Florida Journal of International Law

Volume 30 | Issue 2 Article 1

January 2018

International Law and Limits on the Sovereignty of African States

John Mukum Mbaku

INTERNATIONAL LAW AND LIMITS ON THE SOVEREIGNTY OF AFRICAN STATES

*John Mukum Mbaku**

Abstract

Since the end of the Cold War, there has been an acceleration in globalization, a process that has resulted in significant increases in interaction between peoples and nations. As a consequence, it has become increasingly difficult for national governments to have full control over what happens within their territorial boundaries. In fact, globalization has made it quite difficult for national governments to exercise full control over their domestic economies and political processes. An important consequence of globalization is the internationalization of constitutional law. This process has resulted in the virtual disappearance from almost all countries of the concept of complete and absolute sovereignty. In fact, many States, including those in Africa, now enjoy only an attenuated form of sovereignty, one that is characterized by the failure of States to have complete control over the determination of the content of their national constitutional law. Thus, in constitutional design and interpretation, States must take cognizance of international law, particularly international human rights instruments. While this internationalization of constitutional law can be viewed as an infringement on the sovereign right of African countries to determine the content of their national laws, this article argues that such interference, either through direct incorporation of provisions of international human rights instruments into national constitutions or reliance upon international and comparative sources as an interpretive device, is critical and important for the promotion of good governance and the recognition and protection of human rights in the continent.

INTRODUCTION

As African colonies gained independence in the 1950s and 1960s, what emerged were supposed to be "independent and sovereign nations"—each with an internationally recognized identity.[1] In the *Corfu Channel Case*, decided in 1949, the International Court of Justice (ICJ) declared that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations."[2] During the last several centuries "the process of globalization [has transformed]

---

* *John Mukum Mbaku* is Brady Presidential Distinguished Professor of Economics & John S. Hinckley Research Fellow at Weber State University (Ogden, Utah, USA). He is also a Nonresident Senior Fellow at the Brookings Institution, Washington, D.C., and an Attorney and Counselor at Law (licensed in the State of Utah). He received the J.D. degree and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law, University of Utah, where he was Managing Editor of the Utah Environmental Law Review, and a Ph.D. (economics) from the University of Georgia. This chapter reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

1. *See, e.g.*, WILLIAM H. WORGER ET AL., AFRICA AND THE WEST: A DOCUMENTARY HISTORY, VOLUME 2: FROM COLONIALISM TO INDEPENDENCE, 1875 TO THE PRESENT 154 (2010); MARTIN WELZ, INTEGRATING AFRICA: DECOLONIZATION'S LEGACIES, SOVEREIGNTY, AND THE AFRICAN UNION 1–15 (2013); *see* AFRICAN RECKONING: A QUEST FOR GOOD GOVERNANCE 1–10 (Francis M. Deng et al. eds., 1998).

2. Corfu Channel (U.K. v. Alb.), Judgment, 1945 I.C.J. Rep. 4, at 35 (Apr. 9); *see* JORGE E. NÚÑEZ, SOVEREIGNTY CONFLICTS AND INTERNATIONAL LAW AND POLITICS: A DISTRIBUTIVE JUSTICE ISSUE 3–14 (2017) (examining, inter alia, how to deal fairly and justly with certain sovereignty conflicts); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 13–31 (2008) (arguing that the colonial confrontation was central to the formation of international law, and in part, the concept referred to as sovereignty); ERSUN N. KURTULUS, STATE SOVEREIGNTY: CONCEPT, PHENOMENON, AND RAMIFICATIONS 1–11 (2005) (arguing, inter alia, that state sovereignty is the foundation of international relations).

traditional conceptions and constructions of sovereignty."[3] As has been explained by the ICJ, "the fundamental principle of State sovereignty, [is the basis] on which the whole of international law rests."[4]

Independence produced sovereign nations from what had been colonies.[5] Sovereignty was supposed to grant each African government absolute power over its own territory and its people. Under this principle, intervention in the internal affairs of a sovereign state was considered a violation of international law. In fact, regional organizations, such as the Organization of African Unity (OAU), acknowledged this principle and imbedded it as a guiding principle in their founding documents.[6] This meant that the OAU and its successor organization, the African Union (AU), could not interfere in the internal affairs of Member States. With respect to African countries, it would become increasingly evident that strict adherence to the principle of sovereignty of nations[7] was interfering with the ability of continental organizations, such as the OAU (and later, the AU), as well as international organizations, such as the United Nations (UN), to maintain international peace and security, including the protection of human rights. According to Article III of the Charter of the OAU, "[t]he Member States, in pursuit of [the OAU's purposes] solemnly affirm and declare their adherence to . . . [t]he sovereign equality of all Member States [and] [n]on-interference in the internal affairs of States."[8] The OAU adhered to this policy and hence, did not intervene to stop mass

3. Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425, 425 (1999); *see* THE OXFORD HANDBOOK OF TRANSFORMATIONS OF THE STATE (Stephan Leibfried et al. eds., 2015) (presenting a series of essays that examines state transformations over the years); STATE, SOVEREIGNTY, WAR: CIVIL VIOLENCE IN EMERGING GLOBAL REALITIES (Bruce Kapferer ed., 2004) (examining, inter alia, the relationship between the state, sovereignty and the waging of war).

4. Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S), 1986 I.C.J. Rep. 14, ¶ 263 (June 27).

5. *See* WILLIAM H. WORGER ET AL., AFRICA AND THE WEST: A DOCUMENTARY HISTORY: VOLUME 2: FROM COLONIALISM TO INDEPENDENCE, 1875 TO THE PRESENT 154 (2010) (arguing, inter alia, that independence produced "proud and independent sovereign nations" in Africa).

6. *See* Org. of African Unity [OAU] Charter art. 3, ¶ 3 ("The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles: . . . Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.").

7. Which meant that the OAU and its successor organization, the AU, could not interfere in the internal affairs of Member States.

8. Org. of African Unity [OAU] Charter art. 3, ¶¶ 1–2; *see, e.g.*, Segun Joshua & Faith Olanrewaju, *The AU's Progress and Achievement in the Realm of Peace and Security*, 73 INDIA QUARTERLY 454, 457–58 (2017); John S. Moolakkattu, *The Role of the African Union in Continental Peace and Security Governance*, 66 INDIA QUARTERLY 15, 152–59 (2010).

atrocities committed during the Nigerian Civil War, which lasted from 1967 to 1970 and has been considered the OAU's "greatest failure."[9]

When the UN came into being in 1945 in the aftermath of the Second World War, it was viewed as a multilateral or intergovernmental organization whose main objective was to prevent another world war.[10] As argued by Robert Weiner, the UN "was created in 1945 to prevent another world war. It was designed, as the preamble to the UN Charter states, to eliminate the scourge of war that had befallen humanity twice in the first half of the twentieth century."[11] The UN was also granted the power by its Member States to promote international cooperation, was well as maintain international peace and security.[12] Under the UN Charter, the UN Security Council (UNSC) has primary responsibility for maintaining international peace and security.[13] The UNSC must determine "the existence of a threat to the peace or act of aggression" and call upon the parties to the dispute "to settle or even authorize the use of force to maintain or restore international peace and security."[14] Article 34 of the UN Charter grants the UNSC the power to "investigate any dispute, or any situations which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."[15]

The question of whether it is acceptable to use force in international relations has remained a major challenge to state actors around the

---

9. Ehimika A. Ifidon, *The OAU, AU and the Response to Conflict: De-Linking Domestic Jurisdiction and the Capacity to Intervene, in* CONTEMPORARY ISSUES IN AFRICA'S DEVELOPMENT: WHITHER THE AFRICAN RENAISSANCE? 280, 284 (Richard A. Olaniyan & Ehimika A. Ifidon eds., 2018).

10. According to the Preamble of the UN Charter, the peoples of the world, in forming the UN, were determined "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." U.N. Charter pmbl.

11. Robert Weiner, *The United Nations and War in the Twentieth and Twenty-first Centuries, in* STICKS & STONES: LIVING WITH UNCERTAIN WARS 238, 238 (Padraig O'Malley et al. eds., 2006).

12. *See* U.N. Charter art. 1 ("The Purposes of the [UN is] . . . [t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.").

13. *Id.* at art. 24 ("[i]n order to ensure prompt and effective action by the [UN], its Members confer on the [UNSC] primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the [UNSC] acts on their behalf.").

14. U.N., *The Security Council*, https://www.un.org/en/sc/ (last visited June 11, 2018).

15. U.N. Charter art. 34. The question is: can the UNSC undertake this task without interfering in the internal affairs of Member States?

world.[16] For example, Christian Reus-Smit argues that "[d]etermining when states can use force legitimately is the central normative problem in world politics" and that, "[i]nternationally, circumscribing the conditions under which states may use force legitimately is critical to the maintenance of peace and stability in international society."[17] He went on to the argue that "the degree to which legitimate force may be used internationally to constrain illegitimate force domestically lies at the heart of the problematic relationship between order and justice in world politics."[18]

With respect to the civil war in Syria, policymakers in the United States, the United Kingdom, and France advocated in favor of intervention for humanitarian reasons. In fact, the Friends of Syria, "which was established specifically for the sake of creating a venue outside of the UN in which an international coalition could begin considering actions that would protect the lives of Syrian civilians," asked the United States to work with its European Union allies "to conduct an international humanitarian intervention to protect Syrian civilians."[19] Nevertheless, policymakers in the Russian Federation have often quoted Alexander Mikhailovich Gorchakov, a 19th-century Russian prince, who served as the foreign minister of the Russian Empire from April 27, 1856 to April 9, 1882. Prince Gorchakov is quoted as saying that "Foreign intervention in domestic matters is unacceptable. It is unacceptable to use force in international relations, especially by the countries who consider themselves leaders of civilization."[20] Russia's present foreign minister, Sergei Lavrov, in a 2013 interview about the civil war in Syria, invoked Prince Gorchakov's famous words and "resurrected Gorchakov as a model for a new Russian diplomacy."[21]

---

16. *See* Peter Beaumont, *Yes, the UN has the duty to intervene: but when, where and how?*, THE GUARDIAN (May 4, 2013), https://www.theguardian.com/world/2013/may/04/un-syria-duty-to-intervene.

17. Christian Reus-Smit, *Liberal Hierarchy and the License to Use Force," in* FORCE AND LEGITIMACY IN WORLD POLITICS 71, 71 (David Armstrong et al. eds., 2005).

18. *Id.*

19. Radwan Ziadeh, *A Syrian Case for Humanitarian Intervention, in* THE SYRIA DILEMMA 119, 122–23 (Nader Hashemi & Danny Postel eds., MIT Press 2013) (arguing, inter alia, that although the international community does not want the civil war-related atrocities in Syria to continue, it is unwilling to intervene because the legacy of the bloody and costly U.S.-led intervention in Iraq left many policymakers in the United States and other countries weary of more military operations).

20. *See* Susan B. Glasser, *Minister No: Sergei Lavrov and the blunt logic of Russian power*, FOREIGN POLICY (Apr. 29, 2013), https://foreignpolicy.com/2013/04/29/minister-no/; *see also* RUSSIA'S FOREIGN POLICY: IDEAS, DOMESTIC POLITICS AND EXTERNAL RELATIONS (David Cadier & Margot Light eds., Springer 2015).

21. Glasser, *supra* note 20.

The Russian foreign minister's remarks stand in direct contrast to the views of many state and non-state actors in countries, such as the United States, the UK and France, who believe in the emerging doctrine of humanitarian intervention, which preaches that more must be done, including military intervention, to stop impunity and the abuse of human rights in places such as Sierra Leone, Liberia, and Côte d'Ivoire, and other countries where sectarian violence, some of which has deteriorated into civil war, is killing many people and displacing thousands of others.[22] This new doctrine is referred to as the Responsibility to Protect (R2P). In fact, "[t]he Obama Administration in the US . . . led the way in terms of incorporating atrocity prevention into its national policy-making structures" and in 2010, "the President appointed a Director on War Crimes, Atrocities and the Protection of Civilians within the National Security Council."[23]

The R2P's language has been invoked by many countries to justify their intervention in the internal affairs of other countries.[24] Failures of R2P in Iraq, Afghanistan, and Libya, however, have forced proponents of this doctrine of humanitarian intervention to reconsider its

22. *See* TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 267 (2007) (discussing inter alia, humanitarian military intervention by (1) the ECOWAS in Liberia in 1990 and Sierra Leone in 1998; the United Kingdom in Sierra Leone in 2001; and (3) France in Côte d'Ivoire in 2003).

23. *See* ALEX J. BELLAMY, THE RESPONSIBILITY TO PROTECT: A DEFENSE 88 (2015) (showing that the R2P is the global community's major response to the problem of genocide and mass atrocities, some of them committed by national governments); *see also* GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (arguing that despite the fact that the world has vowed, since the World War II holocaust against Jews, that it will never happen again, genocide, ethnic cleaning, and other forms of mass atrocities continue unabated); THE OXFORD HANDBOOK OF THE RESPONSIBILITY TO PROTECT (Alex J. Bellamy & Tim Dunne eds., 2016) (describing the R2P as providing an effective framework for responding to crimes of genocide, ethnic cleansing, war crimes, and crimes against humanity).

