August 2008, Kinshasa.
- 2 Author's interview with MONUC official, 14 August 2008, Kinshasa.

**The conundrum of conditions for intervention
under article 4(h) of the African Union Act**

Dan Kuwali

**Terror in the backyard:
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The conundrum of conditions for intervention under article 4(h) of the African Union Act

Dan Kuwali*

Introduction

The justification for intervention in terms of article 4(h) of the African Union Act is grave circumstances that constitute serious human rights violations in the form of genocide, war crimes and crimes against humanity. Yet, acts that shock the conscience and elicit a basic humanitarian impulse remain politically persuasive. A practical example of this is the widespread human rights abuses that occurred in the Darfur region of Sudan, which tests the efficacy of the AU's right of intervention as well as the commitment to the responsibility to protect (R2P) norm. Thus, the question which this discussion seeks to address is how and when the AU should implement article 4(h). A related question is when the international community should take on this 'responsibility to protect'. Conceivably,

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the legitimacy of the AU right of intervention will depend on how the AU answers the question as to when and how it should intervene in a member state. The present discussion will not dwell on 'second-tier intervention' which involves intervention to restore peace and stability (although it does beg the question as to whether it will focus on state security or human security) and 'third-tier intervention' or intervention by invitation (which could spark a debate on whether or not it should be at the request of third states or the state in question) (Kioko 2003:816; Cilliers & Sturman 2002:5; Baimu & Sturman 2003:4).

Human rights violations as a threat to or breach of international peace and security

The practice of the Security Council has shown that human rights violations may under certain circumstances be regarded as threats to the peace, and that rampant and egregious violations of essential human rights may themselves constitute 'breaches' of the peace. According to Lepard (2002:177) a definition of 'peace' that includes the absence of widespread and severe violations of fundamental human rights is justifiable because it recognises a 'moral equivalence between war and human rights violations that have a similar impact to war on the welfare and protection of human rights'. Expanding the permissible range of threats to peace to include human rights violations threatening 'international peace' allows greater consistency than a 'trans-boundary effects' test. Given that such a test is not explicitly required by the text of the UN Charter, it should not be used to allow absurd results from a moral point of view.

According to the trans-boundary effects test, losses of life on the same scale in different countries may not lead to lawful Security Council jurisdiction under chapter VII merely on the basis of whether they produce refugee flows across borders, spill-over effects or are likely under the circumstances to provoke intervention by particular states. Lepard (2002) counsels that such inconsistencies could be avoided by an interpretive approach focused on preserving human life and safeguarding other essential human rights. In any case, the debate is driven the question of when the situation ceases to be essentially a domestic matter calling for international intervention.

When does a situation cease to be 'essentially a domestic matter'?

Although the inchoate notion of 'humanitarian intervention' is starting to gain international legal salience, it is still a controversial concept in international law. Similarly, the right of the AU to intervene in a member state in the face of grave circumstances presents questions regarding sovereignty turning on the issue of when the protection of a state's citizens ceases to be a domestic issue. Put bluntly, the crucial question is how to determine the deterioration or tolerance threshold after which a situation ceases to be a matter essentially within the domestic jurisdiction of a state. For instance, in spite of the humanitarian rationale the ECOWAS intervention in Liberia in 1990 was beset by

acrimony and controversy as some ECOWAS member states, notably Côte d'Ivoire and Burkina Faso, contested the political and legal basis of the intervention. They argued that the Liberian crisis was an internal problem that did not require regional military intervention (Aboagye & Bah 2005). In the words of Ekiyor (2007:4):

In relation to prevention of genocides and war crimes, one key question asked on the continent is what is an extreme circumstance? The international community was slow to intervene in the Liberian conflict in 2003, though evidence of widespread killings by government and rebel forces was clear. The subjectivity in assessing extreme situations undermines the importance of implementing [R2P]. The argument that Iraq was an extreme case, while Liberia was not, raises scepticism that interventions under R2P will also be based on the geostrategic value of countries requiring preventive intervention than on the need to protect civilians.

The questions of threshold that the notion of R2P raises are similar to those brought to the fore by article 4(h). In promulgating the principle of R2P, the International Commission on Intervention and State Sovereignty (ICISS) set a very high threshold for humanitarian intervention, only to be considered in the face of 'large-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation' (Evans & Sahnoun 2000:34–36, parr 4.32–4.43). In fact, the ICISS proposed the following 'conscience-shocking situations' as justifying military intervention for humanitarian protection: acts defined by the provisions of the 1948 Genocide Convention (UN 1948), the threat or occurrence of large-scale loss of life, diverse manifestations of 'ethnic cleansing', crimes against humanity and violations of international humanitarian law, and situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war.

The point, however, is that every life counts and should therefore be protected. In addition, in terms of the obligations under the UN Charter, every sovereign state has the duty to save succeeding generations from the scourges of war (and certainly human rights violations). Therefore, to suggest that the international community should not intervene until 'conscience-shocking situations' have occurred, may be a misstatement of gargantuan proportions. This is particularly so with respect to the high threshold for crimes against humanity, requiring as it does 'widespread and systematic attack' and that of war crimes, which require 'a plan or policy or as part of a large-scale commission' of the crimes. The same applies to genocide which requires a specific intent (*dolus*). It is understandable, however, that the rationale behind limiting the threshold to serious violations is not to dilute the attempt to protect civilians against massive savagery, but rather to reduce the possibility of abuse of the right to launch humanitarian interventions. This underscores the need for a definitive threshold for deciding upon and exercising the right of intervention under the AU Act.

Certainly, the international community should not wait for an all-out large-scale war with its accompanying devastation before condemning and punishing its perpetrators. Thus, although the rule against intervention in internal affairs encourages states to solve their own problems and prevent them from escalating into a threat to international peace, the 'just cause' theory provides a benchmark for determining when rules protecting sovereignty should yield to intervention to protect the rights of individuals at risk. Drawing from the provisions of the UN Charter, the AU Act and views of various scholars, a common yardstick for a legitimate intervention is therefore to save humanity from atrocities (Danish Institute of International Affairs 1999). The AU Act is precise in article 4(h), which provides for the right of intervention in cases of war crimes, genocide and crimes against humanity. Yet, apart from being silent on how to intervene, article 4(h) is also incomplete on how to decide when to intervene.

International human rights and humanitarian law instruments provide clear definitions of war crimes, genocide and crimes against humanity, but there is a lack of consensus on what constitutes grave circumstances. The experience from the Rwandan genocide and the Darfur crisis, clearly attest to the fact that valuable time may be expended on debating labels for the ominous events, rather than taking action. Concepts such as 'grave circumstances', 'supreme humanitarian emergency' and 'severe violations of international human rights and humanitarian law' may be prone to subjective definitions. There is evidently a need for intervening states to make a convincing case to the effect that the violations of human rights within the target state have reached such a magnitude that they 'shock the conscience of humanity'. However, this leads to the question as to how many people must die before humanitarian intervention can be justified. Certainly, it should not be the numbers that get killed or tortured that matter.

In this regard both Wheeler (2000:34) and Kindiki (2005:285) suggest that a supreme humanitarian emergency exists when the only hope of saving lives depends on the outsider coming to the rescue. Although the AU Assembly of heads of state and government (the AU Assembly) can decide on intervention on its own initiative or at the request of a member state pursuant to article 4(j), the provision does not spell out a clear-cut threshold that would warrant intervention. The various thresholds for intervention under article 4 (h) is examined below.

The thresholds for intervention under article 4(h) of the AU Act

War crimes: the challenges of victor's justice

Although the AU has provided for war crimes as a threshold for intervention, accountability for war crimes is limited to armed conflict. The 1949 Geneva Conventions

and 1977 Additional Protocol I thereto provide protection for non-combatants during armed conflicts.¹ In elaborating the Geneva Conventions, Additional Protocol I defines ‘war crimes’ as grave breaches of the Conventions or the Protocol. The Rome Statute of the International Criminal Court (ICC) has filled the protection gap in internal armed conflicts by dealing with criminal responsibility for grave breaches in common article 3 and protocol II. Following the *Tadi* case (interlocutory appeal, par 94), war crimes may be perpetrated in the course of either international or internal armed conflicts. War crimes are serious violations of customary or, when applicable, treaty rules concerning international humanitarian law (Ratner & Abrams 2001:82, 98–99).

War crimes may be perpetrated by military personnel against enemy servicemen or civilians, or by civilians against members of the enemy armed forces. Conversely, crimes committed against friendly forces do not constitute war crimes. Criminal offences, if they are to be considered war crimes, must also have a link with an international or internal armed conflict (Cassese 2003:739–740). It is noteworthy that no statutory limitation applies to war crimes. Yet the lack of any exact, objective criterion defining armed conflict poses challenges for determining when a conflict begins, although it is generally agreed that it involves the use of armed forces, as opposed to police, and the actual firing of weapons (Ratner & Abrams 2001:84).

The grave breaches provisions serve to criminalise a core set of violations of the Geneva Conventions by mandating that states enact penal legislation and then extradite or prosecute offenders.² In practice, however, the picture that emerges of a common attitude towards war crimes in history is that in a just war, there can be no war crimes; one side’s heroes are the other side’s war criminals. There is an African saying that ‘as long as lions do not have their own historians, hunting stories will continue to glorify the hunters’. Looking at the spectrum of justice of warfare, this proverb proves to be absolutely correct. The natural tendency of those in power, particularly military leaders, is to glorify their deeds, often by creating myths centring round heroes. States have proved to be reluctant to prosecute their own soldiers for war crimes unless they are especially heinous and publicised, ‘they have thus justified impunity, or a small administrative punishment, on the exigencies of warfare’ (Ratner & Abrams 2001:106). In addition, states often hesitate to prosecute the opponent’s soldiers if the opponent is still holding some of their prisoners, for fear of reprisal. According to Ratner and Abrams (2001:106–107):

[A]s with interstate war crimes, the prospect of actually achieving individual accountability will depend heavily on the belligerents themselves ... If government forces succeed in putting down a rebellion, they would seem prone to prosecute only the losers for violations of domestic law, rather than investigate the actions of both sides for war crimes. If the rebels are successful, they might choose to address only the accountability of the former government and its military forces.

Ratner and Abrams (2001:106–107) also lucidly explain the accountability dilemma in an intrastate conflict thus:

Moreover, the nature of intrastate conflict means that generally only the government at best will have functioning courts. This makes it less likely that the opposition forces will be able to try their officials for internal war crimes and perhaps more likely that the government will direct its prosecutions toward opposition figures rather than own military personnel. In the event an international tribunal is established it will again depend upon the parties' co-operation in handing over officials, who will doubtless attempt to justify their acts based on military necessity.

Though prohibited, war crimes continue to be committed with impunity. Contrary to the aims and aspirations of the 'peoples of the UN', the scourge of war continues to generate untold abuses to civilians while most of the abusers have gone unpunished. Experience shows that perpetrators of atrocities are often rewarded with access to political power. In the Democratic Republic of Congo (DRC), for instance, the former warlords were safely ensconced in the transitional government. Therefore, until the responsibility for ensuring civilian protection is respected by states and non-state actors, the norm of responsibility to protect will remain an ideal.

Hence, the establishment of the ICC is a quantum leap towards the protection of human rights given that it can 'deter future war criminals, and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity'.³ The same holds true for the ad hoc International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as international criminal tribunals and the Special Court for Sierra Leone (SCSL).

Thus, today, the international community no longer tolerates situations in which war crimes go unpunished. Furthermore, the Geneva Conventions and Additional Protocols provide for certain formal mechanisms to monitor compliance with the law during hostilities. It is clear from the wording of article 4(h) that the insertion of the right of intervention in the AU Act was reaction to the crimes committed against civilians in armed conflicts on the African continent. However, intervention to prevent war crimes will be problematic to implement if the loopholes to check war crimes are not addressed.

According to Greenwood (2003:820) the most important means of ensuring compliance with international humanitarian law is 'scrutiny by, and pressure from, third parties'. The reasoning is that a warring state will often be heavily dependent upon the goodwill of neutral states, which may well be jeopardised by allegations of atrocities. Such allegations can also have a negative effect on public opinion in the belligerent states

themselves. Pressure of this kind operates outside the law itself, since the law makes no express provision for it (Greenwood 2003:820–821). It is in such areas where ‘pressure operates outside the law’ where the AU needs to intervene to fill the protection gap. This argument is validated by the fact that the diminishing impact of the ‘protecting power’ system has shifted the burden to the International Committee of the Red Cross (ICRC) to assume the humanitarian functions. Where the ICRC is granted access it operates strictly on a confidentiality basis and its reports are not made public. Although the ICRC has at times been successful in private persuasion where it detected violations, it cannot be used to mobilise public opinion to put pressure on the state committing the violations.

The AU has several options for tying the loose ends in the protection of civilians in armed conflicts, including but not limited to establishing a committee to oversee the compliance with international humanitarian law; ensuring that countries have made a declaration pursuant to article 90 of the Additional Protocol I to the Geneva Conventions which recognises the competence of the International Fact-finding Commission; ensuring that countries at risk declare a state of emergency pursuant to article 4 of the International Covenant on Civil and Political Rights (ICCPR) or else do not breach human rights; creating a standing police capacity for the AU within the African Standby Force that will ensure that perpetrators of war crimes are brought to justice (regardless of whether they are from the government or the insurgents); strengthening the link between the AU and the ICC; establishing a proactive disarmament regime; and establishing an obligatory dispute resolution mechanism.

Genocide: numerical issues and evidentiary problems of intent

Although article 4(h) of the AU Act lists genocide as a condition for intervention, problems remain regarding the *actus reus* (unlawful act) and *mens rea* (intention to commit crime) of genocide, the nature of protected groups and the quantitative dimension of the crime.⁴ However, much debate about genocide revolves around the proper definition of the word. Indeed, the concern about their inability to prevent or halt the Rwandan genocide led the then OAU heads of state and government to set up an international panel of eminent personalities to investigate the 1994 genocide in Rwanda and surrounding events (OAU 2000). This panel blamed the neighbouring countries, but also the erstwhile OAU, the UN and the international community at large for failing to call the killings in Rwanda by their proper name, namely genocide, and for failing to stop the violence. According to article 6 of the Rome Statute genocide refers to the intentional killing, destruction or extermination of groups or members of a group. Genocide acquired autonomous significance as a core crime upon the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by the General Assembly, a day before the proclamation of the Universal Declaration. Article

I of the Genocide Convention contains an obligation to prevent acts of genocide and to punish persons guilty of genocide, within a state's own jurisdiction (Schabas 2002:30).

The International Court of Justice (ICJ) has recognised that the prohibition of genocide is a customary legal norm *erga omnes* (obligations towards all other member states of the international community) that also has a status of *jus cogens*, that is, peremptory norms that may neither be derogated from by international agreement nor *a fortiori* by national legislation (Cassese 2003:744). As Schabas (2000:3–4) noted, the ICTY and the ICTR consider genocide to be the crime of crimes. Similarly, in its advisory opinion on *Reservations to the Convention on Genocide*, the ICJ (1951:15, 24) held that 'the principles underlying the Convention are principles which are recognised by civilized nations as binding on states, even without any conventional obligation'. Apart from being endorsed by the Security Council in resolution 808(1993), this position has been echoed in the ICTR case of *Akayesu* (par 495) and ICTY case of *Krstić* (par 541). At the level of state responsibility, it is now apparently accepted that customary rules of genocide impose *erga omnes* obligations and at the same time confer on any state the right to require that acts of genocide be discontinued. Further, those rules are *jus cogens*.

Although still controversial, article II of the Genocide Convention has lent stability to the definition of genocide as constituting any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group (Glaser 1970:15–16):

- Killing members of the group
- Causing serious bodily or mental harm to members of the group
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- Imposing measures intended to prevent births within the group
- Forcibly transferring children of the group to another group

Genocide is thus comprised of three main elements: first, the commission of at least one of the acts listed in the definition, second, the act should be directed at the specified groups and third and importantly, the intention should be to destroy the group wholly or partially.

It follows from the language of article II that the act of genocide involves the commission of certain acts against specified (stable and permanent) groups with a specific intent and does not require the complete annihilation of a group. The Convention confines itself

to the physical destruction of groups to which persons normally belong 'involuntarily', often by birth. This explanation derives from the opinion of the International Law Commission (ILC) that the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership of a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual of a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target of this type of criminal conduct. In short, at the heart of the definition is the fact that the perpetrator has identified the group for particular destruction. The test is subjective and not objective (Schabas 1999:3).

The language of the Convention in the chapeau of article II is that genocide must aim at the destruction of the group 'in whole or in part' giving an impression that '... there must be some quantitative threshold where mass murder turns into genocide' (Schabas 2000:40). On the basis of the argument by Schabas, the quantitative test is more than merely a numbers game. The term refers to the genocidal intent and not to the physical act. Given that genocide is a crime of intent, 'the real question is what is the purpose of the offender, not what is the result' (Schabas 1999:3). Thus it is not necessary to have the intension of achieving the complete annihilation of a group, although the crime of genocide does by its very nature seem to require the intention to destroy at least a substantial part of the group. The actual result, in terms of quantity, will nevertheless be relevant in that it assists the trier of fact to draw conclusions about intent based on the behaviour of the offender. The greater the number of actual victims, the more plausible becomes the deduction that perpetrators intended to destroy the group, in whole or in part.

The number of victims may vary depending on the nature of the group and the proportion they represent of the group's total population (Schabas 1999:3). According to Bassiouni (1994:279, 323) the protected group may be defined qualitatively as well as quantitatively or, put differently, 'significant' rather than a 'substantial' part of the group must be targeted. The total number per se may be a strong indication of genocide regardless of the actual numbers killed. Using the 'significant group' approach, the test is whether the destruction of a social class or level threatens the group's survival as a whole. The involvement of a government is not required and genocide may be committed without an organised plan or policy of a state or similar entity. However, according to the *Kayishema* case (par 94) the existence of a plan or policy may form strong evidence of the existence of the specific intent for the crime. This is evident from the fact that article IV of the Geneva Convention holds that persons committing genocide or any of the other acts outlined in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

The *Akayesu* case confirmed that the enumeration of genocidal acts in article II of the Geneva Convention is exhaustive as opposed to illustrative, and that the term clearly includes bodily or mental torture, inhumane treatment and persecution. In this case, the ICTR found the accused guilty of genocide for acts of rape and mutilation. The *Akayesu* case contained the landmark decision which defined rape as an act of genocide when committed with the intent to destroy a particular ethnic group (*Akayesu* case, judgment, par 516). Practitioners have suggested that in determining whether an act is genocidal, it will be guided by the Geneva Convention's primary focus on preventing the physical destruction of groups. The ICTY and ICTR have held that the defendant must possess the specific intent to be guilty of genocide; if he merely knew his actions would further the destruction of the group but did not have the specific intent to do so, he can only be found guilty of complicity in genocide (*Akayesu* case, judgment, parr 485, 538–548; Ratner & Abrams 2001:32–37). The intent to destroy should be directed at the group as a protected group (Ratner & Abrams 2001:38).

However, determining what constitutes genocide and what is merely criminal or inhuman behaviour is not a clear-cut matter. Furthermore, in nearly every case where accusations of genocide have been made, partisans of various sides have fiercely disputed the interpretation and details of the event, often to the point of providing wildly different versions of the facts. This debate is reminiscent of the Rwandan genocide of 1994, when valuable time was expended on debating labels for the terrible events that had taken place in that country. An accusation of genocide is certainly not to be taken lightly and will almost always be controversial. This reflects the sentiments of Beckman (2005:135) when he says that genocide has 'a clear legal definition and it certainly constitutes a very severe accusation'. He argues that the hesitation to 'use the very word – genocide – [is] undoubtedly governed by political considerations, though in a legal context'. The implications are that admitting to the occurrence of genocide means that the commitment and responsibilities under article VII of the Genocide Convention are invoked. Although the Genocide Convention does not impose any right or duty to intervene, it obligates states parties to 'call upon the competent organs of the UN to take action to suppress acts of genocide'. This is possibly why many states deliberately played down the scale of the killing in Rwanda, fearing that an acknowledgment that genocide was occurring would create a legal (and moral) obligation to intervene (Schabas 1999:6; Mepham & Ramsbotham 2007:2).

Historical evidence shows that the welfare of civilians has been overshadowed by the narrow national self-interest of one or more of the permanent members of the UN Security Council, coupled with lack of international consensus on what constitutes genocide. This has played into the hands of the protagonists, to the detriment of the civilian population, who continue to bear the brunt of serious violations. Such dithering on the part of the international community, exacerbated by the lack of a common mechanism to verify the existence of genocide, reinforces the need for AU action that

would rapidly and effectively arrest any genocidal intent on the continent (Report of the High Level Mission in Darfur). While arguing that the situation in Darfur certainly warranted more concrete international action, Bah (2005:32–42) poignantly asks:

If the killing of approximately 75 000 [as it was then, now 200 000] innocent civilians and the displacement of [2,5] million do not constitute genocide, then what does? How many more people would have to be slaughtered and driven from their homes before the international community responds appropriately?

The situation in Darfur is further complicated by the rather ambiguous report of the UN International Commission of Inquiry on Darfur. For instance, while the report acknowledged that war crimes had been committed, it added that this did not constitute genocide and concluded that in some instances individuals, including government officials, may have committed acts with genocidal intent. In this respect the report falls short of expectations and could have the unintended effect of deflecting international attention from the real issue on the ground, which is justice for the innocent victims. In contrast, the US Congress observed that ‘the atrocities in Darfur, Sudan, are genocide’ and called on the members of the UN ‘to undertake measures to prevent the genocide’.⁵ This shows that the tougher issue is not whether to intervene, but when and how. That is the question with which the international community still grapples. This will also be the question that will occupy the AU. The enforcement mechanisms envisaged by the Genocide Convention are ineffective since it contemplates trials before the courts of the state in whose territory the genocide has occurred, or before an international penal tribunal pursuant to article VI. Yet history is witness to the fact that the hand of the state or those who wield state-like power is visible in every modern-day genocide, a fact that will make national prosecutors reluctant to act (Jallow 2007).

The definition in the Geneva Convention does not include cultural genocide, in the form of for instance the destruction of the language and culture of a group or the extermination of a group on political grounds. By the same token, the limitations of the definition of genocide, particularly the restricted list of protected groups and intent requirement, pose significant hurdles to making a case of genocide where it is difficult to determine whether victims constitute a cohesive group as protected by the Convention, for instance where a religious sect overlaps with a political group as in the case in the Darfur region of Sudan. In advocating for the expansion of the definition of genocide, Ratner and Abrams (2001:44–45) find no justification in the definition for including groups based on religion, nationality and ethnicity while excluding those based on political views, social status or economic station:

[T]he decades since the Genocide’s adoption have seen several episodes of mass killing ... which in large part fall outside the Convention’s

ambit, yet which from today's perspective are in many respects morally indistinguishable from those that do fall within it ... with the end of the Cold War and the nearly universal professed commitment to a core corpus of human rights, the least denominator that prevailed in 1948 has certainly increased.

Although the ICTR expressed judicial activism in expanding the interpretation of the definition in the *Akayesu* case, judicial interpretation is contentious coupled with political hurdles to amend the Convention. In this regard Ratner and Abrams (2001:45) see the most promising route for the evolution of the international law on genocide to be through expansion of customary law. They therefore suggest that states could expand the definition of genocide under their domestic laws and press for recognition of a more expansive interpretation of the crime in international fora. If it accepts this recommendation, AU member states could expand their interpretation with regard to article 4(h) to encompass the mass destruction of any human collective, based on any core element of human identity, in order to enable it to address all forms of this most heinous of international offences.

From the perspective of article 4(h) of the AU Act, a member state of the AU can use the provisions of article VIII and (subject to jurisdictional requirements) article IX of the Genocide Convention to act as a 'whistleblower'. The whole idea is to prevent or suppress genocide and not necessarily react after the fact, as has been the case in the past. If such an approach is followed, however, the question to be answered is which would be a most competent organ of the UN to follow up the complaint and what would the role of the AU be. It is conceivable to assume that article VIII of the Genocide Convention permits the Security Council to authorise military intervention to stop genocide, even more so when informed of such situation by states party to the Convention. As the Security Council is generally the UN organ with the primary responsibility for peace and security, its approval would be needed before any concerted international effort might be launched. In this regard the UN Charter with its rules on the use of force remains the governing body of law in terms of which article VIII of the Genocide Convention is implemented (Saul 2002:527; Orentlicher 2005).

In addition, the General Assembly could request the ICJ, in accordance with article 96 of the UN Charter, to give an advisory opinion on the legal question relating to the commission of genocide by a member state. Although the opinions of the ICJ do not bind the organs that request for them or the members of the UN unless there is a prior express agreement to that effect, they serve to enlighten a requesting organ 'on the course of action it should take'. It is true that according to the ICJ's jurisprudence, a state's consent is not necessary in advisory proceedings and that therefore 'no state, whether a member of the UN or not, can prevent the giving of an Advisory Opinion which the UN considers desirable in order to obtain enlightenment on the course of

action to take'. It is noteworthy that referring a matter to the ICJ does not preclude it from being discussed by the Security Council, since it is a settled principle that the ICJ may adjudicate on the legal aspects of a case, the subject matter of which was under the active consideration by the Security Council, under chapter VII of the Charter (*DRC v Uganda*; Ntanda-Nsereko 2002:497–521, 509).

Yet time is of the essence in preventing genocide and the issue of time to decide in a given case whether or not a proposed intervention would be justified is dealt with under the ICJ statute and rules of procedure. These matters are of the highest urgency, and a decision to intervene under article 4(h) cannot possibly await the decision of the ICJ. In this connection Harhoff has suggested that the way out is to institute a new 'quick procedure' under chapter IV of the ICJ statute, by which a specially designated chamber of the Court would be asked to render an advisory opinion on the matter within a certain (short) time frame, at the request of the Secretary-General (Harhoff 2001:109–112, 111). However, given the uncertainty of the Secretary-General's authority to request advisory opinions from the ICJ and the possible reluctance of the Council to see its inherent authority to prescribe the use of force pass to another UN organ, this option might not gain immediate support (Harhoff 2001:109–112, 111). Another option would be to bring the question of genocide before the African Court of Human and Peoples' Rights (ACHPR) pursuant to article 3 of the Protocol establishing the African Court of Human and Peoples' Rights (ACHPR Protocol). This article extends the jurisdiction of the Court to all cases and disputes submitted to it on the interpretation and application of the Charter, the Protocol establishing the Court and any other relevant human rights instrument ratified by the states concerned (including the Genocide Convention).

