

ADDRESS BY THE PATRON OF THE TMF, THABO MBEKI, AT THE AGM OF THE LAW SOCIETY OF THE NORTHERN PROVINCES: SUN CITY, NOVEMBER 5, 2011.

“International Law and the Future of Africa”.

Chairperson,
Distinguished delegates:

I would like to thank the Law Society of the Northern Provinces for giving me the honour to address its AGM this morning.

As you know, I suffer from the great deficiency that I am not a lawyer. However I took the decision to speak to you on what I consider to be the important subject of “International law and the future of Africa”.

I elected to address this topic because I am convinced that the legal community in our country, such as yourselves, and in Africa as a whole, has an urgent obligation to use its enormous talents to defend the inalienable right of the peoples of Africa to self-determination and thus affirm the inviolability of an important principle of international law.

I hope that what I will say later will explain why, in all humility, I decided to place this challenge at your feet.

Last year we celebrated the 50th Anniversary of the adoption by the UN General Assembly of the historic “Declaration on the Granting of independence to Colonial Countries and Peoples”.

Among other things, the Declaration says:

“The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

For the colonised, the Declaration constituted an important step forward in terms of expanding the corpus of international law to the extent that it decreed that "all peoples have the right to self-determination".

This proposition had been raised earlier in the context of the Second World War, when US President Franklin D. Roosevelt and British Prime Minister Winston adopted "The Atlantic Charter" in 1941, which served as the precursor to the UN Charter.

In this context they said they "deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world" and went on to say that:

"they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned"; and,

"they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."

And yet the UN Charter which came into force in October 1945 suggested that the colonial powers could continue to hold onto their colonies. This was despite the fact that its Article 1, spells out that one of "The Purposes of the United Nations" is: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..."

In its Article 73 the UN Charter says: "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end..."

"(agree) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement."

To this extent the UN Charter gave legitimacy to continued colonial rule, of course with the proviso that the colonial powers would chaperone their wards towards self-government. It is self-evident that this was done at the insistence of the then colonial powers, principally the United Kingdom and France.

To the contrary, the "Declaration on the Granting of Independence to Colonial Countries and Peoples" made the peremptory determination that:

"All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

"Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."

It goes without saying that the eradication of colonialism, apartheid and white minority rule is one of the great and historic achievements of the period since the end of the Second World War.

As an expression of this development, we too, as South Africans, won the rights "freely (to) determine (our) political status and freely (to) pursue (our) economic, social and cultural development."

I am certain that all of us present here at this AGM, other South Africans and all Africans throughout our Continent, place a high value on these rights and would defend them with our very lives.

Chairperson:

I have spoken as I have because of troubling developments which suggest, ominously, that Africa's right to self-determination, so unequivocally confirmed in the "Declaration on the Granting of Independence...", and entrenched as an important part of international law, is under threat.

In hindsight, it would seem to me that we made a serious error as Africans when we paid virtually no attention to a particular and pernicious thesis advanced by various individuals in the countries of the North, and specifically the UK, arguing for the re-colonisation of Africa.

In a 2002 article on "The Post-Modern State", the British diplomat and then adviser to UK Prime Minister Tony Blair, who now occupies an important position in the EU Commission, Robert Cooper, said that one of the "main characteristics of the post-modern world" is achieving "security (that) is based on transparency, mutual openness, interdependence and mutual vulnerability."

He went on to say:

"Today, there are no colonial powers willing to take on the job, though the opportunities, perhaps even the need for colonisation is as great as it ever was in the nineteenth century. Those left out of the global economy risk falling into a vicious circle. Weak government means disorder and that means falling investment..."

"All the conditions for imperialism are there, but both the supply and demand for imperialism have dried up. And yet the weak still need the strong and the strong still need an orderly world. A world in which the efficient and well governed export stability and liberty, and which is open for investment and growth - all of this seems eminently desirable.

"What is needed, then, is a new kind of imperialism, one acceptable to a world of human rights and cosmopolitan values. We can already discern its outline: an imperialism which, like all imperialism, aims to bring order and organisation but which rests today on the voluntary principle."

