

## Engagement Matters:

### South Africa, the United Nations and a Rights-Based Foreign Policy

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Democratic South Africa under the Mandela government had proclaimed and pursued a rights-based foreign policy in support of democracy with a special commitment to strengthening the United Nations (UN) and promoting the values the organisation stands for in terms of human rights and justice. Since then the priorities have shifted. In the course of this process, the national interest in terms of economic policy and strategic alliances gained importance, while risking losing focus on the rights-based agenda. This agenda is defined by and anchored in the normative frameworks and conventions ratified. But *Realpolitik* has at times replaced the soft power of promoting and representing such an agenda through a foreign policy, which both within the UN system as well as in other bi- and multilateral relations pursues own interests of a middle power over and above the advocacy of such rights-based values.

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## **Introduction**

This article critically examines the role of South Africa with special reference to the values embodied in the human rights principles of the UN system and argues for a re-emphasis of a rights-based foreign policy guided by a non-alignment loyal only to the normative frameworks established by the UN for global governance. It is argued that South Africa's foreign policy should be measured mainly in terms of its willingness to engage with the global governance system as represented by the UN, and its support of the normative frameworks codified by the UN as relevant reference points for any country's policy. It is suggested that South Africa despite its claims of being in unconditional support of such rights-based agenda might be able to do better if being less guided by strategic parameters.

Rights-based in this context is defined as a value-oriented policy, which pursues the protection and enhancement of human rights, supporting individual and collective security and the best possible degree of participation of people in the affairs of their countries free from fear, while being protected from abuse of power. The guiding principles for such policies are enshrined in the Charter of the UN, the Genocide Convention and the Universal Declaration of Human Rights, both adopted as the first normative frameworks by the UN 65 years ago in December of 1948, as well as all subsequent normative frameworks ratified since then, including the so-called second and third generation of human, political and social rights evolving over decades and setting a moral and political compass for so-called good governance and the rule of law.

South Africa's two terms as a non-permanent member of the UN Security Council (UNSC) within five years (2007/8 and 2011/12) has documented the country's willingness to engage with and in the institution but produced a mixed record. Using the case of South Africa's policy with regard to the dispute and international intervention concerning Libya, the ambiguity was explained as 'norm subsidiarity'. This suggests, 'that states are often sticking to their own interpretation of norms' with South Africa being 'no exception in this regard'.<sup>1</sup> The recently emerging South African foreign relations seem to display a growing discrepancy between the unreserved recognition of fundamental principles in the spirit of the Charter of the UN and the strategic pragmatism guiding the country's international policy.<sup>2</sup> In contrast to such *Realpolitik* it is argued that it does not require considerable material investments to create social capital internationally through unconditional loyalty to the spirit and intention of the global normative frameworks adopted and their pursuit in terms of domestic and foreign policy positions taken. This in return would add to the positive image abroad, enhances global reputation as an honest broker and hence is in the national interest too.

The article first reasons why the UN in the absence of any better alternatives should be considered as the relevant global governance agency and norm provider, also by means of revisiting the approach by Dag Hammarskjöld as the organisation's second Secretary-General. It then weighs the guiding principles of a *Realpolitik* against those of a principled, rights-based approach and suggests that the latter creates social capital, which adds to the reputation of a state. By examining several cases of policy options and practices, it suggests that double standards prevail and the proclaimed rights-based policy by South Africa is at best incoherent. It finally returns to the argument that a

truly rights-based foreign policy would add to a country's reputation and credibility and hence also to its weight in global policy matters.

### **Why the UN Matters**

In an address at the University of California's Convocation on 13 May 1954 the UN's second Secretary-General Dag Hammarskjöld concluded: 'It has been said that the United Nations was not created in order to bring us to heaven, but in order to save us from hell.' According to him, 'that sums up as well as anything I have heard both the essential role of the United Nations and the attitude of mind that we should bring to its support.'<sup>3</sup>

Since then, the UN as global governance institution has executed its authority with mixed results. But despite manifold obstacles and at times against all odds it has remained the only legitimate body to negotiate global matters with the involvement of all stakeholders. Hence sovereign states do join. South Africa was not only a member of the League of Nations but also a founding member of the UN. In the shadow of the Holocaust the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide on 9 December 1948 and the Universal Declaration of Human Rights the next day became markers for the further course of the newly established institution. Both normative frameworks, like many more to follow, have created a compass and navigation kit for measuring the policy of states – both domestically and internationally – and providing them with demarcations in terms of rights-based values and principles. Not by coincidence, the South African government policy of Apartheid was finally

declared a crime against humanity by a resolution of the General Assembly of the very same UN it has co-founded.<sup>4</sup>

As Noeleen Heyzer, then for a decade the executive director of the UN Development Fund for Women (UNIFEM) summarized in the annual Dag Hammarskjöld Lecture she presented in 2004:

The United Nations plays an important role in upholding the rule of law by helping countries to strengthen national systems for the administration of justice in accordance with international standards. Increasingly, the UN is realizing the importance of adopting a comprehensive approach, by engaging all relevant institutions in the development of national justice systems, and paying attention to various dimensions of this process, including establishing standards of justice, formulating laws that codify them, strengthening institutions that implement them, developing mechanisms to monitor them, and protecting the people who must have access to them.<sup>5</sup>