24. Examples include intervention by French troops in 2011 in Côte d'Ivoire and Mali. *See* DAMAN LAURENT ADJEHI, CÔTE D'IVOIRE: CAUGHT IN CROSS FIRE, & AFRICA IN DIRE STRAITS 254 (2012), (arguing that "the French intervention thwarted a more gruesome genocide than in Rwanda."); *see also* ABEL ESCRIBÀ-FOLCH & JOSEPH WRIGHT, FOREIGN PRESSURE AND THE POLITICS OF AUTOCRATIC SURVIVAL 217 (2015); Isaline Bergamaschi & Mahamadou Diawara, *The French Military Intervention in Mali: Not Exactly Françafrique but Definitely Postcolonial, in* PEACE OPERATIONS IN THE FRANCOPHONE WORLD: GLOBAL GOVERNANCE MEETS POST-COLONIALISM 137, 137 (Bruno Charbonneau & Tony Chafer eds., 2014). An example also includes the NATO-led no-fly zone in Libya during the sectarian conflict that toppled Gaddafi's regime in 2011. *See* THE NATO INTERVENTION IN LIBYA: LESSONS LEARNED FROM THE CAMPAIGN (Kjell Engelbrekt et al. eds., 2014). Some observers have argued that French military intervention in Côte d'Ivoire was a model of success since it brought hostilities to an end and paved the way for the installation of a democratic civil authority. *See* Beaumont, *supra* note 16. Nevertheless, it is also argued the R2P failed in Iraq, Afghanistan, and Libya—in the latter three countries, R2P only ended up exacerbating sectarian violence and inciting civil war. *Id.*

applicability.[25] The doctrine, which was designed to provide a more effective response to threats to international peace and security, as well as "give meaning to the promises of 'never again' made after the Holocaust and the killing fields of Cambodia, Bosnia and Rwanda has met difficulties."[26] But, what went wrong with such a lofty goal? As argued by several policymakers, including Australia's former minister, Gareth Evans, "[w]hat punctured the optimism that the world might be on its way to ending internal mass atrocity crimes once and for all, is the controversy that erupted in the [UNSC] in 2011 about the way the norm was applied in the NATO-led intervention in Libya, and the paralysis that in turn generated in the [UNSC's] response to Syria."[27] As argued by Evans, a major part of the problem concerned the fact that three of the permanent members of the UNSC, the United States, the UK, and France (the P3), were not just interested in ending the conflict in Libya, but were determined to see a change of regime in the country and were willing to use whatever tools were available to them, including military force, to achieve this objective.[28] As a consequence, the P3 rejected ceasefire offers that may have brought the conflict to an early end and saved a lot of lives, but which did not involve an ouster of the Gaddafi regime.[29] Many African countries, including South Africa, which had embraced the R2P as an important and effective way to deal fully with and stop atrocities, saw the P3's utilization of the principle for regime change as a betrayal.[30]

The belief that the R2P has emerged as a tool to be used by some countries, such as the United States, the UK, and France, to advance their own national agendas, has resulted in a push back from many countries, including Brazil and South Africa.[31] These opponents, nevertheless, do not seek to abolish humanitarian intervention. Instead, they argue that future R2P applications should be "guided by a 'prudential' assessment of the practicality of achieving the desired outcome in complex conflicts and informed by a mechanism for transparent, real-time reporting of the progress of operations to council members, to prevent resolutions being used as blank checks by the P3 countries."[32] The main question here is:

25. *See* Beaumont, *supra* note 16; *see also* RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT 246 (2017).

26. Beaumont, *supra* note 16.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

how can countries participating in or contributing troops and other resources to R2P missions be prevented from acting opportunistically and using the process to maximize their national objectives instead of those that are at the heart of humanitarian intervention?

R2P, which is the global community's unanimous commitment to prevent and deal with international crimes, was expressed formally in the UN's 2005 World Summit Outcome Document (2005 WSOD).[33] Paragraph 138 of the 2005 WSOD states that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[34] However, in the case where states fail or are unwilling to perform their duties to protect, the international community "has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[35] If, however, the peaceful or pacific approach does not work to fully and effectively resolve the conflict and end the atrocities, the international community is "prepared to take collective action, in a timely and decisive manner, through the [UNSC], in accordance with the [UN] Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate."[36]

It is important to note that the R2P is a political commitment by Member States of the UN and is not a legally binding obligation on their part.[37] Nevertheless, R2P's provisions flow directly from binding international legal norms (e.g., norms assumed under the Convention on the Prevention and Punishment of the Crime of Genocide and various emerging norms of customary international law). [38] The UNSC granted official and formal recognition to R2P in 2006 through Resolution

33. G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005).

34. *Id.* ¶ 138.

35. *Id.* ¶ 139. Note that the international community is supposed to act in accordance with Chapters VI and VIII of the UN Charter. *See* U.N. Charter art. 4 ("Membership in the [UN] is open to all peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.").

36. World Summit Outcome, *supra* note 33, ¶ 139.

37. Jennifer M. Welsh, *Implementing the "Responsibility to Protect": Catalyzing Debate and Building Capacity*, *in* IMPLEMENTATION & WORLD POLITICS: HOW INTERNATIONAL NORMS CHANGE PRACTICE 124, 129 (Alexander Betts & Phil Orchard eds., 2014).

38. *See* Karin Oellers-Frahm, *Responsibility to Protect: Any New Obligations for the Security Council and Its Members?*, *in* RESPONSIBILITY TO PROTECT (R2P): A NEW PARADIGM OF INTERNATIONAL LAW? 184 (Peter Hilpold ed., 2014); *see also* G.A. Res. 260 (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948), at art. I ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.").

1674.[39] In doing so, the UNSC reaffirmed "the provisions of paragraphs 138 and 139 of the 2005 [WSOD] regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[40]

In 2009, the UN General Assembly (UNGA) officially and formally recognized R2P through Resolution 63/308 of October 7, 2009.[41] In its recognition of R2P, the UNGA made reference to the 2005 WSOD and indicated that the UN would "continue its consideration of [R2P]."[42] The UNGA then undertook several dialogues to examine and deal with different aspects of R2P and its implementation. As argued by Hehir, "the degree of attention R2P receives is clearly more sustained than that afforded to other issues, and the annual Informal Interactive Dialogues certainly provide an important insight into the views of member states."[43] For example, the UNGA dialogue undertaken in 2012 focused exclusively on "timely and decisive responses and the 2013 dialogue was devoted to state responsibility and prevention."[44]

In 2011, then UN Secretary-General, Ban Ki-moon, presented a report to the UNGA and the UNSC in which he addressed the regional and sub-regional dimensions of R2P in anticipation of a dialogue on the topic in the UNGA meeting that was scheduled for July 2011.[45] Ban Ki-moon also stated that "[o]ver the last three years, [the UN] had applied [R2P] principles in [its] strategies for addressing threats to populations in about a dozen specific situations" and that "[i]n every case, regional and/or sub-regional arrangements have made important contributions, often as full partners with the [UN]."[46]

Since they began to gain independence in the 1950s and 1960s, Africans have struggled to find ways to deal with government impunity and the abuse of human rights by state and non-state actors. The OAU's strict adherence to the policy of non-interference in the internal affairs of its Member States prevented the organization from taking firm action to prevent atrocities committed against citizens by their governments.[47] The

39. S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

40. *Id.* ¶ 4.

41. G.A. Res. 63/308, The Responsibility to Protect (Oct. 7, 2009).

42. *Id.* ¶ 2.

43. AIDAN HEHIR, HOLLOW NORMS AND THE RESPONSIBILITY TO PROTECT 93 (2018).

44. Maria Sharpe, Int'l Refugee Rts. Initiative, *From Non-Interference to Non-Indifference: The African Union and the Responsibility to Protect* 7 (Sept. 2017).

45. U.N. Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, ¶ 1, U.N. Doc. A/65/877–S/2011/393 (June 27, 2011).

46. *Id.* ¶ 4.

47. Org. of African Unity [OAU] Charter art. 3, ¶ 3. For example, the OAU did nothing to prevent mass atrocities in Nigeria. *See* Lassie Heerten & Dirk Moses, *The Nigeria-Biafra War:*

AU, the successor organization to the OAU, has been similarly constrained, as evidenced by its inability or unwillingness to intervene to stop mass atrocities in countries such as the Democratic Republic of Congo, the Central African Republic, Burundi, and South Sudan.[48]

On July 17, 1998, 120 countries adopted the Rome Statute of the International Criminal Court (Rome Statute) and established the International Criminal Court (ICC).[49] The treaty entered into force on July 1, 2002.[50] The Rome Statute established four important or core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[51] Many African countries initially supported the Rome Statute and the ICC, primarily because of the atrocities that had befallen Rwanda in 1994, as well as their belief that many state and non-state actors who were involved in criminal actitivities, were not being held accountable for their crimes because their national legal and judicial systems were either unwilling or unable to prosecute these individuals for the crimes that they were alleged to have committed.[52] As a consequence, the ICC was seen by many human rights activists in Africa as a "crucial court of last resort," one that could be called upon to intervene and deliver

---

Postcolonial Conflict and the Question of Genocide, 16 J. OF GENOCIDE RES. 169, 174 (2014) (arguing that the OAU considered the Nigerian civil war "an internal affair," and "ensured that no step was taken that might be interpreted as recognizing the Biafran government."). Nor did the OAU do anything to prevent mass atrocities in Liberia. *See* Max A. Sesay, *Civil War and Collective Intervention in Liberia*, 23 REV. AFR. POL. ECON. 35, 38 (1996) (stating that the OAU failed to resolve the Liberian crisis, allowing the country to be controlled by various "rebel factions, foreign troops and foreign observers."). The OAU also did nothing to prevent mass atrocities in Sierra Leone. *See* Abass Bundu, DEMOCRACY BY FORCE?: A STUDY OF INTERNATIONAL MILITARY INTERVENTION IN THE CONFLICT IN SIERRA LEONE FROM 1991–2000 89 (2001) (arguing, inter alia, that during the civil war in Sierra Leone, the OAU "did not sanction the application of force.").

48. *See, e.g.*, Int'l Crisis Grp., *The African Union and the Burundi Crisis: Ambition versus Reality*, Briefing No. 122/Africa 1-17 (Sept. 28, 2016) (detailing, inter alia, the failure of the AU to address the humanitarian crisis created in Burundi by the decision of President Pierre Nkurunziza to seek a third term); Celia Garrett, *The Responsibility of an Inactive African Union in South Sudan*, KENAN INST. FOR ETHICS, https://kenan.ethics.duke.edu/the-responsibility-of-an-inactive-african-union-in-south-sudan/ (last visited Nov. 20, 2018) (examining, inter alia, the failure of the AU to prevent "brutal human rights violations" in South Sudan).

49. *See* Rome Statute of the International Criminal Court art. 1, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]; Knut Dörmann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 1–2 (2004).

50. Dörmann, *supra* note 49, at 1–2.

51. Rome Statute, *supra* note 49, at art. 5.

52. *See* John Mukum Mbaku, *Africa and the International Criminal Court: Is There Room for Cooperation?*, GEO. J. OF INT'L AFFAIRS (Apr. 26, 2017), https://www.georgetownjournalofinternationalaffairs.org/online-edition/africa-and-the-international-criminal-court-is-there-room-for-cooperation.

justice to victims who, otherwise, would not be able to see justice in countries with dysfunctional legal and judicial systems and which were not able to fully and effectively prosecute those alleged to have committed international crimes—the same crimes that were the purview of the ICC.[53]

Although the ICC, the AU, and many Africans are interested in making certain that those who commit international crimes in the African countries are fully prosecuted, a rift has gradually developed between Africans and the ICC. The AU and many Africans have argued that the ICC is pursuing a policy of "selective justice"[54] in which the only people it is interested in prosecuting are Africans.[55] In fact, the ICC has thus far prosecuted only African cases.[56] Although there is no evidence that the ICC's intervention and subsequent prosecution of African cases is based on political considerations and not on solid legal grounds, the international tribunal cannot ignore the voices of Africans who argue that the ICC is a tool of Western imperialism.[57] For, given the continent's troubled past relationship with Europe,[58] it is not unreasonable for Africans to believe or argue that the ICC, an international legal organization located in Europe and funded primarily by the Europeans

53. LUIS GABRIEL FRANCESCHI, THE AFRICAN HUMAN RIGHTS JUDICIAL SYSTEM: STREAMLINING STRUCTURES AND DOMESTICATION MECHANISMS VIEWED FROM THE FOREIGN AFFAIRS POWER PERSPECTIVE 219 (2014).

54. Lydia A. Nkansah, *International Criminal Court in the Trenches of Africa*, 1 AFR. J. INT'L CRIM. JUSTICE 8, 9 (2104).

55. Mbaku, *supra* note 52.

56. *See* Olympia Bekou, *National Implementation of the ICC Statute to Prosecute International Crimes, in* THE INTERNATIONAL CRIMINAL COURT AND AFRICA 272 (Charles Chernor Jalloh & Ilias Bantekas eds., 2017) (stating, inter alia, that "[w]ith all but one of the situations currently before the [ICC] (ICC or Court) emanating from the African continent, the ICC has been criticized for so-called 'geographical bias'.").