It is clear from its title that the Genocide Convention is concerned with both prevention and punishment. However, Schabas (1999:2) has noted that it is 'the second prong of its mission – punishment – that has received the most attention ... What the convention means by preventing genocide remains enigmatic, but defining it is an urgent priority, given the recent failure to stop genocide in Rwanda'. Therefore, according to the framers of the Convention and cognisant of the mission of the UN Special Advisor for the Prevention of Genocide, the AU should focus on prevention and response to a potential genocidal action and generate political support where needed. To achieve this, the AU needs to build a human security architecture with a vigilant early warning and corresponding early response instrument. In this regard the AU human rights institutions should work closely with, and co-ordinate the relationship between the AU and the international community as well as with the UN bodies in general.

Can intervention prevent crimes against humanity?

The term 'crimes against humanity' has come to mean something atrocious committed on a large scale. This is however not the original meaning nor is it the technical definition.

The template definition of ‘crimes against humanity’ is contained in article 6(c) of the 1945 Charter of the International Military Tribunal (IMT) (also known as the London Charter) which conceived them as murder, extermination, enslavement, deportation and other inhumane acts committed against civilian populations, before or during a war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, regardless of whether they are in violation of the domestic law of the country where they were perpetrated. In the *Erdemovic* case, the ICTY decided that crimes against humanity are serious acts of violence that harm human beings by striking at what is most essential to them: their lives, liberty, physical welfare, health and dignity. The Trial Chamber stated that these crimes ‘are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment’. It said that these crimes also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated (*Erdemovic* case, par 27–28). It is therefore the concept of humanity as a victim which essentially characterises crimes against humanity.

Considering the novelty of the international legal concept of crimes against humanity in the immediate post World War II era and insofar as these crimes transcend the ambit of ordinary war crimes, Dinstein (2000:373, 393) argues that article 6(c) of the London Charter was not declaratory of customary international law at the time of its adoption. This view is supported by Cassese (2003:741–742), who suggests that the correct view seems to be that article 6(c) constituted new law, as explained by both the limitations to which the new notion was subjected and the extreme caution and reticence of the Tribunal. Although there has been no specialised international convention since then on crimes against humanity, crimes against humanity have been included in the statutes of the ICTY (art 5) and ICTR (art 3), as well as in the ICC statute (art 7).

The central dimension of crimes against humanity is that they are directed against the civilian population as such, rather than against individual civilians in isolation. The term ‘civilian’ in this context is generally regarded as the antonym of combatants, as articulated in article 48 of the Additional Protocol I. Drawing from the judgment in *Tadić*, a wide definition of civilian population is intended given that the emphasis is not on the individual victims but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population (*Tadić* case, par 123; *Akayesu* case, par 579; *Kayishema and Ruzindana*, par 123). The presence of some non-civilians in the midst of a targeted population which is of predominantly civilian nature does not change the overall civilian character of the population.

Crimes against humanity are not isolated or sporadic occurrences, but are part either of a governmental policy or of a widespread or systematic practice of atrocities tolerated, condoned, or acquiesced to by a government or a de facto authority. The International Law Commission set two general conditions for acts to qualify as crimes against

humanity, namely the inhumane acts must be committed in a systematic manner (meaning a preconceived plan or policy) and secondly, they should be committed on a large scale. Each individual offence will either be a particular instance of crime frequently repeated or be part of a string of such crimes (widespread practice), or be a particular manifestation of a policy or a plan drawn up or inspired by state authorities or by an entity holding de facto authority over a territory, or of an organised political group (systematic practice). The jurisprudence of the international criminal tribunals points to the fact that the requirement that the occurrence of crimes be widespread or systematic is a disjunctive one (International Law Commission 1996).

While there is a requirement that such offences must take place on a large scale, one of the most significant elements is that such offences should at least be tolerated by a state, government or entity. The emphasis on government endorsement is justifiable because of the focus of human rights and international humanitarian law on protecting individuals from those with power over them, but it is equally clear that profit-driven entities may commit horrendous acts as well (Cassese 2003:741–742; Ratner & Abrams 2001:79). In the *Tadić* and *Jesic* cases, however, the ICTY has acknowledged that a single act might qualify as a crime against humanity if it were part of such an attack. In this sense the need to establish a systematic – even if not widespread – course of conduct seems to indicate that simply the occurrence of a couple of reprehensible acts would not suffice, but rather that there must be a clear pattern of behaviour. This was clear in the *Finta* case where the Canadian Supreme Court propounded that what distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions, which are essential elements of the offence, are undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race (*Tadić* case, judgment, par 645–649; *Jesic* case, judgment, par 53; *Finta* case, 1994: 814).

To a large extent, many concepts underlying this category of crimes derive from, or overlap with, those of human rights law laid down in standard provisions of international human rights instruments. There are at least 11 international instruments defining crimes against humanity, but there are slight differences in their definitions of the crime and its legal elements. However, what all of these definitions do have in common is that they refer to specific acts of violence against persons, irrespective of whether the person is a national or non-national and irrespective of whether these acts are committed in time of war or peace. Furthermore, these acts must be the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of the persecution. Such a policy can also be manifested by the ‘widespread or systematic’ conduct of the perpetrators, which results in the commission of the specific crimes contained in the definition.

What emerges from tracing the numerous definitions of crimes against humanity from 1945 to 1998 is according to Dinstein (2000:382–383) ‘that their precise outlines

are by no means engraved in stone: they seem to change with the *Zeitgeist*'. On this basis, he argues that given the constant modifications, it is doubtful that any particular definition of crimes against humanity has necessarily acquired the status of customary law although the core crimes such as murder, extermination, enslavement and similar inhumane acts perpetrated against the civilian population have certainly attained customary international law status. On the basis of the foregoing, it is therefore correct to contend that core crimes constituting crimes against humanity constitute customary international law and are also deemed to be part of *jus cogens*, which is the highest standing in international legal norms.

Thus, crimes against humanity constitute a non-derogable rule of international law. The implication of this standing is that they are subject to universal jurisdiction, which means that all states can exercise their jurisdiction in prosecuting a perpetrator irrespective of where the crime was committed. It also means that all states have the duty to prosecute or extradite, that no person charged with that crime can claim the 'political offence exception' to extradition, and that states have the duty to assist each other in securing the evidence needed to prosecute. Furthermore, no perpetrator can claim the 'defence of obedience to superior orders' and no statute of limitation contained in the laws of any state can apply. Lastly, no one is immune from prosecution for such crimes. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.

The list of the specific crimes contained within the meaning of crimes against humanity has been expanded since article 6(c) of the IMT Charter to include rape and torture, in articles 5 and 3 of the respective ICTY and ICTR statutes. The statute of the ICC also expands the list of specific acts, adding the crimes of enforced disappearance of persons and apartheid. Further, the ICC statute contains clarifying language with respect to the specific crimes of extermination, enslavement, deportation or forcible transfer of population, torture and forced pregnancy. Although crimes against humanity overlap with genocide and war crimes to some extent, crimes against humanity are distinguishable from genocide in that they do not require intent to 'destroy in whole or in part', as cited in article II of the 1948 Genocide Convention, but only the intent to target a given group and carry out a policy of 'widespread or systematic' violations. As a corollary of the *Tadić* case, crimes against humanity are also distinguishable from war crimes in that they do not only apply in the context of war but in both war and peace. Crimes against humanity are strictly confined to acts hostile to the civilian population as opposed to war crimes, which are usually directed against combatants no less than civilians. Further, crimes against humanity, unlike war crimes, postulate widespread or systematic criminal action (*Tadić Interlocutory Appeal*, par 140–141; *Tadić* case, merits, par 627; Dinstein 2002:393).

The daunting task for the AU in terms of article 4(h) therefore is how to ensure that all perpetrators of crimes against humanity, be it states or non-state actors, do not get away

with impunity. Yet, in case of crimes against humanity, more often than not there are difficulties in bringing perpetrators to justice. For example, apart from the current case of Darfur, renegade General Laurent Nkunda has been accused of crimes against humanity in the DRC for his role in the massacres committed in Kisangani in May 2002. At the time of writing, however, the DRC government has not yet arrested him let alone brought him to trial. Furthermore, despite allegations of crimes against humanity in the DRC, a UN investigation team, led by the chief of the human rights section of the UN Mission in the DRC, which was dispatched to investigate reports of the massacre of the Banyamulenge ethnic group, found no evidence to support the allegations. The implication is that unless interventions are progressively shifted from emergency reactive activities to proactive initiatives, such as deterring would-be authors of crimes against humanity, the international community will continue to witness impunity of perpetrators of atrocities.⁷

Accordingly, the AU intervention regime needs to develop a concerted approach aimed at intervention to prevent crimes against humanity through conflict resolution measures, with targeted strategies where conflicts are simmering, or peer pressure where systematic patterns of human rights violations are revealed. At the same time there is a need to deter would-be perpetrators while gathering evidence for possible prosecution of violators. If humanity is to be protected from crimes against humanity, then perpetrators of human rights violations must be brought to justice at all costs. This may seem to be an unrealistic demand, but it is not. It is mainly a matter of political will, and political will is influenced by outside pressure. This underscores the important roles of the Continental Early Warning System (CEWS) and the African Peer Review Mechanism. Regional co-operation between judicial authorities must be further enhanced to overcome the legal problems connected to the principle of non-extradition of the nationals of a particular state. The CEWS must keep a close watch and be actively involved in human rights monitoring and reporting, as well as collection of evidence for possible prosecutions. The AU may in fact need a special committee to oversee the implementation of humanitarian norms in collaboration with the human and peoples' rights institutions.

Summary: the challenge of a broad definition of the thresholds without opening the door too widely

According to article 7(1)(e) of the PSC Protocol, the PSC shall recommend intervention in a member state in respect of 'grave circumstances' under article 4(h) as 'defined in relevant international conventions and instruments' of the AU Assembly. Thus, the AU is bound adopt the definition of 'war crimes', 'crimes against humanity' and 'genocide', as enshrined in the Rome Statute of the ICC, the Genocide Convention, the Geneva Conventions and Additional Protocols and the tried and tested definitions in the Statute of the ICTY and the ICTR. However, the lacuna on a common definition of what

constitutes genocide or the threshold of 'grave circumstances' involving war crimes and crimes against humanity may cause a paralysis in deciding on intervention under article 4(h) of the Act. Defining when abuses are 'grave' or when there is a 'disaster' is highly subjective and the nature of the decision, whether it is made by the UN Security Council or the AU, would inevitably be highly politicised.

However, it is clear that the AU's right to intervene in a member state, as does the notion of R2P, specifies that sovereignty implies certain responsibilities on the part of the state towards its people, and that this imposes some limitations on what a particular government can or cannot do with respect to its own people. Similarly, the broadening of the concept of security has fortified the regime for the protection of civilians – unlike the situation during the Cold War when security was the sole preserve of the state. Human security means individual freedom from basic insecurities. Genocide, wide-spread or systematic torture, inhumane and degrading treatment, abductions, slavery, war crimes and crimes against humanity are forms of intolerable insecurity that breach the human security norm. Massive violations of the right to food, health and housing may also be considered to fall in this category, although their legal status is less elevated. A human security approach means that the AU will contribute to the protection of every individual human being and not only on regional defence, as occurred under the security approach of nation-states. These responsibilities require a consistent and optimal use of human rights instruments in conjunction with the CEWS and the Solemn Declaration and Memorandum of Understanding on the Conference on Security, Stability, Development and Co-operation in Africa in order to maximise capacity for early warning and conflict prevention in Africa, taking the paucity of resources into consideration (Ayodele 2000:59–60).

Indeed, the framers of the AU Act recognised that the AU's R2P could lawfully override entrenched norms regarding domestic jurisdiction. In this sense the AU can intervene in situations involving violations of human rights based on evolving conceptions of domestic jurisdiction. However, a question that still has to be answered is when the AU can intervene, in view of the fact that the threshold for intervention, namely war crimes, genocide and crimes against humanity, is still the subject of international debate. Almost all AU member states are party to the 1949 Geneva Conventions and the 1977 Additional Protocols, yet the vast majority of victims of war are now found in Africa. Twenty-five AU member states are parties to the Genocide Convention, while Rwanda has been a state party acceding since 1975 whereas Sudan acceded without reservation in 2005. Yet Rwanda has experienced a textbook example of genocide and the occurrence of genocide in Darfur is still a subject of hot debate. How does one explain that despite the fact that well over half the AU members have ratified the ICC Statute, the first four situations before the ICC are from AU member states?

The AU's discretion is confined to assessing the existence of legally defined situations as specified in article 7(1)(e) of the Peace and Security Council Protocol, rather than making

the kind of political finding the UN Security Council would when it establishes a threat to international peace and security. It seems reasonable to suggest that for purposes of intervention, or put bluntly, to prevent the commission of these international crimes under article 4(h), there should be a broader definition for thresholds while retaining the strict definition under international criminal law. This will limit the types of violations of human rights which do not reach the level of grave circumstances as a legitimate cause for intervention.

Article 4(h) in its present formulation seems to suggest that intervention will occur upon the commission of war crimes, genocide and crimes against humanity. This reactive interpretation is not in line with the preventive agenda for the protection of human rights. By the very nature of the crimes in article 4(h) this would imply complicity of the state or of its organs, which calls up the issue of victor's justice where it is only the vanquished who are prosecuted. Furthermore, article 4(h) is not linked to other extant early warning and monitoring mechanisms such as, for example, the Fact-finding Commission established in terms of article 90 of 1977 Additional Protocol 1 and UN 1235 special procedure. However, article 3 of the ACHPR Protocol is a utility provision for preventing serious violations of human rights such as genocide, as it accords the African Court of Human and Peoples' Rights wide jurisdictional latitude with regard to the interpretation and application of human rights instruments such as the Genocide Convention and Geneva Conventions.

Notes

- 1 The four conventions reflect first applicability in all armed conflicts, regardless of any formal declaration of war; second elaboration of basic principles for non-international armed conflict; and third a list of grave breaches for which states are obliged to enact penal legislation and prosecute or extradite individual offenders. The conventions have received near-universal acceptance and have a strong claim to represent customary law. *Cf* Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: ratifications, accessions and successions, par 7 (available at www.icrc.org/eng/party_gc#7) (see UN 1993:10).
- 2 It states in the pertinent section: 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches ... Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned'. GC I, art 49, GC II, art 50, GC III, art 129, GC IV, art 146.
- 3 The Rome Statute of the ICC entered into force on 1 July 2002 in accordance with article 126 of the Statute; see Secretary-General Kofi Annan, commenting on the adoption of the ICC Statute on 17 July 1998 in Rome; see generally International Criminal Court Fact Sheet, *supra* note 360. War crimes tribunals of the Former Yugoslavia and Rwanda have clearly established that criminal liability exists for war crimes during internal armed conflicts and that crimes against humanity extend beyond periods of armed conflict.
- 4 For instance, in the *Jelesic* case where the Prosecutor had simply failed to prove the perpetration of genocide in Bosnia in the sense of some planned or organised attack on the Muslim population; see generally *Prosecutor v Jelesic*, Case no. IT-95-10-T (14 December 1999).

- 5 However, upon recommendation of the report, the Security Council has finally agreed to forward the issue of Darfur to the ICC. The government of Sudan is under an obligation to co-operate with the ICC by handing over some of its senior political and military officers believed to be behind the alleged war crimes in Darfur (see UN 2005).
- 6 Customary international law may not require a connection between crimes against humanity and any conflict at all. See *Tadić Interlocutory Appeal*, *supra* note 369, par 140–141; see also *Prosecutor v Dusko Tadić*, par 627.
- 7 See MONUC (2004:6–8) for a comprehensive review of events surrounding the Bukavu crisis of June 2004.

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Terror in the backyard: Domestic terrorism in Africa and its impact on human rights¹

Cephas Lumina*

Introduction

Terrorism is not a new phenomenon, nor are state responses to it.² There are very few, if any, states that have not experienced the phenomenon referred to as terrorism. In the African colonial context, the nationalists who waged campaigns against the order existing at the time in the quest for freedom were decried by the colonial administrations as terrorists and subjected to penal sanctions, ranging from lengthy periods of incarceration to the death penalty.³

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It is notable, however, that acts of terrorism on the continent are not confined to the colonial era: Many African states have experienced acts of terrorism in one form or another in the post-independence period.⁴ During the last two decades, for example, there have been various incidents of terrorism in several countries.⁵ Acts of terrorism also seem to be widespread in the continent's various armed conflicts which have been characterised largely by egregious human rights abuses committed for the sole purpose of instilling terror in those who have nothing to do with the grievances of the warring factions.⁶

Since the 11 September 2001 attacks in the US, terrorism has been a pre-eminent concern of the international community, both with regard to its impact on human rights and how to confront it. In the aftermath of the attacks a number of countries have introduced anti-terrorist legislation or revived draconian colonial anti-terrorism legislative measures,⁷ some doing so under pressure from the US and other powerful countries.⁸ Almost invariably these laws greatly impinge upon, or have serious implications for several human rights.⁹

This paper has a dual focus. It provides a brief overview of the human rights impact of acts of domestic terrorism in Africa and also examines state responses to domestic terrorism with the aim of exploring the implications of these responses for human rights. The ultimate aim is to gain some perspective on the more general question of the impact of domestic terrorism on human rights in Africa.

Terrorism: an elusive concept

It should be noted from the outset that there is no universally accepted definition of terrorism (Duffy 2005; Saul 2006; Lumina 2007). Since the 1920s, the international community has unsuccessfully attempted to formulate a universally accepted definition of terrorism. This 'definitional knot' is primarily attributable to the fact that terrorism is a controversial and elusive concept which evokes strong emotional and contradictory responses (Lumina 2007).

In regard to the definition of 'domestic terrorism', it has been asserted that there are presently 'few instances of domestic terror completely without international linkages' (Goredema 2003:93). For this reason and to avoid being tied up in the definitional knot at the expense of its main focus, this paper does not attempt to define the term. Rather, it adopts the working definition that domestic terrorism is the use of violence by nationals of a particular state, within the territorial limits of the state, with the aim of changing the political and/or social order of that state.¹⁰ This definition focuses on the national affiliation of the perpetrator as well as the geographical location of the terrorist act.

The impact of domestic terrorism on human rights

There are two dimensions to the relationship between terrorism and human rights. One concerns the impact of acts of terrorism on human rights, while the other relates to the impact of counter-terrorism measures on the enjoyment of human rights.

Acts of terrorism and their impact on human rights

It is generally accepted that terrorism poses a threat to the social and political values that are directly or indirectly related to the full enjoyment of human rights and fundamental freedoms. Irrespective of the entity that perpetrates them – whether a state or a group of individuals – all acts of terrorism seriously impair or impede the enjoyment of human rights, including a range of socio-economic rights, such as the rights to health, food and housing (see for example UN 2002a:1, see also OAU 1999, preamble, par 10). According to a former UN special rapporteur on human rights and terrorism, ‘there is probably not a single human right exempt from the impact of terrorism’ (UN 2001b, par 102).

Women and children are particularly vulnerable to acts of terrorism, especially those committed in the context of armed conflict. In a number of the conflicts that have occurred in Africa in recent years, women and girls have been systematically raped and sexually enslaved, while children have been abducted from their homes and families. For example, since its formation in 1988, the Lord’s Resistance Army (LRA) has committed widespread abuses against civilians, including wilful killings, looting and destruction of property in order to instil terror in the local population in northern Uganda. It has also abducted close to 25 000 children and abused them as combatants, forced labourers and, in the case of girls, as sexual slaves or ‘wives’ to its commanders (see UN 2007a, par 10 and 22; Human Rights Watch 2003b).¹¹ Child abductees have often been terrorised into beating and killing civilians, and abducting other children. Similar abuses have also occurred in the conflicts in among others Côte d’Ivoire, the Democratic Republic of Congo (DRC), Liberia, and Sierra Leone.

It is important to recognise that although acts of terrorism have resulted in serious violations of human rights, states’ efforts to curb terrorist activities have also culminated in the abridgment of many rights and freedoms, not only of the ‘terrorist’ suspects but also of innocent civilians. Some of these rights and freedoms infringed upon in the quest to curb acts of terrorism include the rights to life, liberty, human dignity, privacy, expression and association, as well as procedural rights concerning persons charged under domestic anti-terrorism laws. The rights of refugees are particularly susceptible to undue suspension or violation under the guise of anti-terrorist measures (see eg Human Rights Watch 2008; Okoth-Obbo 2007; Rudiger 2007).

State responses to terrorism and their impact on human rights

General

States commonly respond to the terrorist threat by adopting of a range of legislative and administrative measures. It is noteworthy, however, that domestic counter-terrorism measures are not a new phenomenon in Africa. In many countries the colonial governments employed various legislative and administrative measures to deal with what they considered terrorist activities but which the African people fighting for liberation and for their rights considered a just fight. These activities were commonly criminalised through draconian laws prescribed by the colonial powers for their colonies.

The colonial administrations used repressive measures (including declaring states of emergency) to thwart the liberation struggles. In October 1952 the British colonial government in Kenya for example declared a state of emergency in response to the Mau Mau uprising. The emergency remained in effect until January 1960 and saw a number of leaders of the Mau Mau arrested and hanged (Anderson 2005; Elkins 2005).

In South Africa numerous apartheid-era laws curtailed and penalised the activities of the country's liberation movements through a range of criminal sanctions – from restrictions on movement to imprisonment and the death penalty. Under cover of anti-terrorist statutes, such as the Terrorism Act, 1967 and the Internal Security Act, 1982, apartheid state security agents routinely and with impunity abridged the human rights of suspected freedom fighters (branded 'terrorists'),¹² as well as members of their families, through arbitrary arrests, imprisonment without trial, torture and extra-judicial executions.

It is also notable that as parties to the international treaties relating to terrorism as well as to the OAU Convention on Terrorism (1999, art 4), most African states are obliged to take measures to address terrorism. Thus, for instance, the OAU Convention enjoins the states parties to adopt 'any legitimate measures aimed at preventing and combating terrorist acts in accordance with the provisions of (the) Convention and their respective national legislation'.¹³ Nevertheless, in article 22 the Convention cautions that: 'Nothing in this Convention shall be interpreted as derogating from the general principles of international law, in particular the principles of international humanitarian law, as well as the African Charter on Human and Peoples' Rights.'

In similar vein, resolution 1373 adopted by the UN Security Council shortly after the 11 September attacks allows states to take the necessary steps to prevent the commission of terrorist attacks, including stopping the recruitment of members of terrorist groups, and adopting measures to prevent the financing, planning, facilitation and commission of terrorist acts.¹⁴

It is thus clear that international law permits states to take national legislative and administrative measures to combat terrorism, provided these are consistent with international law. However, given that most new anti-terrorism laws in Africa have been introduced under pressure from powerful states it is improbable that they reflect local concerns, including the protection of human rights, which are commonly guaranteed by many national constitutions.

It is also noteworthy that a number of African states have eschewed adopting any new counter-terrorism legislation. For example, in southern Africa, only three (Mauritius,¹⁵ South Africa¹⁶ and Tanzania¹⁷) of the 14 member states of the Southern African Development Community have enacted specific anti-terrorism legislation. The rest assert that their existing criminal laws already cover the conduct referred to as ‘terrorism’.¹⁸

Common characteristics of counter-terrorism legislation

What follows is an overview of the common characteristics of counter-terrorism legislation adopted in selected African countries. The countries in question have been chosen for two main reasons: First, their counter-terrorism legislation is readily accessible and second, their legislation has attracted attention from the UN special rapporteur on terrorism as well as from international human rights organisations such as Amnesty International and Human Rights Watch.

Definition of terrorism

The statutory definition of terrorism in many African countries is problematic: it is generally vague and overly broad. For example section 3(2) of the Prevention of Terrorism Act, 2002 of Mauritius defines an ‘act of terrorism’ as an act which ‘(a) may seriously damage a country or an international organisation; and (b) is intended or can reasonably be regarded as having been intended to seriously intimidate a population; unduly compel a Government or an international organisation to perform or abstain from performing any act; seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation; or otherwise influence such government or international organisation’. The section further specifies activities which may constitute terrorism, including attacks upon a person’s life that may cause death, kidnapping, seizure of aircraft, ships or other means of public transport, the manufacture, possession, acquisition or supply of weapons (including nuclear and biochemical weapons), and interference with public utilities the effect of which is to endanger life. It is an offence not only to carry out or threaten an act of terrorism, but also to omit doing anything reasonably necessary to prevent an act of terrorism.

In similar vein, section 7 of Uganda’s Anti-Terrorism Act, 2002 provides that ‘terrorism’ is any act which involves serious violence against a person or serious damage to property,

endangers a person's life (not the life of the person committing the act), or creates a serious risk to the health or safety of the public. Any such acts must be 'designed to influence the Government or to intimidate the public or a section of the public', and must be in pursuance of a 'political, religious, social or economic aim' indiscriminately without due regard to the safety of others or property. The section lists numerous acts which constitute terrorism (section 4 of Tanzania's Prevention of Terrorism Act, 2002 does the same).

Sections 8 and 9 of the Act provides for other terrorist offences including aiding, abetting, financing, harbouring or rendering support to any person, with the knowledge or belief that such support will be used for or in connection with the preparation or commission or instigation of acts of terrorism, and publishing or disseminating materials that promote terrorism. Conviction for any of these offences carries the death penalty. The Act does not provide for any appeal against prescription as a terrorist organisation.

Section 1 of South Africa's Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, which creates the offence of terrorism, does not define the term but defines terrorist activity and terrorist-related acts. However, in his recent report the UN special rapporteur on human rights and terrorism has expressed concern about the 'overly broad list of crimes that may be treated as terrorist activity' under the Act (UN 2007b).

Under Egypt's Anti-terrorism Law, 1992, which amongst others amends the country's penal code and code of criminal procedure, terrorism is defined as

[A]ny use of force or violence *or any threat or intimidation* to which the perpetrator resorts in order to carry out an individual or collective criminal plan *aimed at disturbing the peace or jeopardising the safety and security of society* and which is of such a nature as to harm or create fear in persons or imperil their lives, freedoms of security; harm the environment; damage or take possession of communications; *prevent or impede the public authorities in the performance of their work; thwart the application of the Constitution or of laws or regulations* (author's emphasis).

Both the UN Human Rights Committee (2002, par 16) and the special rapporteur on human rights and terrorism have expressed serious concerns about this broad and general definition of terrorism. According to the special rapporteur, the 'broad' definition of terrorism 'seems to allow it to be used against dissidents and members of the opposition' and 'has led to an increase in crimes punishable by the death penalty' (UN 2005).

Algeria's definition focuses on domestic terrorism and the threat it poses to state security. Article 1 of Decree no 93-03 (which amends and supplements Ordinance

no 66.156 of 8 June 1966 and enacts the penal code), defines an act of terrorism as ‘any offence targeting state security, territorial integrity or the stability or normal functioning of institutions through any action seeking to among others spread panic or create a climate of insecurity, disrupt traffic or freedom of movement on roads, damage national symbols, harm the environment or impede the activities of public authorities or institutions.

