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Promoting the rule of law: Challenges for South Africa's policy

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Two acronyms are prominent current currency – and they happen to be the two sides of the same coin. The Responsibility to Protect (RtoP) and the less controversially discussed sibling Rule of Law (RoL) are for obvious reasons complementary. After all, situations of state failure which require the international community's responsible intervention with the aim to protect people from abuse through the state power under which they are forced to live (if not killed by it or seeking refuge elsewhere), result in a post-conflict situation, which requires transitional justice and the establishment of a lasting RoL. While RtoP emerged as one of the most contentious issues recently discussed in the context of global policy and governance, RoL has been never really much a matter of openly spectacular debate. But this does not mean that it is a widely accepted and practiced notion. The paradigm can well surface as one of massive differences very soon, when the next General Assembly of the United Nations opens with a high level debate in mid-September.

This paper seeks to summarise several of the core issues around the debate on the RoL. It is linked with the challenges for South African domestic and foreign policy, measured against its self-proclaimed role as a pro-active global player assuming even more responsibility in terms of continental policy matters. This is documented by the successful campaign to fill the position of chairperson at the AU Commission with one of South Africa's leading political office bearers.

1. The rule of law as a global responsibility

When Lakhdar Brahimi presented the Dag Hammarskjöld Lecture in 2002, he placed the RoL at the core of his reflections. He emphasised that law must have human beings as its focus. The RoL "was originally a narrow, legalistic concept, meaning that no man is punishable except for a distinct breach of the law, established in the ordinary courts of the land." But since then, "this concept acquired a much wider meaning, requiring the existence of just laws and the respect of human rights" (Brahimi 2002: 10). Emerging during the era of the Enlightenment, such concept of law ultimately embraced all societies in a global order:

> Today, Human Rights Law and Humanitarian Law are important branches of international law, based on the view that the human dimension had to be considered, that people mattered, that they had rights as human beings, and that they needed legal protection. They represent an acknowledgment that laws should be just and that the Rule of Law should have a strong human rights component. (Brahimi 2002: 14)

Witnessing since then what is often referred to as the "Arab Spring," the Algerian diplomat almost prophetically continued: "The question of human rights has also mobilised people around the world to be vigilant and vociferous about their own rights, and show concern for the rights of people

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in other countries." (Brahimi 2002: 14)

A global community in search of more justice requires efforts to come to terms with the inherent difficulties to find a measured and justified response to injustice exceeding tolerable limits (whatever tolerable limits in the case of injustices and violence might mean). For far too long the despotic regimes in our world were protected by the principle of state sovereignty and non-interference in matters of domestic affairs and could get away, literally, with murder. Since the turn of the century this has changed. The Westphalian order, critically challenged over its emphasis on the dogma of national sovereignty by concerned advocates of a responsible, humanitarian-oriented international law - albeit with inconclusive evidence as to the primacy of either state sovereignty or internationally codified moral values (cf. Havercroft 2012) - does not any longer protect despots by all means. The firewall has cracks. Significantly, the new Constitution of the African Union stipulated a decade ago, when adopted at the Durban Summit in 2002, the collective responsibility and obligation of the body to intervene in member states in cases of war crimes, crimes against humanity and genocide. This was pioneering and – noteworthy as it is – a result of shared African concerns.

Gareth Evans, a former Australian foreign minister, who through his own relentless advocacy has been one of the midwives to bring about and apply a new understanding, summarises with regard to the translation of the RtoP doctrine into action: "For centuries, right up to the beginning of our own, mass atrocity crimes perpetrated behind state borders were seen essentially as nobody else's business. Now, at least in principle, they are regarded as everyone's business." (Evans 2012: 375).