57. *See* John Okoth, *Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals, in* AFRICA AND THE INTERNATIONAL CRIMINAL COURT 179, 190 (Gerhard Werle, Lovell Fernandez & Moritz Vormbaum eds., 2014) (arguing, inter alia, that the ICC's "exclusive focus on African cases during its first 10 years of operation is tantamount to judicial imperialism and a neo-colonial encroachment into national jurisdictions.").

58. Many of today's African countries were, at some time in the past, colonized by European countries. During the 19th and 20th centuries, Belgium, Britain, France, Germany, Portugal, and Spain had colonies in Africa. *See generally* Olúfémi Táíwò, HOW COLONIALISM PREEMPTED MODERNITY IN AFRICA 128 (2010) (showing, inter alia, the role played by Lord Lugard in shaping the foundations of British colonialism). In addition, European countries were also quite instrumental in the capture and sale of Africans into slavery in the Americas and other parts of the world. *See* WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 106 (2012) (showing, inter alia, "[t]he European Slave Trade as a Basic Factor in African Underdevelopment."); BASIL DAVIDSON, THE AFRICAN SLAVE TRADE, A REVISED AND EXPANDED EDITION 95 (1980) (examining, inter alia, the "manner of the [slave] trade.").

and a few other advanced economies, would advance the interests of its funders and not those of African countries.[59]

In April 2016, the ICC—which had been expected by many victims of international crimes in Kenya to deliver justice to them—abandoned its case against the Deputy President of Kenya, William Ruto, for lack of sufficient evidence to prosecute.[60] Ruto had been charged for crimes against humanity in connection with the sectarian violence that pervaded Kenya in the aftermath of the December 2007 presidential elections.[61] The violence killed as many as 1,300 people and displaced thousands of other Kenyans.[62] The ICC also dropped the case against Kenya's President, Uhuru Kenyatta, who was also facing charges of crimes against humanity.[63] The failure of the ICC to present a credible case against both Ruto and Kenyatta was a significant blow against the court's credibility.[64] Of particular importance was the fact that victims of the atrocities that pervaded Kenya in the aftermath of the December 2007 presidential

59. *Who Pays for the ICC?*, AFRICAN BUSINESS MAGAZINE (Oct. 1, 2011), https://africanbusinessmagazine.com/uncategorised/who-pays-for-the-icc/ (noting that the ICC receives over 60% of its yearly budget from members of the European Union).

60. Marlise Simons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya's William Ruto*, N.Y. TIMES (Apr. 5, 2016), https://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html.

61. *See* Lorraine Smith-van Lin, *Non-Compliance and the Law and Politics of State Cooperation: Lessons from the Al Bashir and Kenyatta Cases*, *in* COOPERATION AND THE INTERNATIONAL CRIMINAL COURT 114, 118 (Olympia Bekou & Daley J. Birkett eds., 2016); Benjamin Aciek Machar, *Kenyan Politics*, *in* ASSESSING BARACK OBAMA'S AFRICA POLICY: SUGGESTIONS FOR HIM AND AFRICAN LEADERS 189, 206 (Abdul Karim Bangura ed., 2015); KIMANI NJOGU, HEALING THE WOUND: PERSONAL NARRATIVES ABOUT THE 2007 POST-ELECTION VIOLENCE IN KENYA (2009) (providing personal narratives of the post-election sectarian violence that engulfed Kenya after the 2007 presidential elections).

62. *See* Prisca Mbura Kamungi, *The Politics of Displacement in Multiparty Kenya*, *in* KENYA'S UNCERTAIN DEMOCRACY: THE ELECTORAL CRISIS OF 2008, 86, 110 (Peter Kagwanja & Roger Southall eds., 2010) (stating, inter alia, that by the time the post-election "conflict thawed 1,300 to 2,000 people had been killed."); Peter Kagwanja, *Courting Genocide: Populism, Ethno-nationalism and the Informalization of Violence in Kenya's 2008 Post-election Crisis*, *in* KENYA'S UNCERTAIN DEMOCRACY: THE ELECTORAL CRISIS OF 2008, 106, 110 (Peter Kagwanja and Roger Southall eds., 2010).

63. Owen Bowcott, *ICC drops murder and rape charges against Kenyan president*, THE GUARDIAN (Dec. 5, 2014), https://www.theguardian.com/world/2014/dec/05/crimes-humanity-charges-kenya-president-dropped-uhuru-kenyatta; *see also* Marlise Simons, *International Court Throws Out War Crimes Conviction of Congolese Politician*, N.Y. TIMES (June 9, 2018), https://www.nytimes.com/2018/06/09/world/africa/bemba-overturn-international-court.html.

64. *See* Alastair Leithead, *Dismissal of Case Against Kenya's Ruto Huge Blow to ICC*, BBC NEWS (Apr. 5, 2016), https://www.bbc.com/news/world-africa-35974172; Thomas Escritt, *International Criminal Court Throws Out Charges Against Kenyan Deputy President*, REUTERS (Apr. 5, 2016), https://www.reuters.com/article/us-kenya-court-ruto/international-criminal-court-throws-out-charges-against-kenyan-deputy-president-idUSKCN0X21WC.

elections were left with no legal remedy.[65] Many of these victims, as well as several human rights activists in the continent, are most likely to consider the failure of the ICC to secure justice for the Kenyan victims as an indication that the ICC was not the court of last resort that they had hoped it would be when they threw their support behind its establishment through the Rome Statute.[66] In addition to the fact that the failure of the ICC to successfully prosecute Ruto and Kenyatta revealed the difficulties of holding accountable sitting African executives for international crimes committed within their own countries, it made clear to African victims of such crimes that they could not rely on ICC intervention to deliver justice to them.

On June 8, 2018, the Appeals Chamber of the ICC overturned the conviction of former Democratic Republic of Congo Vice President Jean-Pierre Bemba on war crimes and crimes against humanity.[67] Bemba had been charged by the ICC with two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging) committed by his troops in the Central African Republic between October 2002 and March 2003.[68] Bemba, who at the time, was leader of the *Mouvement de Libération du Congo*,[69] sent his troops to the Central African Republic in October 2002 to help suppress an attempted coup against then President Ange-Félix Patasse.[70] Bemba was convicted and sentenced to 18 years in prison.[71] The verdict in the Bemba case was considered very important because it was the first time that the ICC had convicted a defendant of either *rape* or *command responsibility* for the

65. HUM. RTS. WATCH, *"I Just Sit and Wait to Die": Reparations for Survivors of Kenya's 2007–2008 Post-Election Sexual Violence*, at 84 (Feb. 15, 2016); Leithead, *supra* note 64.

66. *See* Luke Moffett, *After the Collapse of the Kenyatta Case, How is the ICC Supposed to Help Victims?*, THE CONVERSATION (Dec. 10, 2014), http://theconversation.com/after-the-collapse-of-the-kenyatta-case-how-is-the-icc-supposed-to-help-victims-34991; Agnes Odhiambo, Hum. Rts. Watch, *Justice Lacking for Victims of Post-Election Violence* (July 11, 2017), https://www.hrw.org/news/2017/07/11/justice-lacking-victims-kenyas-post-election-violence; Sam Jones, *Kenya Failing Post-Election Violence Victism, Says Amnesty*, THE GUARDIAN (July 15, 2014), https://www.theguardian.com/global-development/2014/jul/15/kenya-post-election-violence-amnesty-international.

67. *Jean-Pierre Bemba: Congo Warlord's Conviction Overturned*, BBC NEWS (June 8, 2018), https://www.bbc.com/news/world-africa-44418154.

68. *Id.*

69. Congolese Liberation Movement.

70. *See* Stephanie van den Berg & Amedee Mwarabu, *Congolese ex-Vice President Bemba Acquitted of War Crimes on Appeal*, REUTERS (June 8, 2018), https://www.reuters.com/article/us-warcrimes-congo-bemba/congolese-ex-vice-president-bemba-acquitted-of-war-crimes-on-appeal-idUSKCN1J42GN.

71. Jason Burke, *Jean-Pierre Bemba sentenced to 18 years in prison by international criminal court*, THE GUARDIAN (July 21, 2016), https://www.theguardian.com/law/2016/jun/21/jean-pierre-bemba-sentenced-to-18-years-in-prison-by-international-criminal-court.

actions of their troops—a commander can be found responsible for failing to take action to stop crimes he knows are being committed by his subordinates.[72]

Bemba's lawyers subsequently appealed his conviction to the ICC's Appeals Chamber and three of the chamber's five judges overturned the conviction, stating that the trial court had "erroneously convicted for specific criminal acts that were outside the scope of the charges as confirmed."[73] In addition, the ruling also stated that "[t]he trial chamber had erred in its evaluation of Bemba's motivation and the measures that he could have taken in light of the limitations he faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country."[74] Although some Africans saw Bemba's conviction as part of the ICC's persecution of Africans, others believed that the court had offered hope to victims of international crimes who were unable to get justice from their own governments because the latter were either unwilling or unable to prosecute those who commit these crimes.[75] Hence, the Appeals Chamber's decision to overturn the conviction can be seen, not only as a setback to the more than 5,000 victims who had waited for more than 15 years to see justice done, but can also be considered an indication that the ICC, in its present configuration, is not likely to deliver the justice that Africans expect.[76] Bemba's acquittal argued his lawyer, Peter Haynes, was "not some acquittal on a technicality,"[77] implying that the ICC prosecutors had failed to make their case against Bemba.[78]

---

72. *Id.*

73. Press Release, International Criminal Court, ICC Appeals Chamber acquits Mr. Bemba from charges of war crimes and crimes against humanity (June 8, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=pr1390.

74. *Id.*

75. *Editorial: The Guardian View on Jean-Pierre Bemba: No Impunity for Wartime Rape*, THE GUARDIAN (UK), June 22, 2016.

76. Mike Corder, *ICC Overturns ex-Congo VP Bemba's war crime convictions*, US NEWS (June 8, 2018), https://www.usnews.com/news/world/articles/2018-06-08/icc-overturns-ex-congo-vp-bembas-war-crime-convictions.

77. *Id.*

78. On Tuesday June 12, 2018, judges at the ICC order the interim release of Jean-Pierre Bemba. In a press release announcing the release, the international tribunal stated as follows: "[t]aking into account all relevant factors and the circumstances of the case as a whole, the Trial Chamber considers that the legal requirements for continued detention are not met." Press Release, International Criminal Court, Bemba et al. case: Trial Chamber VII Orders Interim Release for Mr. Bemba Following Appeals Chamber Acquittal (June 12, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=PR1393. Nevertheless, Bemba is scheduled to be sentenced on July 4, 2018 for his conviction on bribing witnesses during the war crimes trial. France 24, *ICC Orders interim release of DR Congo warlord Bemba*, FRANCE 24 (June 13, 2018), http://www.france24.com/en/20180612-international-court-orders-interim-release-congo-warlord-bemba. He had appealed that conviction but lost. *Id.*

Both R2P missions and ICC intervention, all of which have infringed on the sovereign right of African nations to freely govern themselves, have not functioned as anticipated. For example, the operation in Libya under the R2P doctrine only exacerbated sectarian violence and worsened conditions in the country.[79] As for ICC intervention, the Court failed to deliver justice to the victims of the post-election violence in Kenya and the successful appeal of Jean-Pierre Bemba's conviction means that his more than 5,000 victims in the Central African Republic will also be deprived of justice.

Although an examination of the failure of African countries and the international community to deal fully and effectively with international crimes is important, it is not the subject matter of this article. Instead, the article acknowledges that intervention in the internal affairs of African countries may become necessary in order to deal with human rights abuses, including crimes of genocide, ethnic cleansing, war crimes, and crimes against humanity. It then examines how such intervention can infringe on the sovereign right of African nations to determine the content of their national constitutions. The Article also looks at other forms of infringement on the sovereignty of African nations, which include international law. It is then argued that such infringements on national sovereignty can be justified if they can successfully tackle atrocities that national legal, political, and judicial institutions are incapable of handling. Such infringements on sovereignty are especially important in cases where local political elites are unwilling to protect their local populations, including especially vulnerable groups (e.g., women, children, and ethnic and religious minorities), from international crimes. Finally, using a case study from the United Republic of Tanzania, the paper shows how judges can use their interpretive powers to advance the protection of human rights by striking down customary laws that discriminate against and harm some citizens.

---

79. *See* Alan J. Kuperman, *Why R2P Backfires (and How to Fix It)*, *in* LAST LECTURES ON THE PREVENTION AND INTERVENTION OF GENOCIDE 121, 125 (Samuel Totten ed., 2018). It has been argued that the failure was due to the fact that the P3 countries—the United States, the UK and France—acted opportunistically to maximize their national interests by utilizing the intervention to force regime change, instead of concentrating on achieving a ceasefire between the groups that would have paved the way for the establishment of conditions favorable to peaceful coexistence. *See* Noel M. Morada, *Ensuring African Solutions While Implementing under Article 4(h) Intervention*, *in* AFRICA AND THE RESPONSIBILITY TO PROTECT: ARTICLE 4(H) OF THE AFRICAN UNION CONSTITUTIVE ACT 312, 318 (Dan Kuwali & Frans Viljoen eds., 2014). Yet, it is important to note that it is very difficult to secure the international consensus that is needed to increase the chances that military intervention will succeed. A truly multilateral and well-thought out approach is more likely to minimize opportunism on the part of any country, as well as, function well to resolve international crises.