Critics argue that the broad and vague definitions of terrorism, which are a common feature of anti-terrorism laws, open the concept to abuse.¹⁹ This underscores the need to describe terrorism in precise and unambiguous terms that narrowly define the punishable offence and distinguishes it from conduct that is either not punishable or is subject to other less severe penalties.

Law enforcement powers

Most anti-terrorism legislation confers extensive powers on law enforcement agencies, such as powers to detain terrorist suspects for prolonged periods without trial or access to counsel, to seize or freeze assets, to intercept communications, and to deny asylum to certain suspects. For example, section 27(1) of the Prevention of Terrorism Act, 2000 of Mauritius allows the police to detain ‘terrorism’ suspects without access to legal counsel for 36 hours and gives the government the right to deny them asylum and to return them to countries where they might face human rights risks. Under section 10(6)(b) of the Act, the Minister responsible for national security may prohibit the entry into Mauritius of suspected international terrorists or terrorist groups.

In terms of section 25, the Minister may, for the purposes of preventing or detecting offences or prosecuting of offences under the Act, give directions to service providers for the retention of communication data. The police may obtain a court order authorising a communication service provider to intercept, withhold or disclose information or communications to the police.

Under the Prevention of Terrorism (Special Measures) Regulations, 2003, which give effect to part II, section 10(6) of the Act, the government has the power to freeze the assets and funds of suspected international terrorists and terrorist groups. In terms of regulation 3, the central bank or the financial services commission may give directives to any financial institution under its regulatory control to freeze any account, property or funds held on behalf of any listed terrorist. It is an offence for a national or any person within Mauritius to give financial support directly or indirectly to listed individuals or entities.

Under section 19(5) of the Ugandan Anti-Terrorism Act, 2002 law enforcement officials also have extensive communication interception and surveillance powers,

including powers to monitor bank accounts, e-mails, telephone calls and other electronic communications of suspects.

In terms of Egypt's Emergency Law, 1958 (as amended by Act 50 of 1982), suspects may be detained without charge for up to 30 days. However, there is no limit to the length of detention if a judge decides to uphold the legality of the detention order.

Implementing the measures outlined above may, arguably, bring the law into potential conflict with certain fundamental rights and freedoms. These are dealt with in the discussion on counter-terrorism legislation and human rights later on in the paper.

Sanctions

African domestic counter-terrorism legislation typically provide for penalties that are generally more severe than those under the ordinary penal laws for comparable conduct. Common punishments for terrorist offences include lengthy periods of incarceration (including life imprisonment) and the death penalty. In some cases, imprisonment may be accompanied by heavy fines or forfeiture of assets. For example, section 18 of South Africa's anti-terrorism legislation provides for the imposition of life imprisonment or hefty fines on convicted terrorists. In addition to any such punishment, courts are empowered, under section 19, to issue orders for forfeiture of property reasonably believed to have been used in or in connection with, the commission of an offence.

Under section 7(1) of Uganda's Anti-Terrorism Act, the offence of terrorism carries a mandatory death sentence if the terrorist act directly results in the death of any person. In terms of section 9(2) of the Act a person who publishes or disseminates materials that 'promote terrorism' is 'liable on conviction to suffer death'. Similarly, in terms of section 86 of the Egyptian Penal Code (as amended), life imprisonment and the death penalty are competent punishments for terrorism offences such as leading or financing terrorist groups. Acts of terrorism that result in the death of a person attract the death penalty.

Minimal procedural safeguards

Some anti-terrorism laws, such as section 29(1) of the Prevention of Terrorism Act of Mauritius and section 3 of the Anti-Terrorism Act of Uganda provide for some safeguards, albeit in limited form. Thus, for instance, some statutes prohibit the institution of prosecution for offences related to terrorism without the consent of the relevant national prosecution authority (usually, the director of public prosecutions).

South Africa's anti-terrorism legislation contains the additional requirement that the national director of public prosecutions promptly communicate the outcome of any prosecution to amongst others the UN Secretary-General. This is arguably a safeguard

for the suspect's rights as well as a mechanism for ensuring South Africa's compliance with its international obligations relating to terrorism.

Nevertheless, it is unclear to what extent these safeguards are effective in practice as this is an assessment that can only be made once the anti-terrorism laws have been tested in courts of law.

Counter-terrorism legislation and human rights

The pressure on states to respond to the international terrorist threat since 11 September has resulted in some African states adopting domestic legislative and administrative measures which effectively abridge or threaten to abridge human rights.²⁰ These measures include prolonged detention of suspects, curtailing the right of access to legal representation, removing the right of appeal, seizure of property and placing limits on freedom of expression.

According to Amnesty International (2004) such national legislative responses to terrorism are 'eroding human rights principles, standards and values'. In its report for 2004, Amnesty International states that countries have continued to flout international human rights standards in the name of the 'war on terror', with the consequence that 'thousands [have been subjected to] unlawful detention, unfair trial and torture – often solely because of their ethnic or religious background'.

Terrorism and states' obligations under human rights law

Before examining the impact of counter-terrorism measures on human rights, it is instructive to outline the nature of states' obligations under human rights law as they relate to their duty to ensure the security of persons subject to their jurisdiction.

States bear the primary responsibility for ensuring the security of all persons under their jurisdiction. In this regard, states are at liberty to adopt measures, including emergency measures, to address terrorism and to protect those subject to their jurisdiction. However, these measures must be consistent with international human rights standards. As the UN Working Group on Terrorism (UN 2002a, par 26) has emphasised, international law requires that states adhere to basic human rights standards in their fight against terrorism.²¹

Both the UN General Assembly and the former Commission on Human Rights adopted resolutions underscoring the need to protect human rights and fundamental freedoms while countering terrorism. Thus, for example, General Assembly Resolution 57/219 of 18 December 2002 affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular, international human rights, refugee and humanitarian law.²²

Significantly, the UN Security Council – the author of Resolution 1373 pursuant to which many of the states adopting anti-terrorism legislation purport to act – has recently reaffirmed ‘the imperative to combat terrorism in all its forms and manifestations by all means’, in accordance with the UN Charter and international law.²³ In 2003, the Security Council declared that ‘states must ensure that measure(s) taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law’.²⁴

It is notable that resolution 1373 itself expressly calls upon states to ‘take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts’ (art 3(f)). In its preamble, the resolution also reaffirms the need to combat by all means, in accordance with the UN Charter, threats to international peace and security (preamble, par 5).²⁵

The imperative to respect human rights in the fight against terrorism is also evident from the statement of former UN Secretary-General, Kofi Annan, to the Security Council on 18 January 2002: ‘[T]here is no trade-off between effective action against terrorism and the protection of human rights ... [W]hile we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities – such as human rights – in the process’ (UN 2002b:3).

At the regional level, all 53 AU member states are parties to one or more of the core international human rights treaties. In addition, all have ratified the African Charter on Human and People’s Rights (the Human Rights Charter) (OAU 1981),²⁶ 41 are parties to the African Charter on the Rights and Welfare of the Child, 1990, 37 are parties to the 1969 AU Convention Governing Specific Aspects of the Refugee Problem in Africa, 37 have ratified the AU Terrorism Convention, nine (including Algeria and Egypt whose legislation is reviewed in this article) are parties to the Arab Convention for the Suppression of Terrorism, 1998 and two are parties to the Arab Charter on Human Rights, 2004. These treaties not only impose legal obligations on the state parties to respect, protect and implement fundamental rights and freedoms, they also include clear restrictions on the actions that states may take within the context of the fight against terrorism.

Most African states also have fundamental rights guarantees in their constitutions. These constitutions are generally proclaimed to be the ‘supreme law’ of the countries concerned so that any law that is inconsistent with the constitution is void to the extent of the inconsistency.²⁷ Consequently, any anti-terrorism legislative measures adopted by the state have to be consistent with the guarantees of human rights in a supreme constitution.

It is important to note that terrorism may, under certain conditions, lead to a state of emergency. It is also worthy of note that states may suspend certain rights during an emergency that threatens the life of the nation. However, international law imposes strict limitations as well as procedural requirements with respect to such suspensions, or 'derogations'. Thus, for example, under the International Covenant on Civil and Political Rights, 1966 (the Covenant), any derogation measure must be of an exceptional nature, temporary,²⁸ subject to regular review, consistent with the state's other obligations under international law and non-discriminatory. There are also some rights which are non-derogable under any circumstances.²⁹ Under the Covenant, these rights include the right to life; prohibition on torture and related treatment; freedom of thought, conscience and religion; and the principles of precision and of non-retroactivity of criminal law (except where a later law prescribes a less severe penalty).

Specific human rights concerns

As mentioned above, there is hardly any human right that is unaffected by terrorism. While it is not intended to provide an exhaustive treatment of the human rights issues raised by anti-terrorism legislation, an overview of selected human rights may be instructive.

Prohibition on torture and cruel, inhumane or degrading treatment

The prohibition on torture and cruel, inhumane or degrading treatment is, under both the universal and regional human rights systems, absolute and non-derogable under all circumstances.³⁰ In its concluding observations on Egypt's report in 2002, the Human Rights Committee (2002, par 4) stated that while it was aware of the difficulties that the state faced in its prolonged fight against terrorism, 'no exceptional circumstances whatsoever can be invoked as a justification for torture'.

According to the former UN special rapporteur on torture, 'the provisions of some new anti-terrorist legislation at the national level may not provide sufficient legal safeguards as recognised by international human rights law in order to prevent human rights violations', especially those prohibiting torture and other forms of ill-treatment (UN 2002c, par 5). In his statement to the Third Committee of the UN General Assembly, the special rapporteur averred to reported circumventions of the prohibition on torture in the name of countering terrorism. These attempts included the legal arguments of necessity and self-defence; attempts to narrow the scope of the definition of torture and arguments that some harsh methods should not be considered as torture but merely as cruel, inhumane or degrading treatment or punishment; acts of torture and ill-treatment perpetrated against terrorist suspects by private contractors; and the indefinite detention of suspects (including children) without determination of their legal status and without access to legal representation (UN 2004c).

In the African context, there have been reports of torture of terrorist suspects. For example, in 2003 a number of people detained in a facility controlled by the Ugandan government's Joint Anti-Terrorism Task Force were tortured (Human Rights Watch 2003a).³¹ In its annual report for 2004, Amnesty International (2004) stated that, in 2003, torture continued to be widespread in Algeria, particularly in cases which the government described as 'terrorist activities'.

It should be noted that the prohibition against torture is now firmly established as a rule of customary international law and, arguably, has the character of *jus cogens*.³² As the special rapporteur has stated, the definition of torture contained in the Convention against Torture cannot be altered by events (such as terrorism) or in accordance with the will or interest of states (UN 2004c).

Detention without trial

Counter-terrorism laws commonly confer powers of pre-trial and administrative detention upon the state, although the periods of detention vary between states. For example, under the Prevention of Terrorism (Special Measures) Regulations, 2003 of Mauritius, a terrorist suspect can be detained for up to 36 hours without access to anyone other than a police officer or medical officer on request. Egypt's Emergency Act of 1958 permits detention without charge for up to 30 days. According to Bascombe (2004), counter-terrorism laws tend to place emphasis on the detention of suspects and often do not require the presentation of evidence prior to a suspect's detention. This undermines the due process of law.

It is notable, however, that while pre-trial detention is not per se prohibited under international human rights law, there are certain principles to which a state must adhere. These include the right of accused persons to be informed of the charges against them, limits on the length of pre-trial detention and opportunities for detainees to challenge their arrest or detention. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, the African Commission on Human and Peoples' Rights found that the State Security (Detention of Persons) Act of 1984 and the State Security (Detention of Persons) Amendment Decree, no 14 of 1994, which allowed the Nigerian government to detain people without charge for up to three months and denied them the opportunity to challenge the arrest and detention before a court of law prima facie violated the right not to be arbitrarily arrested or detained which is guaranteed in article 6 of the Human Rights Charter.

Preventive detention may also violate the presumption of innocence. Thus, in *Pagnouille (on behalf of Mazou) v Cameroon*, the African Commission held that the detention of a person on the mere suspicion that they may cause problems constitutes a violation of the detained person's right to be presumed innocent.

Fair trial

The right to a fair trial consists of a range of complementary entitlements or safeguards, including the right to equal treatment, the presumption of innocence, the right to trial by an independent, competent and impartial tribunal, the right of a criminal suspect to be informed of the reason for their detention and the right to seek legal advice.³³ However, anti-terrorist laws often curtail these under the pretext that more detention time is required for the law enforcement officials to complete their investigations. Where it is permitted, the right to counsel is limited to consultation with 'approved' legal practitioners. For example, the Prevention of Terrorism (Denial of Bail) Act, 2002 of Mauritius allows for a deviation from the presumption of innocence provided for in the country's Constitution by providing for the denial of bail to persons alleged to have committed certain offences related to terrorism. The offences include belonging to a proscribed organisation, assisting or participating in a meeting concerned with an act of terrorism, harbouring terrorists or dealing with terrorist property.

In some countries, there is provision for special or military courts to try terrorist offences. Under the Emergency Act of 1958, Egyptian military courts and state security courts have jurisdiction to try civilians accused of terrorism without fair trial guarantees (Human Rights Watch 2003a). The military courts are presided over by military officers appointed by the minister of defence and their decisions are subject to review by other military judges and confirmation by the president, who normally delegates this function to a senior military official. This has prompted the Human Rights Committee to observe that the use of these courts infringes on a defendant's normal right to fair trial before an independent court (Human Rights Committee 2002).

Although not prohibited under international law, the trial of civilians before military courts raises questions concerning, in particular, the independence of these courts. In the *International Pen* case, the African Commission held that the trial of Saro-Wiwa violated article 7(1)(d) of the Human Rights Charter because the composition of the special tribunal, established under the Civil Disturbances (Special Tribunals) Decree, no 2 of 1987, was at the discretion of the executive branch. In the Commission's view, removing cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises the impartiality which is required by the Human Rights Charter.³⁴

Freedom of association and peaceful assembly

These are basic civil rights which are considered an important platform for the exercise of other rights, such as the right to freedom of expression, cultural rights and the right to political participation. They are thus crucial to any functioning democracy. However, they are also rights which have increasingly been curtailed or are under threat from anti-

terrorism legislation as governments move to ban public demonstrations in the name of state security. Such legislation can easily be used to suppress or undermine democratic opposition. In its report for 2003, the UN Working Group on Terrorism expressed the concern that 'The rubric of counter-terrorism can be used to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent and/or suppression of resistance to military occupation' (UN 2002a).

For example, the Ugandan government has been criticised for using the Anti-Terrorism Act to 'repress political dissent and strictly limit freedom of expression' (Kagari 2003). In September 2002, Ugandan radio stations were warned against giving publicity to an exiled political leader whom the government had labelled a terrorist and threatened with prosecution under the Act, in terms of which it is an offence to give publicity to terrorists (Committee to Protect Journalists 2002; Bascombe 2004). Since the 11 September attacks Egypt has arrested hundreds of suspected opponents of the government for alleged membership in the Muslim Brotherhood, a proscribed but non-violent group, and possession of 'suspicious' literature (Human Rights Watch 2003a).

It is important, however, to acknowledge that associations and organisations may be used as a means through which persons organise and undertake terrorist activities, and thus be a means for the destruction of democracy. This makes it 'difficult to draw a line between too much limitation and appropriate restrictions' (UN 2007b, par 9).

Refugees and asylum seekers

Some governments have used anti-terrorism legislation to suppress not only political oppositions but also minority groups and to circumvent their international obligations towards asylum seekers and refugees (Human Rights Watch 20027). For example, Tanzania's Prevention of Terrorism Act, 2002, gives immigration officers the power to arrest any person suspected of being a terrorist or to have been involved in terrorist activities without a warrant. The minister responsible for immigration is empowered to refuse asylum to anyone.

In similar vein, the Prevention of Terrorism Act of Mauritius gives the government the right to extradite persons suspected of committing acts of terrorism or to deny such persons asylum and to return them to countries where they may be at risk of persecution.

Given the proliferation of conflicts on the continent and the attendant flow of refugees and displaced persons, it may be contended that such powers are too extensive and are inconsistent with the well-established international legal principle of *non-refoulement*. This principle refers to the prohibition on sending persons to countries where they

would be at risk of serious human rights abuses such as torture and other ill-treatment, or enforced disappearance.

Privacy

The constitutions of a number of African countries (such as Mauritius (s 9), South Africa (s 14) and Uganda (s 27) guarantee the right to privacy. However, as was seen above, anti-terrorism legislation commonly confers powers on law enforcement agencies that potentially threaten this right, for example by anti-terrorism laws that give the police extensive powers to combat terrorism, including through the use of electronic surveillance to identify terrorists. Such provisions are not unique to African anti-terrorism legislation: The Canadian Anti-Terrorism Act also gives the police extensive powers of surveillance, and in terms of the Anti-Terrorism, Crime and Security Act of the United Kingdom, the Home Secretary has powers to issue a code of conduct for the retention of communications data by communications service providers for national security reasons. As was stated above, the Ugandan Anti-Terrorism Act (s 19(4)) gives law enforcement officials extensive powers to monitor bank accounts and electronic communications of terrorist suspects. The potential for abuse under these provisions is considerable. Thus it has for example been argued that the phrase ‘articles of a kind which could be used in connection with terrorism’ in the Ugandan Anti-Terrorism Act is so ‘vague that it could be used to search for almost any object’ (Bossa & Mulindwa 2004).

The Financial Intelligence and Anti-Money Laundering Regulations of Mauritius also provide for the verification of the ‘true identity of all customers and other persons’ with whom banks, financial institutions and cash dealers conduct business and the Anti-Money Laundering (Miscellaneous Provisions) Act, 2003 (which amends the Financial Intelligence and Anti-Money Laundering Act, 2002) provides for derogation from the banks’ duty of confidentiality to enable them report suspicious transactions. Under section 28(2) of the Prevention of Terrorism Act of Mauritius the authorities have the power to undertake ‘an accurate, continuous and uninterrupted record’ of amongst others the movements of terrorist suspects throughout the period of their detention. A video recording made in terms of this section is admissible in evidence in court notwithstanding the common law rule against hearsay. While it may be argued that the video recording of a detained suspect’s movements or actions is designed as a safeguard against abusive practices such as torture, the prolonged detention itself may, especially where it is solitary, arguably constitute torture or degrading treatment as well as a violation of the right to privacy.

Other human rights concerns

Counter-terrorism measures raise numerous other human rights concerns. According to the UN special rapporteur on religious intolerance, anti-terrorist measures in a number

of states have unduly limited freedom of religion or belief, in violation of international human rights standards (UN 2004a). Responses to terrorism have also led to new forms of racial discrimination and a growing 'acceptability' of the traditional forms of racism where certain cultural or religious groups are viewed as terrorist risks (UN 2004b). This has given rise to new forms of racism that render it more difficult to combat racial discrimination and xenophobia.

Some of the domestic anti-terrorism laws mentioned *prima facie* pose a threat to the rights of the child. For example, while the Uganda Anti-Terrorist Act imposes the sentence of death for the offence of terrorism, it does not expressly stipulate that the sentence does not apply to children who might be involved in such activities.³⁵ In view of the low age of criminal responsibility³⁶ in Uganda, this lacuna is a matter of serious concern (Bossa & Mulindwa 2004).

Conclusion

Acts of terrorism (whether domestic or international) and state measures to counter terrorism have the potential to impact negatively on fundamental rights and freedoms. Of particular concern is the fact that many countries have been pressured to introduce 'anti-terrorism' legislation by powerful countries, without due regard to their local circumstances. This situation not only heightens the likelihood that these countries have not paid much attention to the human rights implications of such legislation but it also increases the risk of abuse by the governments concerned.

It is therefore important that each state should have the freedom to adopt anti-terrorist legislation that not only helps it to address the scourge of terrorism and ensure the security of all persons subject to its jurisdiction, but also enables it to meet its human rights obligations. In sum, national efforts to curb domestic terrorism should reflect local circumstances and take the relevant international and national human rights standards into account.

Notes

- 1 This article is based on a paper presented by the author at a seminar on 'Towards understanding domestic terrorism in Africa', co-hosted by the Institute for Security Studies (ISS) and the Terrorism Studies and Research Program (Cairo University), on 5-6 November 2007 in Accra, Ghana. The seminar presentation will be published by the ISS as part of the seminar report. I am grateful to the ISS for permission to adapt the paper for publication.
- 2 For a historical background, see Bassiouni (1975); Cassese (1989); Murphy (1989); Han (1993); Laqueur (2001); Sinclair (2004); Duffy (2005); Lutz and Lutz (2005); Hoffman (2006); Saul (2006); Botha (2006); Elagab and Elagab (2007); Lumina (2007).
- 3 For example, more than 150 000 native Kenyans were imprisoned under harsh conditions and over 1 090 hanged between 1952 and 1959 during the state of emergency declared by the British colonial

- administration in response to the Mau Mau uprising in Kenya. The uprising began in the early 1950s among the Kikuyu of the Kenyan highlands who had been forcibly dispossessed of their land by British settlers. See Anderson (2005) and Elkins (2005). In similar vein, the apartheid regime in South Africa sentenced many nationalists to lengthy prison terms.
- 4 Terrorism can be domestic or international in character. This paper focuses on domestic terrorism as defined in section two of the paper. It is notable that the underlying causes of terrorism are diverse, with the only commonality being that individuals who are frustrated with the status quo employ a campaign of systematic violence (often against civilian targets) in order to put pressure on the government of the day to succumb to their demands. For a brief useful discussion of the underlying reasons for terrorism in Africa see Botha (2008:10–14).
 - 5 These include the 1996 spate of bomb blasts in Zambia which were blamed on a shadowy group called ‘the Black Mamba’ and left one police officer dead; the October 2004 bomb blasts at Egyptian tourist resorts that killed 28 people; the August 1998 embassy bombings in Kenya and Tanzania which killed hundreds; and the October 2002 Soweto bombings alleged to have been carried out by members of the white supremacist Boeremag organisation in South Africa.
 - 6 Examples are the conflicts in Angola, the Democratic Republic of Congo, Côte d’Ivoire, Liberia, Sierra Leone and Uganda.
 - 7 African countries that have introduced or are in the process of introducing anti-terrorism legislation include Algeria, Egypt, The Gambia, Kenya, Mauritius, Morocco, Namibia, South Africa, Swaziland, Tanzania, and Uganda (see eg Mulama 2004).
 - 8 African countries that have acted under US pressure include Kenya, Malawi, South Africa, Tanzania and Uganda. See Kraxberger (2005); see also Bascombe (2004); Mulama (2004); Lumina (2007); ICLMG (2005).
 - 9 In October 2001, Amnesty International (2001) raised the concern that: ‘In the name of fighting “international terrorism”, governments have rushed to introduce draconian measures that threaten the human rights of their own citizens, immigrants and refugees ... Governments have a duty to ensure the safety of their citizens, but measures taken must not undermine fundamental human rights.’ Common features of the new anti-terror laws are broad or vague definitions of new offences, wide powers of detention without trial, prolonged incommunicado detention (which is known to facilitate torture), intrusions into privacy, and measures which effectively deny or restrict access to asylum or speed up deportation.
 - 10 The UN Working Group on Terrorism (UN 2002, par 13) has identified broad elements of terrorism: ‘Without attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality.’ For a discussion of the distinction between domestic terrorism and international terrorism, see Botha (2008:8–10).
 - 11 According to the Redress Trust (2006), between 70 and 80 per cent of the LRA’s forces are abducted children.
 - 12 For example, one of the world’s most respected statesmen, Nelson Mandela, was for long considered a terrorist not only by the apartheid regime but by countries such as the US as well.
 - 13 See also article 5 which requires the states parties to co-operate in preventing and combating terrorism ‘in conformity with national legislation and procedures of each state’ and article 6, which recognises the jurisdiction of each state party over certain ‘terrorist acts’.
 - 14 The Security Council has adopted numerous resolutions on terrorism subsequent to resolution 1373. These include resolution 1377 of 12 November 2001 (ministerial declaration on the global effort to combat terrorism), resolution 1456 of 20 January 2003 (declaration by foreign ministers on combating terrorism), resolution 1535 of 26 March 2004 (creation of Counter-Terrorism Committee Executive Directorate, CTED), resolution 1566 of 8 October 2004 (creation of working group to consider measures against individuals, groups and entities other than Al-Qaida/Taliban), resolution 1624 of 14 September 2005 (prohibition of incitement to commit terrorist acts), resolution 1631 of 17 October 2005 (UN co-operation with regional organisations in maintaining international peace and security), and resolution 1805 of 20 March 2008 (extension of mandate of CTED).

- 15 Counter-terrorism legislation in Mauritius include the Prevention of Terrorism Act, 2002, the Financial Intelligence and Anti-Money Laundering Act, 2002, the Prevention of Corruption Act, 2002, the Prevention of Terrorism (Special Measures) Regulations Act, 2003 (as amended), the Financial Intelligence and Anti-Money Laundering Regulations Act, 2003, the Anti-Money Laundering (Miscellaneous Provisions) Act, 2003, and the Convention for the Suppression of Financing of Terrorism Act, 2003.
- 16 Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.
- 17 Prevention of Terrorism Act, 2002.
- 18 For instance, in a report to the UN Counter-Terrorism Committee in June 2002, the government of Zambia stated that it has a number of provisions under its Penal Code (Cap 87 of the Laws of Zambia) that can be used to fight terrorism in accordance with Resolution 1373. In similar vein, Algeria treats terrorism as a criminal offence within its Penal Code.
- 19 For example, Amnesty International and other human rights groups have expressed concern that most of the provisions of the Prevention of Terrorism Act, 2002 of Mauritius are too broad and do not meet the international standards of fairness. In particular, Amnesty International (2004) has expressed concern that the term 'acts of terrorism' could be broadly interpreted to undermine fundamental human rights.
- 20 The UN has recognised the threat to human rights posed by anti-terrorism measures, leading to amongst others the appointment of an independent expert on protection of human rights while countering terrorism. See also the Berlin Declaration adopted by the International Commission of Jurists on 28 August 2004.
- 21 The primacy of international human rights law derives from the UN Charter and has been reiterated by various bodies of the organisation. Article 1(3) of the Charter sets human rights as the cornerstone for the achievement of the purposes of the UN. Article 55(c) provides that the UN will encourage 'universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion', while article 56 imposes an obligation on UN member states 'to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in article 55'. Clearly, UN member states are obliged to respect human rights, and the pre-eminence of this obligation is confirmed by article 103 of the Charter.
- 22 See also E/CN.4/Res/2003/68 adopted by the Commission on Human Rights at its 59th session on 25 April 2003.
- 23 See UN Security Council resolution 1566 (2004), adopted by the Security Council on 8 October 2004.
- 24 Security Council resolution 1456 (2003), annex. This position has been reaffirmed in subsequent Security Council resolutions on terrorism.
- 25 It is interesting to note, however, that the CTC which is established in terms of resolution 1373 maintains that 'monitoring performance (of states) against other international conventions, including human rights law, is outside the scope' of its mandate.
- 26 The Charter protects a number of fundamental rights and freedoms, including equality before the law (art 3); the right to dignity, and the prohibition of slavery, torture, cruel, inhumane and degrading treatment or punishment (art 5); right to a fair trial, including the right to be presumed innocent (art 7); freedom of expression (art 9); and freedom of association (art 10).
- 27 For example, in terms of section 2 of the Constitution of Mauritius, 1968: 'This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.' See also Constitution of South Africa 1996 (s 2) and Constitution of Uganda, 1995 (s 2).
- 28 It is notable that Egypt has been under a state of emergency since the assassination of President Anwar al-Sadat. Egypt justifies its extension of the state of emergency on the grounds that it is necessary in 'order to deal with the phenomenon of terrorism and to protect the security and stability of society'. It further claims that security measures under the emergency have 'largely succeeded in eradicating the phenomenon of terrorism, in spite of its spread throughout all other parts of the world' (Human Rights Committee (2002), par 7).
- 29 It is notable that, unlike the Covenant and the other regional instruments, the Human Rights Charter contains no general derogation.
- 30 See General Comment no 20 on article 7 of the Covenant, 10 March 1992, par 3.

