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Human Rights and the Rule of Law – Challenges (not only) for South Africa

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> I wish to leave you with the words of the Russian author, Nikolai Ostrovsky: "Man's dearest possession is life. It is given to him but once, and he must live it so as to feel no torturing regrets for wasted years, never know the burning shame of a mean and petty past; so live that dying, he might say: All my life, all my strength were given to the finest cause in all the world - the fight for Liberation of Mankind." (Dlamini Zuma 2012)

Introduction

These concluding words by the South African Home Affairs Minister Nkosazana Dlamini-Zuma before parting to resume office as the new chairperson of the African Union Commission are in a way setting the tone and focus of this contribution. It stresses justice as an integral part of a fight for liberation of mankind. The following reflections will therefore seek to explore to which extent currently debated normative frameworks and notions relating to justice through the promotion of a rule of law (and thereby to the protection of human rights) offer a relevant link between the local, the regional and the global.[1]

[1] This is a considerably revised and updated version of a Policy Paper originally published by the Open Society Foundation for South Africa/South African Foreign Policy Initiative (SAFPI) as *Promoting the rule of law: Challenges for South Africa's policy*. SAFPI Commentary No 5, August 2012. I am grateful to the editors of this issue and other members of the editorial group of *Stichproben* for useful comments to further improve the quality of the text. The article is devoted to the memory of Michael Louw and Neville Alexander, who in very different ways and independent from each other contributed during their lifetime to the culture of a new South African society.

Two acronyms are prominent current currency – and they happen to be two sides of the same coin. The Responsibility to Protect (RtoP) and its 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 the 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 that is supposed to be more than the previous law of the rulers. While RtoP emerged as one of the most contentious issues recently discussed in the context of global policy and governance, the RoL has never really much been a matter of openly spectacular debates. This does not mean, however, that it is a widely accepted and practiced notion. The marked increase in a "rule of law promotion industry" (Peerenboom/Zürn/Nollkaemper 2012: 311), to which the same volume is the most recent addition, is however a strong indication that the debate has accumulated some dynamic.

This was underscored by the fact that the first-ever high-level meeting devoted to the RoL took place a day ahead of the 67th General Assembly of the United Nations on 24 September 2012. Already at the start of the full day meeting, during which highest representatives from more than 80 countries contributed to the debate, a "Declaration on the Rule of Law at the National and International Levels" (A/67/L.1) was adopted. This signaled the eagerness of the member states to not distance themselves from the noble goals. They reaffirmed their "commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development."[2]

This article summarises several of the core issues around the RoL. The general aspects are then linked to some challenges for the particular case of a South African domestic and foreign policy measured against its perceived

[2] From the Preamble of the Declaration, which as a draft resolution was submitted and circulated by the President of the General Assembly on 19 September 2012. For a detailed account on the debate with links to the documents see the report issued by the UN Department of Public Information at http:/www.un.org/News/Press/docs/2012/ga11290.doc.htm (accessed 25 September 2012). Further information on matters related to the subject can be found on the United Nations Rule of Law website and repository (www.unrol.org).

as well as self-proclaimed role as a pro-active continental if not global player. This understanding of policy makers in Pretoria was further cemented by the successful campaign to fill the position of chairperson at the AU Commission as from 2013 with one of the leading South African political office bearers, thereby openly seizing even more responsibility also in terms of African policy matters.

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." 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 Enlightenment, such a 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 in other countries." (Brahimi 2002: 14)

The global community in search of more justice requires efforts seeking to come to terms with the inherent difficulties to find measured and justified responses to injustice exceeding the tolerable limits (what ever 'tolerable limits' in the case of injustices and violence might mean). Far too long

despotic regimes were protected by the principle of state sovereignty and non-interference into matters of domestic affairs and could get away literally with murder. Since the turn of the century this has changed. The Westphalian order had been critically challenged with regard to its exclusive emphasis on the dogma of national sovereignty since its early days 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 (see Havercroft 2012). Nowadays global policy institutions do not any longer turn a blind eye on gross human rights violations, though there is still no even-handed approach to terrorist regimes. But there is no longer an unquestioned protection of ruthless perpetrators ordering destruction of their own people while hiding behind the shield of state authority. The firewall has cracks. Significantly enough, the new Constitution of the African Union documented already a significant paradigm change leaving behind the strict principle of non-intervention into internal affairs of member states as adhered to by the Organisation for African Unity. When adopted a decade ago 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 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 had been one of the midwives to bring about and apply a new understanding of a global responsibility not accepting national sovereignty as a firewall separating the inside from the outside 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 advocates of the RtoP need to remain aware and constantly alert that they walk a tight rope – 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 more guided by geo-strategic interests than true concerns for suffering 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 developments 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'. It illustrates the dilemma a concerned international community is so often confronted with – not least once again in the case of Syria.