I. CONSTITUTIONAL GOVERNMENT, SOVEREIGNTY AND THE DEMANDS OF INTERNATIONAL LAW

A. *International Law and National Sovereignty*

Within the concept of constitutional government, the people (i.e., the citizens) are considered the source of all power exercised by the government. People form governments and grant them power to protect their rights[80] and provide them with certain goods and services. For example, Mbaku argues that, through the constitution, the people empower the government "to perform certain well-defined functions (e.g., collect taxes and provide public goods and services, such as national defense and police protection)."[81] Specifically, through the constitution, the people constitute a government and grant it the power to govern, that is, to perform certain well-defined activities on their behalf.[82] The constitution (1) defines and elaborates governmental powers; (2) places constraints on the exercise of government power in order to minimize self-dealing and other forms of impunity, such as corruption; (3) mandates that the government derive its power or authority to govern from the people (i.e., the governed); and (4) determines and regulates the allocation of "powers, functions and duties among the various agencies and officers of government as well as defining their relationship with the governed."[83]

The constitution is traditionally "perceived as essentially a state-centered notion which is linked to the concept of statehood and the idea of a state exercising its sovereign power."[84] But, what is sovereignty as it

80. These rights usually are defined in the constitution. *See generally* JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 128 (2018) (arguing, inter alia, that "[g]overnments are formed by the people and specifically empowered through the constitution to guarantee and protect their rights.").

81. *See* John Mukum Mbaku, *Constitutionalism and Governance in Africa*, *in* SOCIO-POLITICAL SCAFFOLDING AND THE CONSTRUCTION OF CHANGE 35, 46 (Kelechi A. Kalu & Peyi Soyinka-Airewele eds., 2009) [hereinafter *Constitutionalism and Governance*]. Mbaku also argues that "[t]he government, having been created by individuals and designed to perform certain well-specified functions for them, should not act in a tyrannous manner towards citizens or allow itself or its structures to be used as instruments of plunder to violate the rights of the people." MBAKU, *supra* note 80, at 85. The goods provided by the government to citizens are usually referred to as "public goods"—these goods have characteristics which make their provision through private markets extremely inefficient. *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 3–12 (1996). Hence, the decision to allow the government to provide them. *Id.*

82. *Constitutionalism and Governance*, *supra* note 81, at 46.

83. Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 441–42 (2012).

84. *Id.* at 441.

relates to constitutions? Sovereignty can be defined as "the supreme, undivided, absolute and exclusive power attributed to the state within a demarcated territory."[85] While sovereignty grants the right of the state to regulate itself, without interference from other states or outside actors, the government is not expected to act without limits—the people are at the center of government and governance and hence, they serve as an important constraint on the exercise of government power. As stated by Thomas Paine in his discussion of a constitution, the latter is a "thing antecedent to a government, and a government is only the creature of a constitution."[86] In addition, the constitution "is not the act of . . . government, but of the people constituting a government."[87]

Professor Charles Manga Fombad, an expert on constitutions and constitutionalism in Africa, states that "a constitution consists of the collection of all rules, whether written in a formal document or not, that limits both government and the governed with respect to what may or may not be done."[88] But, are all these rules legal, in the sense that "courts of law will recognize and enforce them"?[89] Modern constitutional scholars and legal experts state that some constitutional rules are legal and hence, are recognized and enforced by the courts[90] and that others are extra-legal and take the form of "usages, understandings, customs or conventions, which the courts may not necessarily recognize and enforce, but which are nonetheless effective in regulating government and the governed."[91] These definitions make clear that there are two centers of authority in each country—the *state* and *the people*.[92] Although the government is empowered through the constitution to govern, it must derive its legitimacy from the people. Hence, the consent of the people is critical to constitutional government and effective governance requires that the government be accountable to the people and the constitution.[93]

As made evident by Article 2(7) of the UN Charter, traditional law recognizes the right of states to self-regulate—that is, to govern themselves.[94] The UN is prohibited from intervening in any "matters

85. *Id.*

86. THOMAS PAINE, THE RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS 122 (Mark Philp ed. Oxford Univ. Press 1995) (1791–1792).

87. *Id.* at 122.

88. Fombad, *supra* note 83, at 442.

89. *Id.*

90. K. C. WHEARE, MODERN CONSTITUTIONS 1–3 (Oxford University Press, 1966).

91. Fombad, *supra* note 83, at 442.

92. *See* MBAKU, *supra* note 80, at 130.

93. *Id.*

94. U.N. Charter art. 2, ¶ 7.

which are essentially within the domestic jurisdiction of any state."[95] Nevertheless, the same article cautions that "this principle shall not prejudice the application of enforcement measures under Chapter VII" of this Charter.[96] But, the question that must be answered is: Which issues or matters are exclusively within the jurisdiction of domestic law and which are within the jurisdiction of international law?

In 1923, the Permanent Court of International Justice (PCIJ)[97] was called upon to provide an advisory opinion on whether a dispute between France and Great Britain "as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8th, 1921, and their application to British subjects, . . . is or is not by international law solely a matter of domestic jurisdiction."[98] In its opinion, the PCIJ stated that "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."[99] This approach, which effectively "defines the scope of domestic jurisdiction as what is left over after the rules of international law have claimed their jurisdiction,"[100] has been criticized as being too broad.[101]

The ICJ[102] provided what is considered "a more authoritative position" in the *Case Concerning Military and Paramilitary Activities in*

---

95. *Id.*

96. *Id.* Chapter VII deals with action that must be taken by the UN with respect to threats to the peace, breaches of the peace, and acts of aggression. *See id.* at arts. 75–85.

97. The Permanent Court of International Justice (PCIJ), also called the World Court, existed from 1922 to 1946 and was the predecessor of the International Court of Justice. *See* Christian J. Tams, *The Contentious Jurisdiction of the Permanent Court*, *in* LEGACIES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 11 (Christian J. Tams & Malgosia Fitzmaurice eds., 2013). The PCIJ was provided for in the Covenant of the League of Nations. *See* League of Nations Covenant arts. 13–14. It sat for the first time in 1922 and effectively dissolved in 1946. *See* TIM HILLIER SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 544 (1998) (stating, inter alia, that "[t]he PCIJ sat for the first time in the Hague on 15 February 1922 and . . . dissolved together with the League of Nations in April 1946."). The work of the PCIJ contributed significantly to the development of international law. *See, e.g.*, James Crawford, *The International Court of Justice and the Law of State Responsibility*, *in* THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 71, 71–73 (Christian J. Tams & James Sloan eds., 2013) (examining, inter alia, the contributions of the ICJ and those of the PCIJ to the development of international law).

98. Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, ¶ 1 (Feb. 7).

99. *Id.* ¶ 40.

100. Fombad, *supra* note 83, at 442.

101. Anthony D'Amato, *Domestic Jurisdiction*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1090, 1091 (Rudolf Bernhardt ed., Max Planck Inst., 1992).

102. The ICJ is the UN's principal judicial institution. The ICJ was established in 1945 by the Charter of the UN and began its work in 1946, following the dissolution of the PCIJ. *See* CLIFF ROBERSON & DILIP K. DAS, AN INTRODUCTION TO COMPARATIVE LEGAL MODELS OF CRIMINAL

and Around Nicaragua.[103] In its judgment, the ICJ stated that as a consequence of the principle of sovereignty, each state has "the choice of a political, economic, social and cultural system and the formulation of foreign policy."[104] Nevertheless, "[a] purposive interpretation of the proviso to Article 2(7) of the Charter [of the UN] and the practice of the UN over the decades has shown that the organization could in fact intervene in constitutional matters which are essentially within the domestic jurisdiction of any state if international peace and security were said to be threatened."[105] Today, many international legal experts argue that the UNSC can intervene in domestic constitutional matters, and hence, limit domestic jurisdiction, if international peace and security are threatened.[106] In other words, the UNSC can infringe on the sovereign right of nations to freely govern themselves, as well as determine the content of their constitutional law, in situations where international peace and security are threatened.[107]

Many international treaties and conventions specifically acknowledge the sovereign right of each state to design and adopt a constitutional system of their choice. For example, the International Covenant on Civil and Political Rights states that "[a]ll peoples have the right . . . [to] freely determine their political status and freely pursue their economic, social and cultural development."[108] These treaties and conventions, which are part of international human rights law, also impose certain obligations on States Parties—these obligations effectively infringe on and "limit states'

JUSTICE 259 (2016) (providing an overview of the founding of the PCIJ and its subsequent replacement by the ICJ). The ICJ settles legal disputes between Member States of the UN. It also gives advisory opinions to authorized UN organs and specialized agencies. *See* Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOR OF SIR ROBERT JENNINGS 63 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (examining, inter alia, the ICJ as a source of international law).

103. Fombad, *supra* note 83, at 442.

104. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 205. (June 27).

105. Fombad, *supra* note 83, at 443; *see also* A. A. Cançado Trindade, *The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations*, 25 INT'L & COMP. L. Q. 715, 719–22 (1976).

106. BRIAN D. LEPARD, RETHINKING HUMANITARIAN INTERVENTION: A FRESH APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS 149 (2002); ROBERT S. JORDAN, INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH TO THE MANAGEMENT OF COOPERATION 161 (2001).

107. Fombad, *supra* note 83, at 443.

108. International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; *see also* International Covenant on Economic, Social and Cultural Rights art. 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (using similar language to the International Covenant on Civil and Political Rights) [hereinafter ICESCR].

sovereign right to exclusively determine the content of their domestic constitutional law."[109] Hence, the need for African States to meet their international treaty obligations directly infringes on their sovereign ability to determine the nature, scope and content of their domestic constitutional law.

Granted, various international human rights instruments impose binding obligations on African States and hence, infringe on each State Party's sovereign right to the exclusive right to determine the content of its constitutional law. Such infringement, nevertheless, must not be considered negatively—these commitments to international human rights instruments can minimize impunity by national governments, significantly improve governance, and enhance the recognition and protection of human rights. With respect to the African countries, it is hoped that the need for these countries to draft and adopt constitutions that reflect and are in line with the provisions of international human rights instruments, should minimize the ability of national governments to act with impunity and abuse the rights of citizens.[110]

B. *International Cooperation and National Sovereignty*

In the last several decades, it has become increasingly important for countries to cooperate in resolving problems and risks of a global nature. Some of these include pandemics (e.g., Ebola);[111] global warming;

109. Fombad, *supra* note 83, at 443.

110. For each African country, there are at least three ways to ensure the protection of human rights. First, the courts can be empowered and provided with the capacity to enforce the laws and protect human rights. More importantly, national courts can make certain that national laws reflect or are in line with international human rights laws and norms. This includes, not just the constitution and laws enacted by national legislatures, but also customs and traditions, many of which have a significant impact on the rights of vulnerable groups, such as children, women, the poor, and ethnic and religious minorities. Second, civil society can help enhance the protection of human rights and the enforcement of laws that protect the fundamental rights of citizens through the development of a human rights culture. Such a culture can significantly enhance the ability of citizens to voluntarily accept and respect the laws that are designed to protect human rights. Finally, legislators (i.e., law makers) can make certain that national laws, including the constitution, comply with international human rights laws and norms.

111. Beginning in 2014, for example, there was an outbreak of the Ebola virus in Liberia, Sierra Leone, and Guinea. Mary Pickett, *Global cooperation needed to stop the spread of Ebola virus disease*, HARVARD HEALTH BLOG (Aug. 1, 2014, 2:11 PM), https://www.health.harvard.edu/blog/global-cooperation-needed-stop-spread-ebola-virus-disease-201408017314. It did not take long for countries in West Africa, as well as the international community, to realize that treating the disease and minimizing its spread required the type of cooperation that involved, not just West African States, but also other members of the global community, including the European countries, the United States and other developed countries. In fact, shortly after the outbreak of Ebola in Liberia, healthcare workers and epidemiologists in the United States and the European Union were warning their governments about the possible spread of the virus to their

terrorism and various forms of cross-border sectarian violence; famine and extreme malnutrition;[112] natural disasters (e.g., droughts and floods, earthquakes); extreme poverty; corruption in international business transactions; cross-border criminal activities, including transnational organized crime; and migration.[113] The cooperation needed to fully and effectively deal with or confront these international risks necessarily requires the concluding of international, as well as regional, treaties and other types of agreements.[114]

In Africa, states have had to make compromises in order to deal with problems that are common to them and their neighbors, near and far. This process has been referred to as the "progressive denationalization" . . . or "internationalization of constitutional law."[115] Professor Charles Manga Fombad has defined the internationalization of constitutional law as "the development of the adoption in national constitutional laws of many shared norms whose origins can be traced to international and regional supra-national laws."[116] But, how exactly can domestic constitutional law

countries through international travel (*see, e.g.*, Caelainn Hogan, *CDC Urges U.S. Health Workers to be Vigilant as Ebola Virus's Toll Grows in Africa*, WASH. POST (July 28, 2014), https://www.washingtonpost.com/national/health-science/cdc-urges-us-health-workers-to-be-vigilant-as-ebola-viruss-toll-grows-in-africa/2014/07/28/710f56de-1680-11e4-85b6-c1451e622637_story.html?noredirect=on&utm_term=.eb8aa59d571c; Manny Fernandez, *2nd Ebola Case in U.S. Stokes Fears of Health Care Workers*, N.Y. TIMES (Oct. 12, 2014), https://www.nytimes.com/2014/10/13/us/texas-health-worker-tests-positive-for-ebola.html; Andrew Higgines, *In Europe, Fear of Ebola Exceeds the Actual Risks*, N.Y. TIMES (Oct. 17, 2014), https://www.nytimes.com/2014/10/18/world/europe/in-europe-fear-of-ebola-far-outweighs-the-true-risks.html. Hence, it was important that these governments cooperate with officials in Liberia to contain the spread of the disease.