- 31 It is interesting to note that section 21 of Uganda's Anti-Terrorism Act criminalises torture, inhuman and degrading treatment as well as illegal detention by law enforcement officials in furtherance of their powers of interception of communications and surveillance under the Act.
- 32 Rules or principles of international law having a higher status and from which no derogation is permitted.
- 33 See, for example, article 14 of the Covenant (UN 1966); article 7 of the Human Rights Charter (OAU 1981); article 6 of the European Convention on Human Rights. See also General Comment no 13(21) adopted by the Human Rights Committee in 1984, Doc.HRI/GEN/1/Rev.5, 122–126; Hanski and Scheinin (2003:147–200).
- 34 See also the report of Amnesty International (2007) in which the organisation condemns the 2006 sentencing of 12 people in Tunisia to lengthy prison terms on terrorism-related charges after 'unfair' trials.
- 35 In terms of section 7(1) of the Act: 'Subject to this Act, *any person* who engages in or carries out any act of terrorism commits an offence and shall, on conviction – (a) be sentenced to death if the offence directly results in the death of any person; (b) in any other case, be liable to suffer death' (emphasis added). Section 9(2) similarly imposes the death penalty on 'any person' convicted of specified terrorism-related offences.
- 36 Section 88 of the Children Act 2000 (cap 59) provides that the minimum age of criminal responsibility shall be 12 years. While Uganda is entitled a minimum age of criminal responsibility in terms of article 40(3)(a) of the UN Convention on the Rights of the Child, rule 4(1) of the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules) recommends that 'the minimum age should not be fixed at too low an age level, bearing in mind the facts of a child's emotional, mental and intellectual maturity'. It is notable that article 37(a) of the Convention on the Rights of the Child prohibits the imposition of the death penalty for offences committed by persons below 18 years of age.

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Uganda, Republic of

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Nuclear Africa: Weapons, power and proliferation

Gavin Cawthra and Bjoern Moeller*

Since the end of the Cold War, a specific discourse has gained almost universal prominence even though it seems to defy plain common sense, namely that the proliferation of nuclear weapons to non-nuclear weapon states and perhaps non-state actors is the main problem facing the non-proliferation regime. This has ceased to be a problem at all, however. States that already have nuclear weapons maintain their much larger and more sophisticated arsenals and these are even being upgraded on a continuous basis.

Much international attention is therefore paid to the nuclear non-proliferation regime inaugurated by the Non-Proliferation Treaty (NPT), whilst other forms of nuclear arms control are being systematically disregarded. On closer analysis, however, the NPT

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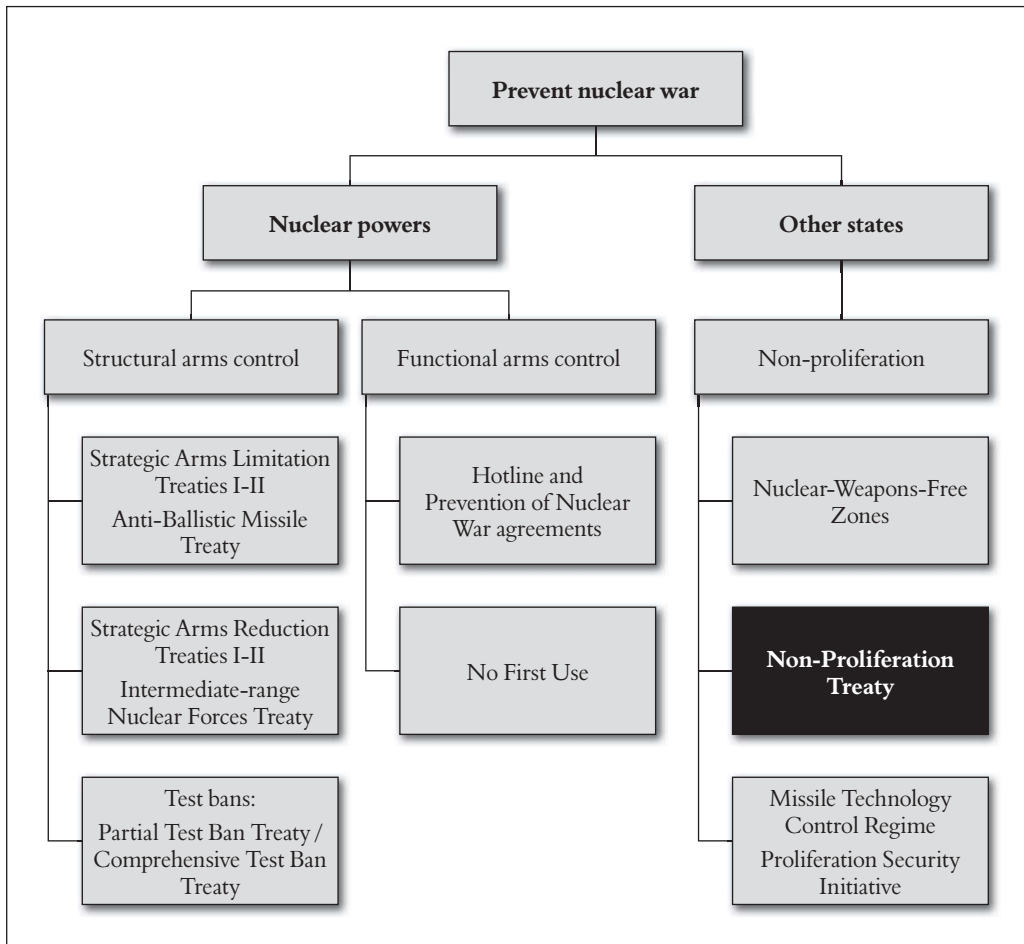
reveals itself as just one piece in a much larger puzzle, or as one element in the endeavour to eliminate – or at least limit – the risk of nuclear war, preferably without increasing the risk of conventional war. When the aim is to prevent nuclear war by means of arms control (as summarised in figure 1), elements of nuclear and nuclear-related arms control may be grouped into measures intended to reduce or otherwise modify nuclear arsenals (structural arms control) and constraints on nuclear activities (functional arms control).

From the category of structural arms control, the following deserve mention:¹

- Attempts to halt the strategic nuclear arms race between the United States and the Soviet Union, notably with the SALT (Strategic Arms Limitation treaties) of 1972 and 1979, of which only the first entered into force (Newhouse 1973; Kaplan 1973; Carter 1989; Rice 1988; Talbott 1985)
- Modest attempts to reverse this arms race, for example in the form of the START (Strategic Arms Reduction Treaty) or – on a regional scale – the Intermediate-range Nuclear Forces Treaty (INF Treaty); banning intermediate-range nuclear missiles²
- A quest for arresting, or at least slowing down, the technological arms race by proscribing nuclear testing with the Partial Test Ban Treaty (PTBT) followed by a Comprehensive Test Ban Treaty (CTBT) (Loeb 1993; Carter 1989)
- Proscriptions or limitations on non-nuclear arms programmes such as defences against nuclear attack with the potential of leading to or accelerating nuclear arms races, as was the rationale for the 1972 ABM (Anti-Ballistic Missile) Treaty (Bunn 1993)³
- Control of particular technologies which might make nuclear war more likely, such as the use of MIRVs (Multiple Independently-Targeted Re-entry Vehicles) on strategic nuclear missiles, limited in the START II Treaty and the preceding bilateral ‘de-mirving’ agreement (Lockwood 1993)⁴
- Efforts to stem the geographical spread of nuclear weapons, for example into the seabeds of the world’s oceans, in Antarctica or in outer space (Ramberg 1993; Garthoff 1993; Joyner 1993)

From the category of functional arms control, we might mention the following:

- Efforts to prevent nuclear wars by accident or misunderstanding, amongst others via the establishment of a hotline in 1963 and by means of a Prevention of Nuclear War (PNW) agreement (Stone 1993)⁵

Figure 1 Nuclear arms control and the Non-Proliferation Treaty

Source: Garthoff 1993; Joyner 1993

- Proposals for banning either the use or, as a minimum, the first-use of nuclear weapons⁶

All of these measures addressed, albeit with rather meagre results, what would logically appear to be the main problem in reducing nuclear arsenals – nuclear weapons of states with the largest and most sophisticated arsenals directed against each other and at a very high level of readiness.

Proliferation risks in Africa

There has never been any great enthusiasm for nuclear weapons in Africa. In fact, various African organisations have passed several resolutions against them, for example against French nuclear tests in the Sahara desert in the early 1960s. Apart from Egypt, Libya and

Table 1 Nuclear fuel cycle facilities in Africa

| Country | Facility | | | | | |
|--------------|-----------------------------------|----------------------------------|----------------------------------|---------------|-----------------|-------------|
| | Name | Type | Status | Scale | | |
| Egypt | Fuel element fabrication plant | Fuel fabrication | In operation | Pilot plant | | |
| | Inchas nuclear fuel laboratory | Fuel fabrication | In operation | Laboratory | | |
| Gabon | Mounana | Uranium ore processing | Decommissioned | Commercial | | |
| Morocco | Jorf Lasfâr – Khouribga | Uranium recovery from phosphates | Deferred | Commercial | | |
| | Safi – Youssoufia | | | | | |
| Namibia | Rössing | Uranium ore processing | In operation | Commercial | | |
| Niger | Arlit | Uranium ore processing | In operation | Commercial | | |
| South Africa | Beva | Fuel fabrication | Shut down | Commercial | | |
| | Pelindaba | Fuel fabrication | In operation | Pilot plant | | |
| | Beisa | Uranium ore processing | Shutdown | Commercial | | |
| | Blyvooruitzicht | | Decommissioned | | | |
| | Buffelsfontein | | Decommissioned | | | |
| | Central processing plant, Gauteng | | Shut down | | | |
| | Driefontein | | Decommissioned | | | |
| | East Rand | | Decommissioned | | | |
| | Freegold | | Decommissioned | | | |
| | Harmony (Merriespruit) | | Decommissioned | | | |
| | Hartebeestfontein | | Shut down | | | |
| | Phalaborwa | | Shut down | | | |
| | Randfontein (Cooke) | | Decommissioned | | | |
| | Stilfontein | | Decommissioned | | | |
| | Vaal Reefs – 1 | | Shut down | | | |
| | Vaal Reefs – 2 | | In operation | | | |
| | West Rand Consolidated | | Decommissioned | | | |
| | Western Areas | | Shut down | | | |
| | Western Deep Levels | | Shut down | | | |
| | Valindaba (laser) | | Uranium enrichment | | Deferred | Pilot plant |
| | Valindaba Y – plant | | | | Decommissioning | |
| | Valindaba Z – plant | | | | Decommissioning | |
| | Valindaba (UF6) | Conversion to UF6 | Shut down | Commercial | | |
| | Pelindaba zircaloy tubing | Zircaloy tubing | Shut down | | | |
| | Tunisia | Gabes | Uranium recovery from phosphates | Being studied | Commercial | |

Source: IAEA, List of nuclear fuel cycle facilities. Available at www.nfcis.iaea.org/NFCIS/.

South Africa (see below), the only African countries that have ever expressed an interest in joining the nuclear club have been Nigeria and Gabon. The former did so only for a very brief period, mainly for peaceful use and partly as a counter to the South African nuclear programme, and the latter with a request from then President Omar Bongo to France for a nuclear power station, which was understandably rejected and has never been repeated (Ogunbadejo 1984).

Even though Africa has substantial uranium deposits and production, what is lacking (apart from political will) are both the general technological and industrial foundation and the more specific technologies related to the nuclear fuel cycle. The only exception is South Africa (see table 1).

Not only is Africa thus nuclear-weapons free, but it also strains the imagination to envision any change in this regard. Indeed, Africa has experienced three cases of 'nuclear reversals', in Egypt, South Africa and Libya, all of which had been pursuing nuclear status or even achieved this, only to subsequently abandon their nuclear ambitions.⁷

Egypt

The Egyptian nuclear weapons programme seems never to have been a really high priority (Gregory 1995; Rublee 2006). It was first launched by President Nasser and continued under his successors, Anwar Sadat and Hosni Mubarak. It initially took the form of a request for 'off the shelf' nuclear weapons addressed to the Soviet Union and China in 1965 and 1967, respectively. When both requests were turned down, Egypt approached India for a collaboration agreement, which was signed in 1970, but produced very little actual assistance. Ambitious plans for an indigenous nuclear weapons production capability, based on a full nuclear fuel cycle, had to be abandoned by 1981, when Cairo signed the NPT. What actually came out of these endeavours was first, a very small (2 MW) research reactor followed by another reactor with a greater capacity (22 MW), which was still quite insufficient for producing weapons-grade material.

There seems to be no significant risk that Egypt may want to resume its nuclear programme and even less grounds to fear that it might be successful this time. It never seemed particularly serious in the first place, even though it was apparently provoked by the clandestine Israeli nuclear weapons programme (Walsh 1994). Since that time, a 'cold peace' has been signed with Israel,⁸ and it is unlikely that this will break down, unless, of course, a complete regime change were to occur in for example the form of an electoral victory for the Muslim Brotherhood who just might decide it wants to construct an 'Islamic bomb'. Even in this (entirely hypothetical and quite unlikely) eventuality, Egypt would be very unlikely to succeed in a quest for a nuclear programme.

Libya

There has been a great deal of international concern about Libya's nuclear weapons programme. This mainly stems from the rather unpredictable nature of the regime,⁹ which was even labelled a 'rogue state' by the US, both because of its sponsorship of international terrorism and its proliferation efforts (Wright 1981; Klare 1995; Tanter 1998; Litwak 2000).

Libya's quest for nuclear weapons seems to have begun almost immediately after the coup which deposed King Idris in 1969.¹⁰ The new leader, Colonel Muammar al-Gadhafi, approached first China (1969–1971) and then France, India and the USSR in the second half of the 1970s for 'off the shelf' equipment, but to no avail. He then tried to shop around for equipment for indigenous production with rather meagre results, even though he claimed only to be interested in peaceful uses of nuclear energy (for example for seawater desalination), and in 1975 ratified the NPT which the king had signed in 1968. Eventually the USSR consented to selling Libya a small research reactor which went into operation in 1981.

Because of the tight constraints imposed by the NPT and other anti-proliferation regime elements, Libya through the 1990s chose to rely mainly on clandestine deliveries of both equipment and technical assistance through the Pakistani A Q Khan network, supplemented by efforts to recruit scientists from other Arab countries. There has even been speculation that Libya's intervention in neighbouring Chad and its de facto occupation of the Aouzou Strip from 1973 to 1994 were partly motivated by the hope of mining uranium (Bowen 2006:29). The main constraints seem neither to have been a lack of political will nor money to fund the programme but rather the lack of an indigenous industrial and knowledge base.

The rationale for the quest for nuclear weapons has never been quite clear, because Libya has never really had any serious enemies – except, of course, for the US which launched an air attack against it in 1986 in retaliation for Libyan support for a terrorist attack against US forces (Davis 1990; Kaldor & Anderson 1986; Jentleson 1991; Jenkins 1986; Blum 1986).¹¹ Even though this may well have strengthened the Libyan desire for a nuclear deterrent, it cannot really explain a quest begun 15 years earlier. A better explanation may be Israel's nuclear weapons, even though an Israeli attack on Libya was never really on the cards. Indeed, the only thing that might have given Israel a motive for such an attack would be the perception that Libya was about to go nuclear. Gadhafi may, however, have viewed the Libyan bomb-in-the-making as a contribution to pan-Arabism, providing a joint Arabian deterrent against Israel. This is borne out by a statement Gadhafi made in 1987:

The Arabs must possess the atomic bomb to defend themselves until their numbers reach one billion, until they learn to desalinate seawater (*sic!*), and

until they liberate Palestine. We undertake not to drop the atomic bomb on anyone around us, but we must possess it ... If there is going to be a game using atomic bombs, then it should not be played against the Arab nation ... This is an essentially defensive weapon (Bowen 2006:18–19).¹²

Since the late 1990s, however, Libya has changed course almost completely in several respects (Mateos 2005; Midem 2006; Bahgat 2004; Zoubir 2002).¹³ Its geopolitical and cultural/ideological orientation has shifted from Pan-Arabism to Pan-Africanism, making it, among others, one of the main promoters and sponsors of African integration (Ronen 2002; Sturman 2003; Huliaras 2001; Solomon, Hussein & Swart 2006). It has also exhibited a strong interest in mending its relations with the West, not least the US, first by discontinuing its sponsorship of international terrorism and even paying compensation to the victims of the PanAm-103 terrorist attack,¹⁴ and then by completely abandoning its proliferation plans.

The motives for abandoning the nuclear programme may have been partly economic (the economy had been deteriorating, albeit from a very high level) and partly related to a revised view of the country's security interests. Rather than seeing nuclear weapons as a likely contribution to national security, the regime came around to the view that they are threats to the very same security (Bowen 2006:48). In December 2003, Libya announced its intention of disarmament of its weapons of mass destruction programme (including chemical weapons) under full international supervision, and then proceeded to actually do so to everybody's complete satisfaction. At present, Libya thus possesses neither weapons of mass destruction nor missiles with ranges in excess of the 300 km permitted by the missile technology control regime.

South Africa

As the only African country to have developed nuclear weapons, and a full nuclear fuel chain, South Africa deserves special attention. From the outset, South Africa's nuclear ambitions were supported by the US and other Western countries. It was one of the first countries in the world to produce uranium (as a by-product of gold mining), with assistance from the UK and US, and nuclear research programmes began in the mid-1950s. In 1957 the South African government signed a 50-year agreement with the US under Eisenhower's 'Atoms for peace' programme, and the following year a South African team was invited to witness US nuclear weapons tests. In the 1960s, the US supplied a research reactor and enriched uranium to power it. US supplies of enriched uranium were terminated as a result of the apartheid regime's refusal to sign the NPT in the mid-1970s, but by then the country had embarked on its own enrichment programme, and by 1978 was producing highly enriched uranium for nuclear weapons. By as late as 1981 South Africa was the third largest recipient of US nuclear exports. With French assistance, a nuclear power station was constructed at Koeberg

near Cape Town in the 1970s, thus completing the nuclear cycle, except for reprocessing (which only a few countries can do) (Cawthra 1986:106–107; Fig 2005:40–43).

The apartheid regime adopted a similar stance to that of the Israelis: while it was obvious to most informed observers that it was developing (or had already developed) nuclear weapons, with the support of its international backers in the West, it did not declare its capabilities. Nevertheless, during the 1970s and 1980s there were a number of events that pointed towards South Africa's nuclear weapons capabilities, some which remain shrouded in secrecy or mystery. In 1974 a nuclear test site was built in the wastes of the Kalahari Desert at Vastrap in the Northern Cape. It was detected by a Soviet surveillance satellite and the US pressured South Africa into dismantling it, apparently without it ever being used. Then, in 1979, a US satellite registered a double flash usually associated with a nuclear explosion in the South Atlantic Ocean, where a South African warship was present. The evidence around this remains inconclusive, but at the time the CIA apparently reported to the US National Security Council that the most likely explanation was that a tactical nuclear weapon had been tested jointly by the South Africans and Israelis (Cawthra 1986:107–109; Fig 2005:41–50).

In 1990, after the unbanning of the ANC and other resistance organisations and the onset of negotiations to end apartheid, then President F W de Klerk ordered the dismantling of South Africa's nuclear weapons capabilities. Three years later, he admitted that six nuclear weapons had been built, with a seventh under construction at the time of the dismantling. Subsequently it was revealed that these were 'old-fashioned' Hiroshima-type bombs that could have been launched from British Buccaneer naval bombers in the possession of the South African Air Force, or from other South African aircraft (Fig 2005:45–50).

It is possible that preparations were also being made to develop nuclear warheads for missiles, as South Africa had a rapidly expanding missile programme at the time, based on a secret agreement with Israel whereby technology from the Jericho II ballistic missile was transferred to South Africa. Three ballistic missiles were built in South Africa, two of which were tested, and although there is no evidence that they were weaponised, Schmidt argues that the Jericho II programme would have allowed South Africa 'to give its nuclear weapons twice the reach into Africa as delivery by Buccaneer bomber would allow' (Schmidt 2007:8).

Many questions remain unanswered about South Africa's nuclear weapons programme. The South African History Archive (2003:5) has listed these amongst them:

- Was it the intention from the early 1970s, when South Africa was developing 'peaceful nuclear explosives', to develop nuclear weapons?

- Was the programme designed only to gain diplomatic leverage or did it have a military purpose?
- What exactly were the foreign sources of technology? (Links with Israel are strongly suspected, while the extent of US, West German and French support is not clear)
- Was a new generation of weapons under development?
- Was foreign pressure put on South Africa to sign the NPT? (It stretches credulity to the limit to believe that the US and other major Western powers did not know of the nuclear weapons programme)
- And finally, was fear of a nuclear arsenal in the hands of a democratic (that is, a black) government a significant factor behind the decision to dismantle?

In July 1991 South Africa became a signatory to the NPT, dismantling its bombs and subsequently placing its highly enriched uranium under international safeguard, dismantling its enrichment and other plants, and opening all facilities to inspection by the IAEA, to the organisation's satisfaction (although its reports were never made public) (SIPRI 1993). Documentation related to the programme was destroyed, but there remained some questions about the role of some of the scientists, and years later cases were recorded of South Africans smuggling nuclear technology to countries such as Libya.

After the first democratic government came to power in 1994, South Africa entered the world arena as the first country to have voluntarily relinquished its nuclear weapons (even though under a previous regime) and was able to use this to good advantage, playing a central role in the 1995 NPT Review and Extension Conference, and bridging the gap between the Non-Aligned Movement and the permanent five UN Security Council members (see below) (SIPRI 1993). It also drove the process of establishing the Pelindaba Treaty (named after one of South Africa's main nuclear facilities) that set up a nuclear-weapons-free zone for Africa, including its island states.

Africa as a nuclear-weapons-free zone

As early as 1964, at the first ordinary session of the OAU, the African states passed a declaration on the denuclearisation of the continent (the Cairo Declaration). It was followed with a Declaration on Security, Disarmament and Development in 1986, but only in 1996, after the apartheid regime had dismantled its nuclear weapons programme and South Africa had made its transition to democracy, did the African states agree on an African Nuclear-Weapon-Free Zone Treaty, better known as the Treaty of Pelindaba. For its entry into force, 28 ratifications were required, but by the end of 2006 only 22

states had done so, namely Algeria, Botswana, Burkina Faso, Equatorial Guinea, Gambia, Guinea, Côte d'Ivoire, Kenya, Libya, Lesotho, Madagascar, Mali, Mauritania, Mauritius, Nigeria, Rwanda, South Africa, Senegal, Swaziland, Tanzania, Togo and Zimbabwe.

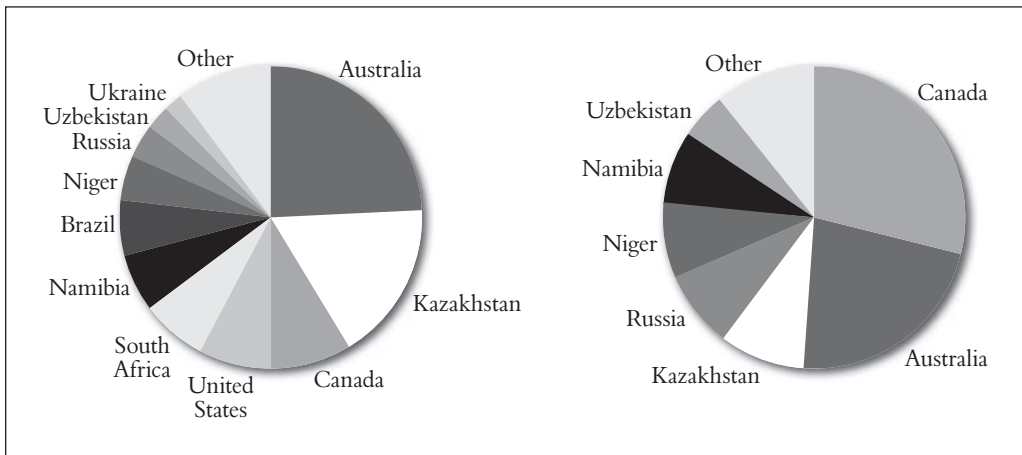
The treaty is to a large extent built on the model of the South American Tlatelolco Treaty. The treaty sets out the rights and obligations of the African members and the additional protocols open for the signatures by other African states, the nuclear powers and the remaining colonial powers (Spain and France). The signatories pledge neither to 'conduct research on, develop, manufacture, stockpile or otherwise acquire, possess or have control over any nuclear explosive device' (art 3), nor to allow the stationing of nuclear weapons or conduct of nuclear tests on their territories (arts 4–5). Any signatory has the right to withdraw 'if it decides that extraordinary events, related to the subject-matter of this Treaty, have jeopardized its supreme interests', but only after a 12-month grace period. The five official nuclear powers, in turn, were invited to sign and ratify Protocol I, thereby renouncing their 'right' to 'use or threaten to use a nuclear explosive device' against any of African signatories (article 1), and with Protocol 2 they were invited to pledge to refrain from nuclear testing in Africa (article 1). This pledge is reiterated in Protocol 3 with regard to France and Spain as the last colonial powers in Africa. The only exception appears to the island of Diego Garcia, to which Mauritius lays claim, but which is recognised as British territory and has been leased to the US for a military base and on which there are almost certainly, at least some of the time, nuclear weapons.