Not everyone shares this fundamentally positive view when judging the performance of the institution established as a global body embracing all recognized governments of sovereign states in this world, seeking to shape, formulate and implement – often against all odds – normative frameworks as rights-based reference points and guiding principles for the execution of responsible governance. Often the UN tends to be not appreciated for its achievements but judged and criticized for its failures. The wide range of conventions, resolutions and other programmatic declarations adopted in the almost 70 years of its existence indeed often reveal an appalling discrepancy between

the defined norms and the social and political realities. But would the world of today be a better one in the absence of such frameworks, as selectively and arbitrarily as they are far too often applied (if applied at all)? Mary Robinson, then UN High Commissioner for Human Rights, in the first Dag Hammarskjöld Lecture delivered in 1998 pointed to some important facts:

Since the adoption of the Universal Declaration of Human Rights in 1948, there have been notable achievements. An impressive body of international law has been enacted, including the two Covenants and the Conventions on racism, torture, the rights of the child and the elimination of discrimination against women. Human rights mechanisms such as special rapporteurs, experts and working groups have been established.<sup>6</sup>

Since then, not least empowered through the institutionalization of the International Criminal Court (ICC) with its executive legal powers to prosecute, as a result of the Rome Diplomatic Conference in June/July 1998, the seemingly toothless tiger has at least partly turned into a credible and serious watchdog. Challenged for what is claimed to be a lack of even-handedness (and indeed reflecting a selectivity so characteristic of those claiming to hold the power of definition as the most influential states setting the agenda in global governance matters), the ICC received in some way a recognition by being taken to task for the role it has played in Africa at the extraordinary summit of the African Union (AU) on 12 October in Addis Ababa. Ironically the campaign for a withdrawal of the African states from the ICC was mainly initiated and promoted by some of the very same governments and heads of state, which had earlier referred cases to the ICC when it suited their very own interests.<sup>7</sup>

The authors of the capstone volume in the impressive stocktaking UN Intellectual History Project Series documented the extent of the UNs' role – greater than many would concede – not only in the creation of a globally relevant range of normative frameworks but also in the implementation of these, thereby enhancing the effectiveness of codified norms in respect of various essential human rights. That this is a never-ending mission and far from achieving only remotely satisfactory results is another story not in doubt. The authors themselves stop short of praise songs but point among others to the need for:

- Integrated approaches to human security that go beyond the traditional compass of territorial defense or military and security forces of countries
- Actions to promote and encourage a greater sense of human solidarity and commitments to human rights, democracy, and culture.<sup>8</sup>

The additional volume on global governance and the UN, with the programmatic subtitle 'an unfinished journey', notes that the organisation as an 'intellectual actor' succeeded in identifying and diagnosing problems, developing norms and formulating recommendations, while it has somewhat less successfully tried to institutionalize ideas.<sup>9</sup> But in the absence of a better alternative, we remain tasked to strengthen the same organisation that Dag Hammarskjöld as its second Secretary-General between 1953 and 1961 was seeking to turn into an active global governance institution contributing to more peace, security, equality, justice and human rights for all. Looking back, it would be unfair to dismiss the efforts and achievements completely. Especially the voices from the so-called global South, at times now overtly critical of the flaws and

biases that international governance as a tool for hegemonic interests displays, should remember that in the absence of the limited power of a UN and among others its Trusteeship Council their future might have been less promising.

In the meantime a plethora of published volumes document the historic and contemporary relevance of the normative, human rights related frameworks generated by the UN and their impact on the global order where they have been implemented politically, as in the case of the decolonization processes emerging since the 1950s. The historical discourses and stages of contestation over the definition and applicability of the Universal Charter of Human Rights is a fascinating case in point, which shows that 'the South' (and in particular representatives from the colonized world, not least from Africa) were indeed able to claim ownership over these fundamental platforms, also created for the sake of their own emancipation – if only at times to later forget about them or dismiss them as instruments of Eurocentric cultural imperialism when the same conventions were applied to the new governments.<sup>10</sup> Opportunistic selectivity of such a dubious nature seems to be among those matters political rulers share when it suits them – no matter where they are and what they represent. Double standards are, so to say, among the universally shared techniques for those in power. Despite such temptations for member states to make selective use of what suits their own interests and to abandon what is considered as an unwanted nuisance, the former Permanent Representative of South Africa to the UN could summarize the role of the global institution in the following way:

It serves as a beacon of hope and inspiration for the poor, disadvantaged, and



marginalised peoples of the world. It is also a centre for the political co-ordination of liberation efforts, and the font of many of the international laws and norms on which those who are involved in struggles for liberation and independence can draw their strength and legitimacy.<sup>11</sup>

Given this positive support it seems opportune that the South African judge Navi Pillay has been the UN High Commissioner for Human Rights for the last few years. Under her guidance the body assumed a trend-setting role in the promotion and protection of human rights in the necessary depth and width of their meaning and thereby set new standards. Other South Africans who have recently contributed to strengthening the UNs' mandate and the Charter's credibility through their assignments, on special missions and through other services include among others Justice Richard Goldstone and Professor Christof Heyns from the Law Faculty of the University of Pretoria. The latter submitted as Special Rapporteur on extrajudicial, summary or arbitrary executions on 13 September 2013 his latest report to the UN General Assembly, condemning the use of lethal force through armed drones.<sup>12</sup> The long tradition of a legal profession seeking to promote human dignity at the domestic front against the institutionalized injustices under Apartheid is reflected also in such international engagements. The latest appointment of the country's former deputy president Phumzile Mlambo-Ngcuka by UN Secretary-General Ban Ki-moon as the new head of the UN Entity for Gender Equality and Empowerment of Women (UN Women) in July 2013 underlines the opportunities to play a meaningful role in global norm-setting and thereby policy making.<sup>13</sup>