The need for international assistance has to be carefully balanced 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. Law reform and constitutional frameworks as constituent parts of local and international crisis management are important elements. The establishment of post-conflict societies seeking new stability requires institutions and norms serving the members of a society in transition towards relative security.

As is the case with RtoP, the promotion of the RoL is not taking place in isolation. It poses a noble challenge to the international community not least as represented through the United Nations (UN). In the aftermath of the foreign intervention in Libya as a result of the application of the RtoP doctrine the need for the anchoring of a post-conflict legally institutionalised culture had once again come to the fore. The difficulties to achieve a common platform among the UN member countries highlight not only the mixed responses to the way RtoP was used in this case, but also to the ongoing differences how justice and the RoL are understood, not least also in the case of Syria. It hence seems no coincidence that during these times the RoL has been the theme for the high-level debate.

As a report by the Secretary-General in preparation for this meeting summarises: "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 the 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 the internationally adopted and

ratified values concerning 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 RoL 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 and questions its legitimacy. As the report concedes, "international law is selectively applied." (ibid.) This raises the crucial question, as to who holds the power of definition when it comes to the application or non-application of such laws.

The document also indicates awareness of the need to connect the RoL paradigm with sustainable human development as well as linking it 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 era: an emphasis on the RoL must not lose sight of its inter-connectivity with the need to find future ways to reproduce societies based on a true notion of sustainability, while not abandoning civil rights in the pursuance of socio-economic and cultural rights.

The Challenges of a Rule of Law Debate

The UN through this renewed debate on the RoL promotes further initiatives taken for the first time on a systematic scale by the UN Secretary-General's 2004 report, which focused on RoL and transitional justice (UN Secretary-General 2004). This document, initiated by Kofi Annan as Ban Ki-moons predecessor, already contains the essentials with regard to the

definition of the RoL by stressing that as a principle of governance, all persons, institutions, and public and private entities, including the state, should be accountable to laws. Since then, the concept evolved into a guiding principle often referred to in resolutions by the UN Security Council as a kind of political imperative. 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 laid not only in the UN Charter but also in the international legal provisions with regard to human rights, criminal, refugee, and humanitarian law. As a recent empirical analysis demonstrates, 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 (see Sannerholm et al. 2012). This underlines among others the prominence the RoL has assumed in conflict management. On the other hand, one needs to be cautious not to mix the emphasis on efforts promoting the RoL with the need for security sector reform in the context of peace building. While both are critically important components, mutually reinforcing and intertwined, their relationship has been hitherto not properly explored (Bleiker/Krupanski 2012). Introducing (or worse: imposing) a RoL is definitely far from being a panacea.

The report submitted by the UN Secretary-General to the high-level debate aims beyond this immediate challenge by advocating an "age of accountability." (United Nations 2012: 11, para. C.i) It is understood that this is not any pseudo-neutral legal affair but a serious political engagement. Promoting the RoL is inherently political and demands frank political dialogue (ibid., p. 15, para. D.i). It requires that those in the camp prioritising civil-political rights versus those on the side emphasising economic and cultural rights are able to find a common denominator to bridge the fundamental differences existing.

But how can the best of intentions be applied in the absence of the necessary muscles requiring not only political will but also leverage? The UN - as Kavanagh and Jones (2011: 16f) warn - is not in the position to follow up on its own declared aims due to a lack of capacity and institutional weaknesses:

> […] 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.