Africa as a uranium supplier

In the run-up to the invasion of Iraq, the UK and the US argued their case for the need to disarm Iraq with reference to an alleged Iraqi purchase of uranium from Niger. Even though this soon turned out to be either a deliberate fraud or at least a complete misunderstanding (see Kerr 2003), such clandestine uranium deliveries to prospective non-African proliferants are in principle conceivable, especially where government writs do not run strongly.

Indeed, in July 2006, a United Nations investigation report submitted to the chair of the UN sanctions committee concluded that there was 'no doubt' that a large shipment of smuggled uranium 238, hidden in a consignment of coltan and uncovered by customs officials in Tanzania, had originated from uranium mines near Lubumbashi in the Democratic Republic of Congo (DRC). The Shinkolobwe mines there (which supplied the uranium for the bombs that the US dropped on Hiroshima and Nagasaki) were closed in the early 1960s when the departing Belgians poured concrete down the mineshafts, but they have reportedly been reopened by local illegal miners. The shipment was destined for the Iranian port of Bandar Abbas, allegedly for forwarding to Kazakhstan, where the coltan would be smelted, but Western commentators assumed the uranium would stay in Iran.

Figure 2 Geographical distribution of identified conventional uranium resources (left) and of uranium production in 2004 (right)



Source: IAEA (2006). The uranium resources of Namibia, Niger and South Africa are thus 6, 5 and 7 per cent respectively.

The only significant producers of uranium in Africa are Niger, Namibia and South Africa, of which only the latter has a technological and industrial potential for a full nuclear fuel cycle, even though only the mining capacity remains along with the actual power plants.¹⁵ (Other major uranium producers in the world are Australia, Canada, China, Kazakhstan, Russia, US and Uzbekistan – see figure 2.) Gabon was a minor producer until the late 1970s, but has ceased mining completely. At present only three African countries are still producing uranium:

- In Niger, two uranium-producing companies have been in operation (one since 1970 and one since 1978) with production capacities of 1 500 and 2 300 tonnes of uranium per annum, and with an actual annual production of around 3 000 tonnes
- Namibia has one operational uranium mine with a nominal production capacity of 4 000 tonnes per annum
- South Africa has one operational mine, run by AngloGold Ashanti, with an annual production (as a by-product of gold mining) of around 1 000 tonnes in 2002. Its only conversion plant (Valindaba) was shut down in 1998, its two enrichments plants (Valindaba Y and Z) closed in 1990 and 1995, respectively, and its fuel fabrication plant (Beva) in 1996. Two nuclear reactors were in operation in 2002 at the Koeberg nuclear power plant with an annual electricity production of 12,588 TW-h. However, there are plans to open other sites (see table 2).

Apart from these three countries, however, several other African countries might become relevant in the future, as indicated by the listing of uranium deposits in table 2.

Table 2 Uranium deposits in Africa

| Country | Status | | | | | | |
|------------|--------------------------|---------------------------|---------|-------------|-----------------|-------------|----------|
| | Dormant | Depleted | Empty | Explored | Developed | Operating | Unknown |
| Algeria | Abankor | | | | | | |
| | Daira | | | | | | |
| | Tahaggart | | | | | | |
| | Timgaouine | | | | | | |
| | Tinef | | | | | | |
| Cameroon | | | Kitongo | | | | |
| CAR | Bakouma | | | | | | |
| DRC | Kamoto | | | | | | |
| | Kasompi | | | | | | |
| | Shinkolob-we-Kasolo | | | | | | |
| Gabon | Bangombe | Boyindzi | | | | | |
| | | Mikouloungou | | | | | |
| | | Mounana | | | | | |
| | | Okélobondo Nord | | | | | |
| | | Okélobondo Satellite Nord | | | | | |
| | | Okélobondo Satellite Sud | | | | | |
| | | Okélobondo Sud | | | | | |
| | Oklo | | | | | | |
| Madagascar | Antsirabe | | | | | | |
| | Folakara | | | | | | |
| | Fort Dauphin Occurrences | | | | | | |
| Malawi | | | | Kayele-kera | | | |
| Morocco | Gantour | | | | | | |
| | Khouribga | | | | | | |
| | Meskala | | | | | | |
| | Oued Eddahab | | | | | | |
| Namibia | Auris | | | | Langer Heinrich | Rossing | |
| | Engo Valley | | | | | | |
| | Goanikontes | | | | | | |
| | Hakskeen | | | | | | |
| | Klein Trekkopje | | | | | | |
| | Mile 72 | | | | | | |
| | Tumas | | | | | | |
| | Valencia | | | | | | |
| Niger | Abakorum | Arlette | | | Artois | Akola | Marianne |
| | Akouta Sud | Taza Nord | | Ebala | Ebba Nord | Akouta Nord | Marthe |
| | Imouraren | Taza Sud | | Tamgak | Ebba Sud | Ariege | Maryline |
| | | Takriza | | | Tabelle | Tamou | |

| Country | Status | | | | | | |
|--------------|---------------------------|------------|-------|----------|-----------|---------------------|---------|
| | Dormant | Depleted | Empty | Explored | Developed | Operating | Unknown |
| Somalia | Alio Ghelle | | | | | | |
| | Dusa Mareb | | | | | | |
| South Africa | Blyvooruitzicht | Phalaborwa | | | | Buffels-fontein | |
| | Chemwes – Stilfontein | Dormant | | | | Harte-beest-fontein | |
| | Driefontein | | | | | President Brand | |
| | Free State Geduld | | | | | President Steyn | |
| | Harmony | | | | | Vaal Reefs Mines | |
| | Lorraine | | | | | Western Areas | |
| | Randfontein | | | | | Western Holdings | |
| | St Helena (Beisa section) | | | | | | |
| | West Rand (U section) | | | | | | |
| | Western Deep Levels | | | | | | |
| Zimbabwe | Kanyemba | Dormant | | | | | |

Source: IAEA, List of uranium deposits (online). Available at www.nfcis.iaea.org/UDEPO/

It has been argued that African uranium mining is set to expand quite dramatically, particularly because of recent price increases which make formerly unprofitable mining ventures financially attractive (Reuters 2007), and new deposits may be discovered. Indeed, in the first months of 2007, the Angolan government announced that it had discovered uranium reserves (*Africa Confidential* 2007). The DRC also intends to explore for more reserves, and signed an agreement late in 2006 with a British company owned by a number of major Western firms, Brinkley Mining Company, to ‘explore, evaluate and develop the country’s uranium resources, including the production of nuclear materials’.

Some analysts have argued that nuclear power may be the solution to the energy shortages of the Third World and Africa (see table 3), but no major steps in this direction have been taken in Africa, nor do any seem likely in the foreseeable future, unless South Africa leads the way, as it may well do (see below). It should be noted that together with the discovery of uranium reserves, the Angolan government declared that it was ‘interested in looking at developing nuclear power, despite the country’s large petroleum and hydro-electric potential’, and presented to parliament a draft law of atomic energy, related to ‘the production and use of nuclear energy’ (*SouthScan* 2006). However, this would be a long way to go for a country with Angola’s low technological and knowledge base with regard to nuclear issues.

Table 3 Per capita electricity use (2003)

| Averages | (kW-h) | Examples | (kW-h) |
|----------|--------|---------------|--------|
| Africa | 593 | Ethiopia | 33 |
| OECD | 8 612 | South Africa | 4 997 |
| World | 2 670 | United States | 14 040 |

Source: IAEA, Nuclear Technology Review 2006. Vienna: IAEA, pp 41–42.

Implications of South Africa's expanding civil nuclear programme

While the post-apartheid government has shown no interest in renewing a nuclear weapons capability, it has, especially in the last two or three years, been strongly inclined towards reviving a civil nuclear power programme. Initially this was based on the development of what was touted as 'revolutionary technology', the Pebble-Bed Modular Reactor (PBMR). This was originally developed in Germany and the US but refined in South Africa. Essentially this is a mini reactor filled with hundreds of thousands of 'pebbles' consisting of graphite and enriched uranium dioxide and the design is meant to be safe and efficient. However, as design costs escalated, technical problems mounted and potential markets outside South Africa withered, enthusiasm for the project appears to have waned (Fig 2005:93–111).

Without abandoning the PBMR, the South African government has now embarked on a process of building more conventional nuclear reactors along the lines of the Koeberg model. This follows global trends, where countries as diverse as China, Russia, Taiwan and Australia are building reactors for power generation as a result of the rising costs of fossil fuels, concerns about global warming and greater comfort about the safety of nuclear reactors. It is also driven by a chronic shortage of electricity in South Africa, where major cities have faced regular blackouts and considerable pressure has been put on the grid by economic expansion. Furthermore, the new reactors may also form part of a renewed South African effort to become an important actor in the global nuclear arena, especially in Africa.

In February 2007, after much speculation that six or even 30 reactors might eventually be built, Minister of Public Enterprises Alec Erwin announced that a new nuclear power station would be built 'in the southern part of the grid' – almost certainly next to Koeberg, which is already licensed for another two reactors (*Business Day*, 13 February 2007). As with Koeberg, French companies were at the forefront of the bidding to build the plant. In the longer term, government aimed to meet 30 per cent of the country's energy requirements through nuclear power, investing almost the equivalent of the

government's total revenue for a year over a period of 18 years (*Mail & Guardian*, 9 November 2007).

More surprisingly, again after much speculation Minister of Minerals and Energy Buyelwa Sonjica announced shortly afterwards that South Africa would re-embark on a uranium enrichment programme 'before year end', possibly with French or Russian support. Such a programme would be in line with South Africa's commitment to develop local beneficiation capacities, would ensure a reliable supply of enriched uranium for the new PBMRs and conventional reactors, and could set South Africa up as an exporter of enriched uranium. This could be extended to reprocessing of spent fuel (*Business Day*, 21 February 2007). This is surprising because few countries find it cost effective to enrich their own uranium – only ten countries do so, and many of them do so through joint ventures to save costs – while even fewer are capable of reprocessing it. It is difficult to envisage how South Africa could find this a cost-effective enterprise.

One clue may lie in its evident ambitions to spread nuclear technology throughout Africa. In November 2006 the Minister of Minerals and Energy held a two-day meeting with African 'energy decision makers' comprising an executive committee called Powering Africa: the nuclear option. She said that Africa possessed significant uranium resources which should be beneficiated (enriched) and used to generate energy, that regional approaches should be adopted to build a nuclear infrastructure, and that discussions were taking place with Nigeria to establish a regional nuclear and radiation regulatory forum. Strategic partnerships would be required with countries that had extensive nuclear programmes, and 'deliberate and calculated planning on behalf of the leaders of the continent' was needed, while South Africa was already developing its own strategy. 'Africa in particular needs nuclear energy,' she concluded (*Business Day*, 28 November 2006).

At the same time South African companies have been developing plans to expand uranium mining – South Africa possesses the fourth largest reserves in the world but they are largely underexploited (see fig 2). A company called Uranium One has started work on a mine near Klerksdorp and a small mining company, Simmer & Jack, plans to exploit uranium in its slimes dams at Buffelsfontein and Randfontein. South African companies have also indicated an interest in exploiting resources at the Kanyemba deposit in Zimbabwe and the Nuclear Energy Corporation has announced plans to build a new smelter for the future disposal of nuclear waste generated domestically. South Africa also supplies one quarter of the world's radioactive medical isotopes, which are exported from O R Tambo international airport (*Business Day*, 23 June 2006; 3 March 2007).

Clearly, although it has no intention of resuscitating its nuclear weapons programme, South Africa has substantial plans for expanding all aspects of its domestic nuclear capabilities and for exporting nuclear technology to Africa. This in part explains some

of its foreign policy positions, in particular in relation to Iran's enrichment programme, which brings us back to the problem of nuclear weapons (from which it is often difficult to separate civil nuclear issues).

Policy challenges for Africa and South Africa

It may be asked why South Africa has been separated from the rest of Africa in this section. The answer is simply that as the only African country with an internationally recognised nuclear technological base, and a former nuclear weapons power which is also represented on the board of the IAEA, South Africa may have somewhat different interests with regard to nuclear power from other African countries. As such it is more influential, as is evident from the NPT review processes. However, South Africa to a large extent shares common policies with the rest of Africa, and has sought to promote the positions of the Non-Aligned Movement, the African Union and the G-77, sometimes acting as a go-between between these groups and the P5.

Africa will continue to remain a nuclear-weapons-free zone. With Libya now falling into line, there are no African states contemplating developing or hosting nuclear weapons. The issue of warships from the P5, which may or may not have nuclear weapons on board, however, is a vexed one. For the most part, African countries hosting such ships (for recreation, official visits or peacekeeping purposes) assume that they do not have nuclear weapons on board and since this is neither confirmed nor denied, leave it at that.

There will be continued emphasis not only on the non-proliferation aspects of the NPT but also on the provisions for disarmament. As noted at the beginning of this paper, this issue – that the P5 signatories to the NPT are expected to disarm, but have shown little if no inclination to do so – has somehow been allowed to slip off the global radar screen. This was the issue that divided the 1995 NPT review conference, with the NAM countries resisting an indefinite extension of the treaty without regular review and the establishment of yardsticks with which to measure disarmament by the P5 (SIPRI 1993).

In general within Africa there is a strong sentiment that any steps taken against states allegedly violating the NPT or developing nuclear weapons outside of the NPT, should be done through multilateral institutions such as the IAEA, or where necessary the UN Security Council. Hence the opposition of most African countries to the US invasion of Iraq on the grounds of its possession of weapons of mass destruction, and the reservations of many African countries about Security Council actions against Iran. These were of course subsequently vindicated by revelations that UN intelligence believes that Iran is no longer intent on developing nuclear weapons.

With its nuclear technology base, and its ambitions to expand it (including through enrichment) South Africa feels perhaps a stronger concern than other African countries about P5 (especially Western) attempts to prevent Iran from enriching uranium. This may explain in part why it held out until the last moment on the Security Council against such actions. As Rob Adam, head of South Africa's Nuclear Energy Corporation put it rather bluntly, the problem is that developed countries seem to want to control the expansion of nuclear activity, and Western powers 'efforts to stop Iran from enrichment demonstrate that' (*Business Day*, 4 September 2006). Likewise, after meeting with her Iranian counterpart in August 2006, South Africa's Minister of Foreign Affairs, Nkosazana Dlamini-Zuma, reiterated 'the basic and inalienable right of all NPT states to develop research, production and use of nuclear energy for peaceful purposes without discrimination' (ANC Today, 25 August 2006).

There remains considerable concern in Africa and especially in Egypt, about Western tolerance of Israel's nuclear weapons and the fact that it has not signed the NPT. This again has been a major issue at the review conferences. The fact that some African countries, such as Egypt and countries in the Horn, essentially form part of the Middle East security complex rather than that of Africa, complicates the issue of proliferation. For example, it has been posited that a 'cascade' might follow the possible development of nuclear weapons by Iran, with Sunni countries such as Saudi Arabia wanting to counter a 'Shia bomb', the question being where this would leave Egypt over the long term? The prospects of such a cascade do, however, seem quite remote.

India and Pakistan, as developing countries with which many African countries share policy principles, pose particular problems, especially for South Africa with its close ties to India and its membership of the India-Brazil-South Africa (IBSA) alliance. However, South Africa's stated position is that despite India's failure to sign the NPT and its development of nuclear weapons, South Africa would, as a member of the NSG, support a bid by India to have access to technology for its nuclear power stations. This bid is also backed by the US, providing it can be pushed through Congress. The support by South Africa is dependent on India's assurance that it has 'separated' its civil nuclear programme from its military one (*Economist*, 22 June 2006; *Business Day*, 3 October 2006).

Conclusion

With the exception of South Africa, African countries have on the whole been unable to develop the nuclear technology infrastructure which would allow them to exploit nuclear power, although some states have important uranium reserves. Furthermore, with the exception of South Africa and Libya, African countries have been unwilling or unable to attempt to develop nuclear weapons, and only South Africa succeeded in this regard.

With the Pelindaba treaty in place, it is highly unlikely that any attempt will be made by an African country – even those that form part of the Middle Eastern security complex – in the near or middle future to develop or deploy nuclear weapons. However, an expansion of civil nuclear technology, uranium extraction and possibly beneficiation, as well as development of nuclear power facilities within South Africa is under way. Whether this process will have much effect on other African countries remains to be seen, although South Africa would certainly like this to happen. In the current economic climate uranium extraction is likely to increase on the continent, too, raising concerns about controls.

South Africa's intentions to promote civil nuclear power inevitably impact on its nuclear diplomacy policy and have some effect on its approaches to non-proliferation. On the whole, however, it is guided, as are many other African countries, by the strategic imperative of promoting disarmament as well as non-proliferation.

Notes

- 1 The texts of all the following agreements are reprinted in Burns (1993), Vol 3.
- 2 On START, see Caldwell (1993), Karp (1992) and May et al (1988). On the INF Treaty, see Nolan (1993) and Dean (1988).
- 3 On the negotiations, see for example Garthoff (1985). On the contents of the treaty, see for example Schwartz (1984), Schneiter (1984) and Drell et al (1986).
- 4 The treaty itself, with accompanying protocols and MOUs, is appended on pp 576–589 in Lockwood (1993). The preceding 'de-mirving' agreement of 17 June 1992 is excerpted in Lockwood (1993:575–576). MIRVs were especially crisis unstable because they allowed one side to 'take out' several enemy missiles (and even more warheads) with each missile in a first strike, while at the same time increasing vulnerability to a hostile first strike that might neutralise several launchers with an even greater number of warheads. Both incentives for and the actual ability to launch a (partially) disarming first strike were thus increased. On MIRV, see also Greenwood (1975).
- 5 On the Agreement on the Prevention of Nuclear War of 1973, see also Holgate (1993). On various other measures, see Blechman (1998).
- 6 On no-first-use see Hampson (1993); see also Bundy et al (1985); Union of Concerned Scientists (1983); Steinbruner and Sigal (1983); Blackaby, Goldblatt and Lodgaard (1984); Lee (1988); Lübckemeier (1988). The International Court of Justice has, in an advisory opinion, proscribed the use of nuclear weapons (see De Chazournes & Sands 1999).
- 7 On the concept, see Levite (2002).
- 8 On the Israel-Egypt peace, see Quandt (1993).
- 9 On the rather bizarre ideology of Muammar al-Gadhafi, see Hajjar (1980, 1982); St John (1983); Sheppard (1987); Anderson (1986); Ayoub (1992). Al-Gadhafi's *Green book* is available online at www.qadhafi.org/the_green_book.html. It is also reflected in the official name of the state, which is 'The great socialist people's Libyan Arab jamahiriya'.
- 10 The following is mainly based on Bowen 2006.
- 11 On the inability to thus deter Libya from new terrorist attacks, see Malvesti (2002); Collins (2004); Jentleson & Whytock (2005).
- 12 On Pan-Arabism see Sela (1997); Barnett (1998).
- 13 On the relative weight of the various policies to bring about this change, see Collins (2004); Jentleson & Whytock (2005).
- 14 On the Lockerbie affair, see Beveridge (1992); Anon (2001); Anon (2003).
- 15 IAEA (2005:43): (Gabon), 60 (Namibia), 62-63 (Niger), and 74-75 (South Africa).

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Complementarity and Africa: The promises and problems of international criminal justice

Max du Plessis*

Introduction

The idea of an International Criminal Court (ICC) has captured the legal imagination for well over a century. It became a reality on 18 July 1998 with the adoption of the Rome Statute of the ICC. After attracting the necessary ratifications the statute entered force on 1 July 2002. After being in existence for just over a year, by November 2003, the court, through the prosecutor, had received more than 650 complaints.

A consideration of these complaints reveals a disturbing lack of understanding about the court and the court's functioning. Fifty of the complaints contained allegations of acts committed

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before 1 July 2002. This is problematic because as one commentator has noted, the court is not the means to scrutinise acts committed during the Vietnam war, or in Cambodia, or to settle scores with Napoleon. That is because the ICC's jurisdiction is forward looking, and it does not have retrospective jurisdiction over acts committed prior to 1 July 2002. A number of communications dealt with acts which fall outside the subject matter of the court's jurisdiction, such as environmental damage, drug trafficking, judicial corruption, tax evasion and less serious human rights violations that do not fall within the court's remit, either.

Thirty-eight complaints alleged – no doubt correctly – that an act of aggression had taken place in the context of the war in Iraq in 2003. The problem here is that the US is not a party to the statute, and in any event, the ICC cannot exercise jurisdiction over alleged crimes of aggression until the crime is properly defined – something which the drafters of the statute expressly left until a future date, most probably some time after 2009. Two communications referred to the Israeli-Palestinian conflict. The difficulty here is that Israel is not a party to the statute, and the Palestinian authority is not yet a state and so cannot be a party. By early 2006 the prosecutor's office recorded that it had received 1 732 communications from more than 103 countries, but that a staggering 80 per cent of those communications were found to be 'manifestly outside [the Court's] jurisdiction after initial review' (ICC 2006).

The point is that a range of organisations and individuals that submitted the first complaints to the prosecutor seem to have fundamentally misunderstood the ICC; to have placed a false hope in the court as a means to provide them justice. The truth is that the court's jurisdiction is limited temporally – it can only exercise jurisdiction on events after 1 July 2002 – and its jurisdiction is limited substantively – it can only consider the most serious crimes of international concern, being genocide, crimes against humanity and war crimes – and until a proper definition of aggression is agreed upon by state parties, it cannot consider complaints about the crime of aggression.

Furthermore, the court's jurisdiction is limited geographically. In the case of state parties, the court can exercise jurisdiction over their nationals wherever they may be in the world. But for non-state parties – like the US – the court can only exercise jurisdiction if the guilty American commits his or her crime on the territory of a state party. The abuse at Abu Ghraib prison by US private Lynddie England and her cohorts – which undoubtedly constitute war crimes and torture – is not something that Iraq or others can refer to the court, since Iraq – on whose territory the crimes have been committed – is not a party to the statute. In a similar vein, the crimes committed in Zimbabwe cannot fall within the purview of the court so long as Zimbabwe remains a non-member of the ICC regime. However, and here is a twist, if a case is referred to the court by the Security Council – as was done in respect of the atrocities in Sudan – then the court can exercise jurisdiction even though Sudan is not a party. That is because the referral bears the imprimatur of the UN Security Council whose resolutions are binding on all member states of the UN, regardless of whether they are parties to the ICC Statute or not.

Complementarity

That brings me to the topic that is at issue in this paper: complementarity. Complementarity is perhaps the key feature of the ICC regime. It is thus vitally important to appreciate its significance, and in so doing, to understand both the promises and problems of international criminal justice as exemplified by the ICC.

The ICC is expected to act in what is described as a 'complementary' relationship with domestic states that are party to the Rome Statute. The preamble to the Rome Statute states that the court's jurisdiction will be complementary to that of national jurisdiction, and article 17 of the statute embodies the complementarity principle, too. At the heart of complementarity principle is the ability to prosecute international criminals in a state's national courts, on behalf of the international community, or to have in place mechanisms to arrest and surrender to the ICC persons that the ICC seeks to prosecute and who happen to be in that state's jurisdiction.

The general nature of national implementation obligations assumed by states which elect to become party to the Rome Statute are wide ranging (see generally Schabas 2001; see also Brandon & Du Plessis 2005). The Rome Statute notes that effective prosecution is that which is ensured by taking measures at the national level and by international co-operation. Because of its special nature, states party to the Rome Statute are expected to assume a level of responsibility and capability, the realisation of which will entail taking a number of important legal and practical measures.

As I have already shown, the ICC does not exercise universal jurisdiction. The ICC's jurisdiction is only triggered where the crime occurred on the territory of a state accepting the Court's jurisdiction (territorial jurisdiction) or the accused is a national of such a state (active nationality principle), or the matter is referred to the Court by the UN Security Council exercising its Chapter VII powers. In terms of article 12 a state accepts jurisdiction by becoming a state party, or can do so by declaration in cases where it is a non-party state. The consequence is that many states which become party to the Rome Statute might not have previously provided for criminal jurisdiction on the active national principle: such states will normally require special legislation to create the domestic legal basis enabling them to bring a prosecution at home of a national accused of international crimes committed elsewhere.

It is thus clear that the state party assumes a significant role in the regime for the prosecution of international crimes, and certain particular features need to be present in the state's legal and justice system in order for this complementary system of justice to function effectively.

The ICC has jurisdiction over those crimes regarded with the highest degree of concern by the international community: genocide, crimes against humanity, and war crimes. These

are thoroughly defined in articles 6, 7 and 8 of the Rome Statute, with further elaboration and definition given in the 'elements of crimes' guidelines agreed to by states parties.

In addition to their duty to take steps to be able to surrender to the ICC persons for whom an arrest warrant is issued, states party to the Rome Statute may take steps to prohibit, as a matter of national or domestic law, the crimes or conduct described in the statute. This is to enable them to conduct a prosecution of such crimes domestically should they elect to do so (and to remove any possibility that the crimes for which surrender is sought, cannot be found in national law). Article 70(4) meanwhile requires states to extend the operation and substance of their national criminal laws dealing with offences against the administration of justice, so as to criminalise in addition conduct that would constitute an offence against the ICC's administration of justice.

Aside from enabling its own justice officials to prosecute international crimes before its domestic courts, a state party is furthermore obliged to cooperate with the ICC with regard to an investigation and/or prosecution which the court might be seized with. The prosecution of a matter before the ICC (and the process leading to the decision to prosecute) will normally require very considerable investigation, information gathering and interagency cooperation, and often require high levels of confidentiality and information or witness protection. Contact between the ICC (in particular the Office of the Prosecutor, OTP) and the national authorities will likely become extensive during the course of an investigation and any request for arrest and surrender or any prosecution. Indeed, in many cases there is likely to be a fairly complex and substantial process of information gathering, analysis and consideration that must be undertaken before the decision to formally investigate can even be taken. The ICC lacks many of the institutional features necessary for a comprehensive handling of a criminal matter: for ordinary policing and other functions, it will rely heavily on the assistance and cooperation of national mechanisms, procedures and agencies of states.