But we need to remain aware and constantly alert that we walk a tightrope – the line between legitimate and undue interference is thin. Self-righteous claims to the moral high ground are misplaced, given the almost endless history of hegemonic policies setting – and thereby constantly eroding – the standards in the interaction between states and people. That foreign intervention is neither a guarantee to protect humans from further atrocities, nor a secure point of departure for peaceful sustainable nation building, is illustrated once again by the current chaos in Libya. The messy aftermath of the overthrow of the Gaddafi regime only testifies once again to the notorious saying "damned if you do, damned if you don't" and illustrates the Catch 22 situation a concerned international community is so often confronted with – not least once again in the case of Syria.

We carefully need to balance the need for international assistance with the need for domestic capacity building, in a bottom up instead of a trickle down approach, to anchor a democratic and fair legal system in local institutions and minds after a period of war-torn decay. We need law reform and constitutional frameworks as constituent parts of international crisis management. Hence post-conflict societies seek new stability through institutions and norms serving all in a society in transition towards relative security. The current mess in Libya and the continued contestation in Egypt are certainly far from being good examples concerning best practices.

As is the case with RtoP, the promotion of RoL does not take place in isolation but poses a noble challenge to the role of the international community not least as represented through the United Nations (UN). It is no coincidence that through the experiences with RtoP in Libya and elsewhere, and the difficulties in achieving a common platform for responding to the situation in Syria, the RoL will, on the initiative of the UN Secretary-General, be the theme for the high-

level debate at the UN General Assembly in mid-September 2012.

A report prepared by the Secretary-General for this high-level debate notes: "Respect for the rule of law at the international and national levels is central to ensuring predictability and legitimacy to international relations, and for delivering just outcomes in the daily life of all individuals around the world." (United Nations 2012: 1). The document defines RoL as "a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are *consistent with international human rights norms and standards.*" (Ibid., p. 2, para I.2.;my emphasis). This means that laws have a normative framework and reference point, rooted in internationally adopted and ratified values of human dignity and protection from the abuse of law. Not every law passed in a parliament is therefore legitimate. It requires compliance with internationally enshrined norms. The international human rights framework is therefore the ultimate guiding principle against which the rule of law is measured. The Secretary-General's report also stresses that the RoL ought to be at the heart of the social contract between a state and the individuals under its jurisdiction to ensure that justice permeates society at every level. RoL ought to protect the full range of human rights.

At the international level, the RoL translates into "the ability of Member States to have recourse to international adjudicative mechanisms to settle their disputes peacefully, without the threat or use of force." (Ibid., p. 4/para. II.A.ii) Its credibility depends on the adherence to such standards by all state actors, which currently is not the case, further noting that "international law is selectively applied" (ibid.). This raises the crucial question: who holds the power of definition when it comes to the application or non-application of such laws?

The document also makes the necessary connection between RoL and sustainable human development as well as the link to economic development. It advocates a holistic human development agenda, reconciling growth with social protection and the environment. It stresses that such an agenda requires, that "the rule of law must play a critical role in ensuring equal protection and access to opportunities" (ibid., p. 8, para B.iii) This is important to note as a complementing perspective to the debates surrounding Rio+20 and the (post) MDGs: the RoL certainly also reminds us of its inter-connectivity with the need to find future ways to reproduce societies based on a true notion of sustainability while not losing sight of civil rights in the pursuance of socio-economic and cultural rights.

2. The challenges of a RoL debate

The UN, through this renewed debate on the RoL, promotes further initiatives on a more systematic scale since the UN Secretary-General's 2004 report - which focused on RoL and transitional justice (UN Secretary-General 2004). The 2004 document contained the essentials with regard to the definition of RoL as reiterated by the new report which stresses that as a principle of governance all persons, institutions and public and private entities, including the state, should be accountable to laws. Since 2004 the concept has evolved into a guiding principle often referred to in resolutions by the UN Security Council. Adherence to international minimum standards is considered an obligation with regard to both substantive justice (i.e. the aims and outcome of justice) as well as procedural justice (i.e. the process by which those aims and results are achieved). The normative foundation is not only the UN Charter but also the international legal

provisions with regard to human rights, criminal, refugee and humanitarian law. As a recent empirical analysis documents, out of a total of 36 UN peace operations initiated in African states between 1989 and 2007 all but six included some concrete forms of RoL assistance. This underlines the prominence that RoL has assumed in conflict management (cf. Sannerholm et. al. 2012).

