Some (perhaps unforeseen) international law and relations in the time of globalisation
ABSTRACT

Globalisation remains an obscure and controversial term. In this article it will simply be used as the exportation to the rest of the world of Western ideas and institutions imbued with democratic governance. The rule of law and market economies form the main ingredients of the phenomenon we call globalisation. Since the end of the Cold War greater cooperation between erstwhile ideological opponents, the spread of multilateral arrangements and the replacement of authoritarian and repressive regimes with more open and democratic forms of government have also fast-tracked a number of developments with consequences that raise serious questions for international law and relations and which could be classified as rather unforeseen.

OPSOMMING

Globalisasie bly 'n vae en kontroversiële begrip. In hierdie artikel word dit eenvoudig gebruik as die uitvoer na die res van die wêreld van Westerse idees en instellings deurdrenk met demokratiese beheer. Die regsreël en markekonomieë is die hoofbestanddele van die verskynsel wat ons globalisasie noem. Sedert die einde van die Koue Oorlog het die groter samewerking tussen eertydse ideologiese opposente, die multilaterale ooreenkomste en die vervanging van autoritêre en onderdrukkende regerings met oper en meer demokratiese vorms van regerings 'n aantal ontwikkelings versnel met gevolge wat ernstige vrae laat ontstaan vir internasionale reg en betrekkinge en wat as onvoorsien beskou kan word.

ISIFINGQO

Intuthuko yamazwe omhlaba iseyitemu elingacacile nelinemiqondo eshayisanayo. Kule athikili lizosetshenziswa njengokuhambisa emhlabeni wonke imiqondo yaseNtshonalanga kanye nezikhungo ezigewele ukubusa ngokwenzandlo yeningi. Ukubusa komthetho kanye neminotho yezimakethe kwenzwa izithako ezinkulu zalesi sehlabako esisibiza ngentuthuko yamazwe omhlaba. Selokhu kwaphela i-Cold War kwaba nokuhlanganyela okukhulu phakathi kwabanemiqondo ephikisanayo esikhathini esedlude, ukusabalala kwamalungiselelo okunzehlangothi eziningi kanye nokubuyiselwa esikhundele kwemibuso ebusa ngamandla necindezelayo ngezimo ezivuleleke kakhulu nezisebenza ngokwenzandlo yeningi zikahulumeni nazo zisheshise inamba yentuthuko ngemiphumelo evusa imibuzo enamandla yomthetho wamazwe omhlaba kanye nobudlelwano nokungahlelwa njengokungabonakalanga kuseza.

SENAGANWA

Tšomišanokakaretšo ya lefase e dula e le lereo la go širega gape la kganetšano. Ka go lengwalonyakilišišo le le tla dirišwa bjalo ka tsamaišo go lefase ka bophara ya dikgopolo le diinstšušene tša Bodikela tšeo di tlašišwe go ka pušo ya demokrasi. Pušo ya molao le diekonomi tša thekišo di bopa ditswaki tše kgolo tša ponagalo ye re e bitšago tšomišanokakaretšo ya lefase. Go tloa mafelelong a kgwebelano, tirišano ya kgolo magareng ga dikgopolo tša manaba, phatlalatšo ya dipekašetšo tša mahakore a mantiši le poolefša ya taolo le mebušo ye e thibelwago ka dibopego tša buleligelo le tša demikrasi tša mmušo di sepetše dišišhabollo tše mmalwa ka lebelo ka ditlamorago tšeo di rotošišego dipotšišo tše kgolo go molao wa boditšhabatšhaba le dikamano gape tšeo di ka hlopšago bjalo ka tšeo di sa lebelelwago.
INTRODUCTION

Globalisation remains an obscure term and the controversy about its real meaning is still the subject of much debate. For current purposes it will simply be accepted that the exportation to the rest of the world of Western ideas and institutions imbued with democratic governance, the rule of law and market economies form the main ingredients of the phenomenon we call globalisation. Since the end of the Cold War greater cooperation between erstwhile ideological opponents, the spread of multilateral arrangements and the replacement of authoritarian and repressive regimes with more open and democratic forms of government (of different shades, naturally!) have also fast-tracked a number of developments with consequences that raise serious questions for international law and relations and which could be classified as rather unforeseen, if that is the correct term to use at all. Below only a few such developments have been selected for current purposes.

DEMOCRATIC GOVERNANCE AND HUMAN RIGHTS

Efforts by the United Nations since 1945 have contributed significantly to the development of multilateral treaty obligations for states in respect to human rights guarantees and democratic governance. However, the effective enforcement of these standards at national level remains worrisome in the majority of UN member states especially amongst the ranks of African and some other developing countries. The one notable exception at regional level is the states forming part of the Council of Europe where the influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the compliance record of the member states are exemplary.