In order to be able to cooperate with the OTP during the investigation or prosecution period¹ (or otherwise with the pre-trial chamber or the Court once a matter is properly before these, for example in relation to witnesses), a state party is obliged to have a range of powers, facilities and procedures in place, including by promulgation of laws and regulations. The legal framework for requests for arrest and surrender on the one hand, and all other forms of co-operation on the other, is mostly set out in part 9 of the Rome Statute. Article 86 describes the general duty on states to cooperate fully with the ICC in the investigation and prosecution of crimes. Article 87 sets out general provisions for requests for co-operation, giving the ICC authority (under article 87(1)(a)) to make requests of the state for co-operation. Failure to co-operate can, amongst others, lead to a referral of the state to the Security Council (article 87(7)). Article 88 is a significant provision, obliging states to ensure that the procedures and powers to enable all forms of co-operation contemplated in the statute are in place nationally. Unlike interstate legal

assistance and co-operation, the Rome Statute makes it clear that by ratifying (which gives effect to the ICC), states accept that there are no grounds for refusing ICC requests for arrest and surrender.² States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws, to follow up arrest warrants or summons issued by the ICC, and to surrender persons in due course.

While the Rome Statute envisages a duty to co-operate with the Court in relation to investigation and prosecution, it should be remembered that the principle of complementarity is premised on the expectation that domestic states that are willing and able, should be prosecuting these crimes themselves. The principle of ‘complementarity’ ensures that the ICC operates as a buttress in support of the criminal justice systems of states parties at a national level, and as part of a broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. It is only if a state party is ‘unwilling or unable’ to investigate and prosecute international crimes committed by its nationals or on its territory, that the ICC is seized with jurisdiction (article 17(1) of the Rome Statute).

To enforce this principle of complementarity, article 18(1) of the Rome Statute requires that the prosecutor of the ICC must notify all states parties and states with jurisdiction over a particular case – in other words non-states parties – before beginning an investigation by the ICC, and cannot begin an investigation on its own initiative without first receiving the approval of a chamber of three judges (article 15). At this stage of the proceedings, it is open to both states parties and non-states parties to insist that they will investigate allegations against their own nationals themselves, in which case the ICC would be obliged to suspend its investigation (article 18(2)). If the alleged perpetrator’s state investigates the matter and then refuses to initiate a prosecution, the ICC may only proceed if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned (article 17(2)(a)). The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action at the level of states.

The promise

Complementarity is therefore an essential component of the ICC’s structure and a means by which national justice systems are accorded an opportunity to prosecute international crimes domestically. Indeed, taken to its full extent, complementarity has the potential to signal the beginning of the end of the ICC. As Holmes put it: ‘Ironically ... the provisions of the Rome Statute itself contemplate an institution that may never be employed.’ The ICC is one component of a regime consisting of a network of states that have undertaken to do the ICC’s work for it; to act, if you will, as domestic ICCs in respect of ICC crimes. It was written in relation to the experience at Nuremberg that, ‘[t]he purpose was not

to punish all cases of criminal guilt. The exemplary punishments served the purpose of restoring the legal order; that is, of reassuring the whole community that what they had witnessed for so many years was criminal behaviour' (Röling 1979:206).

Because of the ICC's system of complementarity we can therefore expect national criminal justice to play an important role in doing the ICC's work, by providing 'exemplary punishments' which will serve to restore the international legal order. In this respect, Anne-Marie Slaughter (2003), Dean of the Woodrow Wilson School of Public and International Affairs at Princeton, has pointed out that:

One of the most powerful arguments for the ICC is not that it will be a global instrument of justice itself – arresting and trying tyrants and torturers worldwide – but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice – either a nation tries its own or they will be tried in The Hague – it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle.

The ICC prosecutor put it as follows on taking up his post:

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of regular functioning of national institutions, would be a major success (quoted in McGoldrick et al 2004:477).

This is the *promise* of international criminal justice as exemplified in the ICC's complementarity regime. One way in which we will come to regard the ICC as effective – as having achieved its promise – will be when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian and human rights law to investigate and prosecute international crimes.

Some problems

Introduction

The reality is that while a 'zero case' scenario is a worthwhile aim, cases have found their way to the ICC in The Hague. Already the ICC prosecutor has the crimes committed in three states parties – the Democratic Republic of Congo (DRC), Uganda and Central African Republic (CAR) – in his sights, and the Security Council referred the Sudan crisis to the ICC even though Sudan is not a party to the ICC. In respect of

Uganda, four arrest warrants were issued by the Court on 8 July 2005 for leaders of the Lord's Resistance Army; with regard to Sudan, arrest warrants were issued on 27 April 2007 for Ahmad Muhammad Harun, former Minister of State for the Interior and currently Minister of State for Humanitarian Affairs in the government of Sudan, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), a leader of the militia/Janjaweed. Investigations are ongoing with regard to the CAR.

It is in respect of the situation in the DRC that the Court has made the most progress. The prosecutor of the Court initiated investigations in the DRC in June 2004 after the Congolese government referred the situation in the country to the Court. Three persons are already in the custody of the ICC. On 17 March 2006, Thomas Lubanga Dyilo, a Congolese national and alleged founder and leader of the Union des patriotes Congolais (Union of Congolese Patriots), was transferred to the ICC. On 17 October 2007, the Congolese authorities surrendered and transferred Germain Katanga, a Congolese national and alleged commander of the *Forces Résistance Patriotique d'Ituri* (Front for Patriotic Resistance of Ituri, FRPI), to the ICC. He is currently charged as a co-perpetrator of the crimes allegedly committed during the joint Front for National Integration (FNI) and FRPI attack on the village of Bogoro in February 2003. Most recently, Mathieu Ngujolo Chui became the third person in the custody of the ICC. He is a Congolese national and the alleged former leader of the FNI and currently a colonel in the national army of the government of the DRC. Chui was arrested on 6 February 2008 by the Congolese authorities and transferred to the ICC. Chui is alleged to have committed crimes against humanity and war crimes as set out in articles 7 and 8 of the statute, in the territory of the DRC since July 2002.

Arrest warrants without arrests: the problem of unwilling states

The small number of persons in custody hints at the difficulties that present themselves to the prosecutor and the Court when investigating and prosecuting a case against the backdrop of complementarity.

This is in the first place the result of a contradiction in that the Court will have jurisdiction only when a state party is unwilling or unable to do the job itself. In illustration, assume that the prosecutor has decided that state X is unwilling or unable to prosecute, such that the ICC might now be seized with jurisdiction in terms of the complementarity scheme. In order for the Court to be seized with jurisdiction – as with a criminal court in a domestic context – there needs to be an arrest. But unlike in a domestic context where the prosecution has a police force ready to assist in arresting accused who can then be brought to Court, the ICC prosecutor is a stateless actor, with no international police force to assist him in effecting arrests. He is at the mercy, if you will, of the state that is implicated in the international crimes he wishes to investigate. To get his hands on an accused he needs state X to be his eyes and ears on the ground and to arrest when possible. Yet state X is the very state that is unable or unwilling to assist him in the first place!

This is the hard reality that the prosecutor is currently experiencing. In the case of the Sudan referral, the Darfur Commission appointed by the UN to investigate the crimes committed in Northern Sudan found that as far as mechanisms for ensuring accountability for the atrocities committed in Sudan are concerned, the ‘Sudanese courts are unable and unwilling to prosecute and try the alleged offenders ... Other mechanisms are needed to do justice’. This is no small finding. The Sudanese government (even as a non-party state) could have relied on the complementarity principle built into the ICC Statute to argue that it is willing and able to prosecute the offenders. Should it in fact be willing and able, the ICC may have to acquiesce and allow the Sudanese authorities to prosecute the offenders. It is apparently for this reason that the Commission saw fit to stress that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders, thereby clearing the way for a ‘clean’ referral of the matter by the Security Council to the ICC. However, the caustic response of the Sudanese government to the Security Council resolution referring the matter to the ICC suggests that the prosecutor will not be able to rely on Sudan’s government for co-operation in investigating and punishing persons responsible for gross human rights violations. Khartoum has called resolution 1593 a violation of its sovereignty (*Agence France-Presse* 2005a) and President El-Bashir reportedly swore ‘thrice in the name of Almighty Allah that [he] shall never hand any Sudanese national to a foreign court’ (*Agence France-Presse* 2005b). This sentiment was shared by Sudan’s UN ambassador, Elfatih Mohammed Erwa, who said: ‘Justice here is a great good used in the service of evil’ (*BBC News* 2005). The Sudanese government insisted it would not allow any Sudanese national to be tried before a foreign court (AU Peace and Security Council 2005, par 87; Appiah-Mensah 2005:10). Khartoum went so far as to instigate public demonstrations objecting to the referral, and the ICC was denounced, somewhat ironically, as an ‘American Court’ (*Agence France-Presse* 2005b and 2005c). While the Security Council referral may have been clean in a technical sense, the prosecutor has anything but a clean or easy complementarity task.

As pointed out earlier, the prosecutor has through the Court issued arrest warrants for Harun and Kushayb, but the Court’s website speaks volumes, despite the terse statement, in relation to these two individuals: ‘No hearings scheduled at this time’ (ICC 2005).

Thus although the Security Council referral is a significant step in the history of the Court, the road that lies ahead will by no means be easy. The challenge for the Court is immense. It has had the Security Council refer a matter to it (an incredibly high-profile situation which even the US – through Colin Powell – has described as ‘genocide’), yet it has no means of truly enforcing the mandate of the referral and has to rely on the Sudanese government for proper investigation and prosecution of the offences.

The Court thus faces the very difficult task of trying to enforce its decisions against a recalcitrant state.³ This task is complicated and aggravated by the fact that Sudan is not a state party to the ICC and as such owes no treaty obligations to the Court. This is

an inevitable problem with the referral of situations involving non-party states to the ICC, as the referral extends the Court's jurisdiction beyond the parameters of the Rome Treaty but does not concomitantly extend the Court's power to enforce that jurisdiction. This problem is one that was foreseen by the drafters of the ICC Statute, but which was never satisfactorily attended to.

One thing is abundantly clear: active Security Council involvement will prove vital for the effective functioning of the ICC. As Dan Sarooshi (2004:104) points out:

[T]he Security Council could decide that compliance by all UN Member states with a particular ICC decision is a measure necessary for the maintenance of peace and security pursuant to Article 41 of the UN Charter, and, as such, bind all UN Member states under Article 25 of the Charter to comply with specific ICC decisions.

Indeed, in a report delivered to the Security Council in early December 2007, the prosecutor of the Court made it clear that without the Security Council's assistance, the Court will not be able to prosecute the persons in respect of which it has issued warrants of arrest. He bluntly told the Council that although 'Sudan has known the nature of the case against Ahmad Harun and Ali Kushayb for 10 months, they have done nothing. They have taken no steps to prosecute them domestically, or to arrest and transfer them to The Hague'. The answer, in his view, lies with the Security Council, and he called on the Council to send 'a strong and unanimous message' to Khartoum to arrest and surrender the two men accused of committing war crimes during the conflict in Darfur (*UN News Centre* 2007). This is obviously correct, and demonstrates the precariousness of the prosecutor's position. It is ultimately up to the members of the UN Security Council to live up to their responsibility and ensure that the government of Sudan respects its obligations under Resolution 1593 and co-operates with the ICC, in particular with regard to the arrest and surrender of Harun and Kushayb.

Unable to be willing or willingly unable? The problem of capacity and priority

It is not only outright recalcitrance that will emasculate the ICC. As a recent study by the Institute for Security Studies (ISS) demonstrates (Du Plessis & Ford 2008), there are a myriad of issues that undermine the promise of international criminal justice through the ICC's complementarity regime.

The creation, through widespread adoption of the Rome Statute, of a permanent ICC has been of enormous practical and symbolic significance. The ideals underlying the ICC require practical instruments and processes. The ISS study, in the form of a monograph, is concerned with whether measures at national level had a significant influence on the

effectiveness of the scheme of international criminal justice. It consists of a compilation of reports by independent experts on the extent of legislative and other measures taken by five selected African states (Botswana, Ghana, Kenya, Tanzania, Uganda – all party to the Rome Statute), to incorporate the statute's obligations into their national laws and procedures. It comprises, too, a comparative overview of the themes emerging from the various country reports. As such, it is an assessment of the capacity of these (and similarly situated) states to respond to international crimes by means of workable, acceptable and lawful processes and within the parameters set by international law, in particular international human rights law. This is in line with the Preamble to the Rome Statute that 'effective prosecution must be ensured by taking measures at the national level and by international cooperation'. We have already seen that at the heart of the complementarity regime are the measures that must be taken by individual states in their own legal systems to ensure no safe harbour exists for the worst international criminals and that there are no barriers to smooth co-operation and assistance between states and with the ICC. States must further ensure that national procedures and mechanisms are of sufficient quality from a rule of law perspective and adequately accommodate human rights safeguards, so that principles are upheld and prosecutions are not jeopardised by deficient investigations.

The monograph tried to find answers to questions such as how relevant to Africa is the priority of implementing measures consistent with the ICC Statute which enable the effective prosecution of international crimes? What is its position relative to the other priorities of government and government departments, human rights defenders and civil society?

The answers highlight the remaining and apparently enduring problems of giving effect to complementarity within Africa. One perception seems to be that having in place national ICC response measures is not particularly relevant or urgent from an African perspective. While all five countries in the sample have ratified the Rome Statute, none have adopted measures to implement Rome Statute obligations at a national level. The reasons for the delay in implementation were in large measure shared amongst the five states studied. Not only did the study reveal the status and peculiarities of individual countries' responses to ratification of the Rome Statute, it also made it possible to gain comparative insights.⁴

The investigations revealed the following features, misconceptions, misgivings or concerns as common barriers to implementation or common reasons for delaying the process of implementation of the Rome Statute in some African countries (as will be readily appreciated, these factors and difficulties can compound one other). First, there was a genuine *lack of awareness* about the need for and significance of implementation at the highest level, among many officials, civil society, the legal profession and judiciary, and the wider community. This manifests either as a complete lack of awareness (so that

there is no local pressure on government for implementation), or ‘awareness’ in the sense that the issue simply has not come up in official or other circles.

Second, there was a discernible *capacity shortfall* in some of the countries manifesting in an over-stretched and thinly-staffed justice system, and a lack of sufficient officials with expertise in drafting legislation or in international criminal co-operation. This means that concept papers and other initiatives moving the issue up to a political level are unlikely to be undertaken, or approved. Parliaments also appear to lack capacity for informed review of these issues at a committee level. As a result only a few issues can have priority. At present, if any capacity is devoted to international criminal issues it is to terrorism and international organised crime. That highlights a third, related finding, namely that these countries have entertained *other priorities*, so that national laws to implement the statute were simply not considered relevant enough to be accorded any or sufficient priority. This came through strongly in most of the reports. Many of the countries have had significant elections, or constitutional reform processes, which appear to have absorbed a good deal of political energy. This need not have prevented implementation, but has certainly not aided it.

A fourth difficulty is a number of *political misgivings* apparently held about implementation, and a sense that the local political risk of implementation (or the regional criticism that might come from needing to surrender a leading figure to an international court in the future) outweighs the risk of any international criticism for lack of implementation. This aspect could be inferred from the fact that implementation has not received political momentum (in Uganda, the reasons for political uncertainty about proceeding are more obvious, given the peace process going on there). But there is also in the reports a trace of a sentiment that having national laws in place will cause more problems and embarrassments than it will solve, or that it would be preferable that these issues be dealt with in some other way, or that international prosecutions are seen as a ‘Western preoccupation’.

There is a fifth and commonly expressed reason for delay in implementation which is *political or constitutional concerns* with the immunity regime of the Rome Statute (that article 27 brooks no immunity even for serving heads of state). This has typically arisen at a late stage in the drafting process, in those countries which have a draft in place. It is rather a significant barrier, particularly where there has been political violence in the country, and given the reportedly high degree of sensitivity resulting from what might be described as the ‘Charles Taylor phenomenon’ (the perception that immunities are never watertight and that prosecution may follow at some point in the future).

Sixth, there is some concern in these countries about the perceived *cost* of implementation measures. Some of these perceptions are based on misunderstandings, for example the mistaken belief in one country that co-operation with the ICC meant undertaking the cost of building new, high quality prison cells without which criminal suspects would be able to claim that their trial was unfair or their rights abused. Some of the concerns are perhaps

more understandable, such as the cost of training prosecutors and judges. This factor is not as significant as others, and is not one of the principle reasons for delay in implementation.

A seventh and final reason is the *absence of domestic pressure groups* either within or outside of government in any of the five countries studied, who regularly give the issue publicity and so forward momentum. Some seminars and programmes have been organised by non-governmental groups, but not on the same scale as during the campaign for ratification. The issue lacks the backing by international partners, political convenience and perceived relevance that has given forward momentum to counterterrorism and organised crime measures. Unlike the Geneva Conventions, the statute lacks the support of a single institution such as the military.

These findings are dealt with comprehensively in the monograph. What does appear from them is that the primary barrier to implementation is that co-operation in preventing impunity for international crimes is not considered, at the higher political levels in these countries, to have sufficient importance, relevance and priority. Viewed in this way, capacity or expertise and cost are in a sense 'secondary' factors that can be addressed once they are prioritised, by direction from the executive or by political leadership or consensus. Possible solutions could include acquiring the services of local or international legal drafting experts, or asking the ICC itself for assistance.

Thus while real capacity constraints do hamper the justice systems of these countries, the real explanation appears to be that once the international credit has been obtained by ratification, actual implementation of the Rome Statute is simply not considered politically significant enough to be accorded priority.

The lack of appeal to the political decision makers appears to be both relative and absolute. It is relative because it simply does not feature highly, so that any post-ratification momentum has been lost. Moreover, there is no discernible constituency at home or abroad calling for action to be taken, and indeed some voices suggest it is a mainly Western preoccupation. Added to this 'relative irrelevance' issue are factors that, even if the issue does receive attention, would tend to positively militate against implementation. These include perceptions or concerns about constitutional immunity and misunderstandings about the reach of ICC crimes that might preclude discussing 'international crimes' for reasons of local politics (for example Kenya), or real concerns about the impact of implementing legislation on local peace processes (for example in Uganda).⁵

Conclusions and suggestions

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC: more than half of all African states (29) have ratified the Rome Statute, and many

have taken proactive steps to ensure effective implementation of its provisions. These efforts must continue. The lesson we learn from the Sudan referral is that complementarity must work if the international criminal justice project in general is to succeed. Perhaps the greatest problem that faces the ICC in future cases is an unwillingness or inability on the part of states parties to properly investigate and prosecute international crimes, a problem obviously compounded where – as in the case of Sudan – the state is not party to the Court’s statute. While such scenarios will entitle the ICC to then assume jurisdiction over the case under the complementarity scheme, it is painfully clear that the Court will struggle to ensure assistance and co-operation from states that are unwilling or unable to do the job themselves.

In my view, the existence of these problems points back to the promise of complementarity. The more the promise of the ICC regime of ensuring that there is meaningful domestic prosecution of the world’s most serious crimes can be faithfully fulfilled, the more likely it will be that the ICC can avoid these problems altogether, or at least diminish their impact.

It is thus important to note that ISS has moved towards capacity building at a senior level as an increasing component of its engagement on security issues. The monograph assessment of responses to ratification of the Rome Statute by some African states comprises one element of the ISS International Criminal Justice Project devoted to examining measures for strengthening the rule of law in Africa by developing national capacity for responding, lawfully and within the context of international law and human rights, to international crimes and criminals. This Project is one component of ISS’s recently inaugurated International Crimes in Africa Programme (ICAP).

An underlying premise of the ICAP and the International Criminal Justice Project in particular is that a key element of long-term post-conflict peace building is strengthening the rule of law and access to justice. Equally important is developing mechanisms to manage and prevent conflict, and creating accountability in government. In Africa, post-conflict peace building is threatened by the widespread lack of accountability among those responsible for the continent’s many violent conflicts that are characterised by torture, rape, murder and other atrocities. The pervasive culture of impunity threatens newly established peace processes – not only because those responsible for atrocities remain free to commit further acts, but also because impunity fuels a desire for revenge which can lead to further violence. Moreover, public confidence in attempts to establish the rule of law is undermined, as are the chances of establishing meaningful forms of accountable governance.

However, for most African countries, the national judicial systems are often too weak to cope with the burden of rendering justice for these crimes. ‘International crimes’ including war crimes, crimes against humanity and genocide, are characterised by large numbers of victims and perpetrators, and are often committed with the complicity if

not the active participation of state structures or political leaders. This means that the political pressure may be too great for national justice systems to cope with. Successful domestic prosecutions are further limited by resource and skills shortages, added to which is the strain of establishing functional criminal justice systems in countries with little tradition of democracy and the rule of law.

In circumstances such as these, when the national justice system is unable or unwilling to investigate or prosecute those responsible, the international community can and should assist with these processes. The international community has already begun to do this in Africa, through the creation of the International Criminal Tribunal for Rwanda, and assisting with the creation of the hybrid Special Court for Sierra Leone. Most recently, the European Union has sent a delegation to assist Senegal in preparing the trial of Hissène Habré, the former Chadian dictator. Habré, who ruled Chad from 1982 to 1990, when he fled to Senegal, is accused of thousands of political killings, systematic torture and waves of 'ethnic cleansing' during his rule. In July 2006, Senegal agreed to an African Union request to prosecute Habré 'on behalf of Africa'. The EU delegation, headed by Bruno Cathala, the registrar of the ICC, is preparing the trial in response to a request by Senegalese President Abdoulaye Wade for international assistance. The EU experts will evaluate Senegal's needs and offer technical and financial help.⁶

It is significant that the AU has named Robert Dossou, Benin's former foreign minister and justice minister, as an envoy to the trial. This is a promising development, and one that hopefully signals broader AU support for initiatives aimed at combating impunity for international crimes. Naturally, one of the most important initiatives in this regard is the creation of the ICC. One can hardly overestimate the importance of Africa to the Court: the ICC's first 'situations' are all on the continent (DRC, Uganda, Sudan, CAR). Africa is thus currently a high priority for the ICC, and will remain so for the foreseeable future. It is the most represented region in the ICC's Assembly of states parties, with 29 countries having ratified the Rome Statute, and is a continent where international justice is in the making.

Ensuring the success of the ICC is important for peace building efforts on the continent. However, the task of reversing the culture of impunity for international crimes and thereby strengthening the rule of law cannot simply be devolved to the ICC. In reality, the Court will be able to tackle a selection of only the most serious cases. Even if it did have the capacity to handle a higher volume of cases, this would be limited in Africa by the fact that the ICC is, by design, a 'court of last resort'. The main responsibility for dealing with alleged offenders therefore still rests with domestic justice systems. Governed by the principle of complementarity, this means that the ICC can only act in support of domestic criminal justice systems. National courts should be the first to act, and only when they are 'unwilling or unable' to do so, can the ICC take up the matter. This implies a certain level of technical competency among domestic criminal justice officials, but a lack of technical competency is only part of the problem. A related

(and oftentimes prior) issue is political support for the idea of international criminal justice and for the ICC's complementarity scheme. In that regard it is vital that more African states ratify the Rome Statute. The ICC cannot, of its own accord, initiate investigations into crimes committed in a state, or by a national of a state that has not ratified or acceded to the statute establishing the ICC. The fact that only 29 of Africa's 53 states have ratified means that a large portion of the continent still falls outside the ICC's mandate. Furthermore, many of those that have ratified have not complied with the further and essential requirement of effective and comprehensive implementation of the obligations contained in the ICC Statute.

Due to a need in Africa for greater public and official awareness about the work of the ICC, and for enhanced political support for the work of the Court and for international criminal justice in general, the fulfilment of the aims and objectives of the ICC on the African continent – in particular through the complementarity regime – are dependent on the support of African states and administrations, the AU and relevant regional organisations, the legal profession, and civil society. Meeting these needs requires commitment to a collaborative relationship between these stakeholders and the ICC. It is also important to remember that responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) is not the responsibility of only the ICC.

Other pan-African structures, such as the African Commission on Human and Peoples' Rights and the African Court of Justice and Human Rights, can play a meaningful role in this regard which should be encouraged. An example in this respect is the work of the African Commission on Human and Peoples' Rights in its 2005 Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC, in which the Commission called on civil society organisations in Africa to work collaboratively to develop partnerships to further respect for the rule of law internationally and strengthen the Rome Statute. That these African structures and organisations should be at the forefront of awareness raising is important, particularly because of the perception in certain African states that international criminal justice and the ICC are an 'outside' or 'Western' priority and relatively less important than other political, social and developmental goals.

The leading regional organisation – the AU – should also play a more significant role in building understanding and support among its member states about the importance of practical measures aimed at ending impunity for serious international crimes. In doing so it should unambiguously state the principles and practical reasons for building capacity to respond to international crimes, including that this capacity is inherent in a developed notion of 'security' and is a key component of peace building, conflict prevention and stability. This will enhance the role and work of the ICC in Africa and encourage states to comply with their complementarity obligations under the Rome Statute. Ultimately, there is both scope and a need for African states, regional organisations and civil society

to draw on African experience to ensure an initiative, based in and focused on African, for contributing towards peace building and stamping out impunity. After all, it should not be forgotten that it is not the UN, ICC or Western states that drafted the aims of the AU. In terms of articles 3(h), 4(m) and 4(o) of the Constitutive Act, it is African states that reiterate that the AU is committed to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity.

Notes

- 1 The extent of cooperation required of states parties is evident from the fact that the OTP has a very wide mandate to 'extend the investigation to cover all facts' and investigate circumstances generally 'in order to discover the truth' (art 54(1)(a) of the Rome Statute).
- 2 See article 89, although article 97 provides for consultation where there are certain practical difficulties.
- 3 The most recent (symbolic) example of this recalcitrance is the Sudanese government's decision to appoint Musa Hilal, a leader of the Janjaweed, to a central government position. Read the full story and the human rights outcry occasioned by it, in *International Herald Tribune* (2008), cited in War Crimes Prosecution Watch (2008).
- 4 In deciding whether the results of the study are relevant to an Africa-wide assessment of attitudes and responses to the ICC and the Rome Statute, it is worth bearing in mind that all of the countries studied can be considered, at least in their respective regions, to be relatively advanced with regard to a number of aspects relevant to this topic. Botswana is for example seen as a leading example of good governance in southern Africa and on the continent; Ghana, whose leader has the status of an elder statesman in West Africa, has come to be considered the most stable and well-governed of the major West African countries (although it has suffered recent instability); Kenya is a leading African state with a complex and evolving democracy and some strong institutions (although instability following the contested election results in late 2007 and current reports of violent demonstrations are of obvious concern); Tanzania, while poor, is stable, growing and respected for its pedigree of pan-Africanism and its regional peacemaking; Uganda recently hosted the Commonwealth summit and some of the processes it has followed towards multiparty democracy, economic growth, women's empowerment, HIV prevention, etc, have been described as a model for other African countries. In considering the problems and possibilities of implementation in other African countries, then, it is worth remembering that the sample is of countries that could reasonably be expected to have made progress or be capable of making progress on implementation.
- 5 It is worth noting that many of the problems with implementation can be seen as generic problems with treaty implementation, ones that have been encountered in many countries in terms of following up the ratification of human rights instruments, for example. It is sufficient in this regard to note first that the Rome Statute is not the only instrument with great aspirations and practical utility that countries are quite prepared to ratify, but which they have failed to implement or report on over many years, and second, that many of the reasons for lack of implementation of human rights instruments, such as political misgivings and lack of capacity, apply equally to such other instruments.
- 6 Senegal has said that the investigation and trial will cost 28 million, and last week said that it would spend over 1.5 million (CFA Fr1 billion) on the trial. In addition to the EU, a number of individual countries including France and Switzerland have publicly committed to helping Senegal (see also *Human Rights First* (2008)).