The report submitted by the UN Secretary-General for the high-level debate at the General Assembly in September 2012, advocates the establishment of an "age of accountability" (United Nations 2012: 11, para. C.i). It is aware that this is not any pseudo-neutral legal affair but requires political engagement. Promoting the RoL is inherently political and demands frank political dialogue (ibid., p. 15, para. D.i). It would require that those in the camp prioritising civil-political rights versus those on the side of an emphasis on economic and cultural rights are able to find a common denominator to bridge fundamental differences. But how can the best of intentions be applied in the absence of the necessary muscle - requiring not only political will but also leverage? As a recent report warns, the UN is not in the position to follow up on its own declared aims due to a lack of capacity and weakness:

> […] important knowledge gaps, poor coordination across development, political and security actors; continuous infighting over roles and responsibilities spurred by weak leadership, a dearth in capacity to actually fulfill established mandates; knowledge gaps; lack on an in-depth relationship with the IFIs and other sources of leverage and legitimacy have dogged UN operations for more than a decade. […] the idea of a stand-alone capacity for rule-of-law support …, which could draw in existing rule-of-law related policy task forces and similar mechanisms from the humanitarian agencies, … could have merit. So too does the idea of an Independent Judicial Service, a tool that member states could draw on (at their own choosing) when they want support on a range of executive and advisory rule-of-law functions, but are not the subject (voluntarily or otherwise) of a UN mission presence. (Kavanagh/Jones 2011: 16 and 17)

Perhaps the already institutionalised 'Special Procedures' (SP) might strengthen the efforts of the UN in promoting the RoL. These are independent experts, who have been tasked under criteria established by the Human Rights Council to promote human rights through either thematic or country-specific mandates. They are true advocates of human rights, often against all odds, and could also be deployed in the further pursuance of the RoL. Once praised by the former UNSG Kofi Annan as "the crown jewel of the system" (Piccone 2011: 207), they might also be gems in the pursuance of the RoL.

At the same time, RoL cannot be a matter imposed from the outside. Local institutions and cultural norms matter, and initiatives to "bring" RoL to the people fail utterly if there is no agency rooted in local interests and structures strong enough to anchor RoL, both in terms of a legal framework and practice as well as in the minds and internalized values of the people:

> Discourse on statebuilding and the rule of law tends to be schizophrenic. One moment, conversation is probing the customs and conventions of society, followed in the same breath by confidently suggesting technocratic and formalistic interventions to modify customs and conventions. (Jensen 2008: 137)

Which once again brings us back to the power of definition applied:

> The crucial issue is how standards and models are applied. Assistance providers need to be aware that 'transplanted' laws and institutions will always be subject to detours, resistance and local adjustment. Thus reformers may be more helped by concentrating on the process of legal and institutional reform than on the particular content that they wish to support. (Sannerholm 2012: 239)

To turn the RoL into an effective tool, the willingness of the UN member countries to pro-actively support the initiative is essential. This includes the willingness not only to point fingers when it seems suitable for the purpose of pursuing own interests, but it also expects governments to scrutinize and improve their own legal systems, ensuring a comprehensive RoL in recognition of all substantial human rights. Citizens deserve to be protected at home and elsewhere. Otherwise, as has already happened so often, international actors (as norm entrepreneurs) tend to create an accountability deficit: "the function of international agencies as 'teachers of norms' is compromised by a discrepancy between what they say and actually do. " (Sannerholm 2012: 244). This applies not only to those who feel extra-judicial practices are justified to protect the *Rechtsstaat* (a perverted form of argument, as if the rule of law can be protected by the absence of it). It also applies to all other actors on the international stage and their policies, both at home and abroad, against which they ought to be measured.

This paper will now have a closer look at South Africa's policy practices and options with regard to different but complementing aspects related to a RoL.