In 2000 African leaders, following the post-Cold War trend, happily endorsed the Western standards of human rights guarantees and good governance by replacing the ill-fated OAU with the AU and its economic development programme under NEPAD. The constitutive documents of both institutions — modelled on the European template — are indistinguishable from the West’s conventional confessions on human rights and democracy, even containing the extraordinary promise to intervene in a member state, if necessary by military means, in response to genocide, war crimes and crimes against humanity. Several African states are now also amongst those, who some commentators claim, have made transitions from undemocratic to democratic rule.

However, the so-called democratic advances under the triumphant march of globalisation seem rather premature. In the developing and post-communist world authoritarian undertones still stifle real democracy; the democratic signs some over-excited commentators write about seem rather superficial and are still undermined by multiple forms of bad governance, corrupt, incompetent and indifferent bureaucracies; failing judicial systems and self-serving ruling elites who have no respect for the rule of law and are only accountable to themselves. In many parts of the world electoralism, it seems, has been confused with democracy. In two reports dated 3 June 2009 (“Worst of the Worst”) and 13 July 2009 (“New Authoritarianism in the 21st Century”) respectively, Freedom House has shown how several states have merely adapted, modernised and made more sophisticated their undemocratic practices and how democratic gains that were made in recent times have been prevented from spreading and in some cases even rolled back. Commenting on these and related developments, Larry Diamond wrote in the 2008 edition of Foreign Affairs (No 2 of 42) that:

In the coming decade, the fate of democracy will be determined not by the scope of its expansion to the remaining dictatorships of the world but rather by the performance of at-risk democracies ... [encompassing] ...more than 50 states, including most countries in Latin America and the Caribbean, four of the eight democracies in Asia, all of the post-Soviet democracies that do not belong to the European Union, and virtually all of the democracies in Africa”.

In the meantime the victims of the abuse of power in Africa have also discovered that there was an unfortunate
misunderstanding with regard to the new standards for good governance set by the Constitutive Act of the African Union: the enforcement of the new standards against delinquent African leaders is negotiable and dispensable! And so is the implementation of the Rome Statute for the International Criminal Court (1998), established for the prosecution of the most serious crimes of international law and international humanitarian law. Consequently, the African Union has declared officially on 3 July 2009 that it will not cooperate with the ICC in surrendering leaders such as President Al-Bashir of Sudan to stand trial for crimes against humanity and war crimes. The political process, they imply, is far more important than the thousands of lives lost or the millions turned into refugees. After all, it is still more comfortable for African leaders to denounce Israel for its operations in the occupied territories or the USA for detention conditions in Guantanamo Bay. The African Union decision represents the most serious challenge to date to the long struggle against the kind of impunity and lawlessness the African continent is known for. However, more scandalous is South Africa’s support for the AU stance. In doing so the South African government (which has ratified the Rome Statute) has flagrantly acted against the country’s own constitution and law (see *The Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002).

In the meantime this malaise has also characterised similar reactions against attempts in other national jurisdictions (France, Belgium) to bring political leaders in Africa to justice for gross human rights violations. Suddenly, positivist claims by political opportunists to state sovereignty, political independence and territorial integrity are popular again, at the very moment when their past abuse has caused an international debate on states’ responsibility to prevent and protect as an inherent part of their claim to sovereignty. The great irony is that while the acceptance, formally at least, of the basic standards for the conduct of governments and of how states should interact with one another is unprecedented in its global reach, it is still the parochial world of the local, regional or geopolitical setting that makes the difference between action and inaction.

**WEAK STATES AND GLOBALISATION**

The proponents of globalisation need individual states to give practical meaning to the ideas that drive the whole enterprise. And not any kind of state will do! What is needed are states that are internally stable and capable of providing basic and efficient services and legal guarantees to their citizens within a political and legal framework that make it possible for public and private institutions to bring about real development in a sustainable manner. Here, we are talking about states that have in fact joined the United Nations and are in terms of Article 4 of the UN Charter presumed to be at least able and willing to carry out their obligations in terms of the Charter. This is after all what states claiming sovereignty and political independence in daily rhetoric can justifiably be expected to do in return. However, at this point in time the world is largely left with nothing but the hubris of a large number of states who were allowed to join the United Nations through the process of decolonisation for which purpose the Article 4 requirements had to be abandoned or watered down to a level where they had no effect in real terms any more. Clapham’s striking assessment of these developments warrants emphasis:

