"MIGRATION IN AFRICA, AN ENDURING PHENOMENON?"

presented by

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Dr. Beyani's lecture was based on the following text:

Allow me first of all to express my sincere and heartfelt thanks to the Royal Norwegian Embassy, the Office of the High Commissioner for Refugees, and Lawyers for Human Rights, for inviting me to deliver this lecture. I am deeply honored and humbled to have received and accepted the invitation to do so. My thanks are also due to the South African Institute of International Affairs and the University of Witwatersrand for hosting the lecture. And I would like to show my appreciation to the Republic and people of South Africa for welcoming me into their country.

The issue of migration in Africa is one of the most challenging and will remain so for successive generations to come. The scope of the problem is phenomenal. Estimates show that there are about 2-3 million refugees and about 12 million internally displaced persons in Africa. In examining the phenomenon of migration in Africa, account has to be taken of the fact that the history of Africa is one of migration in time and space in the Northern, Western, Eastern, Central, and Southern parts of the continent. Barring the slave trade within and outside Africa, migration in pre-colonial Africa had positive effects in resolving protracted conflicts as defeated communities migrated elsewhere in search of peaceful environments, security, livelihoods, water, and resources.

Colonialism, however, changed this state of affairs. The demarcation of Africa into territorial entities based on the Westphalian model of statehood after the Berlin Conference in 1884 meant that the newly created boundaries became obstacles to open migration. Paradoxically, colonialism itself constituted migration from the global North to the global South in search of territory, space, resources, and new opportunities for economic expansion on the part of colonial powers.

Specific problems, which continue to have a reverberating consequence on the problem of migration, are apparent. Creation of the colonial states did not just constrain migration in time and space; it also destroyed existing economic, social, and political ties, denied communities ownership of resources and access to them. Colonial domination and control thus forcibly displaced many communities from their lands and source of livelihood, restricting their residence to specific areas in which economic

productivity and livelihoods were poor. To compound this, and this is where the second problem lies, the structure of the colonial state in Africa was built to serve and protect colonial interests, and not to serve the people as such. It was established with a repressive state apparatus, based on divide and rule on ethnic lines, and built on internal and external economic and political relations that were vertically aligned externally to the colonial power.

Although colonialism gave rise to these problems, the major factor which belies migration as an enduring problem is that the post colonial state has not, in the main, been reformed to rectify the social, economic, and political fragmenting imbalances that are the root cause of migration in Africa. At independence, most of the new African leadership assumed control of the state with the same repressive state apparatus that were devised against their own people, and the economic structures of many of the African states are still outward, rather than, inward looking. In other words, the majority of African populations are still socially, economically, and politically disenfranchised since colonial times and their search for well-being means that they have to migrate internally to urban areas where services, access to livelihoods, energy, water, and resources are concentrated. Resort to migration across borders takes place for the same reasons, although there are additional reasons to do with continuing internal struggles for the fulfillment of economic and political internal self-determination, inclusion, and identity. These struggles are manifest in varying and vicious internal armed conflicts which indicate that self-determination on the part of certain populations in Africa is far from completion.

So far so good, or bad, as the case may be. At this point, I do sense a silent question: what does all that have to do with Nansen? Surely he remains one of the greatest humanitarians of all time, and it must be said that neither he nor his home country, Norway, did not contribute to these problems because they never colonised anyone, let alone Africa! So true, but there is the irony that whereas Nansen was dealing with the consequences in Europe of ideological fragmentation in the former Soviet Union in 1921 under the auspices of the newly created League of Nations in 1920, the founding instrument of that League- the Covenant of the League of Nations-enshrined the sacred trust of civilisation in relation to colonial entities that were not yet ready to withstand the strains of modern civilization in Africa and elsewhere.

This meant that while Europe was dealing with the social and legal consequences of denationalization and expulsion from the Soviet Union of some 2 million individuals, the same powers were causing colonial fragmentation and dislocation in Africa and yet their role as 'civilizers' was legally cemented in the League of Nations. In my view, that burden of history lies on colonial powers, but the responsibility for rectifying it lies on the leadership of African states. The connection between these factors calls for regional and international approaches to the problem of migration in Africa. It does not call for African solutions to African problems because the magnitude of the problem is international and Africa is the setting in which the problem is compounded.