3. South Africa and the rule of law – at home and abroad

Two examples selected from a domestic and a sub-regional level illustrate the risks the absence of a firm commitment to the RoL might hold for South Africa in terms of its reputation but also legitimacy vis-à-vis its citizens and the wider world as a proponent of good governance. Being the regional hegemon in SADC, for the second time within less than a decade a temporary member of the UN Security Council, a member of BRICS and the G20, South Africa has since the end of Apartheid clearly managed to punch above its weight in international policy arenas. While not having the economic muscle of other so-called emerging economies, it holds substantial symbolic political influence at policy debates in whichever arena they take place.

South African mediators (most prominently previous and current presidents) have been tasked with conflict mediation on the continent - albeit with mixed results - during the last 15 years. High-ranking South African political office bearers also played a role in global governance bodies, drafting programmatic international policy documents, often resulting in normative frameworks. Individual South African experts are crucial in promoting human rights and the protection of people within missions by the UN system (most notably the Human Rights Council) - testifying to a track record which further creates and justifies high expectations.

South Africa therefore has reason to be proudly measured against such high expectations. While the internationalism rooted in solidarity with the struggle of people for human rights and civil liberties played a significant supportive role in the abolition of the white minority regime, democratic South Africa has now the chance to contribute to a better world for many people elsewhere while

remaining aware of its similar obligations towards its own citizens.

3.1. The Traditional Courts Bill

Originally introduced in 2008, the Traditional Courts Bill was withdrawn and finally re-submitted in 2012 (Republic of South Africa 2012). Similar to the Protection of Information Bill - passed on 22 November 2011 by the ANC MPs in the National Assembly amidst a massive public protest campaign, which included mourning under the slogan of "black Tuesday" – it is among the most contentious issues provoking legal and political disputes in South Africa. Both laws in different ways (in the one instance strengthening the control of central government over access and use of information, in the other willing to surrender legal discretion to local institutions) question the firmly rooted foundation of the country's legal system in one of the most progressive constitutions with regard to the pillars of good governance, citizen rights (and protection), civil freedom, liberty and democracy.

Both initiatives resonate with laws under the notorious apartheid system. They bring back memories when a police state found it convenient to control media through sheer police state methods and to curb the freedom to expression, even though there remain many niches in the public sphere where this is still used (and at times abused). The Traditional Courts Bill, in contrast, is reminiscent of the divide and rule policy of the white minority regime, which under the euphemism "separate development" domesticated "citizens as subject" (Mamdani 1996) by partly delegating authority to indigenous collaborators in the rural areas. As state recognised executors of so-called traditional customary law, they usurped binding jurisdiction, which served the stabilisation of central powers through local quislings.

Provincial public hearings conducted during April and May 2012 by the Department of Justice provided testimony to many concerns raised by community actors who would be affected by such jurisdiction. These concerns, as summarised in a report by the Law Race and Gender Unit at the University of Cape Town, included i.a.:

- The exclusion of legal representation in a traditional court;
- No guaranteed right for women to represent themselves or their protection from discriminatory customary practices;
- Concern that such extensive powers for chiefs would facilitate corruption and oppression as abuse of power;
- Creation of a divided, second-class citizenship for those in the rural areas;
- Provision of a tool for traditional leaders to extent their power also over people not in recognition of their authority. (Luwaya 2012: 4)

The UCT paper ends with the summary conclusion:

> what emerged as a general pattern at the hearings was the presentation of the Bill as a restoration and protection of African ways, systems, and culture. The Bill was complimented, by members of the Provincial legislature and some members of the public, for restoring power and respect to chiefs and was identified as allowing 'us to practise our ways and customs'. Presenting the Bill in this light meant that any speaker who took an anti-Bill stance appeared to be taking an anti-customary law stance, whereas many of the speakers were attempting to make the point that the Bill distorts and undermines the real nature of customary law which is participatory and multi-vocal. (Luwaya 2012: 5)