For South Africa under its democratically elected government human rights remain for the last two decades officially a core issue in its international relations – ever since Mandela declared in 1993 that, ‘human rights will be the light that guides our foreign policy’.<sup>14</sup> As a critical observer suggests, however, ‘this lofty statement of principles has been hampered by a series of factors’, which cast doubts on the coherent application of these principles.<sup>15</sup> Looking at some of the evidence in the recent past, democratic South Africa’s policy in promoting the Rule of Law (RoL) as a rights-based approach both at home and abroad ‘is inconsistent at best’, as the Executive Director of the Southern Africa Litigation Centre recently concluded.<sup>16</sup>

### ***Realpolitik and/or Social Capital***

The tension between a rights-based policy and the primacy of economic and geostrategic interests is of course not a specifically South African one but in a varying degree inherent to most if not all domestic and foreign policies by governments. It is also exemplified by the dilemma of other states in the region such as the positions held by the Botswana government. While this pursues a remarkably rights-based oriented foreign policy guided by the conviction that perpetrators should not have impunity, it violates at the same time the fundamental rights of the Basarwa where these clash with the interests to fully exploit the wealth provided by diamonds as the only meaningful economic resource to finance public expenditure. Notwithstanding this tension, which reflects the contradictions between normative values and material interests, Botswana has gained considerable international reputation and respect through its stance on both Robert Mugabe’s abuse of power and office in Zimbabwe and the extradition of Sudan’s al Bashir. Botswana also openly refused to participate in the campaign against the ICC.

Such positions are held in deviation from the official policy of many other states in SADC and the AU, but have certainly not undermined the legitimacy and credibility of Botswana's 'soft power'.

The same can be concluded with regard to the principled decision of the newly sworn in Malawian head of state Joyce Banda, who was indicating in May 2012 that if the Sudanese president al Bashir would attend the AU Summit in her country her government would comply with the ICC indictment. As a consequence, the Summit relocated within weeks to Addis Ababa, presumably without damaging in any way Malawi's reputation or eroding the authority of president Joyce Banda (rather the opposite might have been the case, though not acknowledged). Such pronounced views and positions of non-conformity with dominant positions on the continent testify that there is no uniform 'African' view on policy matters but that indeed specific policy makes a difference when it comes to the perceptions and images of governments and their credibility as human rights advocates. Those in charge over political power who are not afraid to articulate their own rights-based policy also in international affairs among peers in pursuance of justice add to a positive image of their country – and the continent - in the world and create social capital.

During 2011, Brazil, India and South Africa were united with Russia and China as members of the UNSC. All three are contenders campaigning also for permanent seats in the body. Hence the united BRICS in action on this level of global governance authority was a unique opportunity to see if the role played in this constellation would make any

difference. As critical observers from Human Rights Watch concluded, however, the record showed merely more of the same:

Rather than reshape the Council, these Southern leaders seemed content to settle for business as usual and failed to make a significant mark. They seemed unable or unwilling to harness their historical experiences to act as leaders in combatting today's abusive regimes.<sup>17</sup>

Asking for a mere expansion of the UNSC and thereby pretending that this would bring problems closer to a solution is rather a smokescreen promoting the own ambitions to represent the African continent as a permanent member in the body. But this would not unlock the existing paralysis: "There is no reason to think that an expanded UNSC would be any better at addressing the contemporary challenges facing humanity – if anything, paralysis would likely only be worse."<sup>18</sup>

Meanwhile, there are windows of opportunity to leave a mark and make achievements through the promotion of issues. South Africa took a decisive initiative in 2011 within the Human Rights Council for the adoption of a resolution on violations based on sexual orientation and gender identity, with the support of Brazil. While the Human Rights Watch advocates welcome such initiatives on thematic issues as 'gateways for progress on a range of issues', they stress that these should not replace 'action to address abuses by particular governments'. For them, the current mantra of 'cooperation, not condemnation' is not sufficient.<sup>19</sup>

This slightly differs with the views expressed during a policy advisory group seminar organized by the Cape Town based Centre for Conflict Resolution (CCR) on 12/13 December 2012. As the report suggests, the criticism leveled against South Africa during its first term as a non-permanent member on the UNSC in 2007/2008 for not supporting draft resolutions seeking to impose sanctions against the governments of Myanmar and Zimbabwe seemed unwanted given that since then Zimbabwe's situation has stabilized and important political reforms took place in Myanmar.<sup>20</sup> This seems a legitimate pragmatic argument in defense of such passivity or non-intervention, at least from an ex-post perspective, in both cases.