112. In West and East Africa, malnutrition has created humanitarian crises that have required the cooperation of two or more states for their effective management. Consider, for example, famine in the Lake Chad Region, which has made necessary cooperation between Cameroon, Chad, Niger, and Nigeria. *See* Catherine Hardy, *Three Million at Risk of Famine in Lake Chad Region*, EURONEWS (Feb. 24, 2017), http://www.euronews.com/2017/02/24/three-million-at-risk-of-famine-in-lake-chad-region.

113. *See* James C. Hagen et al., *Strategic Activities to Promote Cooperation and Coordination Disaster Management*, 17 MGT. IN HEALTH 21, 21–22 (2013).

114. *See, e.g.*, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families pmbl., July 1, 2003, 2220 U.N.T.S. 3 (designed "to bring about the international protection of the rights of all migrant workers and members of their families."); International Convention for the Suppression of the Financing of Terrorism pmbl., Dec. 9, 1999, 2178 U.N.T.S. 197 (designed specifically "to enhance international cooperation among States in devising and adopting effective measures for the prevention and financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators."); United Nations Convention Against Transnational Organized Crime frwd., Nov. 15, 2000, 2225 U.N.T.S. 209 (designed to "Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.").

115. Fombad, *supra* note 83, at 443–44.

116. *Id.* at 444.

in the African countries be influenced by international law?[117] As argued by one legal scholar, the international process can take place "where it is expressly or implicitly provided for by the constitution"; "where is it based on customary or constitutional international law"; "where it results from progressive interpretation or operates as an aid to constitutional interpretation"; and "under the emerging customary international law [R2P] principle."[118]

1. Government Treatment of Their Citizens Becomes an Important Concern of the Global Community

In the aftermath of the atrocities committed during World War II, the international community became quite concerned about how national governments treated or were treating their citizens. In response to these concerns, the community of nations, as reflected in the UN,[119] moved quickly to establish "minimum standards of human rights protection with monitoring bodies to scrutinize national performance."[120] These minimum standards were elaborated in various international instruments, the most important of which was the Universal Declaration of Human Rights (UDHR).[121] One can argue, of course, that the UDHR is only a "declaration" and hence, is not legally binding on Member States of the UN system. Nevertheless, since it was proclaimed by the UNGA in Paris on December 10, 1948, many of its provisions have been incorporated into "other international and regional instruments as well as national constitutions"[122] and as a consequence, many of the UDHR's provisions are now "considered to express principles of customary international law."[123]

Due to the special status of many of the UDHR's provisions, the latter and "other instruments which contain rules considered to be customary international law are automatically applicable in most common law countries . . . as part of national law and must therefore be taken into account in any interpretation of the constitution."[124] The provisions of these international human rights instruments, including those of the

117. Any such influence is an infringement on the sovereign right of each African state to exclusively determine what constitutes domestic or national constitutional law. International influence, for example, can totally reshape domestic constitutional law so that it reflects international human rights law and norms.

118. Fombad, *supra* note 83, at 444.

119. The UN came into being in 1945.

120. Fombad, *supra* note 83, at 444.

121. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

122. Fombad, *supra* note 83, at 444.

123. *Id.*

124. *Id.* at 445.

UDHR, have become limits to state sovereignty as states must take them into consideration when interpreting their national constitutions, as well as when designing their constitutions and enacting post-constitutional laws.

It is important to note, however, that these international human rights instruments and standards "do not automatically confer justiciable rights in national courts."[125] Nevertheless, they do and can have significant impact on national laws, including the constitution, how they are designed and how they are enforced. Many provisions in the constitutions of African countries, including especially those which recognize and protect human rights, "have been substantially influenced by international human rights instruments and standards."[126] For example, in the Preamble to the Constitution of Cameroon, it is stated as follows: "We, the people of Cameroon, . . . [a]ffirm our attachment to the fundamental freedoms enshrined in the [UDHR], the Charter of the [UN] and the African Charter on Human and Peoples' Rights, and all duly ratified international conventions."[127]

But, does this affirmation in the Cameroon and other African constitutions of the fundamental rights and freedoms enshrined in various international human rights instruments make the latter part of national law and hence, make the rights contained in these international instruments justiciable in national courts? As argued by one international legal scholar, this affirmation, however, "does not render any of these instruments part of national law nor can they be invoked on this basis alone in the interpretation of the constitution."[128] In fact, such affirmations, as contained in the Constitution of Cameroon, do not seriously infringe on the country's sovereign right to exclusively determine the content of domestic law.

Now, consider the case of the Republic of Bénin. Constitutional designers in this African country have directly incorporated provisions of certain international human rights instruments into the national constitution.[129] First, in the Preamble to the Constitution, it is stated as follows:

> WE, THE BÉNINESE PEOPLE, [r]eaffirm our attachment to the principles of democracy and human rights

125. Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 108 (2002).

126. Fombad, *supra* note 83, at 445.

127. Constitution of the Republic of Cameroon pmbl. (1972).

128. Fombad, *supra* note 83, at 445.

129. Constitution de la République du Bénin [Constitution of the Republic of Benin] pmbl. (1990).

> as they have been defined by the Charter of the [UN] of 1945 and the [UDHR] of 1948, by the African Charter on Human and Peoples' Rights adopted in 1981 by the [OAU] and ratified by Bénin on 20 January 1986 and *whose provisions make up an integral part of this present Constitution and of Béninese law and have a value superior to the internal law.*[130]

This is repeated in Article 7 of the Constitution of the Republic of Bénin, which, makes the "rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights . . . an integral part of the . . . Constitution [of Bénin] and of Béninese law."[131] In addition, the Béninese constitution imposes a duty on the government to make certain that the people are fully educated on the national Constitution, the UDHR, the African Charter on Human and Peoples' Rights, and other international human rights instruments.[132]

The Constitution of the Republic of Angola makes express reference to the applicability of international law in applying and interpreting the national constitution. For example, according to Article 26, which is titled "Scope of fundamental rights,"

> 1. The fundamental rights established in this Constitution shall not exclude others contained in the laws and applicable rules of international law. 2. Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the [UDHR], the African Charter on the Rights of Man and Peoples and international treaties on the subject ratified by the Republic of Angola. 3. *In any consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.*[133]

The Angolan Constitution, in Article 27, provides additional elaboration. It states that "[t]he principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of

130. *Id.* (emphasis added).

131. *Id.* at art. 7.

132. *Id.* at art. 40 ("The state has the duty to assure the diffusion and the teaching of the Constitution, of the [UDHR], of the African Charter on Human and Peoples' Rights of 1981 as well as all of the international instruments duly ratified and relative to human rights.").

133. Constituição da Républica de Angola [Constitution of the Republic of Angola] art. 26 (2010) (emphasis added).

a similar nature that are established in the Constitution or are enshrined in law or international conventions."[134]

The Constitution of Ghana directly imposes a duty on the state to take into consideration, international human rights instruments when enacting laws. Article 37(3) of the Ghana Constitution states that "[i]n the discharge of the obligations in clause (2)[135] of this article, the State, shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes."[136] In addition, Article 40(c) imposes an obligation on the government to "promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means."[137]

In 2010, the people of Kenya provided themselves with a new constitution, which introduced the concept of separation of powers with checks and balances.[138] In addition to creating an independent judiciary, the constitution also speaks directly to the applicability of international law within the country. In Article 2(5), it states as follows: "The general rules of international law shall form part of the law of Kenya,"[139] effectively making "the rules of international law" justiciable in Kenyan courts. Additionally, the Kenyan constitution also states that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[140]

Other African countries, unlike Kenya, Angola, and Benin, do not directly make international law part of their basic law. For example, while the Constitution of the Republic of South Africa, 1996, acknowledges international law, it does not make provisions of the latter directly justiciable in domestic courts. Instead, it imposes on national courts, an obligation to "consider international law" when interpreting the Bill of Rights.[141] In Cape Verde, the constitution states that "[c]onstitutional and legal norms regarding fundamental rights must be interpreted and

134. *Id.* at art. 27. By doing so, Angola directly makes certain international human rights provisions are justiciable in its domestic courts.

135. Clause 2 empowers the State to enact laws to provide citizens with effective and full access to development processes and to promote and protect "all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes." Constitution of the Republic of Ghana art. 37, cl. 2 (1992).

136. *Id.* at art. 37, cl. 3.

137. *Id.* at art. 40.

138. CONSTITUTION art. 174 (2010) (Kenya).

139. *Id.* at art. 2, § 5.

140. *Id.* at art. 2, § 6.

141. S. AFR. CONST., 1996, § 39(1).

integrated in accordance with the [UDHR]."[142] As already mentioned, the Constitution of Ghana imposes an obligation on the government to "promote respect for international law"[143] but does not make any provisions of international law directly justiciable in Ghanaian courts.

Scholars of constitutional law have often wondered what domestic courts should do in the case where there is no "explicit or implicit" authorization for them to invoke or refer to international human rights instruments. The answer to this question differs from country to country, within the African continent. In recent years, many African countries, which have not explicitly or implicitly authorized the invocation of international human rights instruments, have, nevertheless, been making reference in their constitutions to international human rights law.[144] Such references, even if they do not constitute explicit or implicit authorization for domestic courts to refer to or apply international law, have actually provided "room for the large volume of international jurisprudence to influence the nature and scope of rights provided in the constitution and the manner in which these rights are recognized and enforced by the courts."[145]

Despite several setbacks,[146] constitutional designers in Africa are gradually warming up to the idea of recognizing international human rights instruments in their constitutions and constitutional interpretation and practice. Many countries in the continent are slowly but steadily

142. Constituição da República de Cabo Verde [Constitution of the Republic of Cape Verde] art. 17 (1992).

143. Constitution of the Republic of Ghana art. 40 (1992).

144. For example, in the Constitution of Angola, "Duly approved or ratified international treaties and agreements shall come into force in the Angolan legal system after they have been officially published and have entered into force in the international legal system, for as long as they are internationally binding upon the Angolan state." Constituição da República de Angola [Constitution of the Republic of Angola] art. 13 (2010). In the Constitution of Cameroon, it is stated that "[d]uly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement." Constitution of Cameroon art. 45 (1972).

145. Fombad, *supra* note 83, at 447.

146. Some of these setbacks include the failure of countries, such as South Sudan, Somalia and Central African Republic, to provide themselves with institutional arrangements that can actually enhance peaceful coexistence and promote inclusive economic growth and development. Many of these states are pervaded by sectarian violence, which is partly a result of the ability of the citizens to provide themselves with effective governing processes, particularly those that provide the citizens of the various subcultures within each country with the wherewithal for self-actualization. *See generally* MBAKU, *supra* note 80, at 2–5, 155–56, 177–83 (arguing, inter alia, that much of the ethnic-induced violence that has pervaded African countries since independence has been due to the failure of these countries to provide themselves with effective institutional arrangements, specifically, those undergirded by the rule of law).

recognizing the importance of making certain that domestic law[147] reflects international human rights laws and norms.[148] Many of these countries, if only implicitly, are gradually warming up to the idea of accepting certain types of infringements on their sovereignty in order to improve the protection of human rights and generally promote good governance.

2. When Countries Recognize International Law as Part of National Law

If an African country signs and ratifies an international instrument and the latter is relevant to national constitutional matters, such an instrument can have an effect on the content of the national constitution or its interpretation. In fact, such an international instrument can directly infringe on the sovereign right of the state to exclusively determine the content of its domestic constitutional law. It has been argued that the nature of such impact will depend on "how effect is given to international instruments in the particular country."[149] One can find two well-established approaches in the international law literature: the "monist approach,"[150] and the dualist approach.[151] In countries where the monist theory governs the relationship between domestic and international law, the latter and the former comprise one single legal order within the nation's legal system. However, international law is superior to or prevails over national or domestic law. Thus, in an African country which adheres to this approach, the provisions of international human rights instruments, for example, override any contrary domestic law.[152] Domestic courts, then, must "give effect to principles of international law over [superseding] or conflicting rules of domestic law."[153]

In countries where the relationship between international and national law is governed by the dualist theory, the two legal systems are separate and independent of each other. Within states adhering to this theory, international law regulates exclusively international relations (i.e.,

147. In this discussion, domestic law includes the customs and traditions of the various subcultures within each country. In these countries, part of the effort to develop a culture of human rights must include the need to make certain that none of the customary and traditional practices of any subculture (e.g., female genital mutilation; virgin cleansing) violate the provisions contained in various international human rights instruments.