In so far as giving tribute to Nansen's work is concerned, I wish to recall what I said at the Nansen Conference on Climate Change and Displacement in the 21st Century in Oslo, Norway, 6-7 June 2011. That Conference marked an important occasion to commemorate the genius of Nansen's remarkable humanitarian contribution to the cause of those in need of international protection. At the beginning of

Nansen's diplomatic intervention in 1921, international law then protected individuals as nationals of states, and as foreign nationals or aliens lawfully admitted by third states. In the 21st century, the notion of 'aliens' is itself alien to humanity and human rights as inclusive principles. Aliens as such should be idealized in terms of unidentified flying objects (UFOs) from outer space, if any.

Nansen made a great contribution to embracing the principle of the protection of humanity across state boundaries regardless of identity. Armenians who were expelled from Turkey for religious reasons benefited from his arrangements for their protection in 1926 as much as those who had been expelled and denationalised earlier by the former Soviet Union for reasons of ideology. His innovation lay in the recognition in international law of the protection of refugees as a special category of persons in need of international protection on the basis of having lost or being denied the protection of their own state of origin or nationality. A critical element of this was the design of the Nansen passport, which enabled refugees and stateless persons, initially from the former Soviet Union and Armenians from Turkey, to immigrate to other states for protection.

Nansen's legacy is significant to assessing the question whether migration in Africa is an enduring phenomenon. I have chosen this theme to be provocative deliberately in that it invites debate on perspectives on migration, what responses to it as well as the stoke of measures considered necessary to deal with it. Migration is a complex and multi-faceted concept, which basically connotes the movement of persons within or between states. A further dimension is the movement of persons between states belonging to integrated regional organizations, e.g., the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Inter-Governmental Authority on Development (IGAD), and the Southern African Development Community (SADC). These are highly significant developments in the quest for regulating and managing migration in Africa, and I will revert back to this later in the lecture.

There is a complexity about the term 'migration', which arises from the causes of migration, patterns of migratory flows, and the constructed categories of migration that correspond to them. Ordinary migration within or between states is that which is deemed to be voluntary and lawful on the face of it. It presupposes lawful entry and admission into states by the issuance of immigration visas, with temporary or permanent residential status. This is what underlies the commonly held conception of migration in the Westphalia model of the state. Migration of this type is prompted by adventure, the search for a better life style, established employment prospects, business opportunities, investments, etc. For these categories of migrants, the protection accorded to them is evident in the principle expressed in modern passports, in which issuing states 'request all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford the bearer such assistance and protection as may be necessary.' Nansen's great achievement lay in restoring such protection and assistance to refugees who had lost it. Despite that achievement, it goes without saying that this is a form of protection enjoyed specifically by migrants of a certain privileged social and economic status or standing, to the exclusion of the common African migrant who may not even have a passport.

Forced migration is deemed to be involuntary by virtue of the force of circumstances that compel persons to move or flee from their places of residence or habitual residence. It is characterised by

coercion against the will or choice of persons to remain and conjures up, for example, images of persons on overcrowded precarious boats attempting to cross the Mediterranean from North Africa to Europe, or those fleeing violence, disorder, human rights violations, armed conflict, hunger, famine, or starvation, such as the current situation in Somalia. In formal terms, the category of forced migration includes refugees, illegal or undocumented involuntary migrants, including victims of trafficking and smuggling, and internally displaced persons. There could be others who perhaps do not meet these neat classifications, e.g., the homeless and those dehumanised by elitist laws as rogues and vagabond, as if they were not human beings.

The point to appreciate firmly is that no form of migration is strictly voluntary. Persons migrate because there is either an interest, an incentive, inducement, coercion, or a disruptive uprooting force to their safety, security, dignity, well-being, or livelihood. Adverse impacts of climate change and natural disasters will continue to displace and dislocate individuals and populations. Migration will endure as long as these elements continue to be part of the fabric of society and humanity and of displacement as adaptation to climate change.