Indeed, the reasons for being not in support of the US-sponsored draft resolution presented to the UNSC on 12 January 2007 in condemnation of the human rights violations in Myanmar, as well as the South African blocking of a Security Council briefing in March 2007 on Zimbabwe's deteriorating situation lied in the rationale that both issues were considered internal matters not bringing international peace and security at risk. Dealing with them in the UNSC would be a selective singling out of culprits, while other perpetrators with similar dismal track records do not provoke the moral consciousness of the Western governments acting as human rights proponents: 'Whether intended or mere co-incidence, South Africa's actions helped prevent a situation where the UN is not seen as pandering to sectional interests or held hostage by a few powerful players.'<sup>21</sup> If this stance was a result of deliberate policy reflections, however, it was badly communicated and unable to enhance reputation. Rather, it created a bad publicity, since the way it was covered in the media suggested that South Africa would play the role of a spoiler. As a more critical analysis of South Africa's voting

behavior during her first two years as a non-permanent member of the UNSC suggested: 'South Africa seemingly subordinate human rights to broader goals intended to increase her influence and standing amongst the majority of the developing world'.<sup>22</sup>

It would certainly enhance and strengthen credibility of a still rights-based *Realpolitik* guided by fundamental principles, if those holding such views as given in the cases of Myanmar and Zimbabwe would not at the same time close eyes, ears and their mouth when it comes to failures to deliver and hide behind the old notion dating back to the Westphalian order that national sovereignty is a shield protecting against any kind of foreign interference: 'A foreign policy favouring sovereignty over human rights underlines the disengagement of South Africa 's foreign policy from the human rights values espoused in her constitution.'<sup>23</sup> The much applauded Global Political Agreement (GPA) for Zimbabwe, brokered by Thabo Mbeki, had been abused for most of the time by Robert Mugabe and ZANU-PF's policy not least through the unilaterally imposed elections held on 31 July 2013. This was an obvious (and successful) attempt to outplay the other parties and to manipulate once again the will of the electorate. South Africa's credibility as an honest broker would certainly not have been damaged if it had spoken out against such abuse and the blatant violation of the spirit and intention, under which the transitional arrangements were entered. Especially the public insults, which Mugabe hurled at one of the substantial negotiators representing the South African president (calling her a 'street woman'), would have required a clear rebuke. Instead, South Africa's at best lukewarm position (rather: inactivity) not only with regard to the wheeling and dealing of the autocrat but also with regard to the shelving of the SADC Tribunal and Zimbabwe's blatant contempt of court is another worrying indication that

quiet diplomacy might risk to end as compliance with perpetrators. At the end, ZANU-PF with the at least indirect support if not open complicity of other SADC states, including South Africa, managed to re-consolidate its political rule despite its appalling record of human rights violations.<sup>24</sup>

The refusal to allow the Dalai Lama a visit to South Africa (for the second time!) to join retired bishop Desmond Tutu in celebrating his 80<sup>th</sup> birthday is another case in point. The setting would have obviously not been an opportunity to provide the visitor a forum in support of the desire of the people of Tibet to autonomy and self-determination, which remains denied by the occupying Chinese government. But even if there would have been such a risk: it is a similar claim to that of the Namibian people, who for decades were fighting for their right to self-determination against the illegal occupation by South Africa – a fight, which was supported not only by the UN but also the ANC as a fellow liberation movement to SWAPO.

Similarly, the continued deafening silence with regard to the purge of the Rohingya in Burma, was another matter of concern. It should not be justified by the reluctance even of Au San Suu Kyi to take any critical view – not to mention efforts to seek any prevention – concerning the acts of organized violence bordering to forms of genocide is an insult to human consciousness. If the slogan of the ‘struggle days’ still has some meaning, then ‘an injury to one is an injury to all’, also in global terms. In Burma as well as in Zimbabwe the success of cooperation instead of condemnation seems at best gradual if not dubious. It also seems to create misleadingly so the impression, as if cooperation would require abstention from articulating critical views or the

condemnation of abuses and betrayals for the sake of 'quiet diplomacy'. If this kind of diplomacy remains too long too quiet, however, it actually risks turning into complicity. In line with the logic guiding the refusal to act on these domestic affairs in the UNSC, statements need not to be made within such a forum. But the complete absence of the articulation of any critical observations suggests a lack of concern and a similar bias to that of other countries with specific interests – which often deserve to be blamed for their selectivity.

If one speaks out over the constant violations of fundamental human rights in the Palestine territories and the continued occupation of the Western Sahara, one ought to also speak out in similar matters of concern. A review undertaken at the end of South Africa's first year in the UNSC generously suggests that the country's role in global governance matters was executed 'within an overarching framework of solidarity, social justice and democratic participation; and on the basis of a diplomacy that recognizes the importance of rules and principles'.<sup>25</sup> The importance of rules and principles is however credibly underlined by even-handed action, which provides coherence and legitimacy. Such commitment through action should document that these rules and principles are indivisible and a guiding compass to be applied in any given situation. They are all an integral part of the UN Charter and subsequent normative frameworks adopted, but require steadfast and uncompromising implementation to live up to the proclaimed ideals.