148. *See, e.g.*, S. AFR. CONST., 1996, § 232.

149. Fombad, *supra* note 83, at 447.

150. The monist approach is quite prevalent in the Francophone and Lusophone African countries. Fombad, *supra* note 83, at 447.

151. The dualist approach is prevalent in Anglophone African countries. *Id.*

152. *See* Adjami, *supra* note 125, 108–09.

153. *Id.*

relations between sovereign States).[154] Governing the national legal system, however, is reserved exclusively for municipal law. The national legal system can only give effect to international law if and when the national legislature has duly incorporated international law into domestic law and created justiciable rights, which can be enforced by domestic courts.[155]

Generally, international jurists consider international legal norms that have evolved into and gained the status of *international customary law*[156] as part of *municipal law* under both monist and dualist theories. According to this view, customary international law, now considered part of domestic law, will prevail over the latter and hence, serve as a constraint on the ability of national policymakers to retain their sovereign right to act in matters of law.[157] In some countries (e.g., the UK), domestic courts will make every effort to ensure that the application of municipal law is compatible with international customary law.[158] Nevertheless, if there is a conflict, municipal law will prevail.[159]

The question that has not been fully resolved is: how does one determine when norms and treaties of international law have attained the status of customary international law and hence, are eligible to be incorporated into municipal law? According to the international law literature, in order for an international law principle to attain the status of customary international law, it must meet and conform with the definition of Article 38 of the Statute of the International Court of Justice.[160] Article 38(1)(b) refers to "international custom, as evidence of a general practice accepted as law."[161]

---

154. *Id.* at 109.

155. *Id.*

156. Also referred to as "customary international law." *See, e.g.*, BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 98, 99 (2010) (arguing, inter alia, that customary international law is a primary source of international law and that a "state is bound even by customary rules to which it did not explicitly assent").

157. Adjami, *supra* note 125, at 108–29.

158. Adjami, *supra* note 125, at 109 n.18.

159. *See id.*

160. V. D. DEGAN, SOURCES OF INTERNATIONAL LAW 143 (1997).

161. Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179. One international legal scholar, however, has argued that there are only a few provisions of international humanitarian law, all of which are enshrined in the Geneva Conventions, that can be considered as having attained the status of customary international law and which are then eligible for automatic incorporation into municipal law. Michel-Cyr Djiena Wembou, *Les normes internationales relatives aux droits de l'homme et leur application dans la législation interne des États africains: problèmes et perspectives*, 11 AFR. J. INT'L L. & COMP. L. 51, 52–53 (1999) (UK).

With respect to African countries, adhering to either the monist or dualist theories seems to have been influenced by each country's colonial history. The majority of countries that were colonized by France and Belgium (i.e., Francophone countries) inherited the monist view of international law, while former British colonies embraced the dualist approach.[162] South Africa and Namibia, however, follow the Roman-Dutch law model and, at the same time, practice the common law and dualist approaches to adjudication.[163]

Despite the existence of these two distinct approaches to how effect is given to international instruments in the African countries, it is important to recognize the fact that there currently is no significant difference between African countries in the way in which they treat treaties, which they have signed and ratified. Throughout the continent, whether the country is Francophone, Lusophone or Anglophone, it is often the case that many African countries sign and ratify treaties and conventions but often make little effort to "domesticate these [legal] instruments"[164] even where their national constitutions state that upon ratification, an international instrument is effective immediately and takes precedence over or overrides national or domestic law. In these countries, international law does not fully infringe on the sovereign right of policymakers to freely legislate.

In the Anglophone countries, customary international law is considered an integral part of national (domestic) law. If the principles contained in an international instrument (e.g., a treaty or convention) "have crystallized into customary international law,"[165] that instrument may still form part of national constitutional law even if the country has not signed and ratified the relevant international instrument. Thus, the fact that an Anglophone African country has not yet signed and ratified an international human rights instrument does not necessarily mean that various principles contained in the instrument cannot form part of national constitutional law, as long as these principles have "crystallized into customary international law."[166]

How an international instrument affects a national legal system hinges on what the instrument is, as well as its properties. International treaties are binding on States that are parties to the treaties (i.e., States Parties). This "binding effect" can be linked directly to the international law

162. Adjami, *supra* note 125, at 109–10.
163. *Id.* at 110.
164. Fombad, *supra* note 83, at 447.
165. *Id.* at 448.
166. *Id.*

principle referred to as *pacta sunt servanda*,[167] which has been codified in the Vienna Convention on the Law of Treaties (Vienna Convention).[168] According to Article 26 of the Vienna Convention, which is titled *Pacta sunt servanda*, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[169]

Some treaties specifically impose an obligation on States Parties to adopt legislation or other measures to give effect to the provisions in these treaties—that is, to create rights that are justiciable by local or domestic courts. For example, under Article 1 of the African Charter on Human and Peoples' Rights, States Parties to the Charter "shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."[170]

A State can, through its constitution, put to rest any doubts as to whether international law, including customary international law, is law within its national jurisdiction. For example, South Africa's constitution speaks directly to the applicability of both *international law* and *customary international law*.[171] Article 232 of the Constitution of the Republic of South Africa[172] deals specifically with *customary international law* and states that "[c]ustomary international law is law in the Republic [of South Africa] unless it is inconsistent with the Constitution or an Act of Parliament."[173] Article 233 of the same constitution addresses the issue of the applicability of *international law*: "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative that is inconsistent with international law."[174] Lawmakers and citizens of countries like South Africa have voluntarily opted to allow international law to infringe on their sovereign right to determine the content of their constitutional law

167. This is the most important principle of customary international law of treaties and means that treaties must be observed. *See* T. O. ELIAS, THE MODERN LAW OF TREATIES 40 (1974).

168. Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), at art. 26 [hereinafter Vienna Convention].

169. *Id.* at art. 26.

170. The African Charter on Human and Peoples' Rights art. 1, *adopted* June 27, 1981, 1520 U.N.T.S. 217. Some scholars have noted that when the OAU drafted the Charter, Member States were quite aware of the "disparity between the effect of international law in monist and dualist States and sought through article 1 to emphasize the character of the treaty as binding on States." Adjami, *supra* note 125, at 110. *See also* LONE LINDHOLT, QUESTIONING THE UNIVERSALITY OF HUMAN RIGHTS: THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN BOTSWANA, MALAWI, AND MOZAMBIQUE 73 (1997).

171. S. AFR. CONST., 1996, §§ 232–33.

172. *Id.* § 232.

173. *Id.*

174. *Id.* § 233.

in an effort to enhance and improve the protection of human and peoples' rights, as well as create, within the country, a culture that respects and protects human rights.[175]

Efforts in Africa to allow international law to infringe on the sovereign right of domestic lawmakers to freely legislate has been part of the overall effort, led by the OAU and its successor organization, the AU, to eliminate authoritarian systems of governance and transition these countries to democracy, as well as integrate them into the global society of free nations.[176] The OAU, which was founded in 1963,[177] was so pre-occupied with eradicating all forms of colonialism, including apartheid in South Africa, that it paid very little attention to democracy, good governance and the rule of law, including respect for human rights. In fact, the OAU's Charter specifically prohibited intervention in the internal affairs of Member States and strongly supported the concept of territorial sovereignty, effectively rendering the continental organization totally impotent when it came to government impunity and the abuse of human rights in the continent.[178]

---

175. South Africa's constitutional decisions are most likely colored by the people's experiences with apartheid-era legal systems that subjected the African majority to an attenuated form of citizenship, exploitation, and abuse. *See* SAUL DUBOW, SOUTH AFRICA'S STRUGGLE FOR HUMAN RIGHTS (2012) (examining the experiences of the human rights movement in South Africa and the key role that it played in the transition to democratic governance).

176. The African Charter on Democracy, Elections and Governance art. 2 (Jan. 30, 2007) (stating that "[t]he objectives of this Charter is to: 1. [p]romote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights," as well as "[p]romote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties.").

177. Tiyanjana Maluwa, *The Transition from the Organization of African Unity to the African Union, in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION 25, 41 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012).

178. *See* Org. of African Unity [OAU] Charter art. 3, ¶ 3 ("The Member States, . . . solemnly affirm and declare their adherence to the following principles: 3. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."); In fact, throughout its existence, from 1963 to 2002, the OAU made little effort to deal with gross abuse of human rights by brutal dictators—the latter included Idi Amin of Uganda, Jean-Bedel Bokassa of Central African Republic, and Francisco Macìas Nguema of Equatorial Guinea. Clement Nwankwo has argued that the OAU, "[h]obbled by severe limitations and replete with contradictions," it was not able to "ameliorate the serious problem of human rights abuses in Africa." Clement Nwankwo, *The OAU and Human Rights*, 4 J. DEMOCRACY 50, 51 (1993). Other scholars have argued that the OAU, after its establishment in 1963, "did not concern itself with the protection and promotion of human rights in Africa" and "remained reluctant to confront human rights issues on the continent even though the Preamble to the O.A.U. Charter supports the principles enunciated in the [UDHR]." Olusola Ojo & Amadu Sesay, *The O.A.U. and Human Rights: Prospects for the 1980s and Beyond*, 8 HUM. RTS. Q. 89, 89 (1986).

The AU was established on May 21, 2001 in Addis Ababa, Ethiopia, and launched on July 9, 2002 in South Africa, in order to replace and take over the duties of the OAU.[179] The OAU, however, did leave behind an instrument that has become a critical part of its successor's efforts to promote democracy, good governance, and the rule of law in the African countries. That instrument is the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration), which is now considered a major tool for the implementation of the AU's democracy and good governance agenda.[180] Nevertheless, the basic framework for promoting and enhancing democracy and good governance in Africa is contained in the Constitutive Act of the AU (Constitutive Act).[181]

The Constitutive Act is an international treaty and hence, is binding on all Member States.[182] The basic principles of the AU's democracy and good governance agenda are contained in four major instruments, namely, (1) the Constitutive Act; (2) the Lomé Declaration; (3) Declaration on the Principles Governing Democratic Elections in Africa;[183] and (4) Guidelines for AU Electoral Observations and Monitoring Missions.[184]

The AU, through these four instruments, especially the Constitutive Act, supports the efforts of Member States to transition to democratic governance and promote and protect human and peoples' rights. In the Constitutive Act, specific reference is made to the promotion of democracy and the protection of human rights. In Article 3, it is stated that the "objectives of the [AU] shall be to: g) promote democratic principles and institutions, popular participation and good governance; h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments."[185] The objectives provided in Article 3 can be seen

179. *See* Tiyanjana Maluwa, *The Transition from the Organization of Afrian Unity to the African Union*, *in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK 9–23 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012) (examining, inter alia, the creation of the AU as a replacement for the OAU); *see also* Constitutive Act of the African Union, *adopted* July 11, 2000, 2158 U.N.T.S. 3 (entered into force May 26, 2001) [hereinafter Constitutive Act].

180. Organization of African Unity [OAU], *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, AHG/Decl. 5 (XXXVI) (July 10–12, 2000) [hereinafter *Lomé Declaration*].

181. Constitutive Act, *supra* note 179.

182. *See* Vienna Convention, *supra* note 168, at art. 26.

183. African Union [AU] AHG/Decl. 1 (XXXVIII), Declaration on the Principles Governing Democratic Elections in Africa (July 8, 2002).

184. African Union [AU] EX.CL/91 (V), annex, Guidelines for African Union Electoral Observations and Monitoring Missions (July 8, 2002).

185. Constitutive Act, *supra* note 179, at art. 3(g)-(h).

as goals that the AU and its Member States want to accomplish. In order to do so, the AU is to be guided by several principles, which are elaborated in Article 4—these principles are directly linked to each Member State's ability to maintain its sovereign right to determine the content of its constitutional law. The relevant principles include:

> (g) non-interference by any Member State in the internal affairs of another; (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; (j) the right of Member States to request intervention from the Union in order to restore peace and security; (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; (p) condemnation and rejection of unconstitutional changes of governments.[186]

These common values and principles, as promoted by the AU, can be seen as significant constraints on and challenges to the sovereignty of Member States. As argued by Professor Fombad, the embrace of and commitment to democracy and good governance, including the protection of human and peoples' rights by regional organizations, such as the AU, provides the wherewithal and opportunity for Member States to use peer pressure to force their neighbors to transition to democratic governance and respect the rights of their citizens.[187] The Constitutive Act, however, provides only guiding objectives and principles and allows concrete action to be taken by institutions and organs created under it and geared towards the fulfillment of specific objectives and goals.[188]

The Lomé Declaration defines the common values and principles for democratic governance in Africa and makes quite clear that the main goal

186. *Id.* at art. 4(g), (h), (j), (o), (p).

187. *See* Fombad, *supra* note 83, at 451–52.