This view was echoed by Bruce Anderson, columnist of The Independent (London), in a June 2, 2003 article, in which he wrote:

"Africa is a beautiful continent, full of potential and attractive people who deserve so much more than the way in which they are forced to live, and die. Yet it is not clear that the continent can generate its own salvation. It may be necessary to devise a form of neo-imperialism, in which Britain, the U.S. and the other beneficent nations would recruit local leaders and give them guidance to move towards free markets, the rule of law and - ultimately - some viable local version of democracy, while removing them from office in the event of backsliding."

On April 19, 2008 The Times (London) published an article by Matthew Parris entitled 'The new scramble for Africa begins', in which he said:

"Fifty years ago the decolonisation of Africa began. The next half-century may see the continent recolonised. But the new imperialism will be less benign. Great powers aren't interested in administering wild places any more, still less in settling them: just raping them. Black gangster governments sponsored by self-interested Asian or Western powers could become the central story in 21st-century African history."

Writing in the New Statesman magazine published on 15 January 2001, another British commentator, Richard Gott, writing to oppose this "new imperialism", said:

"What Africa really needs, Maier, (in his book This House Has Fallen: Nigeria in Crisis), seems to suggest, is the advice of a new generation of foreign missionaries, imbued with the new, secular religion of good governance and human rights. Men such as Maier himself and R W Johnson would fit the bill admirably. Other contemporary witnesses, the innumerable representatives of the non-governmental and humanitarian organisations that clog the airwaves and pollute the outside world's coverage of African affairs with their endless one-sided accounts of tragedy and disaster, echo the same message.

"With the reporting and analysis of today's Africa in the hands of such people, it is not surprising that public opinion is often confused and disarmed when governments

embark on neo-colonial interventions. The new missionaries are much like the old ones, an advance guard preparing the way for military and economic conquest."

I am certain that all of us will not hesitate to denounce these arguments in favour of "a new kind of imperialism", "a form of neo-imperialism", "neo-colonial interventions" as constituting a direct and unacceptable challenge to international law, and equally repugnant justification for the repudiation of the solemn "Declaration on the Granting of Independence..."

In the passages we have quoted from his article, Robert Cooper says 'the weak still need the strong and the strong still need an orderly world - a world in which the efficient and well governed export stability and liberty, and which is open for investment and growth...'

In essence he is arguing that the mighty and powerful should use their might to determine the shape and content of 'the new world order', positioning themselves as the global but unelected law-givers, giving practical expression to the undemocratic and brutal principle and practice that 'might is right'.

As South Africans we waged a protracted and costly struggle among other things to assert the primacy of the rule of law and to establish a law-governed society founded on respect for justice in all its forms. In this regard we sought to liberate ourselves from arbitrary rule and injustice and therefore the ineluctably negative consequences of the implementation of the principle that 'might is right'.

I am certain that all other genuine liberation struggles elsewhere in Africa also sought to achieve the very same outcomes.

It therefore stands to reason that in our own country we have a fundamental obligation to defend and advance the rule of law, and the attendant justice, at the same time as we defend and advance the rule of law, and the attendant justice, in the ordering of the system of international relations, especially as it relates to Africa's interactions with the rest of the international community.

It is in this context that I have raised the important matter of defending and safeguarding the right of the peoples of Africa to self-determination, and your tasks in this regard, as an important and vibrant segment of our country's and Continent's legal community.

On September 14 – 16, 2005, a World Summit Meeting of the UN General Assembly took place at the New York Headquarters of the UN and, inter alia, adopted important decisions about what has come to be known as "the Responsibility to Protect" (R2P).

As part of its "Outcome", the Summit Meeting said:

“Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we: Reaffirm our commitment to the purposes and principles of the (UN) Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States.”

What threatens Africa’s hard-won right to self-determination is precisely the contemporary disrespect for “the purposes and principles of the (UN) Charter and international law and to an international order based on the rule of law and international law”, directly contrary to the decisions of the 2005 World Summit Meeting.