As the CCR's Policy Advisory Group Seminar Report also concluded, the experiences of South Africa's second term as Security Council member in 2011/2012 demonstrated



‘that African countries had to leverage a range of often fluctuating partners and groups at the UN on different issues to strengthen their influence’. This stressed ‘the need for case-by-case strategic alliances for African countries in order to promote their agendas more effectively’.<sup>26</sup> Such declared strategic goals and priorities beg the question if the policy is motivated by promoting an agenda of *Realpolitik* seeking to enhance African influence or if the policy should not be guided beyond geo-strategic parameters by a human rights discourse and orientation, which in contrast stresses the ‘soft power’ approach and hence generates social capital. If the geo-strategy remains the ulterior motive, one would find it difficult to challenge the double morale and standards of hegemonic powers for simply doing the same. Rather, what is needed is a more principled engagement on human rights, which would ‘demonstrate that human rights concerns are universal, not just the product of “western agendas”’. This would not only, as the Human Rights Watch advocates suggest, put ‘more pressure on governments that rely on that excuse to avoid addressing serious human rights abuses’.<sup>27</sup> It would also allow to take similar credible and pro-active positions when it comes to violations of the UN anchored norms and principles by those hegemonic states who dare to claim the power of definition when it suits them.

As two officials close to the South African foreign policy have argued, South Africa pursues despite contradictions and inconsistencies a foreign policy indicating ‘an overarching desire to challenge established power in pursuit of a more democratic international order’, which for them represents ‘a rights agenda in itself’.<sup>28</sup> One hopes that this policy is indeed anchored in convictions guiding a rights-based action.

Undeniably, South Africa’s post-1994 foreign policy was inspired by values rooted in

the history of the people's own struggle against a minority regime denying human dignity for the majority of those governed.

The deputy minister of international relations and cooperation, Ebrahim I. Ebrahim ended his public lecture on occasion of celebrating 19 years of foreign policy under a democratic government on 4 July 2013 with the programmatic confirmation: 'It is the very character of our history that should place us firmly as champions of democracy, good governance, human rights, development, peace and justice.'<sup>29</sup> Such openly declared commitment creates obligations and must accept to be measured against the affirmatively listed paradigms. It is then, when at times second thoughts creep in. As the deputy foreign minister reiterated, the roots of South Africa's foreign policy were in 'events that formed the rich tapestry of our historic struggle for freedom' and were 'informed by our experience of international solidarity, our values and principles ... to build a nation that would be free from oppression, segregation and discrimination'. However, the deputy minister also carefully seeks to prevent too high expectations, as he cautions scholars 'to recognise the realities that limit and sometimes even inhibit the conduct of an active foreign policy ... given our limited resources and the immediate pressing needs and expectations of the majority of our people during this relatively short period'. This might be a relevant constraint for immediately effective local socio-economic transformation to eliminate poverty and other forms of destitution. But the incentive for a value-based foreign policy, which unreservedly pursues goals as identified by the deputy minister, lies among others in the fact that one can live up to values and principles in the international arena through taking sides and thereby invest in social capital without spending too much money. If, however, foreign policy is

considered as an integral part of direct economic interests, the approach changes and impacts in other ways. Given that the deputy minister is eager to point in the very same speech to the fact, that his country is promoting the national interest through foreign engagements while giving priorities to Africa in its role as 'the top investor on the continent', he visibly mixes business interests with policy in a way, which gives business a say in policies. Such blend, however, might not be in favour of a rigorous pursuance of the noble ideals proudly proclaimed. Instead, South Africa should be at home and abroad associated with the UN Human Rights Council advancements, the moral authority of its independent judges and justices and the commitment to a Mandela legacy giving priority to being a 'soft power'.

But what can be observed is a somewhat misled patriotic pride among office bearers over the relative importance as a middle power, giving preference to playing the role of a pseudo-hegemon basing foreign policy on strategic interests for building alliances not with like-minded human rights advocates but with the BRICS or with an Africa using anti-imperialist rhetoric to protect dictators. Both, BRICS and Africa, do anyway not exist in a monolithic or pseudo-homogenous entity. The reference to such unqualified generalisations generously ignoring the much more nuanced political and economic realities and hierarchies misleadingly so also suggests that the BRICS or the African states would share an exclusively common agenda. This is at best only partially and opportunistically so the case and alliances differ from issue to issue, as the interests differ.<sup>30</sup> South Africa's declared aspirations to obtain a lead role on the continent are however suggesting the pursuance of a course, which is guided by power-related deliberations. The intense lobbying during the first half of 2012 for the – at the end

successful – candidacy of South Africa’s former foreign minister for the position of the AU Commissioner was neither a contribution to the much praised African unity, nor did it enhance the image of South Africa in some other parts of the continent. Neither does the rivalry between Nigeria and South Africa for a permanent seat in the UN Security Council reflect any African unity. Nor are flippant remarks helpful, which mock neighbouring countries. At a debate over the ANC Manifesto, president Zuma reportedly stated in defense of the planned introduction of the eTolling system: ‘We can’t think like Africans in Africa. It’s not some national road in Malawi’.<sup>31</sup>

### **Conclusion: Rule of Law as a Rights-Based Policy**

In his speech at the high level event on the RoL preceding the UN General Assembly in September 2012, President Zuma 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’.<sup>32</sup> 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 emphasized 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.’<sup>33</sup>

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'.<sup>34</sup> 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.<sup>35</sup> That this is 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, was openly documented through the extraordinary AU summit on 12 October in Addis Ababa. On this occasion, South Africa missed again an opportunity to live up to its declared noble goals. This reinforced the earlier reluctance to put its money where its words were. 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'.<sup>36</sup> This contrasts with the earlier role attributed to South Africa, as having successfully contributed to ensure the sanctity of the UN Charter and 'that its rules are observed and promoted'.<sup>37</sup>