> The pretence that formally independent states should be treated 'as if' they possessed the full attributes of sovereignty, even if they evidently did not in fact do so, was used to cover the cracks in the façade, under the assumption that these cracks would eventually be sealed, and that artificial states would solidify into the real thing. Both superpowers and former colonial powers helped to maintain the states for whose protection they assumed responsibility, by means of diplomatic support, economic aid and, if need be, direct military intervention. These state-supporting activities were condoned and indeed encouraged by Third World international organizations, despite their general condemnation of 'imperialism', through the adoption of a doctrine of sovereignty that upheld the power of the government of any particular state, and recognized the right of that government to call on
external assistance for its own protection. In the process little attention was given to the domestic structures of the state itself or, in the grossest cases, to the levels of repression and corruption that it embodied.

The great irony of all this is that while questions of effective governance and institutional capacity were blown away by the winds of change Harold MacMillan warned about in the sixties, the international and regional communities of states were forced by subsequent events to return to this fundamental question and to confront it head on. Even in the 2001 base document of the New Partnership for Africa’s Development (NEPAD) it was acknowledged that post-colonial Africa inherited "weak states and dysfunctional economies that were further aggravated by poor leadership, corruption and bad governance" with the result that today "the weak state remains a major constraint to sustainable development" and one of "Africa’s major challenges is to strengthen the capacity to govern and to develop long-term policies". This return to first principles was brought about by mainly two occurrences: the unhappy experiment with economic reforms in developing countries since the seventies and more recently, the concern with the interconnectedness between fragile or dysfunctional states and questions of international peace and security. The interesting aspect is that the pre-conditions for statehood and the question of state capacity, which was left to die in the text of Article 4 of the UN Charter under the domineering influence of post-colonial sentiments, were forced onto the world scene towards the beginning of the nineties, not so much through the efforts of the main political organs of the UN, but through the policy and research papers of international and regional donor institutions. However, a major challenge still facing both the United Nations and regional agencies such as the African Union, in particular, is to demonstrate the political will to deal with the delinquent states in their midst convincingly and effectively. The African Union especially has dismally failed in this regard and cannot prevent predator elites in Africa to gang up against the interests of millions of powerless citizens.

**THE GRANDEST MERGER OF THEM ALL**

The era of globalisation is also characterised by all kinds of mergers, or what some would call fusions. In the music and performing arts industry, for instance, gangster culture has merged (or fused) with popular music and fashion through which gangster lifestyles and language have become sanitised and made respectable. We live in the time of the gangster as hero, as entertainer, as the poor victim of unjust laws and socio-political conditions! At the political and economic level the organised criminal underworld has joined forces with state officials to set up powerful networks of criminal enterprises as a result of which the distinction between the legitimate and illegitimate economy in many states has become blurred. Alvin Toffler wrote about this in *Powershift* (1990), drawing attention to what he called the changing nature of power and wealth creation within the context of a new power system that is in the process of replacing that of the industrial past at an accelerating pace. This new power system is co-owned by the Underground Empire (as Toffler calls it) which is in the process of seizing sizeable chunks of the clout once controlled by nations alone.

What we see emerging is a new form of geopolitics, facilitated by the growing irrelevance of state borders in the wake of an expanding global trade on the back of sophisticated and vulnerable modern communication systems and growing volumes of megabyte money. In 1994, the Secretary-General of the United Nations reported that criminal organisations flourish in weak states where authority has been eroded or where political weakness and poor law enforcement exist, all elements that create many points of convergence and dazzling opportunities for informal alliances with legitimate enterprises. For this purpose criminal organisations —

...find it both necessary and advantageous to co-opt public officials, whether to obtain official documents or export licenses, to help launder the proceeds of criminal activity or to provide intelligence. The linkages may be based on bribery, coercion or a mixture of the two. Organized criminal groups have
demonstrated their preference towards 'systemic' corruption designed to ensure the preservation of congenial and low-risk home base or a comfortable environment in host countries (UN Doc E/CN 15/1996/2 of 4 April 1994, par 18).

In a 2009 report on organised crime, the United Nations Office on Drugs and Crime (UNODC) noted that as globalisation has expanded international trade, so has the range of organised crime activities broadened and diversified. In another report on Transnational Trafficking and the Rule of Law in Africa (July 2009), UNODC has shown how West African states are plundered – because they have all that criminals need: resources, a strategic location, weak governance and an endless source of foot soldiers who see few viable alternatives to a life of crime – with flows in illegally traded goods that surpass the combined gross domestic product of West African states.