188. *See* Constitutive Act, *supra* note 179, at art. 5. Article 5(1) of the Constitutive Act lists the organs of the AU—these are the institutions that are expected to carry out the AU's agenda and objectives. *Id.* Article 5(2) also permits the AU to establish additional organs, as it sees fit. *Id.* One such organ that was established as provided for in Article 5(2) is the Peace and Security Council, which is empowered to "promote peace, security and stability in Africa." African Union [AU], Protocol Relating to the Establishment of the Peace and Security Council of the African Union art. 3(a) (July 9, 2002). In enacting the PSC Protocol, the Heads of State and Government of the Member States of the AU considered "the Constitutive Act . . . and the Treaty establishing the African Economic Community, as well as the Charter of the [U.N.]," and proceeded to establish "an operation structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction, in accordance with the authority conferred in that regard by Article 5(2) of the [Constitutive Act]." *Id.* at pmbl.

is to provide Member States with a "set of principles on democratic governance" that must be "adhered to by all Member States."[189] In making this declaration, Member States believed that "strict adherence to these principles and the strengthening of democratic institutions will considerably reduce the risks of unconstitutional changes on our continent."[190] Of course, adherence to these principles presupposes a certain level of reduction on the sovereignty of Member States. For example, Member States, in adhering to the common values and a "set of principles on democratic governance to be adhered to by all Member States," are required by the AU to adopt a democratic constitution, as well as, practice constitutional government—separation of powers with effective checks and balances, including an independent judiciary and robust civil societies. This invariably imposes a certain level of uniformity on national constitutions.[191]

It is clear that each African country must deal with democracy, good governance, and respect for human and peoples' rights. Thus, national constitutional law must incorporate provisions that enhance the deepening and institutionalization of democracy,[192] advancement of good governance,[193] and the protection of human rights.[194] These requirements, however, represent direct constraints on the sovereign right of Africa's constitutional designers to freely determine the content of national constitutions—the constitutions that they design for their countries must reflect those common principles of democracy, good governance and the protection of human rights embodied in the Constitutive Act and other AU instruments.

While these regional and international constraints or infringements on the sovereign right of African policymakers to freely legislate may be considered an intrusion in the ability of Africans to govern themselves, it is important to recognize the fact that encroachment on sovereignty in the continent necessarily creates an institutional environment that is more suited to the promotion of democracy, good governance, and the

189. *Lomé Declaration*, *supra* note 180.

190. *Id.*

191. For example, all constitutions are expected to address issues, such as the recognition and protection of human rights, the treatment of women and children, the rights of ethnic and religious minorities, etc. *See Lomé Declaration*, *supra* note 180; Fombad, *supra* note 83, at 452–53.

192. Adequate constraints can be imposed on the state in order to prevent civil servants and politicians from acting with impunity and engaging in behaviors that violate the rights of citizens.

193. For example, the separation of powers with checks and balances, including an independent judiciary.

194. Direct incorporation of provisions of international human rights law into national constitutions, including those which have attained the status of custom international law.

protection of human rights. Of course, in view of the fact that some emerging risks to peace and security are of a global or international nature (e.g., Ebola and other pandemics, corruption in international business transactions, and various cross-border criminal activities), African countries must cooperate with other States in order to find effective solutions to these problems. Such international cooperation necessarily involves giving up a certain level of national sovereignty.

3. International Law and Judicial Interpretation of the Domestic Constitution

International law can also influence domestic law through the process of judicial interpretation. In other words, international law can infringe a country's sovereign right to determine, not just the content of domestic constitutional law, but also how it is interpreted. In many of Africa's former British colonies (i.e., Anglophone countries), whose legal systems are based on the common law of England and Wales, "an instrument which has been signed, whether or not it has been ratified and domesticated," can still have significant impact on the domestic legal system through its aid in constitutional interpretation.[195] Many domestic courts in the Anglophone African countries[196] have usually followed the well-known and well-established common law "presumption in statutory construction that courts will strive to interpret legislation in a manner that will not conflict with international law."[197] For example, in the case *Att'y Gen. v. Unity Dow*, the High Court of Botswana made the following declaration:

> Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.[198]

The application of such a principle of interpretation, however, cannot be adopted when domestic legislation is clear and unambiguous.[199] Where there are ambiguities or uncertainties in relevant constitutional provisions, one possible solution is to adopt an interpretive principle that

195. Fombad, *supra* note 83, at 455.

196. *See* Att'y Gen. v. Unity Dow, [1992] BLR 119, 140 (Bots.).

197. Fombad, *supra* note 83, at 455–56.

198. *Unity Dow*, [1992] BLR at 154.

199. *See* Salomon v. Customs and Excise Comm'r, [1967] 2 QB 116, 143 (CA) (holding that "[i]f the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations.").

resolves the uncertainties and/or ambiguities in a manner that upholds any international instruments, particularly human rights instruments, and which may have inspired the adoption of the relevant constitutional provisions. Australian jurist, Michael Kirby, has argued that "[w]here such a constitutional text makes reference to fundamental human rights, as also recognized in international law, it is highly desirable, indeed, obligatory, for judges within municipal systems to familiarize themselves with the international jurisprudence pertaining to the same words in international and regional bodies devoted to expounding their meaning."[200] As a result of the existence of the Bangalore Principles on the Domestic Application of International Human Rights Norms, argued Professor Fombad, there now exists a type of duty on the part of judges to adopt and follow this interpretive principle or approach.[201] Nevertheless, the Bangalore Principles will not apply in the case where the domestic constitution is clear, unambiguous, and is not inconsistent with international law.[202]

States, including those in Africa, must see the evolving internationalization of domestic constitutional law as a global effort to improve governance and generally enhance the protection of human and peoples' rights. It is becoming imperative that domestic courts, including those in Africa, should not blindly adhere to strict doctrines such as monism or dualism, but should take into consideration rulings of international and regional tribunals, with a view to enhancing the maintenance of good governance and adherence to the rule of law. The overwhelming objective of domestic law should be to improve peaceful coexistence, enhance the protection of human and peoples' rights and generally promote sustainable human development.

Judges in Africa, as well as policymakers, must not make themselves slaves to their domestic legal traditions, some of which may be harmful to human rights and human development. Instead, policymakers should seek a progressive approach to constitutional design and judges should be willing "to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies."[203] As argued by

200. Michael Kirby, High Ct. of Austl., The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms (Dec. 28, 1998) (transcript available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_bang11.htm).

201. Fombad, *supra* note 83, at 457–58. *See also* Debra Lyn Bassett & Rex R. Perschbacher, *Perceptions of Justice—An International Perspective on Judges and Appearances*, 36 FORDHAM INT'L L. J. 136, 142 (2013).

202. *Id.* at 457.

203. Michael Kirby, *International Law-The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 345 (2006).

Professor Fombad, this is "a universal trend that is bound to be copied in Africa as judges realize that they cannot isolate themselves from the rapid changes in legal thinking and analysis and from the fresh approaches and new insights generated by international jurisprudence to deal with common problems."[204]

African countries, like their counterparts in other regions of the world, must accept the fact that the most effective way to deal with evolving risks to peace and security, as well as human development (e.g., pandemics, sex trafficking and the exploitation of children, corruption, trans-border criminal activities), is for all countries to cooperate with each other. Such cooperation can be achieved, for example, through participation in regional organizations such as the AU. Nevertheless, in doing so, States would have to surrender a certain level of their national sovereignty to the vehicles[205] that facilitate such cooperation. As explained earlier, giving up some level of national sovereignty is necessary to enhance the meeting of certain minimum standards of governance in a free and modern nation-state—for example, the protection of human rights, peaceful coexistence of each country's subcultures, and poverty alleviation and human development.

4. The Emerging Doctrine of R2P and the Sovereignty of African States

Since African countries began their transitions to democratic governance systems in the mid-1980s, it has become evident that national constitutional designers "can no longer ignore certain basic principles, standards, institutions and values that are considered fundamental and essential to ensuring the rule of law, constitutional democracy and good governance."[206] Perhaps, more important, is the fact that states, including those in Africa, can no longer utilize the principles of sovereignty and non-intervention in their internal affairs to shield themselves from international scrutiny and allow their governments to continue to act with

204. Fombad, *supra* note 83, at 457. *See also* Shannon Ishiyama Smithey, *Comparative and International Law in South Africa Since Apartheid*, *in* HANDBOOK OF GLOBAL LEGAL POLICY 17, 22 (Stuart Nagel ed., 2000) (arguing, inter alia, that "[t]he experiences of the [South African] Constitutional Court's judges predispose them to make use of foreign and international law."). As argued by Judith Resnik, "[i]n contrast to the American directives to judges *against* referencing foreign law, many countries have provisions calling for judges to look outside their legal systems when making decisions about their own law." Judith Resnik, *Constructing the 'Foreign': American Law's Relationship to Non-Domestic Sources*, *in* COURTS AND COMPARATIVE LAW 437, 462 (Mads Andenas & Duncan Fairgrieve eds., 2015). Emphasis in original.

205. In Africa, the AU is one such vehicle. Others include the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC).

206. Fombad, *supra* note 83, at 458.

impunity and engage in activities that threaten international peace and security.[207]

If an African country produces and adopts a constitution that provides the tools for some subcultures (or ethnocultural groups) to oppress and exploit others, or the country fails—as is the case in South Sudan, Somalia, Democratic Republic of Congo, Libya, and Central African Republic—to provide itself with institutional arrangements that enhance and facilitate the effective management of diversity and hence, promote the peaceful coexistence of population groups, that would subject many citizens to significant risks—including death, dismemberment, sickness, and permanent injury. This failure to secure constitutional government within each African country can also threaten international peace and security.

The hope of many of Africa's pro-democracy activists in the mid-1980s was that the continent would gradually move away from a history of dysfunctional constitutional design processes and constitutional practice to more effective forms of constitution making,[208] as well as, governance systems based on or undergirded by the rule of law.[209] Many of these activists hoped to establish within their respective countries governing processes characterized by a separation of powers with checks and balances, including an independent judiciary, free and independent media, and robust civil societies.[210]

---

207. Such activities include the abuse of human rights, the exploitation and abuse of children, environmental degradation, and the denial of opportunities for self-actualization to some groups within the country (e.g., the poor, women, and ethnic and religious minorities); *id.*; *see* MBAKU, *supra* note 80, at 134.

208. In fact, many Africans hoped that they would finally be able "to reconstruct and reconstitute the postcolonial state (through democratic constitution-making) and provide themselves with more democratic governance structures." John Mukum Mbaku & Julius O. Ihonvbere, *Introduction: Issues in Africa's Political Adjustment in the "New" Global Era, in* THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 1, 8 (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003). *See generally* MBAKU, *supra* note 80, at 66 (arguing, inter alia, that "[p]articipation will minimize the chances that some groups will dominate and control constitution-making and, it will also significantly increase acceptance of the outcome by most of the country's relevant stakeholders.").

209. Mbaku argues that "[t]he rule of law is a critical catalyst to Africa's efforts to deal effectively with poverty" and that "[e]ach country must engage its citizens in democratic constitution-making to provide laws and institutions that guarantee the rule of law." John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 1051 (2013) [hereinafter *Providing a Foundation*].

210. It was generally believed that institutional arrangements characterized by "separation of powers and checks and balances" would be critical for "the effective management of ethnocultural diversity in the African countries" and the minimization of "government-tyranny directed at citizens, including those who are members of minority groups." MBAKU, *supra* note 80, at 139.

By its last year as a continental organization, the OAU had already initiated and implemented a system to deal with breakdowns in the Member States' constitutional orders. An example is the decision by the OAU to provide itself with a framework for responding to unconstitutional change of government.[211] This decision by the OAU represented a recognition of the need to deal, at a continental level, with what had gradually become significant breakdowns in constitutional order in many countries throughout the continent, as exemplified, for example, by the pervasiveness of military coups d'état.[212] When the AU came into being in 2002, it continued with the pro-democracy activities that had been initiated by the OAU and continued to emphasize the need to fight dysfunctional constitution making and government impunity in the continent. As exemplified by the Constitutive Act and other instruments, the AU has been making a concerted effort to pressure its Member States, particularly constitutional designers in these countries, to make certain that their national constitutions contain provisions that recognize, respect and protect human rights.[213] In other words, the constitutions of all Member States of the AU must conform to certain minimum standards of behavior on the part of state custodians (i.e., civil servants and politicians).[214] Thus, the AU policy has been one of deliberately seeking to infringe on the sovereign right of African States to freely legislate and to determine the content of their national constitutions in an effort to eliminate constitutional dysfunction, improve

211. *Lomé Declaration*, *supra* note 180.

212. CARLSON ANYANGWE, REVOLUTIONARY OVERTHROW OF CONSTITUTIONAL ORDERS IN AFRICA 1 (2012) (argued that during most of the post-independence period in Africa, governance has been marked by "pervasive military coups," that "[a]t least 44 out 53 African states have experienced at least one coup or one attempted coup" and that "[a]s of 2004, West African states alone experienced 44 successful military coups, 43 often-bloody failed coups, at least 82 coup plots, 7 civil wars, and many other forms of political conflict."); Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 190 (1997) (arguing that "in both francophone and Anglophone West Africa, it was the military régimes that epitomized the low estate to which constitutionalism had fallen during 1963–89.").