The spirit and understanding advocated in this article, resonates with that of the second Secretary-General of the UN. In an address before the Academic Association of the University of Lund delivered on 4 May 1959 on 'Asia, Africa, and the West', Hammarskjöld confidently claimed that, 'the Organization I represent ... is based on a philosophy of solidarity'.<sup>38</sup> On 31 October 1956, during the Suez crisis, he stated before the Security Council in no uncertain terms: 'The principles of the Charter are, by far,

greater than the Organization in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people.’<sup>39</sup>

In his introduction to the 15th Annual Report of the UN for 1959-1960 (31 August 1960) he reiterated:

It is my firm conviction that any result bought at the price of a compromise with the principles and ideals of the Organization, either by yielding to force, by disregard of justice, by neglect of common interests or by contempt for human rights, is bought at too high a price. That is so because a compromise with its principles and purposes weakens the Organization in a way representing a definite loss for the future that cannot be balanced by any immediate advantage achieved.<sup>40</sup>

The many failures of the UN, often paralyzed or abused by the interests of individual member states does not render the UN system and the Hammarskjöld principles meaningless.<sup>41</sup> The onus ‘to save us from hell’ still rests on the institution, which despite all setbacks and shortcomings has at the same time also been a norm-setting authority. Since the adoption of the UN Charter and the Universal Declaration of Human Rights a wide range of further reference points in support of the advocacy of dignity and security for all have been created. Despite a mission unaccomplished, the UN ‘seems to remain the best possibility for a central governing institution at the head of an inclusive transnational constitutionalism, given that existing laws do not function as they should to protect the collective’.<sup>42</sup>

When entering the international arena as a democratic global player from the mid-1990s onward, South Africa had all reason to strengthen the capacity of the UN as a broker for peace and security based on the creation and protection of human rights for all. After all, given the UN-support to the struggle against a racist minority rule in violation of the fundamental principles was among the evidence why the UN matters. It therefore was just an adequate recognition that deputy minister Ebrahim stated:

South Africa is fully committed to actively participating in the UN specifically with the aim of ensuring that the UN's mandates are not usurped by less representative bodies and by ensuring that the UN is responsive to the needs of its membership, not only the narrow interests of a few states.<sup>43</sup>

This commitment implies, for the sake of one's own credibility, to transcend narrow self-interests and to translate them into the interests of wider humanity beyond particular alignments (be it the AU, the non-aligned movement, the BRICS or the G20, for that matter). Usually, this wider humanity is in our world not occupying the commanding heights of societies, holding the power of definition over the directions of international relations and the efficiency of global institutions.

The promotion of such a human rights-based agenda is in itself a powerful and comprehensive framework for any foreign policy. A diplomacy advocating the interests of people who otherwise would continue to remain victims of the abuse of power should, however, not be confused with a 'façade of action'.<sup>44</sup> A rights based foreign policy in recognition of the fundamental values enshrined in the UN Charter and

subsequent normative frameworks would require the courage to dissociate from otherwise preferred bedfellows if these are not up to standard measured against these criteria. - But what could, after all, add more reputation and social capital to the international image of a country, which is represented by a government that walks in the footsteps of Dag Hammarskjöld and Nelson Mandela?

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### **Notes**

<sup>1</sup> Neethling T, ‘Reflections on norm dynamics: South African foreign policy and the no-fly zone over Libya’, *South African Journal of International Affairs*, 19, 1, April 2012, pp. 25-42 (here: p. 39).



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<sup>2</sup> Bischoff P, 'Contrivance with purpose? International relations and the reconstitution of the international', *Strategic Review for Southern Africa*, 32, 2, 2010, pp. 121-133.

<sup>3</sup> Cordier A W & W Foote (eds) *Public Papers of the Secretaries-General of the United Nations. Volume II: Dag Hammarskjöld 1953-1956*. New York and London: Columbia University Press 1972, p. 301.

<sup>4</sup> 'The Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter Apartheid Convention) has its roots in the opposition of the United Nations to the discriminatory racial policies of the South African Government – known as apartheid – which lasted from 1948 to 1990. Apartheid was annually condemned by the General Assembly as contrary to Articles 55 and 56 of the Charter of the United Nations from 1952 until 1990; and was regularly condemned by the Security Council after 1960. In 1966, the General Assembly labelled apartheid as a crime against humanity (resolution 2202 A (XXI) of 16 December 1966) and in 1984 the Security Council endorsed this determination (resolution 556 (1984) of 23 October 1984). The Apartheid Convention was the ultimate step in the condemnation of apartheid as it not only declared that apartheid was unlawful because it violated the Charter of the United Nations, but in addition it declared apartheid to be criminal. The Apartheid Convention was adopted by the General Assembly on 30 November 1973, by 91 votes in favour, four against (Portugal, South Africa, the United Kingdom and the United States) and 26 abstentions. It came into force on 18 July 1976. As of August 2008, it has been ratified by 107 States.' Dugard J, 'International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973', *Audiovisual Library of International Law*, <http://untreaty.un.org/cod/avl/ha/cspca/cspca.html>.