Notwithstanding respect for local customs, constitutional values anchored in a binding normative framework should reign supreme, be applicable and protect everyone who is subject to the territorial state and its legal system. Creating patchwork legal sub-systems will delegate the rule of law to those who hold the local power and undermine state authority as one of the substantive functions of a central state. Given that clause 3(a) of the objects of the bill stresses "the need to align the traditional justice system with the Constitution in order for the traditional system to embrace the values enshrined in the Constitution" (Republic of South Africa 2012: 16), one wonders why vesting traditional courts with the anticipated far reaching degree of autonomy would secure such an objective. Rather, this seems to put the cart before the horse (or donkey, for that matter). After all, section 1 of the constitution states unequivocally that South Africa is a sovereign democratic state founded on the values of non-sexism, universal adult suffrage and a democratic multiparty system to ensure accountability, responsiveness and openness. Section 211 (1) only concedes, that "the institution, status and role of traditional leadership, according to customary law, are recognised *subject to the constitution*" (my emphasis).

For De Vos (2012) section 211 "guarantees no more than a symbolic or ceremonial role for traditional leaders … because traditional leadership is by its nature undemocratic and unaccountable, responsive or open and hence not compatible with democracy, if such leadership is going to be given a governance role". According to the constitutionally enshrined Bill of Rights (in particular section 9), the unfair discrimination on any grounds, including sex, gender and sexual orientation, is prohibited. The practice by many – albeit not all – traditionally based customary laws and their interpretation by those who hold the individual power over their application, violates such fundamental principles. The openly homophobic attitudes among many communities, often resulting in hate speech, if not hate crimes, is only one serious reason for concern about handing over executive powers to those operating outside of a constitutionally defined sphere. From a gendered perspective equal treatment and participation of women and their heritage and property rights as equal citizens are another significant essential under threat.

The constructed dichotomy between "modern" and "traditional" values as reference systems seeks to exploit the latent tension between the respect for and at least partial recognition of local socio-cultural specific features and the joint values of citizenship within a national context of a state. As observed in a profoundly theoretical discussion of the linkages with a particular focus on the international dimensions, "constitutional law becomes a crucial intersection forum for highly differentiated interests and demands from various sectors of society" (Zumbansen 2012: 48). Accordingly, the Congress of Traditional Leaders of South Africa (Contralesa), formed in 1987, challenged the constitution. In its judgment, however, the Constitutional Court dismissed claims against the Bill of Rights provisions in no uncertain terms:

> In a purely republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of any traditional leaders … the principle of equality before the law … could be read as presupposing a single and undifferentiated legal regime for all South Africans with no scope for the application of customary law" (quoted from De Vos 2012).

The Traditional Courts Bill would impose a system incompatible with the constitution over the protest of some local communities who resist

such reinvigoration of "separate" (and unequal) development despite being citizens of one and the same state whose legal system is supposedly based on undivided principles of the RoL. It would in particular set a positive example if a powerful woman now at the helm of the AU Commission (coming from one of the South African regions cultivating local culture) would be able to represent a country which did not sacrifice fundamental constitutional rights on the altar of political expediency.

3.2. The SADC Tribunal

It is somewhat indicative that one of the most recently published stocktaking analyses on the SADC region does not even list the RoL in its index. A chapter on legal aspects is also missing. The SADC Tribunal is at least identified in a single paragraph of one chapter as a potential asset, suggesting:

> The mandate of the Tribunal could be increased to strengthen its role as a guardian of the Community's interests, so it can monitor adherence to the letter and interest of those interests as defined in the SADC Treaty and other instruments. Indeed, one of the major contributions the Tribunal could make would be to define a regional jurisprudence and community law. One of the issues member states might consider is the possibility in the short term for the Tribunal to receive and consider matters regarding non-implementation of, and non-compliance with, agreements and decisions, and what penalties and corrective measures should be put in place. (Landsberg 2012: 72).

Despite being published in 2012, this seems to be wishful thinking dated in the past. The opposite took place during the obvious delay of at least two years between the drafting of this text and its publication.