In the period since the end of the Second World War the world community of nations has built a corpus of international law precisely to avoid the catastrophe of lawlessness imposed by Nazism, which, among other things, led to the criminal murder of six million Jews, the death of twenty million Soviet citizens, and massive destruction of the accumulated wealth of nations.

As you know, in this regard the UN Charter contains important provisions of international law relating to the maintenance of international peace and security. The 2005 World Summit Meeting to which we have referred, which addressed the so-called Right to Protect, expanded the peace-making obligations of the international community.

Article 24 of the UN Charter says: “In discharging these duties (for the maintenance of international peace and security), the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

“The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.”

For its part, the 2005 Summit Meeting resolved that:

“The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations

from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.”

The critical and essential point I am making is that the UN Security Council understood and accepted that its own actions had to be conducted as prescribed by international law. This relates both to the task to maintain international peace and security as provided for in the UN Charter and the ‘responsibility to protect’ as defined by the 2005 World Summit Meeting.

In other words, the UN Security Council itself could only carry out its work, and demand acceptance of its decisions by the world community of nations, including the General Assembly to which it has to report, if it respected the rule of law and established international law, as these relate to its own decisions and operations.

Part of what has obliged us to ring the alarm bells about the threat to Africa’s hard-won right to self-determination is the concrete reality that in the aftermath of the disappearance of the Soviet Union, and therefore the end of the Cold War, the UN Security Council has been open to abuse with regard to respect for the rule of law and international law in terms of its decisions and actions.

It seems obvious that a few powerful countries seek to turn the Security Council into an instrument in their hands, to be used by them to pursue their selfish interests, determined to behave according to the principle and practice that ‘might is right’.

The outstanding, but not only, exemplar in this regard is what has happened during the greater part of this year relating to Libya.

Before saying anything else about this issue, I must state this categorically that those who have sought to manufacture a particular outcome out of the conflict in Libya have propagated a poisonous canard aimed at discrediting African and AU opposition to the Libyan debacle on the basis that the AU and the rest of us had been bought by Colonel Gaddafi with petro-dollars, and therefore felt obliged to defend his continued misrule.

For example, as part of this offensive, relying on all known means of disinformation, the argument is advanced that Gaddafi’s Libya had supported the ANC during the difficult struggle to defeat the apartheid regime.

The incontrovertible fact is that during this whole period, Libya did not give the ANC even one cent, did not train even one of our military combatants, and did not supply us with even one bullet. This is because Gaddafi’s Libya made the determination that

the ANC was little more than an instrument of Zionist Israel, because we had among our leaders such outstanding patriots as the late Joe Slovo.

Libya came to extend assistance to the ANC after 1990, when it realised that the ANC was a genuine representative of the overwhelming majority of our people.

Similarly, the false assertion has been made that the AU depended on Libyan money to ensure its survival. This is yet another fabrication.

The UN Security Council adopted the infamous Resolution 1973 on Libya on March 17, which imposed a 'no-fly zone' and authorised various Member States (NATO) "to take all necessary measures...to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya..."

The Resolution said nothing about 'regime change'. However the fact of the matter is that the NATO actions had everything to do with the overthrow of the Gaddafi regime.

And indeed in a 15 April, 2011 joint letter, Presidents Obama and Sarkozy and Prime Minister Cameron had openly declared their intention to achieve this goal.

In this letter they said: "Our duty and our mandate under Security Council Resolution 1973 is to protect civilians, and we are doing that. It is not to remove Gaddafi by force."

And yet in the same letter they said: "But it is impossible to imagine a future for Libya with Gaddafi in power...There is a pathway to peace that promises new hope for the people of Libya: a future without Gaddafi...Colonel Gaddafi must go, and go for good."

And indeed, as leaders of NATO they ensured that this objective was achieved, directly contrary to what the Security Council Resolution said. And yet the UN Security Council has said nothing about what was a clear violation of international law.