Maybe the 'Special Procedures' (SP) might be another suitable institutionalised form to 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 could at times and according to their mission be considered as true advocates of human rights, often against all odds. Their role might also be useful in seeking to establish equality under just laws by deploying them with related mandates. Once praised by the former UN Secretary-General Kofi Annan as "the crown jewel of the system" (Piccone 2011: 207), they might also be potential 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 utterly fail if there is no agency rooted in local interests and structures strong enough to anchor a RoL both in terms of a legal framework and practice as well as in the minds and internalised values of the people:

> Discourse on state-building 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 determination of the UN member states 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 from governments readiness to scrutinise and improve their own existing legislature towards a comprehensive RoL in recognition of all substantial human rights. Citizens deserve to be protected at home and elsewhere. Otherwise, as it 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 RoL 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.
Dominant and aspiring global players have to be measured against their willingness to contribute to the anchoring, implementation and protection of the normative frameworks, which seek to serve humanity based on a people-centered perspective. Hence 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.

South Africa, Human Rights 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 as a necessary element in and a focus on the protection of human rights 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 the Southern African Development Community (SADC), for the second time within less than a decade a temporary member of the UN Security Council, a member of BRICS (Brazil, Russia, India, China, South Africa) 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 muscles of other so-called emerging economies, it holds substantial symbolic political influence at policy debates in whichever arena they take place. The 'Mandela factor' and its positive associations added further to the relative prominence given to South Africa as a new international actor, often overlooking the less shiny examples of the everyday realities.[3]

South African mediators (most prominently previous and current presidents) were tasked with conflict mediation on the continent - albeit with mixed results - during the last 15 years. Highest-ranking South African political office bearers played a role in global governance bodies drafting programmatic international policy documents often resulting in normative frameworks.[4] Individual South African experts are crucial in the promotion of human rights and the protection of people within missions by the UN system (most notably the Human Rights Council) and other processes seeking to come to terms with injustices.[5] All these engagements testify to a

[3] The Marikana massacre has been the latest and so far most spectacular case in point, which could well mark a watershed (Wehmhoerner 2012). It shocked South Africa and the wider world, when on 16 August 2012 during a demonstration 34 mineworkers of the Lonmin platinum mine near Rustenburg were during a demonstration in execution style killed by the police. Analogies to the Apartheid era were no cheap polemic, since the dimensions of the slaughter revoked memories of the Sharpeville massacre on 21 March 1960, as the only bigger mass killing of demonstrators by police in the country's last half of a century.

[4] Cyril Ramaphosa (during his political career in the 1990s), Thabo Mbeki, Kgalema Motlanthe and Jacob Zuma were all at least nominally involved in norm-setting endeavours by institutionalised global commissions. Trevor Manuel played as Minister of Finance a significant role in the Doha Round and the international financial institutions (IMF and World Bank), to mention only a few examples.

[5] Judge Navi Pillay heading the UN Office of the High Commissioner for Human Rights (OHCHR) in Geneva is currently the most prominent case in point. But also the former Justices of the South African Constitutional Court, Richard Goldstone and Albie Sachs, play visible international roles in

track record, which creates and justifies high expectations, not least also reflected and documented in an independent judiciary, which had been baptised under the apartheid regime.

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. Justice was a core value at stake. The political leadership of democratic South Africa has now the chance to contribute in return to justice and a better world for many people elsewhere too, while at the same time remaining aware of and eager to fulfill its similar obligations towards its own citizens.

The Traditional Courts Bill

Originally introduced in 2008, the Traditional Courts Bill was withdrawn and finally re-submitted (Republic of South Africa 2012). Together with 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 current issues provoking legal and political disputes at the domestic front. 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) indeed question the firmly rooted foundation of the country's legal system in one of the world's most progressive constitutions when it comes to the pillars of good governance, citizen rights (and protection), civil freedom, liberty and democracy.

Both initiatives are resonating with laws under the apartheid system. The Protection of Information Bill brings back memories when a police state found it convenient to control media through sheer police state methods and to curb on the freedom of expression as well as the right to information. 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 subjects" (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

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the promotion of a RoL, legal reforms and justice in different settings, while Prof. Christof Heyns from the Faculty of Law at the University of Pretoria is also the UN Special Rapporteur on extrajudicial, summary or arbitrary executions at the OHCHR.

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 those on the ground, 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 extend their power also over people not in recognition of their authority (Luwaya 2012: 4).