The SADC Tribunal was established on 14 August 2001 and officially inaugurated in 2005 as a major step forward in the sub-regional establishment of a common rule of law. But after several judgments ruling against the Zimbabwean government, but ignored by the latter, the Tribunal was *de facto* aborted at the summit in Windhoek on 16/17 August 2010, when SADC celebrated the 30th anniversary of the sub-regional body. The meeting had originally scheduled a debate over the Tribunal's role as a result of the Zimbabwean government's refusal to accept its jurisdiction. This discussion was postponed with the technical argument that the justice ministers had been unable to prepare the ground at their earlier meeting in April. Instead, the summit decided that a review of the role, functions and terms of reference of the court should be undertaken within six months. The official communiqué added not a further word on the matter. This was tantamount to shelving the controversial issue even after the Zimbabwean authorities were effectively in contempt of court.

Earlier in the same year, the release of the documentary film 'Mugabe and the white African' received worldwide attention and critical acclaim (except in some Southern African countries). It followed the case of a Zimbabwean farmer who successfully objected to his expropriation and eviction from his land by the Zimbabwean authorities (Freeth 2011). The Zimbabwean government declared that the judgment was irrelevant and that the Tribunal's ruling would not be considered binding, since not enough member states had ratified the treaty. On 16 July 2010, the Tribunal made a ruling which reiterated two earlier judgments in the matter and concluded that the Zimbabwean state had violated its decisions; it was to report its finding to the Windhoek summit for appropriate action.

However, the summit did not renew the anticipated second terms of office of three regular and one non-regular Tribunal judges (including the Tribunal's president), whose first term had expired on 31 August 2010. They included the Tribunal's president, although his presidential term was set to run till 27 November 2011. As a result, the Tribunal ceased activities in August 2010.

Since then the SADC Secretariat commissioned an independent review. Submitted in March 2011 by University of Cambridge Senior Lecturer in Law Lorand Bartels as "Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal" to the Committee of Ministers of Justice/Attorneys-General in SADC, it affirmed the jurisdiction of the tribunal and its legal authority and concluded that SADC member states were, by suspending the court, in violation of the international legal obligations they had entered into. One could therefore conclude that SADC member states were, by suspending the court, in violation of the international legal obligations they had entered into. The subsequent extraordinary Windhoek summit of SADC stated in its communiqué on 20 May 2011 that ministers of justice and attorney generals were mandated to initiate amendments to the relevant legal instruments and to submit a progress report in August 2011 and a final report to the summit in August 2012. SADC's Executive Secretary Tomaz Salomao, when asked whether the recommendations would be made public, responded that neither the media nor SADC citizens needed to know what was in the report.

Notwithstanding compelling arguments, the Windhoek summit decided not to reappoint the judges whose term had ended in August 2010, or to replace the judges whose term expired in October 2011. The Tribunal was thereby further dismantled and remained defunct. On 13 June 2011, the four judges whose mandate had not been extended in August 2010 submitted a letter to SADC's executive secretary in which they condemned the decisions as illegal, arbitrary and taken in bad faith, asserting that the treatment of the SADC Tribunal showed that SADC put politics above the law and ignored the legal instruments it had created.

Since then, support campaigns for the full restoration of the Tribunal have been undertaken by a number of human rights organisations and prominent individuals. The SADC Lawyers Association held its 12th annual general meeting on 4-6 August 2011 in Maputo, Mozambique. Deep concern was expressed about the breakdown in the administration of justice and the erosion of the judiciary's independence in Swaziland. The extended suspension of the SADC Tribunal through the extraordinary SADC summit in Windhoek was declared "illegal and ultra vires the provisions of the SADC Treaty and the SADC Protocol"; the resolutions demanded the immediate reinstatement and functioning of the tribunal while any potential amendments to the SADC instruments that governed its operations were considered. More recently a video clip presents compelling evidence of these efforts to bring back an essential element of a regional rule of law component (http://www.youtube.com/watch?v=4iCUlSii6oI).