A week before Resolution 1973 was approved, the AU Peace and Security Council adopted a roadmap for the negotiated resolution of the conflict in Libya and conveyed this to the UN Security Council, as prescribed under Chapter VIII of the UN Charter.

To all intents and purposes the Security Council ignored the AU decision and later blocked the AU Panel on Libya from flying into the country to begin the process of mediating a peaceful resolution of the conflict in that country.

This was despite the fact that Resolution 1973 itself said the Security Council supports the “efforts (of the Special Envoy of the UN Secretary General) to find a sustainable and peaceful solution to the crisis” in Libya.

The Resolution also noted the decision of the AU PSC “to send its ad-hoc High-Level Committee to Libya with the aim of facilitating dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution.”

Libya is an African country. In addition to this, in terms of international peace and security, the conflict in that country has impacted and will continue to impact directly and negatively on a number of African countries.

Despite this, the Security Council, in violation of Chapter VIII of the UN Charter, which provides for cooperation between the Security Council and regional bodies, chose completely to ignore the African Union, preferring to accord a Chapter VIII status to the League of Arab States, simply because the League had called for the establishment of a ‘no-fly zone’.

Resolutions 1970 and 1973 of the Security Council imposed an arms embargo on Libya. The latter Resolution also specifically excluded “a foreign occupation of any form or any part of Libyan territory” and deplored and demanded an end to what it called “the continuing flow of mercenaries” into Libya.

And yet it is now known that Member States involved in the NATO operation sent weapons to the NTC rebel forces and deployed military and other personnel inside Libya to support these forces.

Again this was in violation of international law, and yet the UN Security Council did nothing to stop it.

The armed uprising in Libya started one week after the beginning of the peaceful demonstrations. This can only mean that preparations had taken place before hand to effect a military uprising. In its resolutions the Security Council says nothing about this.

In this regard, in a Report on Libya issued on June 6 this year, the International Crisis Group (ICG) said:

“Much Western media coverage has from the outset presented a very one-sided view of the logic of events, portraying the protest movement as entirely peaceful and repeatedly suggesting that the (Libyan) regime’s security forces were unaccountably massacring unarmed demonstrators who presented no real security challenge. This version would appear to ignore evidence that the protest movement exhibited a violent aspect from very early on...

“Likewise, there are grounds for questioning the more sensational reports that the regime was using its air force to slaughter demonstrators, let alone engaging in anything remotely warranting use of the term “genocide”. That said, the repression was real enough, and its brutality shocked even Libyans. It may also have backfired, prompting a growing number of people to take to the streets.”

It is clear that the beginning of the peaceful demonstrations in Libya served as a signal to various Western countries to intervene to effect ‘regime change’, as clearly explained by Obama, Sarkozy and Cameron in the joint letter we have cited.

These countries then used the Security Council to authorise their intervention under the guise of the so-called ‘right-to-protect’.

Thus the ‘right-to-protect’ was abused and international law was violated to enable some of the major world powers to help determine the future of an African country. In this context all measures were taken to deny our Continent the possibility to help resolve the Libyan conflict without the death of many people and the massive destruction of property, and on the basis of the democratic transformation of that country.

It is clear to many on our Continent that what has happened in Libya has established a very dangerous precedent. The question has therefore been raised – which African country will be next?

As Africans we have a continuing responsibility to protect our right to self-determination as well as a duty to work together to resolve our problems, fully cognisant of the inter-dependence of our countries and the fact that we share a common destiny.

In this regard, to protect that right to self-determination, it seems obvious that we must engage in a sustained struggle to ensure respect for international law and the rule of law in the system of international relations. This must include ensuring that the UN Security Council itself respects international law, which prescribes the rule of law.

I therefore return to the appeal I made at the beginning, that you should use your considerable talents to join this struggle so that indeed, as Africans, we have the possibility “freely (to) determine (our) political status and freely (to) pursue (our) economic, social and cultural development.”

I hope that you will find some space in your busy schedules to reflect and act on this important matter.

Thank you.