The paper ends with the summary conclusion:

> [W]hat 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. This undermines authority also to care for its citizens as one of the substantive functions of a central state. Given that clause 3(a) of the objects of the bill stresses "[t]he 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 then traditional courts with the anticipated far reaching degree of autonomy would be the approach securing 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 among others 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, are only one serious reason for concern to hand over executive powers to those operating outside of the constitutionally defined sphere. From a gendered perspective, equal treatment and participation of women and their recognition and protection of 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 law in the making would impose a system incompatible with the constitution even against the protest of some of the local communities on the ground, 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 at the helm of the AU Commission as from 2013 and coming from one of the South African regions cultivating local culture also visibly and proudly at the highest level of central government would be able to present a home country, which does not sacrifice fundamental constitutional rights on the altar of political expediency.

The SADC Tribunal

It is somewhat indicative that one of the most recently published stocktaking analyses on the SADC region (Saunders/Dzinesa/Nagar 2012) does not even list the RoL in its index. A chapter on legal aspects is missing altogether. The SADC Tribunal is at least in a single paragraph in one of the chapters identified as one of the potential assets, 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).

This seems to be the kind of wishful thinking dated in the past. The opposite development took place between the drafting of this text and its publication. The SADC Tribunal was established on 14 August 2001. Officially inaugurated in 2005, it was a major step forward in the sub-regional establishment of a common RoL. The Tribunal was, however, *de facto* suspended at the summit in Windhoek on 16 and 17 August 2010, when SADC celebrated the 30th anniversary of the sub-regional body. This decision was in response to the case of a Zimbabwean farmer who successfully resisted to the eviction from his land by the Zimbabwean authorities by appealing to the SADC Tribunal. A documentary film, 'Mugabe and the white African', recording the stages of this battle in court and adding footage from the terror on the ground, received worldwide attention and critical acclaim (Freeth 2011).

Despite the Tribunal's pronounced views, the Zimbabwean government repeatedly declared its judgments as irrelevant. It considered the Tribunal's rulings not binding, claiming that not enough member states had ratified the treaty. On 16 July 2010, the Tribunal 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 SADC summit for appropriate action. Instead of dealing with the Zimbabwean non-compliance with the rulings, 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 word more on the matter. This was tantamount to shelving the controversial issue after the Zimbabwean authorities were effectively in contempt of court. However, the summit went even further by not endorsing an anticipated second term in office of four judges, whose first terms 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 as from August 2010.
The SADC Secretariat subsequently 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. One could therefore conclude that SADC member states were, by suspending the court, in violation of the international legal obligations they had entered into. A 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, to submit a progress report in August 2011 and a final report to the SADC summit in August 2012. When asked whether the recommendations would be made public, SADC's Executive Secretary Tomaz Salomao responded that neither the media nor SADC citizens needed to know what was in the report (Van den Bosch 2011).
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 in the region. The SADC Lawyers Association held its 12th annual general meeting on 4-6 August 2011 in Maputo, Mozambique. 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 of the Tribunal to allow it to function while any potential amendments to the SADC instruments that governed its operations were considered. Of lately, a video clip posted online on 11 July 2012 presents compelling evidence of the efforts to bring

back an essential element of a regional rule of law component.[6] As Laurie Nathan (2011: 136) concluded his 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 could be seen as indicative for how serious the regional hegemonic power is with regard to its efforts of upholding the 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 mentioned the Tribunal not with a word.

In preparation for the 32nd official SADC summit on 17 and 18 August 2012 in Maputo, the ministers of justice and attorney generals held another meeting from 11 to 15 June 2012 in Luanda to finalise their submission on the Tribunal. Proposals reportedly suggested that the Tribunal continued under a different mandate. According to a Namibian source (Sasman 2012), the ministers of all member states held 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 for the succession of president Pohamba as next head of state) is in this respect revealing. At an earlier meeting in Walvis Bay in 2011 she had 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" to serve them: "The instruments serve us, they are for us, and this is not a reversible

[6] http://www.youtube.com/watch?v=4iCUlSii6oI (25.09.2012)