As Laurie Nathan (2011: 136) concludes in a sobering assessment:

> By scrapping the tribunal as a result of its efforts to uphold the rule of law, the heads of state … did enormous harm to the integrity and reputation of the organisation. […] With this brazen show of realpolitik, the heads of state made a farce of SADC's legal instruments and formal commitment to democratic principles.

South Africa's role with regard to the future of the Tribunal will be seen as indicative of how seriously the regional hegemonic power is with regard to its efforts to uphold a RoL, especially when other SADC member states maintain strongly antagonistic positions. It is noteworthy that the SADC Extraordinary Summit held on 1 June 2012 in Luanda noted in its official communiqué "that the Region continues to consolidate democracy and the rule of law" – but did not mention the Tribunal.

In preparation for the 32nd official summit on 17/18 August 2012 in Maputo, the ministers of justice and attorney's general held another meeting from 11 to 15 June 2012 in Luanda to discuss and finalise their submission on the Tribunal. The report was to be handed over to the SADC Council of Ministers and the SADC Summit for discussion in Maputo. Proposals – in the form of various options still to be discussed by a variety of shareholders – reportedly suggest that the Tribunal continues under a different mandate. According to a Namibian source the human rights mandate was discussed by ministers, with all member states holding the view that human rights form an integral part of their domestic judicial system. This, by implication, could be interpreted as the intention to return to the dictum of absolute national sovereignty with the aim to strip the Tribunal of its most important role.

The position of Namibia's minister of justice Pendukeni Ithana (at the same time the secretary-general of the governing party SWAPO and among the most serious contenders to succeed President Pohamba as head of state) is in this respect revealing. At a meeting at Walvis Bay in 2011 she expressed the view that the Tribunal was in conflict with international law principles, including a number of SADC member states' constitutions. She reiterated the wish "through appropriate measures to make adjustments from time to time, to fit our interests". She felt that SADC member states were entitled to "fine-tune regional bodies", and that these instruments were to serve the member states: "The instruments serve us, they are for us, and this is not a reversible position" (quoted in Sasman 2012). This utilitarian view of the rule of law turns it again into the law of the rulers. It would be a major setback for the international credibility of the regional body and its member states if the Summit in Maputo would indeed follow such a slippery road.

3.3. South Africa in Africa

The latest spectacular evidence of South Africa's influence was the intensive and ultimately successful campaign securing the election of its former foreign minister and current minister of home affairs Nkosazana Dhlamini-Zuma as the first AU Commission chairwoman. This will also add to the obligations with regard to South Africa's role and its perception and reputation in terms of the RoL and other indicators for good governance, both at home and abroad. Only a credible regional power, which bases its influence on conviction and good practices, can gain lasting recognition and enhance its reputation. The SADC Lawyers' Association congratulated SADC on the election of Dr Dlamini Zuma. It urged "SADC leaders to work together and re-open the SADC Tribunal and ensure that when this is done the Tribunal is not stripped of its mandate and powers". It expressed hope that the new AU Commission chairwoman "will not have to deal with embarrassments emanating from the region's failure to observe its own laws and respect its own institutions".

Along similar lines, the Director of Mobilization and Communication at the Federation of International Women Lawyers (FIDA-Ghana) combined her congratulations to the South African minister with an appeal to ensure the protection of the rights of African women and to

encourage member states to sign the protocol on the African Charter on Human and People's Rights:

> The AU has been championing human rights in a big way and I expect to see her encouraging African countries to implement human rights and principles and also be able to sanction leaders who abuse human rights in their countries to serve as a deterrent to future leaders. (http://www.safpi.org./news/article/2012/au-chairperson-urged-help-enforce-protocol-human-rights)

South Africa's position during the UN General Assembly debate in mid-September 2012 on the RoL will be followed with special interest by a wide range of other state representatives. It will also be noted how South Africa and the chairperson of the AU Commission will position the African Union (AU) towards the ICC and the demands for international jurisprudence in matters of genocide, war crimes and crimes against humanity. This will be a sensitive matter within the AU especially when government representatives of its member countries are implicated, as in the controversial cases of the Sudan and Kenya (cf. Odora 2011, Hansungule 2011, Heinrich Böll Stiftung 2012).