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COMMENTARIES

Kenya: After the crisis, lessons abandoned

Richard Barno*

The story of Kenya's post-election violence has yet to be told. With over 600¹ dead, property of unknown value destroyed,² many people maimed, raped and dehumanised, families and marriages destroyed, children traumatised, the human and economic cost will likely be central to Kenya's soul for generations. This commentary avoids the too personal and painful aspects, but touches on the causes and acts of the violence and reflects on the last six months of 'normalcy'. It reaches the conclusion that while some changes have occurred, it would seem as if no lessons were learned, or that they have been the wrong lessons. Accordingly a future recurrence of the violence appears to be far more likely than unlikely.

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Shattered myths

From discussions with Kenyans one senses a realisation that the post-election violence has changed Kenya. There is for example the visible irritation among especially the middle classes when ‘avoidance of the Kenyan way’ is mentioned. There is a grudging acceptance of the fact Kenya is not immune to internal strife. Her neighbours might be experiencing a sense of poetic justice, for Kenya’s reference to the Somali, Ugandan or Sudanese way with regard to the civil strife in those countries has been replaced by reflective silence when others talk of avoiding the Kenyan way.

That violence, which started off as protest against an alleged stolen victory but quickly turned into inter-ethnic conflict, has brought the realisation that the state of Kenya, too, can collapse. Another consequence has been an increased awareness of ethnic identities, even among the urbanised middle classes. Everything is viewed through an ethnic prism. One of the more visible effects is a lessening of trust of Kenyan professionals and institutions. This is clear from the fact that a number of the members of the two commissions³ created to look into the disputed elections and the post-election violence are not Kenyans.⁴

Six months down the line, the mistrust continues. In a bill published to provide a process for re-drafting of the Kenyan constitution, provision is made for the work to be done mainly by a panel of experts, again with the proviso that a number of them must be non-Kenyans (Constitution of Kenya Review Bill 2008).

Militarisation

Another effect is a worrying trend of acceptance by the population that there is such a thing as ‘too much democracy’. The role of the military in Kenyan society illustrates this development. Kenya has always prided itself on its disciplined military forces, which are totally apolitical and subject to civilian rule. Indeed, apart from an attempted mutiny in the 1960s and an attempted coup in 1982, the Kenyan military has not been involved in politics. To its credit, the military is about the only institution in Kenya that got out of the post-election violence with its reputation intact. In the aftermath of the elections, the military was called in to undertake some police duties and did so without resorting to violence. In fact, parts of the country’s transport network were reopened only after military intervention. After the election violence, the military was again called in, this time to quell a growing insurgency around Mount Elgon. In this case the military succeeded in destroying a ragtag militia, the Sabaot Land Defence Force, with relative ease and achieving what the police had been unable to do in two years. However, it took place amid accusations of serious human rights abuses (Human Rights Watch 2008). Although the military forces are to be lauded for their success, their introduction into

civilian law and order issues and particularly the general acceptance and even protection⁵ of their 'hard-line' methods amount to a surrendering of freedoms and fundamental rights at the altar of peace. Subtle as this argument may be, the negation of hard-won freedom, with the consent of an insecure and traumatised populace, could turn out to be the most negative consequence of the post-election violence.

The post-election upheavals were followed by further unrest and violence: Prison warders, in an unprecedented act and at the risk of being declared treasonous, went on strike shortly after the elections. In March 2008 protesting hawkers threatened to sabotage the railway line and block all roads, a tactic used extensively during the post-election violence. During June and July 2008 pupils in over 200 secondary schools in Kenya resorted to violence over various grievances, and in the process at least two students were killed and property burned in acts of arson. Although school riots and protests by hawkers are common occurrences in Kenya, their intensity and violent tactics have led commentators (see for example Iraki 2008) to link the incidents to public acceptance of violence as a means of addressing grievances and disputes and, in the case of the students, to delayed trauma.

However, every coin has two sides and one positive side effect of the post-election violence is that it did force a political compromise which gave Parliament key powers with regard to the appointment of a prime minister. A newly assertive Parliament has within six months forced the resignation of the finance minister over allegations of corruption and the opening of parliamentary debates to public viewing on television. Similarly, a recognition that politicians played a role in inciting ethnic feelings and that ethnicity is a challenge for the country has led to discussions on the creation of a bill to address issues of negative stereotypes associated with ethnic communities.⁶ Recognition that perceived marginalisation contributed to the post-election violence has resulted in an attempt at inclusiveness in all government appointments and resource allocations, with resources being increased for the devolutionary constituency development funds. There is also a recognition that a new constitutional dispensation has to have an element of devolution of power.

The Kriegler and Waki commissions are, without pre-empting their findings, opening up several institutions and their workings to public scrutiny. The intelligence, police and provincial administration have had to explain and defend themselves and the Electoral Commission of Kenya is being scrutinised, too. Even the prisons department has been subject to scrutiny which resulted in a damning report.⁷ Although it is a pity that this scrutiny was precipitated by violence and is reactive, a proper evaluation of the institutional failures should serve to improve the situation in Kenya.

The media, and particularly the local radio stations which were accused of fanning ethnic hostilities, have been scrutinised, too. Listeners are finding presentations by these

stations quite changed, and one only hopes it is as a result of the realisation of the harm caused and the changed political environment, and not because of threats to withdraw licences.

Where is Kenya headed?

Attempts are being made to address the failed electoral system and the post-election violence, a coalition government which was formed as part of the solution to the election dispute is holding on and in relative harmony, too. Persons displaced during the violence have been resettled with some measure of success and some people have been taken through the criminal justice system because of either partaking in or inciting to (including the spreading of hate messages) election violence. It is also heartening that no one in Kenya is suggesting doing away of with elections or moving away from competitive multiparty politics.⁸ That competitive politics is not blamed for the violence is a surprising but positive indicator of some maturity in multiparty politics in Kenya.

All of these events and occurrences indicate that Kenya is slowly but surely recovering. Unfortunately, however, there are warning signs that these improvements or recoveries are not because Kenyans appreciate the depths to which the country has sunk – and thus a deliberate effort to move away from the abyss – but rather a case of papering over the underlying causes of the violence. Perhaps, also, the people hope that not too much damage was done. It is worrying that no investigation has been conducted, and none appears planned, for the alleged importation of weapons from Somalia which were used by one of the militias in the post-election violence (Kelley 2008). The Kenyan National Dialogue and Reconciliation Committee,⁹ a body created, as the name suggests, to negotiate and provide a long-term structural process to reconciliation, practically abandoned its most important and most difficult task, which was to address root causes of the violence and recommend institutional and constitutional structures necessary to prevent a further occurrence. It would seem that once the power-sharing agreement was in place and all the ‘peace makers’ had been rewarded with cabinet posts, they became too busy to meet the Committee to discuss issues.¹⁰ This constitutes a dangerous and fundamental failure of the peace and reconciliation process.

Equally worrying is the limitation imposed on the Waki commission. After it had failed to address the root causes of the violence, the Reconciliation Committee should have supported the Waki commission’s efforts to do so. However, it actually hampered the work of the Waki commission and imposed it a two month time limit for completion of its work. The Kriegler commission, in its turn, was given a limited mandate,¹¹ which means that closure on who won the 2007 elections will never be achieved. The events echo the past history of the country, in which commissions of inquiry are set up but their reports are shelved and never made public, let alone implemented.

Further evidence that the political leadership has not learnt any lessons came during July and August 2008 when the media were full of reports of political re-alignments geared towards the 2012 elections (see for example the *Sunday Nation* (2008) and *The Standard on Sunday* (2008)). It would seem that campaigns and positioning for the presidency in the 2012 elections have already started, with erstwhile opponents discussing alliances and vice versa. One could argue that this is an indicator of a healed political regime which could serve as an example for the masses. However, that would have the effect of reducing the post-election violence to an election dispute, and of addressing only the symptoms of the violence and ignoring the fundamental causes. In an environment where a number of the persons killed in the violence has not been identified, where many displaced persons have been unable to go back to their homes due to tensions with their neighbours and where every action is still seen through the divide created by the election violence, the political elite show a reluctance to engage with the root causes of the violence.

The sum total paints a picture of a Kenya that is reluctant to face up to the divisions that undermine the Kenyan state, of which the post-election violence is but a symptom, and of a preference for amnesia. Unfortunately this is a situation that may lead to a future implosion from which recovery may be less easy to attain.

Notes

- 1 The exact numbers of those killed in the violence are in dispute. The figures range from 621 according to the police to 1 020 according to medical officials. Human rights organisations allege that an even greater number died. See Omaga (2008).
- 2 The Association of Kenya Insurers put the loss of insured property at over US \$1 billion.
- 3 The Independent Review Commission chaired by South African Justice Johann Kriegler (the Kriegler Commission) is looking into the electoral process and the Commission of Inquiry into the Post-Election Violence chaired by Justice Waki (the Waki Commission) is investigating the post-election violence.
- 4 The Waki Commission has three members, one of which is a Kenyan and the Kriegler Commission seven members, of which four are Kenyans.
- 5 Demonstrations were held in Mt Elgon by local residents in support of the military forces after the release of the Human Rights Watch report accusing them of torture and inhumane treatment of suspects and locals.
- 6 The bill will create a national ethnic and race relations commission with powers to penalise incitement to ethnic and racial hatred.
- 7 The Madoka Commission investigated the cause of the strike by prison wardens.
- 8 The only exception is former president Daniel Moi, who has blamed the violence on the existence of multiparty politics which he says have polarised Kenya along ethnic lines.
- 9 The committee, which had eight members, four from the Party of National Unity and four from the Orange Democratic Movement, was most important body that negotiated the end of the post-election violence and resultant grand coalition government. All members of the committee were appointed to the Cabinet.
- 10 The committee's work was divided into four sessions: the first dealt with an end to the post-election violence, the second with the creation of a political agreement that led to the National Accord and Reconciliation Act, 2008 and led to the creation of the post of prime minister, the third looked into

the post-election violence and the 2007 elections, resulting in the appointment of the Kriegler and Waki commissions, and the last investigated the historical and socio-economic injustices that may have contributed to the crisis.

11 The Kriegler Commission is not required to determine who won the 2007 elections.

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Women hold up half the sky:¹ Peace and security lessons from Liberia

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Introduction

The Liberian response to challenges of peace and security is characterised by strong women in leading positions. The current government is led by President Ellen Johnson-Sirleaf, the first democratically elected woman to hold the presidential office in Liberia and on the continent of Africa. In power since 2006, President Johnson-Sirleaf has come a long way in honouring the promises she made in her inaugural address: ‘My Administration shall thus endeavour to give Liberian women prominence in all the affairs of our country. My Administration shall empower Liberian women in all areas of our national life’ (AllAfrica

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2008a). Women now hold senior positions in her Cabinet as ministers of foreign affairs, commerce and industry, gender and development, and youth and sports. Several of the Liberian ambassadors abroad are women, including those assigned to Belgium, China, Germany and the Nordic countries, Côte d'Ivoire and South Africa. Domestically, Monrovia has a female mayor, a female inspector-general of the national police force and a female commissioner on the Truth and Reconciliation Commission (King-Akerele 2008).

Few countries in the world can boast of such a high level of female presence in their government and civil society. Fewer still can pride themselves on having a democratically elected female state leader. Women's leadership is not however a new phenomenon in Liberian society. The road to peace has been paved with the efforts of Liberian women at all levels to bring about an end to the conflict that has devastated their country. Their peacemaking initiatives, actions and advocacy were instrumental to the Accra Peace Agreement signed in 2003.² It was also the mobilisation of women voters in the presidential election that ensured the victory for Ellen Johnson-Sirleaf. Through a thoroughly pragmatic approach to political participation, fuelled by sheer determination, women rallied other women to register and cast their votes.

The Liberian accomplishments in the field of women's empowerment and leadership are unique and provide lessons of immense value to post-conflict countries worldwide and to the international community as a whole. This short essay will illustrate this value through a few examples that could greatly contribute to our understanding of international security and peace-building activities.

Implementing United Nations Security Council Resolution (UNSCR) 1325

In 2000 the UN Security Council adopted Resolution 1325 on women, peace and security. The resolution calls for the recognition of the impact of armed conflict on women and girls and the different roles they play and it further urges the international community to ensure women's participation at all levels of decision making and peace processes. While the resolution is not binding, the Security Council has recommended that all member states take the necessary steps to implement it at national level. One effective tool is to develop national action plans for its implementation through national policies and programmes.

Liberia is considered by many to be a very interesting case study for the operationalisation of UNSCR 1325. With so many women involved in the peace-building initiatives, together with women who held significant positions throughout the reconstruction process, it is not surprising that women in countries like Sudan, Nepal, the Democratic Republic of Congo and Afghanistan look to Liberia for inspiration and advice.³ While many aspects of the resolution are already incorporated in the national policies and laws

of Liberia, the government is now in the process of developing a national action plan (NAP) for the implementation of UNSCR 1325. Once completed, Liberia could be the first country in Africa, and the first post-conflict country in the world, to have made this commitment to the resolution.

The lessons learned from the Liberian process of drafting an NAP will be of interest to many countries that are experiencing conflict or are in a reconstruction phase after a conflict and/or civil war. It will also be a valuable input to the work done by the UN and other stakeholders in the international community as all current NAPs⁴ are drafted in countries that do not have a recent history of conflict within their borders. While these NAPs are of great importance for peacekeeping activities, the reconstruction process itself is guided from within the country and therefore stands to benefit immensely from the government's commitment to UNSCR 1325.

The building of sustainable peace

The rule of President Johnson-Sirleaf has not gone unnoticed in the international community. Based on the extent of support, ranging from a very successful debt relief campaign to special partnerships⁵ it is clear that many countries have a strong belief in her ability to build sustainable peace in Liberia. Her policies focus on empowerment of her citizens through the reform of the judicial system, free primary education for children and rebuilding Liberia's shattered infrastructure. With a stated commitment to democracy, together with a zero tolerance for corruption, it comes as no surprise that Liberia is becoming the favourite of many a donor.

Liberal values aside, Liberia is also following a path that is in line with current influential thoughts on pragmatic peace building. According to Paul Collier's latest book, *The bottom billion* (Collier 2007), a post-conflict country should receive significant development assistance during the first years of post-conflict reconstruction. It should not invest in its military sector, but rather rely on military guarantees from external actors so that it can instead focus on rebuilding its economic and social sectors to lift itself and its citizens out of debilitating poverty. With Iraq casting shadows on the agenda of military interventions, it is a rather controversial statement to insist on the military presence of external actors.

Liberia is still host to a significant number of UN peacekeeping soldiers. The United Nations Mission in Liberia (UNMIL) has some 15 000 soldiers based in Liberia, five years after the peace agreement has been signed. Although reductions have been announced, it is foreseen that almost 10 000 soldiers will still be based in Liberia in 2010 (AllAfrica 2008b). The Liberian experience of seven years with significant external military assistance will provide valuable insights into the debate on successful policies of peace building and post-conflict reconstruction.

International Colloquium

The International Colloquium on Women's Empowerment, Leadership Development, International Peace and Security was initiated to celebrate President Johnson-Sirleaf's three years in office and to acknowledge the accomplishments of Liberian women leaders. Coinciding with International Women's Day, the Colloquium will be convened in Monrovia in March 2009 by President Ellen Johnson-Sirleaf and President Tarja Halonen of Finland.

The Colloquium has the following goals⁶

- To empower women to be more effective leaders by linking with them with their peers from around the world and sharing best practices
- To support the implementation of UNSCR 1325
- To help achieve the Millennium Development Goal 3 on Gender Equality and Empowerment of Women
- To demonstrate the clear gender dimensions of climate change, and create mechanisms for women to influence and shape climate change adaptation financing, strategies and programmes

The Colloquium promises to be an exceptional event with attendance of women leaders from all over the world. The overall framework of the event is the UNSCR 1325 and its emphasis on women's leadership and empowerment at all levels of society. It further aims to capitalise on the experiences of Liberian women in the peacemaking process, through Track II diplomacy and advocacy efforts. This information is to be synthesised into workshops and other learning tools for empowerment of women in conflict and post-conflict countries. An implementation mechanism, the Angie Brooks International Center, will be created to ensure sustainability and progressive follow-up after the event.

The interest and support for the Colloquium has been remarkable and in March 2009, Liberia will be firmly established as a leader of peace building, spearheading activities and knowledge sharing on women, peace and security.

Liberia as a case study for human security

The human security perspective, as conceptualised in the 1994 UNDP Human Development Report, differs from the traditional security perspective in numerous ways. The level of analysis shifts from the state to the individual, making it a people-centred security approach. While universally relevant, this security approach must

be context specific to accurately reflect people's everyday security concerns. This necessitates a participatory approach to the formulation of a security agenda. The security threats are not only of a military nature, but instead encompass disease, poverty and environmental destruction with no hierarchical order of high v low politics. As a consequence, the means of ensuring security range from protection to empowerment and capacity building.⁷

The Liberian Ministry of Gender and Development, in collaboration with the UN system and other key partners, called for a five-day National Women's Conference in Monrovia in May 2008. The aim was to create a National Action Plan to advance women's rights in Liberian peace building, recovery and development. This action plan is the result of the voices of 350 women who came from across the country to attend the conference. The identified priorities ranged from the national security sector, to economic empowerment, education and capacity building. The plan, which covers the period from June 2008 until June 2011, will also feed into the International Colloquium and its projects. It is an ambitious plan with a very concrete approach: clear objectives, monitoring indicators and committed partners who will help to see this come to fruition.

This is an example of a truly participatory approach to formulating a security agenda. Lessons abound for countries worldwide!

Conclusion

Liberia has made remarkable progress in the period after the Accra Peace Agreement, and especially since 2006 under the rule of President Ellen Johnson-Sirleaf. The peace is still in its infancy, however, and the country is still fragile. Much needs to be done to ensure stability and sustainable peace, many efforts have to be taken by the Liberian government and its citizens, and much support must be given by the international community. The road so far is a remarkable one; full of lessons learned that needs to be shared with other African nations as well as internationally.

To quote a colleague and friend of mine, Karen Barnes from International Alert: 'women want a piece of the peace'. In Liberia they have it. I will wait with great anticipation to see what they will continue to do with it and what remarkable progress they will achieve.

Notes

1 Chinese proverb

2 For examples of their struggle, visit www.marwopnet.org, read African Women and Peace Support Group (2004) and view the documentary feature by Reticker and Disney (2008) (winner as best documentary in 2008 at the Tribeca film festival).

- 3 The author had the privilege of being present at an international conference on the implementation of UNSCR 1325, where women's organisations from countries affected by conflict shared best practice. The Liberian Minister of Gender and Development, Honorable Vabah Gayflor, was a keynote speaker who provided much guidance and inspiration to all participants.
- 4 Countries that have developed a national action plan for the implementation of UNSC 1325 include Denmark, Norway, Sweden, Spain, the Netherlands, Switzerland, Iceland, Austria, the United Kingdom and most recently Finland.
- 5 Denmark has committed US \$22 million to Liberia as a part of their MDG 3 campaign. See http://www.emansion.gov.lr/press.php?news_id=693.
- 6 Taken from a working document established by the Agenda Committee for the International Colloquium.
- 7 For further elaboration on this, see Svensson (2007).

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Spies for hire and information peddlers: A new threat to security in Africa?

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In July 2007, the Ministry of Intelligence Services released a statement on behalf of the Cabinet-level Justice, Crime Prevention and Security (JCPS) Cluster of the South African government, addressing the investigation by intelligence and law enforcement agencies into the document entitled *Special Browse 'Mole' consolidated report*. The Browse Mole scandal had broken in the media several days before this statement was released and concerned a report that had been leaked to a journalist, some leaders of the African National Congress (ANC) and the Congress of South African Trade Unions. The Browse Mole Report allegedly outlined a conspiracy led by Jacob Zuma to oust President Thabo Mbeki. The Report also claimed that Zuma had been seeking funding and support from other African leaders and had received support for his coup plot from Angolan President Jose dos Santos and Libyan leader Muammar Gaddafi.

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The most interesting thing that emerged from the Browse Mole scandal was not in the content of the allegations but rather the statement released by the state on the origins of the report. According to the official statement, the sources of the information used to compile the report were ‘predominantly former members of the present intelligence agencies whose initial background was with the secret services of the apartheid government ... others are people who had relations or associations with these entities’ (JCPS Cluster 2007:2). It further states that the sources of the report are part of wider networks of information peddlers who operate within South Africa as well as in other countries in the region, offering services to private businesses, government departments and foreign intelligence services.

The state intelligence services claim that these private intelligence networks have purposefully targeted the ANC and state structures within southern Africa. According to the official statement the objectives of these ‘information peddlers’ are to

- Weaken and paralyse government by waging a co-ordinated and sustained smear campaign against targeted officials of government
- Erode the integrity and legitimacy of government by suggesting or alleging uncorroborated acts of corruption and involvement in all manner of criminality and other serious, but personal, misdemeanours by a wide range of officials
- Destabilise the ruling party with the intention of weakening the democratic state in its resolve to better the lives of all the people of South Africa, as well as to work for a better Africa and a better world

The government report then details additional objectives behind the ‘machinations of these peddlers’ as

- Destabilising countries politically
- Undermining diplomatic relations with the government of South Africa and thereby dividing the region
- Undermining the integrity and legitimacy of some governments and leaders by alleging collusion with organised crime syndicates and the like
- Making money in ‘a manner most vile’

Although not much has been researched or written about private intelligence actors in Africa, as with much of the phenomenon of the privatisation of security services, the United States seems to be the global leader in outsourcing state intelligence

functions. It is estimated that up to 70 per cent of US intelligence budgets are spent on contractors and that up to 51 per cent of employees of the Defence Intelligence Agency (DIA) are private contractors. Astoundingly, between 50 and 60 per cent of the National Clandestine Service of the Central Intelligence Agency (CIA) are private sector employees. These contractors include Boeing, Booz Allen Hamilton, Lockheed Martin, Northrop Grumman, Raytheon as well as Total Intelligence Solutions that forms part of the Prince Group, the holding company of the now infamous Blackwater Worldwide private military company.

Interestingly, the chairperson of Total Intelligence Solutions is a former head of the counter-terrorism division of the CIA, Cofer Black. Black is known for his prominent role in some of the CIA's more controversial programmes, including the rendition and interrogation of Al-Qaeda suspects and the detention of some of them in secret prisons overseas (Hedgpeth 2007). According to R J Hillhouse, who writes a national security blog called 'The spy who billed me', 'they have the skills and background to do anything anybody wants, there is no oversight; they are an independent company offering freelance espionage services; they are rent-a-spies' (quoted in Hedgpeth 2007).

It seems that the private intelligence industry covers similar ground to the state intelligence structures with regard to the collection and analysis of information and operates along similar lines with regard to supplying certain clients with such information. The difference between such operatives and state agencies is seemingly that the motive of the former is profit. Accordingly, in 2003 Lindiwe Sisulu, then South African minister for intelligence services, noted in her annual budget vote speech that 'intelligence is a secret state activity to understand any threat to national security and thereafter to advise policy makers on steps to counteract such threat. It is an activity performed by officers of the state for state purposes. Secret collection, the use of information that is not publicly available, are the constitutive elements that would distinguish this from other intellectual activity. Having given this definition of intelligence, therefore, it should be clear that there is no scope here for private intelligence activity for purposes of gain or profit' (2003).

Notwithstanding the narrow definition of intelligence and the over-emphasis on secrecy, Sisulu highlights what has been the general attitude of the South African national intelligence community to the private industry: it is not wanted and should not be allowed. The question that arises is why it is regarded as a threat?

In line with the state intelligence services, one can identify two broad categories of private intelligence actors. The first category comprises the domestic operators. These include the more mundane private investigators who can be hired to spy on employees, tap telephone lines, conduct surveillance and carry out counter-espionage activities. These services are quite easy to come by; just one quick Google search will give you several companies from which to choose.

The concern about the actions of such private intelligence actors is that there is the potential for infringement of civil liberties and the invasion of privacy without sufficient oversight. As Sisulu said (2003), 'our concerns refer to the protection of the Constitutional Rights to privacy by South African citizens. When state organs infringe on these rights, it is not for profit and that activity is very strictly governed by a number of laws'. This is correct in theory, of course, as the legislated process requires a warrant from a judge for the interception of communications and the parliamentary Joint Standing Committee on Intelligence (JSCI) reviews reports from the judge assigned to administer such warrants. In terms of section 3(a)(iii) of the Intelligence Oversight Act, 1994 (Act 40 of 1994), the JSCI receives 'a report regarding the functions performed by him or her in terms of that Act including statistics regarding such functions, together with any comments or recommendations which such judge may deem appropriate'.

The concern raised by Sisulu in 2003 was that such rules and oversight procedures do not apply to private contractors and the South African intelligence services have discovered that such companies 'will pay to access data on bank accounts, information on private lives and even health records of individuals, among others'. As Joe Nhlanhla said when he was deputy minister for intelligence services in 1996, we cannot have a situation where elaborate legislation is formulated to protect society from the intrusion of state intelligence agencies while private actors are free to do as they please. 'This is very unacceptable and presents a serious risk to our democracy' (1996).

The activities of the second category of private intelligence actors relate more to the collection, evaluation and analysis of information pertaining to political and economic conditions and fall within the broad risk management and political assessment activities. This seems to be the area in which the Browse Mole document originated. Within this broad field of activity, there are two key concerns regarding private activities. The first is access to state regulated information and the second relates to the provision of false information to the state or information peddling, as it was called during the Browse Mole incident.

As far as access to state information is concerned, the then director-general of the National Intelligence Agency (NIA), Vusi Mavimbela, noted in 2002 during a parliamentary question session that private security companies in South Africa were using national intelligence knowledge against the government. One of the ways in which this problem was addressed, was through the promulgation of the Intelligence Services Act, 2002 (Act 56 of 2002) which states in section 28(1) that a former member may not, for a period of three years after leaving the intelligence services, render a security service unless he or she has obtained a clearance certificate from the director-general concerned. After leaving the intelligence services in 2004, Mavimbela took up the position of executive director with the Mvelaphanda Group, Tokyo Sexwale's corporate umbrella company. According to the website, Mavimbela's key responsibilities are business strategy and

African expansion. The blurred lines between business and politics in Africa mean that the specific skills set gained by the ex-spy boss during his time in public office, provides him with contacts and accessibility someone from the corporate sector might not have.