position.” (Quoted from Sasman 2012) Such blatant misconception of the RoL turns it again into the law of the rulers.
It indeed was a major setback for the international credibility of the regional body and its member states that the summit in Maputo ultimately followed such a dangerously slippery road (see Fritz 2012b). Its handling of the matter raised not only “serious concerns about the normative coherence and cohesion of SADC”, but also gave reason for worries about the lack of recognition “of the primacy of people and regional citizens rather than the security of states and the interests of their ruling elites.” (Le Pere 2012: 1)
The SADC leaders agreed at the Maputo Summit that a new Protocol should be negotiated. Its remit should be limited to interpreting disputes among member states that relate to SADC’s Treaty and Protocols. This effectively bars citizens’ any further individual access to the Tribunal and allows the Zimbabwean government to get away with all sorts of violations despite earlier rulings of the court. This is no good news for the RoL. Rather, it illustrates that SADC’s institutional machinery is “subject to manipulation and abuse with impunity because of the state-driven nature of processes and weak executive authority of the secretariat.” (Le Pere 2012: 2)
Jeremy Gauntlett had been the senior counsel leading the team of lawyers advocating the rights of the farmer family in the ‘Campbell case’ (Freeth 2011) vis-à-vis the Zimbabwean government. The “road to Maputo”, he concluded in an disillusioned if not embittered speech delivered on 23 September 2012, was

> A great triumph for our region's rogue state. A great setback for the rule of law, and for international human rights. The SADC Treaty, the Protocol on the Tribunal and the Tribunal - Justice Mondlane's ‘house of justice in the region' - are all eviscerated. Impunity is entrenched (Gauntlett 2012).

South Africa in Africa

The latest spectacular evidence of the South African influence beyond its borders was the intensive and ultimately successful campaign resulting in the election of its former foreign minister and minister of home affairs Nkosazana Dlamini-Zuma at the AU Summit in July 2012 in Addis Ababa as the first AU Commission chairwoman against strong resistance. While

measured against many more demands and criteria, 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 had in a statement of 19 July 2012 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." (Quoted from Lee 2012) Along similar lines, the Director of Mobilization and Communication at the Federation of International Women Lawyers (FIDA-Ghana) in an interview with the Chinese news agency Xinhua on 24 July 2012 combined her congratulations to the South African minister with the appeal to ensure the protection of the rights of African women and to encourage member-states to sign up to 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.[7]

Unfortunately, as summarised above, the demands for the restoration of the original mandate of the SADC Tribunal through the SADC Summit in Maputo proved to be wishful thinking. South Africa did not visibly pursue this avenue but in cohorts with other SADC member states willingly demoted the Tribunal according to the interest of governments and states at the expenses of their citizens. This definitely dents the image of being at the forefront of the RoL initiatives among the countries from the global South, so eagerly sought to be cultivated by the South African government. As the

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[7]http://www.safpi.org./news/article/2012/au-chairperson-urged-help-enforce-protocol-human-rights (accessed 25.07.2012).

director of the Southern African Litigation Centre observed, South Africa nevertheless understands the rhetorical and strategic value of promoting the RoL principle as a form of soft power enhancing its international standing. This is also documented by the fact that South Africa sponsors two of nine side events to the RoL debate at the UN,

> […] as if in the universe of rule of law, there is only one superpower. But it is hard to see how the role sought by South Africa - as consensus-builder on different aspects of the rule of law - will not be seriously impaired by it having so recently participated in the decision to dismantle the Southern African Development Community (Sadc) Tribunal and it being regarded by many in the international community as having sufficient regional clout to ensure that its views predominate on such matters. (Fritz 2012a, see also 2012b: 6)

In his speech at the General Assembly, President Zuma (2012b) indeed reiterated that, "South Africa was comfortable participating in such a discussion as South Africa was a democratic nation founded on the rule of law, human dignity, equality, freedom and the supremacy of the Constitution". But it was left to another South African, the High Commissioner for Human Rights, to stress the necessary link to human rights much more explicitly. She emphasised that the RoL "constitutes the backbone for the legal protection of human rights" and that without human rights the RoL "is only an empty shell". As she pointed out: "Growing up in South Africa I experienced how the Apartheid regime created a veneer of a 'rule of law' based on legislation that institutionalized injustice and procedures that embodied unfairness." (Pillay 2012) Put differently and a bit more provocative: a RoL-based argument could even seek justification for the killing of the 34 miners, who were participating in the wildcat strike at the platinum mine in August 2012 and the subsequent temporary arrest of other miners on strike surviving the demonstration under an Apartheid law still in existence – accusing them of murder.