The symbiotic relationships between criminal enterprises and state and economic enterprises not only has a corrosive effect on governance, but facilitates the development of a systemic, transnational and multi-sectoral alternative economy which could have devastating effects on national economies, especially in developing countries. This danger takes a more serious turn when it is considered that, following the example of alliances among transnational corporations, transnational criminal organisations may form strategic alliances between diverse organisations to facilitate the distribution of products, to share or to reduce risks, to protect profits and personnel, or to gain access to new markets. If this trend continues it makes sense to consider the possibility of a consolidation of strategic alliances that could follow another feature of the corporate world, namely full-scale mergers (see Secretary General report, above, par. 24, 25; 27, 44).

A NEW KIND OF WAR

Traditionally, armed conflict, or war, *strictu sensu*, was associated with a conflict between states involving their armed forces. Then developed internal armed conflicts aimed at the over-throwing of an existing government or conducted for secessionist purposes. This latter version has gained in prominence after the end of the Cold War. In both instances the warring parties were identifiable and distinguishable and their conduct regulated by the Geneva Conventions (1949) and additional Protocols (1977) as well as other principles of the law of war.

Recently, the US and Russia became involved in talks on a new threat, namely cyber warfare, and how to deal with it. Both parties agree that cyberspace is an emerging battle ground but there is disagreement on how to deal with it. Russia favours the multilateral approach, in other words, the adoption of an international treaty to regulate the use of cyberspace after the example of the Biological and Chemical Weapons Convention. The US rejects this as unnecessary and instead argues for improved cooperation between international law enforcement groups.

The threats as well as the issues are real and what we hear and read about is the tip of the iceberg. In 2007 the computerised infrastructure of the government of Estonia was incapacitated for a whole month by what experts call 'denial of service' which the Estonian government denounced as an unprovoked 'act of aggression'. In July 2009 web sites of the US Treasury and Secret Service were knocked out almost at the same time as South Korean government sites as well as banking sites came under attack. Most of the attacks came from Chinese, Russian and North Korean soil, but to determine who is responsible has proved extremely difficult. In response, many countries, including the United States, are now developing new "weapons" called "logical bombs" that can be hidden in computers to spy on web sites and disable circuits in times of emergency. There is also talk of a new US military command to be set up that will prepare America for both a defensive and offensive computer war (see also, Council on Foreign Relations *The Evolution of Cyber Warfare* February 27, 2008, at http://www.cfr.org; Global New York Times, 28 June 2009 "US and Russia Differ on Treaty for Cyberspace").

In this kind of war the enemy is evasive and has no territorial base. There is no use of armed force in the traditional sense of the term and it is even debatable whether the "attack" qualifies as an armed attack in the context of article 51 of the
UN Charter which regulates the right to self-defence which states are entitled to in terms of the Charter. And how does one distinguish between combatants and civilians and between military objects and civilian objects as required in terms of the law of war? And what about the principle of proportionality, a fundamental principle of the law of war, in deciding on the means and methods of the offensive or defensive action and the possible consequences thereof? Developed at a time when cyber war was considered somebody’s LSD-inspired fantasy, international law dealing with the use of force and the law of armed conflict is ill-prepared for this new phenomenon. Hence, we are now confronted with some major questions on how to deal with the new threats and related issues in terms of an existing legal framework or to develop a whole new legal regime.

CONCLUSION

The question could be asked whether the many challenges faced by the international community in the time of globalisation could not perhaps be better addressed in a world dominated by a single superpower, such as the United States, under whose domineering influence certain leading ideas and solutions lord themselves over the rest of the world. If there were such hopes after the collapse of the bipolar world, they have now all been dashed. The reaction against it has been swift and definitive. The new alliances and regional coalitions that have emerged over the last twenty years paint a picture of a non-polar world (also referred to as variable geometry) which is in the making and in which major shifts in political, economic and cultural power in different corners of the world are taking place, often in direct reaction to the United States and its small band of allies. The great irony is that the new emerging forces and multiple centres of economic and strategic interest, in as much as they are the products of globalisation, are responsible for throwing back to the West new versions and mutations of globalisation.

The non-polar world is not only full of new hazards but its complexity makes it difficult to organise and to establish and maintain order. It may be argued that the deep-seated interest in cooperation between major alliances in the world is still robust enough to rise to the occasion. However, international order also requires the will to act, especially in those crises that undermine the foundation of world order. In a non-polar world though, establishing effective collective responses and making institutions cooperate may prove to be much more difficult, and entropy, followed by greater randomness and disorder may set in. It therefore remains to be seen whether a non-polar world will be better equipped and act more decisively in the face of major challenges such as climate change, poverty, resource depletion, emergence of new powers, nuclear proliferation, religious fundamentalism and transnational terrorism. Evidence at this point in time is far from convincing.

Select bibliography