South Africa has in a number of other recently contentious issues remained not necessarily a fence sitter, but difficult to assess. The voting pattern with regard to the UN Security Council resolutions on Libya and Syria were not always coherent, though there is a strong tendency towards strengthening the responsibility to adhere to international standards and norms of state behaviour and find no excuses for domestic terrorism by governments. But the sobering Libyan experience leading to an unauthorised regime change were the reasons for a reluctance to assume new responsibility for an endorsement of similar interventions. Former president Thabo Mbeki's damning statements on the abuse of the Libya resolution 1973 by the hegemonic Western powers and Nato (Mbeki 2011 and 2012) was a strong signal, given his own continuous involvement in mediation efforts in Africa.

South Africa remains clearly cautious and observant with regard to trends by some states to occupy the moral high ground for their own geostrategic interests - though this cautious attitude is not applied as rigorously to all cases where big power policy is practiced. The tolerance towards its new BRICS partner, China, seems to be much bigger, reflected in the government's inhospitable attitude towards the Dalai Lama and its reluctance to support the Burmese democracy movement against the military junta.

Much closer to home, challenges need to be tackled too. The patience towards the power play by the regime in Zimbabwe and the still friendly relations with the dictatorial monarch in Swaziland require urgent corrections if South Africa is to gain credibility as an even-handed mediator and benign hegemon loyal to a RoL. The reportedly measured handling of the attempts to prevent the Malawian vice-president from rightfully taking office was an encouraging sign. More of the same would do anything but harm to the South African image (though it might damage its reputation among those who consider respect towards the RoL similar to the protection of human rights as an obstacle rather than an opportunity).

4. Concluding remarks

There is certainly more on the agenda than merely a re-emphasis on the RoL. The cautious words of Balakrishnan Rajagopal deserve to be recognised:

> Focusing attention on the rule of law as a broad, if not lofty, concept diverts attention from the coherence, effectiveness, and legitimacy of specific policies that are pursued to ensure security, promote development, or protect human rights. The rule of law agenda threatens to obfuscate the real tradeoffs that need to be made in order to achieve these worthy goals. These tradeoffs are real, partly due to the contradictions of socioeconomic development and political necessities in post-conflict settings and partly due to the contradictions between powerful third-party external actors with their own agendas and expert discourses who seek to intervene during "constitutional moments" of post-conflict reconstruction in the Third World. […]
>
> It is not argued here that the rule of law is a pernicious idea or a Trojan horse. Effective governance of any society cannot rest on any basis other than law. But the term "rule of law" is currently capable of just too many disparate meanings depending on the international policy agenda in which it is evoked. (Rajagopal 2008: 1347 and 1375)

The ambiguities of the matter have been presented in the first two parts of this paper, while the focus on two issues related to South Africa's role domestically and regionally served in the third part to illustrate where the RoL does make a difference. It will not solve all problems, if any, but will facilitate strategies to find solutions.

The establishment of decent living conditions for as many people as possible is a noble task that needs to be shared by the widest possible alliances of forces, including states, official institutions, civil society agencies and individuals. Adherence to the RoL can play a supportive act in these endeavors and add credibility to those actors claiming to play a constructive role. There is nothing more precious on our earth than life. We ought to protect and foster it – not least through the responsible cultivation, promotion and application of norms, which should reflect what we should be: people bonded by the values of humanity.

But whether we like it or not, a decisive role in this yet unaccomplished mission remains vested with the representatives of state authorities. This might be more obvious with regard to the domestic than to the international arena. But they are two sides of the same coin. In both spheres the order brought into being through law depends upon state power. States are authors of law, whether as negotiators of treaties or as generators of customary practice. At the end of the day, as Orford (2008: 9) reminds us: "The language of rights both promises the energy and moral authority of resistance to power, and explains why those exercising such power are in fact guaranteeing the freedom of those they control and manage."

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