But challenges of such dubious nature exist not only at the home front. For South Africa human rights remain officially a core issue in its international relations since Mandela declared in 1993 that, "human rights will be the light that guides our foreign policy". As Marthoz (2012: 5) suggests, "this lofty statement of principles has been hampered by a series of factors",

which cast doubts on the coherent application of these principles. Looking at some of the evidence in the recent past, democratic South Africa's policy in promoting the RoL beyond its borders "is inconsistent at best" (Fritz 2012c: 1). As a non-permanent member of the UN Security Council for two terms during the last decade, South Africa has on a number of contentious issues remained not necessarily a fence sitter, but difficult to assess. The voting patterns 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 behavior and to find no excuses for domestic terrorism by governments.

As President Zuma reiterated on occasion of his farewell speech to the new chairperson of the AU Commission: "We will step up our efforts, working with sister nations within the AU to prevent wars, genocides and crimes against humanity in this continent." (Zuma 2012a) It will therefore be noted how South Africa and the South African chairperson of the AU Commission (who should be more than a South African office holder but will remain also a South African representative, not least since the campaign was driven by the element and argument of being the SADC candidate) will position the body towards the ICC and the demands for international jurisprudence in matters of genocide, war crimes and crimes against humanity. This will be a sensible matter within the AU, especially when government representatives of its member countries are implicated, as in the controversial cases of the Sudan and Kenya (see Odora 2011, Hansungule 2011, Heinrich Böll Stiftung 2012). After all, "South Africa was one of the key proponents of a deferral of the ICC indictment of Sudanese President Omar al-Bashir, thus undermining its support for the institution and the rule of law principles on which it is founded." (Fritz 2012c: 3)

The sobering Libyan experiences, leading to an intervention resulting in an unauthorised regime change, were reasons for being reluctant with regard to assuming new responsibility for the endorsement of 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, 2012) was a strong signal, given his own continuous involvement in mediation efforts. South Africa remains clearly cautious and observant with regard to trends to occupy moral high grounds for mainly geo-strategic own interests by some states – though this cautious attitude is not applied as

rigorously to all cases in which big power policy is practiced. The tolerance towards the new partner China seems to be much bigger, as reflected among others in the government's inhospitable attitude towards the Dalai Lama and its reluctance to support the Burmese democracy movement against the military junta in Myanmar.

Much closer to home, challenges need to be tackled too. The patience towards the unscrupulous power play by the regime in Zimbabwe, and as much so the still friendly relations to the dictatorial monarch in Swaziland require urgent corrections to gain credibility as an even-handed mediator and benign hegemon loyal to a RoL. The evidence pointing to the measured handling of the attempts to prevent the Malawian vice-president from rightfully taking office and instead contributing to her legitimate political take over following the death in office by president Bingu wa Mutharika 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). Celebrating Minister Dlamini-Zuma's farewell from South African politics into the AU arena in a special session of the South African parliament, President Zuma stressed that,

> Africa needs to strengthen the democratic culture and ethos in African institutions. […] Our foreign policy is informed by the fundamental values and principles enshrined in our Constitution. Those are principles of human dignity, the respect for life, the achievement of equity, the advancement of human rights and freedoms, non-racialism, non-sexism, democracy and a respect for the rule of law (Zuma 2012a).

But as Nicole Fritz (2012a) opined ahead of the UN high-level debate on the RoL in disillusionment over the South African opportunities missed at home and in the regional context:

> South Africa looks to the meeting to showcase itself. It is right to do so, but its recent actions threaten to make it more the ugly stepsister than the Cinderella of this ball.

Concluding Remarks

The case of South Africa is only one among several (if not many), which testify to the stark discrepancies between rhetoric and the lack of or at best lukewarm commitment. On the other hand, an overtly narrow and uncritical focus on the RoL as a normative medicine to cure all illnesses would be a dangerously restrictive perspective. 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 the purpose to illustrate where the RoL does make a difference. It will not solve all problems, if any, but it will facilitate strategies to find solutions in the interest of ordinary citizens who seek protection from the abuse of power. After all, "there are … many individuals whose lives would be immeasurably better were they

to live in a state governed by the rule of law." (Zürn/Nollkaemper/Peerenboom 2012: 17)

Admittedly, the establishment of decent living conditions for as many people as possible requires more than the RoL. It 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 and must carefully avoid that a RoL is turned against those in daily struggles for emancipation to serve those who want to secure their vested interests. But adherence to the RoL in combination with a clear focus on and link to human rights can also play a supportive act in these endeavors for more justice 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.

Whether we like it or not, a decisive role in this yet unaccomplished mission remains 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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