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<sup>5</sup> Heyzer N, *Women, War and Peace. Mobilising for Peace and Security in the 21<sup>st</sup> Century. The 2004 Dag Hammarskjöld Lecture*. Uppsala: Dag Hammarskjöld Foundation 2004, pp. 17-18.

<sup>6</sup> Robinson M, *Human Rights. Challenges for the 21st Century. The Dag Hammarskjöld Lecture 1998*. Uppsala: Dag Hammarskjöld Foundation 1998, p. 8.

<sup>7</sup> See for critical African counter arguments among many others Mariam, A G, 'The AU's mass treaty-side brinkmanship', *Pambazuka News*, issue 650, 15 October 2013, <http://pambazuka.org/en/category/features/89281>

<sup>8</sup> Jolly R, L Emmerij & T G Weiss, *UN Ideas That Changed the World*. Bloomington and Indianapolis: Indiana University Press 2009, p. 30.

<sup>9</sup> Weiss T G & R Thakur, *Global Governance and the UN. An Unfinished Journey*. Bloomington and Indianapolis: Indiana University Press 2010, p. 51.

<sup>10</sup> See among others: Burke R, *Decolonization and the Evolution of International Human Rights*. Philadelphia: University of Pennsylvania Press 2010; Whelan D J, *Indivisible Human Rights. A History*. Philadelphia: University of Pennsylvania Press 2010; Gibney M & S Skogly (eds), *Universal Human Rights and Extraterritorial Obligations*. Philadelphia: University of Pennsylvania Press 2010; Hoffmann S-L (ed), *Human Rights in the Twentieth Century*. Cambridge et. al.: Cambridge University Press 2011; Neier A, *International Human Rights Movement. A History*. Princeton, N.J. and Woodstock: Princeton University Press 2012. For a thought-provoking different approach see Westra L, *Human Rights: The Commons and the Collective*. Vancouver, BC: UBC Press 2011.

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<sup>11</sup> Kumalo D S, 'The UN: a personal appreciation', in le Pere G & N Samasuwo (eds), *The UN at 60. A new spin on an old hub*. Midrand: Institute for Global Dialogue 2006, pp. 29-50 (here: p. 31).

<sup>12</sup> *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, United Nations General Assembly, sixty-eighth session, item 69(b) of the provisional agenda, document A/68/382, 13 September 2013, accessible at

<http://justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Heyns-Report-Drones.pdf>

<sup>13</sup> See more at <http://www.safpi.org/news/article/2013/south-africa-s-phumzile-mlambo-ngcuka-appointed-chief-un-women-s-agency#sthash.NVJtN4Yc.dpuf>.

<sup>14</sup> Mandela N, 'South Africa's Foreign Policy', *Foreign Affairs*, 72, 5, 1993; <<http://www.anc.org.za/show.php?id=4113>>.

<sup>15</sup> Marthoz J-P, *The challenges and ambiguities of South Africa's foreign policy*. Oslo: Norwegian Peacebuilding Resource Centre, September 2012 (NOREF Report), p. 5.

<sup>16</sup> Fritz N, *South Africa's role in global promotion of Rule of Law: "Neither here nor there"*. South African Foreign Policy Initiative (SAFPI), SAFPI Policy Brief, No. 12, September 2012, p. 1.

<sup>17</sup> Roth K & P Hicks, 'Encouraging stronger engagement by emerging powers on human rights', *open democracy*, 20 June 2013.

<<http://www.opendemocracy.net/openglobalrights/kenneth-roth-peggy-hicks/encouraging-stronger-engagement-by-emerging-powers-on-huma>>

<sup>18</sup> Fritz N, *The UNSC, the ICC and the (non)role of South Africa*. South African Foreign Policy Initiative (SAFPI), SAFPI Policy Brief No. 15, October 2012, p. 3.

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<sup>19</sup> *Ibid.*

<sup>20</sup> Policy Advisory Group Seminar Report, *Africa, South Africa, and the United Nations' Security Architecture*. Cape Town: Centre for Conflict Resolution, June 2013, p. 23.

<sup>21</sup> le Pere G, M Pressend, M Ruiters & S Zondi, *South Africa's Participation in the System of Global Governance*. A Review prepared for the Presidency's Fifteen Year Review. Midrand: Institute for Global Dialogue, February 2008, p. 15.

<sup>22</sup> Bischoff P-H, 'Reform in Defence of Sovereignty: South Africa in the UN Security Council, 2007-2008', *Africa Spectrum*, 44, 2, 2009, pp. 95-110 (here: p. 106).

<sup>23</sup> *Ibid.*, p. 107.

<sup>24</sup> See i.a. Pallotti A, 'Human Rights and Regional Cooperation in Africa: SADC and the Crisis in Zimbabwe', *Strategic Review for Southern Africa*, 35, 1, 2013, pp. 17-40; Kibble S, 'Zimbabwe Between the Referendum and the Elections', *Strategic Review for Southern Africa*, 35, 1, 2013, pp. 93-117; Southall R, 'How and Why ZANU-PF won the 2013 Zimbabwe Elections', *Strategic Review for Southern Africa*, 35, 2, 2013 (in print).

<sup>25</sup> le Pere G, M Pressend, M Ruiters & S Zondi, *South Africa's Participation in the System of Global Governance*. A Review prepared for the Presidency's Fifteen Year Review. Midrand: Institute for Global Dialogue, February 2008, p. 33.