In most cases the pattern of migration will be based on the cause of movement and such causes are related to specific legal regimes. This is the reason why it is misleading to use the term 'migration' as a generic or omnibus term. Migration across boundaries, whether voluntary or involuntary, plainly involves nationals of third states who may enjoy diplomatic protection and who are protected by the broad framework of international human rights law. Refugees are a special category of protected persons with status in international law that owes much to Nansen's original work, anchored in a well-founded fear of persecution on grounds of race, religion, nationality, political opinion or membership of a particular social group under the 1951 Convention and the 1967 Protocol Relating to the Status Refugees.

Importantly, these instruments remind us of the history of the mistaken idea that the refugee situation in Europe would be resolved after the Second World War. The 1951 Convention reflected this type of thinking when its geographical scope was limited to Europe in the first place and to events that had occurred in Europe before 1st January 1951. Experience however showed that refugee outflows would continue and the reality sank in when the 1967 Protocol removed both the geographical and time limitations to the 1951 Convention. Similarly, the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted on the conception that refugees in Africa were as a result of wars of national self-determination, the struggle for independence and liberation, foreign aggression, occupation, and events seriously disturbing public order, and that the problem of refugees would be resolved after the liberation of Africa. It was at the Arusha Conference in 1967 when the draft of that Convention was being reviewed, that the former President of Tanzania, Mwalimu Julius Nyerere, openly acknowledged the persecution of Africans by Africans, quite apart from the liberation struggle. It suffices to say that the issue of refugees has outlived the liberation of Africa and thus stands as an enduring phenomenon against the odds of expectation on which it was founded.

In these circumstances, international law liberated the sacred trust of civilisation I referred to earlier and transformed it into one of self-determination and independence. In Southern Africa, the idea of

frontline states developed in order to foster a common stand against colonialism in Angola, Mozambique, Namibia, Zimbabwe and apartheid in South Africa. The concept of the frontline states later developed into a more sophisticated regional integration entity of SADC, originally as a coordinating Conference in 1980, which was transformed into a Community in1992. The political, economic, and social platform on which SADC was established as an anti-colonial stand should entail a more humane approach towards migrants as victims of human suffering, including those from Zimbabwe, which is an integral member of SADC.

Unlike ECOWAS and the EAC, SADC lacks a formal legally integrated framework on the free movement of persons, a key component of regional integration. A proposed Protocol on free movement was jettisoned in favor of a Protocol on tourism! To take the example of ECOWAS, not only is there a free movement regime embedded within it; it also has ECOWAS nationality established in relation to the citizens of its member sates. Facilitation of free movement within regional economic and political unions is an important way of managing migration and utilizing it to harness human resources. It should be noted that apartheid South Africa, which should not be glorified, had a crude migratory labour system under WENELA agreements with respect to the migration of labour from neighbouring countries as epitomized in one of Hugh Masekela's greatest songs. The history of that arrangement is still is a pull factor, and it points out to the need for a more formal regulated free movement agreement to be integrated within SADC.

But that should not start and end with regional economic arrangements. It should extend to Africa as a whole, taking the historical premise of the continent that was envisioned in the promise of the 1991 Abuja treaty establishing the African Economic Community as a framework under which a Protocol on Free Movement in Africa was to be concluded. The issue has been caught up in the arguments about the form of continental unity or union Africa should take, and the opposing arguments have not advanced further than those made by Nkrumah and Nyerere at opposite ends when the Organization of African Unity was established in 1963. Continental unity or union is a related but separate matter where the free movement of persons is concerned in Africa.