The example of the move of Mavimbela from state intelligence services to the corporate sector is indicative of some of the problems in defining and acting against private intelligence operators in South Africa. In the business risk assessment and analysis work done by many of the private contractors, either as part of corporations such as Mvelaphanda, De Beers, MTN, Shoprite Checkers and others or as part of private intelligence companies specialising in risk assessment, both parties benefit from an intelligence background of the providers. This relates partly to the skills sets that such operatives have acquired in terms of the collection and analysis of information but more importantly on the African continent, to the fact that ex-agents often have the right contacts to get the job done. As Fred Rustman of CTC International Group, a US based private intelligence company, explained, getting information from rival firms is no different than getting it from enemy governments and they use the same techniques as state agencies (Chubbuck 2008).

The close links between state and economic power and the security forces in many African states mean that the ability to provide analyses and 'open doors' for investors is often based on contacts developed during state service. There can be no denying that the ability to do business in some states, especially where there are high levels of corruption, can only benefit from having the ear of the security services.

It seems that there is a wide range of services and products which the private intelligence industry supplies to big business, private individuals and government departments. One of the ways in which the potential threat posed by private intelligence actors can be determined, is by gaining a better understanding of their clients and the products available to them. Not all the services of the private intelligence sector present a threat to the state and its citizens but some of them do and it is those activities that need to be identified, and then curtailed and regulated.

An analysis reveals three core sectors of activity:

- **Corporate clients**, where typical services on offer include
 - Strategic risk assessments (geopolitical, security and economic assessments)
 - Due diligence and compliance
 - Provision of physical security at sensitive operational sites
 - Information security and counter-espionage
 - Competitive and business intelligence
 - Lobbying and negotiation
 - Staff screening and security vetting

- **Domestic client services**, where typical services on offer include
 - Surveillance
 - General investigation
 - Interception of communications

- **Government services**, where typical services on offer include
 - Strategic risk assessments
 - Interception of communications or communications related information, such as data mining
 - Covert and clandestine operations
 - Technical expertise, especially in the information technology sector and related to information and communications security. This includes the development of new technologies and tools
 - Staff screening and training

The above brief outline of the spheres of activity in which the private intelligence sector operate gives a clear indication that non-state actors are fulfilling the traditional roles of state intelligence agents. But it also indicates that the current global reality is that everybody needs intelligence and the line between what is regulated state information and what is public information is becoming exceedingly blurred in a digital age in which open source intelligence dominates even the state intelligence apparatus. The focus is shifting to the manner in which information is processed and used as opposed to a preoccupation with the covert collection of information. In an article in the *Washington Post*, Cofer Black commented that the most surprising thing about being in the private sector is that much of the information that was considered top secret in state service is publicly available (Hedgpeth 2007).

Two major threats to security can be highlighted as possible consequences of private intelligence activities. The first is infringements on privacy through the interception of communications and the use of intrusive methods of investigation. Domestic spying by state agencies is generally regulated by law and requires approval from the judicial authority. It is important that private investigators and other domestic private intelligence operators are also governed by some form of legislation and that some kind of regulation is in place.

The second potential threat is that it could undermine the national security interests of the state. The use of or over-reliance on private contractors for intelligence could open the door to first the dissemination of false information and second compromised security of state assets such as state information, infrastructure and projects.

Private intelligence actors are a relatively new feature in the security environment in Africa. On a continent where democracy is being challenged on almost a daily basis and

state intelligence services need to face up to being held accountable to the people of the state, the private intelligence sector has the potential to threaten state and individual security. That is not to say that all private intelligence actors are illegitimate. In fact, some of the activities of the private intelligence sector could be utilised by African states to enhance the capacity of the state intelligence services. Private agencies could also serve as a source of intelligence that could augment that of the national intelligence apparatus.

In as much as mercenaries are the rogue and potentially dangerous elements within the private security sector, so too are information peddlers and certain private intelligence actors, and as such they are potentially dangerous. These elements appear to be the exception rather than the rule, however, but there is a need to consider regulation of the private intelligence sector to prevent infringements on civil liberties and to ensure that state information is secure. A starting point for this would be to look more closely at the nature of the threat, as briefly indicated above, and to legislate accordingly.

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Vis pacem ...?

Richard Cornwell*

In academic circles no less than in everyday life there exists a natural tendency to value the new and fashionable, often for no better reason than that it is new and fashionable. This is only a tendency, of course; classic design and established authority also retain an appeal, though sometimes on dubious grounds. But what passes for novelty and new thinking is often little more than a reworking or repackaging of what has gone before. This is almost inevitable, especially if we take the trouble to read what our predecessors have had to say on our chosen subject. As Alfred North Whitehead, the philosopher and mathematician, wrote in his masterful *Process and reality*: ‘The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.’

In the study of war and peace there is much we have still to learn from authors who themselves lived in troubled times, and often sought to advise against recourse to violence

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as a means of addressing political and other problems. The reading of such works warns that the intended ends sought by the originators of conflict are seldom attained, and that the duration of a war is almost always much longer than was envisioned at the outset. The costs of conflict are also seldom borne by its authors, and those worst affected rarely have any influence upon the timing and nature of its conclusion.

This is not to say that all conflict is generic: obviously those of us engaged in the study of contemporary events need to be aware of the specific and the particular. We also need to consult the most recent sources and keep abreast of the latest thinking, but this does not mean that we should neglect to read older texts, which, though they may provide us with little direct insight into the matter of our study, can stimulate broader and more exciting insights. Of course, in an earlier and less prolific literary environment, many of these authors had to write well if they were to be published at all, and that alone makes them worth reading.

The other day I chanced upon a work by that now unfashionable historian, C V Wedgwood, called *The thirty years war*¹. It was written in 1938, and deals in the space of some 550 pages with the intermittent conflict that devastated much of Europe between 1618 and 1648 and, by some accounts, led to the foundation of the modern state system with the Treaty of Westphalia. It is a story with an intrinsic interest, written in a limpid style, though many may find it a little demanding: how many historians today can expect the educated reader to be able to read short passages of French and Latin without a translation?

But what struck me as I read this complex and well-wrought narrative was not just the importance that Wedgwood accorded to personality and individual decisions, a tendency deplored by those with a preference for structural explanations, but some of the more general observations she made about the latter stages of the wars, by which time the conflict had taken on a new dynamic. While the ageing statesmen of Europe continued their intrigues, usually heedless of the disastrous consequences for the common people

... all around them had arisen a new generation of soldiers and statesmen. War-bred, they carried the mark of their training in a caution, cynicism and contempt for spiritual ideals foreign to their fathers.

When lust and private interest gain the upper hand of disorganized society, the most religious of crusades must lose its sacred character ...

The point Wedgwood makes here has to do with the gradual replacement of religiously inspired values by those of proto-nationalism. But it also speaks to the changes wrought upon a society by a conflict in which violence had become a norm, and in which only the relatively old and fortunate survivors could recall a time of peace. This remains

an important observation for us today, when we try to anticipate the difficulties to be expected in the resolution of conflicts that have gone on for decades. This has to be factored into our efforts at peacemaking, for it goes a good way to explaining the relative failure of attempts at externally designed technical solutions with too narrow a dependence upon the tools of disarmament, demobilisation and reintegration.

Protracted war alters the social psyche of those afflicted and involved, at the same time as it alters profoundly the local economic and political landscape and the changing rules that govern it. It is not easy, perhaps not even possible, to re-mould war-torn societies into liberal states in the short to medium term, though this is what the United Nations and other international agencies appear to desire.

Another problem that came to the fore as the 30 years war drew to a close should also ring a familiar note: the Congress of Münster, which opened at the end of 1644

... had been sitting for nearly a year when the delegates found that they were still in doubt as to the *subjecta belligerantia*. A debate was therefore held with the purpose of forming a clear idea of what had been fought for, what was being fought for, and what subjects the peace conference should handle.

So much for root causes. Causes change during the course of conflict, and differ from participant to participant, so that for some the involvement in war may even become a rational choice, either economically or for reasons of security.

Wedgwood also makes the wry comment that although the surrounding areas were suffering the most appalling depredations, the venues of the peace conferences were never short of supplies and there was no sense of urgency:

They took six months from the opening of the congress to decide how the delegates were to sit and who were to go into the rooms first Another mistake was the continuation of hostilities during the congress; a general cessation of arms would have brought the negotiations more quickly to an end, but while the war continued the diplomats ... allowed their decisions to be influenced by its movements and were always prepared to postpone matters a little longer in the hope of some new advantage in the field.

Again, this observation is suggestive of some of the difficulties in quickly bringing conflicts to a negotiated conclusion if those directly involved in the peace talks are themselves rarely subject to many of the discomforts and dangers of war.

The concluding paragraph of Wedgwood's early masterpiece (she was 28 when it was first published) is especially relevant to us today, arguing not only that there was no need

to resort to arms to solve the problems at hand, but that it might so easily have been avoided:

The war solved no problems. Its effects, both immediate and indirect, were either negative or disastrous. Morally subversive, economically destructive, socially degrading, confused in its causes, devious in its course, futile in its result, it is the outstanding example in European history of meaningless conflict. The overwhelming majority in Europe ... wanted no war; powerless and voiceless, there was no need even to persuade them that they did. The decision was made without thought of them. Yet of those who, one by one, let themselves be drawn into the conflict, few were irresponsible and nearly all were genuinely anxious for an ultimate and better peace. Almost all ... were actuated rather by fear than by lust of conquest or passion of faith. They wanted peace and they fought for thirty years to be sure of it. They did not learn then, and have not since, that war breeds only war.

Good intentions, then, are not enough. And short-term solutions involve high and unforeseeable costs, not always to be borne by those making the decisions.

How many young scholars would dare so bold and pithy a conclusion to a book today; and how many would be capable of such elegance and style?

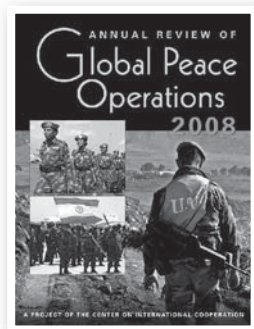
Note

1 Wedgwood, C V 1964. *The thirty years war*. 2nd ed. London: Jonathan Cape.

Annual review of global peace operations 2008

**Genocide:
A comprehensive introduction**

BOOK REVIEWS



Annual review of global peace operations 2008*

The Center on International Cooperation has published its *Annual review of global peace operations*, expertly edited by Alhaji Sarjoh Bah and his team and excellently produced by Lynne Rienner. Here the researcher on peacekeeping will find as much data and as many statistics as any comparative study should need, attractively presented and easy of access. In addition to the plethora of tables, maps and graphs, there are reviews of individual missions, and mission notes are also provided by way of background, covering UN and other operations.

Two very useful essays precede the main text. The first, entitled 'In pursuit of sustainable peace: the seven deadly sins of mediation', by Lakhdar Brahimi and Salman Ahmed, provides a list of mistakes to avoid when attempting to mediate conflicts, in Africa and

* Boulder and London: Lynne Rienner Publishers, 2008 (paperback) ISBN 978-1-58826-564-7.

elsewhere. Usefully, the authors look at the business of mediation and peacebuilding from the perspective of a UNSG Special Representative, the person charged most often with running an entire mission and with the principal responsibility for addressing the political issues through dialogue and an attempt to achieve compromise. This is an important perspective because it involves dovetailing all the other efforts of the peacebuilding team, whether humanitarian or military, and sets the parameters within which success or failure of those efforts must be judged. It is important to remember what the politicians and the public so often overlook, that the success of peacebuilding is measured in terms of the overall impact in terms of the outcomes sought.

The seven deadly sins identified are: ignorance, arrogance, partiality, impotence, haste, inflexibility and false promises.

- Ignorance addresses the need for informed and real-time intelligence projected against an informed background of the particularities of a conflict situation and the society in which it takes place
- Arrogance refers to the need to acknowledge the limits of what we know and the importance of acquiring insights from a variety of different perspectives, and from different levels of the social strata. What does the conflict look like from the ground up? This is also a warning to resist the temptation to see resemblances with the familiar and with previous experiences that may prove very superficial and poor guides to action
- Partiality is a sin that omits the need to establish a basis of trust and impartiality before hard messages can be passed on. One's identity as an impartial and honest broker cannot be taken for granted, but has to be worked on
- Impotence refers to the mediator recognising the limits to his ability to coerce or convince parties to take actions they see as inimical to their interests. He has to know where these limits might be in terms of international support, whether this be diplomatic leverage or in terms of the concerns of troop contributing countries.
- Haste is a warning that there no quick fixes. Consultation is a constant and reiterative process. Floating a political solution too early may kill off a very promising idea. It is important to win and gauge support for it before that stage is reached. It is equally mistaken to rush into implementation before there has been a chance for acceptance of an agreement to be made more general
- Inflexibility reminds us that it is important to remember that even as negotiations have been going on the situation on the ground may not have been static. The balance of forces may be changing, alliances may have been formed or broken, new leaders may have replaced the older ones, the internal constituency battles may have a

determining influence. External developments may have altered local perceptions of relative advantage – the coming US elections come to mind. The mediator must have the flexibility to adjust course accordingly

- False promises brings us to the realisation that progress towards a peace agreement will probably be slow, that there will be setbacks, that political problems require political solutions that involve difficult compromises and concessions, and that the rebuilding of a war-torn state is the work of many years, even decades. It is essential to get this message across if false expectations are to be countered, with the risk that conflict may resume in the disappointment that follows. There are limits to what external peacebuilders can achieve. They must not represent themselves or allow themselves to be represented as national saviours

The authors also make the very important point that mediation is generally needed for a long time *after* the conclusion of a peace agreement and the deployment of a peacekeeping mission. Post-agreement activities such as restoring infrastructure and services, DDR, refugee returns, elections, constitutional reform and economic reconstruction may involve new threats to vested interests and require that the parties to the peace remain engaged and even that additional or subsidiary agreements be negotiated.

There have been many instances in which a peace agreement has been heralded, enemies have embraced for the cameras and the beginning of a new dawn announced, only for the peace agreement to unravel, sometimes because the signatories were acting in bad faith, but also because of the dynamic nature of the political process and changes in the balance of forces. We can think here of the numerous agreements in the Côte d'Ivoire peace process, of Somalia's 14 failed attempts since 1991 to reconstitute a national government, of the numerous agreements concluded on the Congolese civil war, each intended to mark the conclusion of a conflict that continues to this day in certain areas even after the acceptance of a new constitution and the holding of elections (a magnificent achievement in itself which owed much to the activities of MONUC).

The point the authors make here is that peace agreements are not simply about high politics and statecraft, but about low-key and continued engagement with those who seek revisions of the contractual side of an agreement.

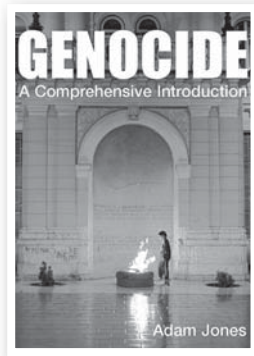
The second of the introductory essays, by Alhaji Sarjoh Bah and Bruce D Jones, deals with hybrid arrangements in complex peace operations, which, as the authors correctly point out, have become the norm not only in UN missions, but those mounted by other regional bodies. Darfur is often cited as a novelty in this respect, with its merging of AU and UN operations, but is really merely a point on a continuum, and a particularly tricky one politically speaking. Yet of the 50 or so operations covered in this report on 2007, some 40 involved some form of institutional partnership.

As the authors note, so far peacekeeping partnerships have been driven by operational demands and there has been little attempt to develop best practice. This essay traces the benefits, problems and lessons learned as peacekeeping partnerships move towards a division of labour based on comparative advantage. The authors note that even on current trends, the development of these partnerships will be a work of many years of learning from experience, whether they involve sequential, parallel or integrated operations. Though the authors are at pains to point out that every operation is essentially *sui generis*, which makes the formulation of best practice dangerous, however tempting, there are four categories into which major problems may be conveniently divided: politics, personnel, planning and funding.

As in the first essay, the authors lay out some very clear messages that should be of use as a checklist for practitioners.

It is unavoidable that, though comprehensive in their coverage, the brief case studies and the many graphics that make up the bulk of the 370-odd pages tend to deal with the official, 'authorised', version of peacekeeping operations. The real messiness of peacekeeping and the compromises and inadequacies cannot accurately be conveyed in numbers. But few scholars using this excellent publication would be misled into believing otherwise.

Richard Cornwell



Genocide: A comprehensive introduction*

Adam Jones

Over the past decade genocide studies have, rightly so, become an independent field of study, mainly as a result of the tragic events that took place in Rwanda in 1994. Apart from the objective study of the phenomenon of genocide, much emphasis is placed on efforts to prevent it. This welcome development has resulted in intense academic research, as well as the institutionalisation of the crime of genocide in the Rome Statute of the International Criminal Court and the appointment of a special advisor for the prevention of genocide by the United Nations Secretary-General. This work forms part of the burgeoning literature on the subject.

The author, Adam Jones, is a professor in political science at the University of British Columbia, Okanagan, and former research fellow at the Genocide Studies Programme at Yale University and answers to the description of both scholar and activist. The book

* London & New York: Routledge, 2006. ISBN 0-415-35384-X, 430 pages, paperback.

is aimed at senior undergraduate and graduate students, but also at non-specialists and activists interested in the subject.

The author's point of departure is that during all stages of human existence and in nearly all parts of the world genocide has been experienced at some stage, while most human groups were both victims of and have proven themselves capable of inflicting genocide. As recent events have proven, the risk of genocide is still current. These factors highlight the need for an introductory text to provide an overview over the discourses about and writings on the subject, to provide a comparative analysis of historic genocides and to explore genocide from a multi-disciplinary perspective. The objective of this book is to fill this gap. Every chapter contains ample reference to the applicable core literature on the subject, while the book is also accompanied by a website, www.genocide-text.net.

The book is organised into four parts. In the first, genocide is put into historic context. After dealing with its origins in the earliest times, the definition of genocide as a legal concept, resulting from the work of an early 'norm entrepreneur', namely the Polish lawyer Raphael Lemkin, is documented. This is followed by a legal analysis of the founding international instrument, the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. A controversial question is raised of whether forms of structural and institutional violence giving rise to famine and malnutrition may be defined as genocide – a relevant question in present-day southern Africa.

The relationship between the phenomena of imperialism/colonialism, war and social upheaval and genocide is then explored. The author concludes that, historically, genocide frequently accompanies imperialism and colonial expansion, and that the circumstances under which war is fought often provide a cover for the perpetration of genocide. Furthermore, social revolutions are often accompanied by the conditions, ideologies and mobilisation that may result in genocide.

The second part contains a comparative analysis of a number of case studies of genocide, starting off with a chapter on genocides of indigenous peoples. Colonialist 'extinction' discourses are discussed, with the European actions against indigenous peoples in the Americas, again probably controversially, being described as the most extensive and destructive genocides of all times. The author's controversial argument illustrates the complexity and controversy surrounding the definition of genocide, and specifically the requirement of intent: if death resulting from forced labour and disease does not meet the requirement of specific intent, it raises the possibility that lesser degrees of intent may result in the concept of second and third degree genocide.

A number of genocides are then each accorded a chapter for historic overview and analysis. These include the Turkish genocide of Armenians, the terror unleashed by Stalin in the Soviet Union against ethnic Russians as well as minorities and political and

socio-economic groups, the genocide of Jews and other groups by the Nazis, the actions by the Khmer Rouge in Cambodia and the more recent events in Bosnia, Kosovo and Rwanda. Interspersed with the major case studies are 'capsule' studies of other cases of genocide, such as the Chechens, the Kurds of Iraq, East Timor, Bangladesh, the Congo and Darfur. The chapters provide excellent historical overviews and analyses of the ideological, sociological and philosophical factors underlying these events.

In the third part the genocide phenomenon is examined from a variety of social science perspectives. The first chapter here deals with psychological perspectives, trying to 'get inside the minds of those who commit (genocide) and those who seek to prevent or limit it' (p 261). The psychological elements of fear, narcissism, greed and humiliation in fuelling and explaining genocide are considered, and the author then attempts to explain the motivations of 'rescuers' such as the Swedish diplomat Raoul Wallenberg, who saved thousands from Nazi persecution, and Paul Rusesabagina, whose rescue of refugees in Rwanda was a subject of the film *Hotel Rwanda*.

The sociology and anthropology of genocide are the subjects of the next chapter. The relationships between modernity and genocide as well as ethnicity and genocide are explored, as is the role of individuals and organisations in provoking and channelling violence. The author also reflects upon the potential vulnerability of so-called 'middleman minorities', who are defined as distinguishable minorities enjoying economic advantages over the majority population.

The part dealing with anthropological perspectives provides a good overview of the contribution this field of study makes to genocide studies, by explaining the effect of racial theories, the influence that cultural practices and symbolism may have, and how forensic anthropology can assist in prosecuting genocidaires.

The contributions of political science and international relations to the study of genocide, both fields of study dealing with power and its domestic and international distribution, are explored in the next chapter. These fields contribute by means of empirical investigations of genocide (usually done with a view to prevention), and by analysing the changing nature of war, the link between new wars and genocide, the relationship between the level of domestic development of a society and its potential for genocide, and the creation of norms and prohibition regimes.

In these chapters the author gives a comprehensive overview of current research relating to genocide and, as was promised at the outset, also of the literature relating to genocide that is now being published on this field.

The last chapter of part three deals with the gendering of genocide. A distinction is drawn between root-and-branch genocides and genocides with a distinct gender character,

providing an overview over the different manifestations of gendercide. The author comes to the conclusion that history indicates that the majority of genocidaires are men, but then Jones also returns to a theory first propounded in the chapter on Bosnia, namely that historically, the most vulnerable group is males of 'war-making age', from 15 to 55.

In part four Jones takes a look at the future of genocide, the first chapter being devoted to the place of genocide in history. It explores the manipulation and sanitisation of history and memory in post-genocide societies, as well as recent developments with regard to the acceptable limits of genocide denialism in free societies.

Jones then explores the topical issue of the complex relationship between obtaining justice, finding the truth and obtaining redress for wrongs in post-genocidal societies. He examines developments in the international legal order with regard to individual responsibility for crimes against humanity since the Nuremberg and Tokyo trials as well as processes like the *gacaca* experiment in Rwanda and truth and reconciliation commissions.

In the final chapter the author looks at strategies of intervention and prevention, dealing first with genocide indicators before moving on to different forms and levels of intervention, specifically humanitarian intervention. With regard to prevention strategies, the role that ideologies can play in the perpetration or prevention of genocide is explored, as well as the ways in which individuals can contribute by the witnessing of and honest reporting on human rights abuses. The book concludes on a personal note by elaborating some steps individuals can take to reduce their 'genocide potential' and in this way contribute to prevention.

Genocide: a comprehensive introduction lives up to its title: it is comprehensive both in breadth and depth, dealing admirably with a wide variety of disciplines. The strength of the book is the way in which the author is able to integrate a number of diverse disciplines into a comprehensive text. However, for the uninitiated to some of the disciplines, like the present legally trained reviewer, this does not always make for easy reading. Perseverance will however be rewarded with much food for thought and new avenues to pursue to come to an understanding and possibly being able to contribute to the prevention of the complex phenomenon of genocide.

Comprehensive footnotes and a thorough index containing references to the literature and the many maps, illustrations and boxed texts as well as the accompanying website serve to improve its value to the reader. These factors ensure that the book will make a valuable contribution to the bookshelves of students, scholars, practitioners and activists.

Reviewed by Andre Stemmet
Senior State Law Adviser (International Law)
South African Department of Foreign Affairs

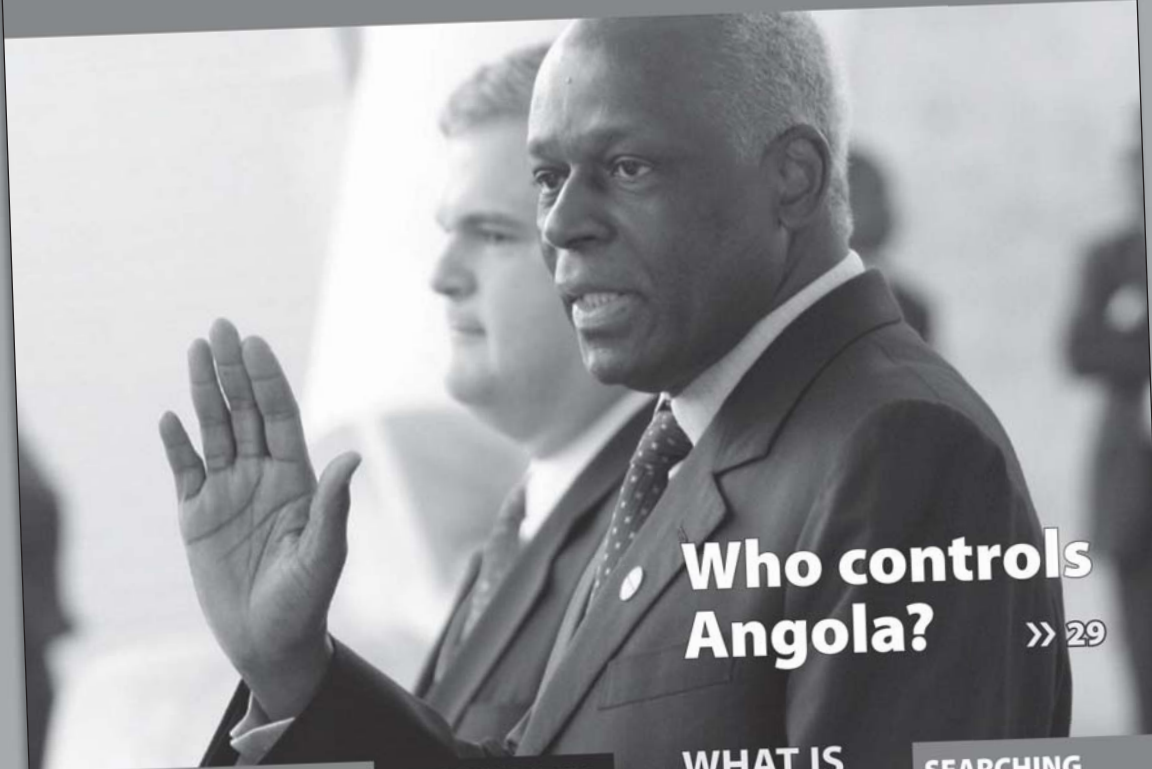
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