<sup>26</sup> Policy Advisory Group Seminar Report, *Africa, South Africa, and the United Nations' Security Architecture*. Cape Town: Centre for Conflict Resolution, June 2013, p. 25.

<sup>27</sup> Roth K & P Hicks, 'Encouraging stronger engagement by emerging powers on human rights', *open democracy*, 20 June 2013.

<sup>28</sup> Valji N & D Tladi, 'South Africa's foreign policy: between idealism and the realpolitik of being an emerging power', *open democracy*, 19 June 2013

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<<http://www.opendemocracy.net/openglobalrights/nahla-valji-dire-tladi/south-africa%E2%80%99s-foreign-policy-between-idealism-and-realpolit>>

<sup>29</sup> 'Celebrating 19 years of South Africa's Foreign Policy', Public Lecture by Deputy Minister of International relations and Cooperation, H. E. Mr Ebrahim I Ebrahim, South African Institute of International Affairs (SAIIA), 4 July 2013

<http://www.safpi.org/news/article/2013/dep-min-ebrahim-celebrating-19-years-south-africa-s-foreign-policy>. All quotes following are form this source.

<sup>30</sup> One only needs to observe the wheeling and dealing over climate change related negotiations within COP, which clearly reflect alliances and interests beyond an established North-South divide and put also polluters like South Africa on the spot.

<sup>31</sup> Quoted in Patel K, 'Zuma at ANC Manifesto forum: the courts have spoken on eTolls, people must obey', *Daily Maverick*, 22 October 2013

<http://www.dailymaverick.co.za/article/2013-10-22-zuma-at-anc-manifesto-forum-the-courts-have-spoken-on-etolls-people-must-obey/#.UmbMZiTrbdI>

<sup>32</sup> Zuma J, Address to the High Level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels. UN Headquarters in New York, 24 September 2012,

<<http://www.dfa.gov.za/docs/speeches/2012/jzum0924a.html>>.

<sup>33</sup> Pillay N, Statement at the High Level Meeting on the Rule of Law at the National and International Level. New York, 24 September 2012,

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12572&LangID=e>.

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<sup>34</sup> Zuma J, Address on the occasion of the Joint Sitting of Parliament, to pay tribute and bid farewell to Dr. Nkosazana Dlamini-Zuma, the African Union Commission Chairperson. Cape Town, 19 September 2012  
<<http://www.thepresidency.gov.za/pebble.asp?reid=6775>>.

<sup>35</sup> See i.a. Obote Odora A, 'International Criminal Justice in the Shadow of Politics', in Melber H & M Schoeman (eds), *The United Nations and Regional Challenges in Africa – 50 Years After Dag Hammarskjöld*. Uppsala: The Dag Hammarskjöld Foundation 2011 (*Development Dialogue*, no. 57), pp. 77-107; Hansungule M, 'How to Tackle Impunity – A Comment', in *Ibid.*, pp. 108-122; Heinrich Böll Stiftung, *A Fractious Relationship: Africa and the International Criminal Court*. Cape Town: Heinrich Böll Foundation 2012 (*Perspectives*, no. 1.12).

<sup>36</sup> Fritz N, *South Africa's role in global promotion of Rule of Law: "Neither here nor there"*, South African Foreign Policy Initiative (SAFPI), SAFPI Policy Brief, No. 12, September 2012, p. 3.

<sup>37</sup> le Pere G, M Pressend, M Ruiters & S Zondi, *South Africa's Participation in the System of Global Governance*. A Review prepared for the Presidency's Fifteen Year Review. Midrand: Institute for Global Dialogue, February 2008, p. 10.

<sup>38</sup> Cordier A W & W Foote (eds), *Public Papers of the Secretaries-general of the United Nations. Volume IV: Dag Hammarskjöld 1958-1960*, (Selected and edited with Commentary), New York and London: Columbia University Press 1974, p. 384.

<sup>39</sup> Cordier A W & W Foote (eds), *Public Papers of the Secretaries-General of the United Nations. Volume III: Dag Hammarskjöld 1956-1957*. New York and London: Columbia University Press 1973, p. 309.

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<sup>40</sup> Cordier A W & W Foote (eds), *Public Papers of the Secretaries-general of the United Nations. Volume V: Dag Hammarskjöld 1960-1961*. New York and London: Columbia University Press 1975, p. 139.

<sup>41</sup> See the contributions to Stahn C & H Melber (eds), *Peace Diplomacy, Global Justice and International Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammarskjöld*. Cambridge: Cambridge University Press 2013/14 (forthcoming).

<sup>42</sup> Westra L, *Human Rights: The Commons and the Collective*. Vancouver, BC: UBC Press 2011, p. 263.

<sup>43</sup> 'Celebrating 19 years of South Africa's Foreign Policy', Public Lecture by Deputy Minister of International relations and Cooperation, H. E. Mr Ebrahim I Ebrahim, South African Institute of International Affairs (SAIIA), 4 July 2013

<http://www.safpi.org/news/article/2013/dep-min-ebrahim-celebrating-19-years-south-africa-s-foreign-policy>.

<sup>44</sup> Roth K, 'A Facade of Action. The Misuse of Dialogue and Cooperation with Rights Abusers', in Human Rights Watch, *World Report 2011. Events of 2010*, New York: Human Rights Watch 2011, pp. 1-22.