Of course there will always be arguments about the virtues or vices of such movement. Those arguments should take note of the force of globalization which is a compelling factor in the migration of persons and in the establishment of regional economic and political entities to engage with globalization. While there is an inherent contradiction between promoting the free movement of persons, goods, services, and capital as the hall marks of globalization on the one hand, and seeking to curtail migration on the other hand, this contradiction has been held in balance by regional entities in which such movement is regulated alongside that of goods, services, and capital. There are two things that are necessary to achieve here. One is for the respective regional entities to conclude reciprocal agreements on the movement of each other's nationals in the entities as a form of migration partnerships. The other is to extend such agreements to regional entities outside Africa as a framework for regulating migration of respective nationals within the framework of such entities, with reciprocal conditions of treatment. After all, there is too a problem of migration into Africa, which is not always acknowledged.

Containment measures taken unilaterally by individual states, including readmission agreements, will not work, for no single state can actually contain migration flows. Even with this reality, a global regime on migration as such, leaving aside the protection of asylum seekers and refugees, is still beyond reach. Be that as it may, developments in human rights reinforce the protection of migrants, refugees, and internally displaced persons, on a global basis. Illegal presence of migrants does not warrant ill-treatment contrary to human rights. Treatment should be consistent with human rights, e.g., the requirement of due process in matters of removal or deportation, as was decided by the African Commission against Zambia in a case involving the unlawful deportation of West African nationals. Measures of deportation or removal must not amount to non-refoulement for refugees and asylum seekers, and should not expose migrants to the risk of treatment amounting to torture, cruel, inhuman or degrading treatment in the countries in which they are, or to third states to which they are to be removed. Thus Botswana was held by the African Commission to have breached this principle when she deported an individual to a 'no person's' land on the border with South Africa on grounds that he was not a national of Botswana.

The framework of human rights has developed to the extent that migrants who are illegally present in a country should be protected from harm in terms of personal security as well as acquired rights, e.g., private relationships such as marriage, family, or the length of time migrants have lived in a country. There is protection too in the sphere of economic, social and cultural rights, particularly protection from exploitation or slavery in matters of employment. As the Inter-American human rights system has said, in cases where illegal migrants are employed, it is the factor of employment, and not illegal stay, that triggers the bond of protection. It is clear too that the right to health is important to migrants as human beings and to the state in which they are, especially where contagious diseases are concerned. Providing treatment in such cases far out weighs the argument about health resources being spent on migrants.

There is protection as well for victims of trafficking and smuggling with regulatory standards for their treatment in international human rights law. Trafficking in women and children is a form of modern day slavery in which the victims or survivors suffer increased vulnerability owing to ineffective protection for migrants, refugees, and internally displaced persons. It is this vulnerability that traffickers and smugglers take advantage of to exploit and dehumanise women. It has to be borne in mind that Failure or neglect to protect women from slavery and trafficking entails international responsibility. The ECOWAS Court of Justice is on record in holding Niger responsible for its failure to protect a woman from slavery.

In so far as internally displaced persons are concerned, the initial resistance to their protection has yielded into a more positive framework for applying the 1998 Guiding Principles on Internal Displacement. It is indeed satisfying to note that Africa pioneered the setting of legally binding standards for the protection of internally displaced persons when the African Union adopted the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in 2009. The Convention sets forth a framework right for the treatment of internally displaced persons in terms of protection and assistance, throughout the phase of displacement, as well as in applying durable solutions to them. This is important because lack of protection and assistance to internally displaced persons increases migration flows considerably in search of security and welfare elsewhere. The challenge now lies in bringing the Convention into force and to implement it. So far, 14 states have

ratified the Kampala Convention and one more ratification is required for it to enter into force. The Convention will turn out to be an enduring framework for managing the problem of internally displaced persons on the continent of Africa.

I would like to conclude that far from being a temporary or passing phenomenon, migration in Africa is an enduring phenomenon and will continue to be. To deal effectively with migration in Africa is to face up to the consequences of the nature and structures of the colonial and post colonial state in relation to its own population. In the meantime, more has to be done, along the model set by ECOWAS, to regulate migration liberally on a continent wide basis and through regional entities, by reference to specific regional and international instruments of human rights and those on trafficking and smuggling, refugees, and internally displaced persons.

Thank you very much.