213. According to art. 3(h) of the Constitutive Act, an important objective of the AU is to "[p]romote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments." Constitutive Act, *supra* note 179, at art. 3. The AU Commission has also produced strategy paper that details the "guiding framework for collective action" to promote and protect human rights in Africa. African Union [AU], Human Rights Strategy for Africa, ¶ 1 (Dec. 14, 2011).

214. These minimum standards of behavior on the part of civil servants and political elites include accountability to the people and the constitution, and fidelity to the law. As argued by Mbaku, "institutional arrangements that adequately constrain civil servants and political elites, provide the wherewithal for the effective management of ethnic and religious diversity, and promote entrepreneurial activities and the creation of wealth," are "characterized by a general adherence and fidelity to the rule of law." *Providing a Foundation*, *supra* note 209, at 964.

governing processes, and enhance the protection of fundamental human rights.

Granted, the Constitutive Act, like the OAU Charter, contains provisions that affirm each Member State's sovereignty and the principle of non-intervention.[215] It also prohibits forceful intervention in the internal affairs of Member States.[216] Nevertheless, these provisions now come with heavy qualifications. For example, while the Constitutive Act preaches a policy of "non-interference by any Member State in the internal affairs of another,"[217] it qualifies this prohibition by granting the AU the right "to intervene in a Member State pursuant to a decision of the Assembly [of the AU] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[218] During its existence, many atrocities were committed in the African countries but the OAU was either unwilling or did not have the legal mandate to act or speak out.[219] It is now clear that Article 4(h) of the Constitutive Act has provided the AU with the legal authority to act and take military action, when necessary, to eliminate or minimize any threats to international peace and security.[220]

---

215. *Compare* Org. of African Unity [OAU] Charter art. 3, ¶¶ 1–2, *with* Constitutive Act, *supra* note 179, at art. 4.

216. *Id.* at art. 4(f) (prohibiting "the use of force or threat to use force among Member States of the [African] Union.").

217. *Id.* at art. 4(g).

218. *Id.* at art. 4(h).

219. In a special report released by the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events, the Panel remarked that "the OAU's reluctance to take sides in the Rwandan conflict continued to result in practices that [the] Panel finds unacceptable. It was bad enough that the genocide was not condemned outright. But [the] failure was seriously compounded at the regular Summit meeting of OAU Heads of State in Tunis in June [1994], where the delegation of the genocidaire government under interim President Sindikubwabo was welcomed and treated as a full and equal member of the OAU, ostensibly representing and speaking for Rwandan citizens." Org. of African Unity [OAU], *The Preventable Genocide of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events*, para. 15.92 (July 7, 2000). As argued by Legum, "[t]he OAU is, as one might expect, weakest and at its most disappointing when it comes to dealing with serious internal problems of its member-states. Thus there has never been any question of the OAU expressing even mild criticism of the 'double genocide' that has scarred the life of Burundi; or seeking to ameliorate the conditions in the Sudan." Colin Legum, *The Organization of African Unity—Success or Failure?*, 51 INT'L AFF. 208, 212–13 (1975). Nevertheless, "[t]he OAU's greatest failure, perhaps, was its inability to make a positive contribution during the nightmare years of civil war in Nigeria." *Id.*

220. Constitutive Act, *supra* note 179, at art. 4(h). As argued by Fombad, "the most significant provision of the Constitutive Act . . . is Article 4(h) which gives the AU the power to intervene in a state 'pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity.'" Fombad, *supra* note 83, at 459.

When the AU adopted Article 4(h), it became the first international organization to recognize and give credence to the concept that "the international community has a responsibility to intervene in crisis situations if the state fails to protect its population."[221] The Constitutive Act was signed on July 11, 2000 at Lomé, Togo, long before Member States of the UN recognized and accepted R2P as a norm of international law.

In the aftermath of atrocities, such as the Rwandan Genocide, as well as Sudan's genocidal war in the Darfur region of the country, the global society became concerned about the need to develop an effective framework to deal with these types of humanitarian crises. In 1999, then UN Secretary-General, Kofi Annan, a former Ghanaian diplomat, "made compelling pleas to the international community to try to find, once and for all, a new consensus on how to approach these issues [i.e., the multifarious peace-and-security-related issues that were plaguing the international community]."[222] Annan went on to ask the global community an important question, one that spoke to the failure of particularly the UN to provide adequate response to various threats to international peace and security. He posed the following question: "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?"[223]

Responding to this challenge, the Government of Canada, with the assistance of several foundations, established the International Commission on Intervention and State Sovereignty (ICISS) and tasked it with developing a framework to deal with emerging threats to international peace and security. The ICISS subsequently established a new approach to dealing with threats to international peace and security and named it R2P. As detailed in the ICISS Report, the R2P incorporates and embraces three important elements. These are:

A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.

B. The responsibility to react: to respond to situations of compelling human need with appropriate measures,

221. Fombad, *supra* note 83, at 459.

222. Int'l Comm'n on Intervention and St. Sovereignty, *The Responsibility to Protect*, at vii (Dec. 2001) [hereinafter *Responsibility to Protect*].

223. U.N. Secretary-General, *'We the Peoples': The Role of the United Nations in the 21st Century*, ¶ 217, U.N. Doc. A/54/2000 (Mar. 27, 2000).

which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.

C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.[224]

Working from the idea that sovereignty is both a privilege and a responsibility, the ICISS Report argued that the international community had an obligation to "prevent, or at least greatly mitigate" the type of "slaughter" that had occurred in Rwanda in 1994.[225] The ICISS Report specifically mentioned the following international crimes: *genocide*, *war crimes*, *crimes against humanity*, and *ethnic cleansing*.[226] Critics of the R2P have argued that this was a policy developed by the Western industrial countries and imposed on the rest of the world, especially the developing countries.[227] Nevertheless, it is important to note that the AU had asserted its right to intervene in the internal affairs of Member States in order to protect citizens from certain grave atrocities (e.g., war crimes, genocide, and crimes against humanity) long before the ICISS and the global community warmed up to the idea.[228] The failure of the OAU to prevent and/or halt the atrocities that formed the Rwandan Genocide, as well as its inability to deal with other humanitarian crises throughout the continent formed the impetus to the AU's decision to embrace the doctrine of responsibility to protect.[229]

The R2P consists of at least three elements. First, "the state is responsible for protecting its citizens from genocide, war crimes, crimes against humanity, and ethnic cleansing."[230] Second, if the state is either unwilling or unable to protect its citizens, the international community must act to either directly protect these people or help the country develop

224. *Responsibility to Protect*, *supra* note 222, at xi.

225. *Id.* at 1.

226. *Id.* at xii.

227. *See, e.g.*, Fombad, supra note 83, at 459.

228. *See* Edward C. Luck, *The United Nations and the Responsibility to Protect* 2, THE STANLEY FOUND. (Aug. 2008), https://www.stanleyfoundation.org/publications/pab/LuckPAB808.pdf.

229. Sabelo Gumedze, *The African Union and the Responsibility to Protect*, 10 AFR. HUM. RTS. L. J. 135, 139 (2010) (arguing that "the AU took the lead in entrenching the [R2P] in its founding legal document, the Constitutive Act," and that "the [R2P] is found in article 4(h) of the Constitutive Act" and that it was "the Rwanda genocide . . . [that] was one of the most important considerations for entrenching the [R2P] in the Constitutitive Act.").

230. Fombad, *supra* note 83, at 459–60.

the capacity to do so.[231] Of course, it might be a challenge to convince national leaders to develop the political will to act to protect the population. Finally, if a state fails to protect its citizens from mass atrocities, such as the Rwandan State did in 1994, and if it is not possible to peacefully resolve the conflicts threatening the peace and security of the people, the international community must intervene.[232] International intervention can be undertaken in three major steps—first, efforts should be made to resolve the crisis through diplomatic means; second, if diplomacy fails, then, more coercive means can be applied.[233] Finally, if both diplomacy and coercion fail, the international community can then apply military force, with the latter serving as a method of last resort.[234]

During the last several decades, in view of human atrocities in Rwanda, the Balkans, Syria, and other countries around the world, the global community has warmed up to the emerging principle that "intervention for humanitarian protection, including military intervention without a state's consent, is legitimate in extreme cases when major harm to civilians is occurring or imminent and the state in question is unable or unwilling to end the harm or is itself the perpetrator."[235] But, what exactly is the R2P supposed to achieve, especially given the fact that it infringes on the sovereign right of States to manage their own affairs? The R2P is born out of the recognition that the responsibility for ensuring that certain fundamental human rights are recognized and protected lies not just with national governments but with the international community at large. Thus, the intervention of international law in domestic legal processes is designed to ensure accountability of national governments to the people and the constitution. More specifically, the impetus behind the R2P is the protection of human rights. Doing so, can provide an institutional environment that enhances the elimination of poverty and the promotion of social and human development, as well as the elimination of those conditions (e.g., political and economic marginalization of some individuals and groups—women, youth, religious and ethnic minorities) that threaten social cohesion and peaceful coexistence. The emerging importance of R2P at the global level implies that issues of good governance, the rule of law, constitutionalism, respect for and protection of human rights, and peaceful coexistence, are no longer issues just for

231. *Id.* at 459–60.

232. *Id.* at 459.

233. World Summit Outcome, *supra* note 33, ¶ 139.

234. Fombad, *supra* note 83, at 459.

235. *Id.* at 460. Note that one can find legal support for this type of intervention in the internal affairs of States in the UN Charter, Chapter VII. *See* U.N. Charter arts. 41–42.

national governments and domestic policymakers but have now become a concern for the global community.

Of course, some individuals have opposed R2P, arguing that it is "an invention of the North and West that has been imposed on the developing countries of the South."[236] It is also seen as an infringement of state sovereignty.[237] The counter argument to these policymakers is that they still have the primary obligation to protect their citizens and that the international community is only forced to intervene in the case where protection of the people by national governments is not forthcoming or where the State is the perpetrator of these atrocities. The international community cannot stand by and watch human atrocities, such as those that occurred in Rwanda, the Balkans, and other countries, continue to take place.[238]

Other critics have argued that limiting R2P to only four crimes—genocide, war crimes, crimes against humanity, and ethnic cleansing—is simply too narrow.[239] Yet, it is not that difficult to recognize that broadening the list of crimes could seriously diminish the principle's applicability and effectiveness.[240] It is important to clarify the fact that military intervention under R2P is considered a tool of last resort and would be utilized only when and if all available peaceful means to resolve the problem have been utilized but have failed to do so.[241] While there exist frameworks for humanitarian intervention, R2P, nevertheless, "offers a broader range of tools to both prevent and halt mass atrocities."[242] In addition, R2P activities can be carried out only through a multilateral process, involving the participation of a broad-based coalition of countries and institutions, with the approval of the UNSC and in the context of the AU, with the approval and acquiescence of the AU's Assembly of Heads of State and Government. Finally, both the UNSC and the AU's Assembly are political institutions whose agendas and activities can be manipulated by rich and powerful states seeking ways to maximize their national interests. Nevertheless, Professor Fombad has argued that despite these shortcomings, R2P remains a powerful tool to fight government impunity (which includes, for example, the abuse of human rights) and constitutional dysfunction.[243]

236. Luck, *supra* note 228, at 2.
237. Fombad, *supra* note 83, at 460.
238. *Id.* at 459–60.
239. *Id.* at 460.
240. *Id.* at 459–60.
241. *Id.* at 460.
242. *Id.* at 460–61.
243. *Id.*

During the last few decades, several humanitarian crises have proven to Africans that there is need to adopt, at the continental as well as the regional level, a policy of R2P. In view of atrocities, such as those that occurred in Rwanda in 1994 and those that are currently taking place in South Sudan, Central African Republic, Libya, Somalia, and several other countries around the continent, both the UN and the AU, as well as regional institutions such as the ECOWAS and SADC, must fully embrace the R2P, recognizing the fact that even though this is an infringement on the sovereign right of each country to determine the content of its constitution and domestic laws, intervention is necessary to prevent atrocities directed at citizens. Below, we take a look at how the AU and the sub-regional group, the ECOWAS, responded to the threat to international peace in The Gambia in 2016.

On December 1, 2016, presidential elections were held in The Gambia. The two most important candidates competing for the position of president were incumbent President Yahya Jammeh of the Alliance for Patriotic Reorientation and Construction, who had come to power through a military coup, Adama Barrow of the Coalition 2016,[244] and Mama Kandeh of the Gambian Democratic Congress.[245] On December 2, 2016, incumbent President Jammeh went on television and conceded his defeat to his opponent, Barrow.[246] In his concession speech, Jammeh stated that he believed the December 1, 2016 electoral exercise had been "the most transparent election in the world" and went on to assure Gambians and the world that he would not contest the results.[247] The final official results showed that Barrow had captured 43.3% of the votes cast against Jammeh's 39.6% and Kandeh's 17.1%.[248]

Nevertheless, on December 9, 2016, Jammeh took to the airwaves to announce to the Gambian people and the world that he would not accept the results of the December 1, 2016 elections, claiming that there were

244. The *Coalition 2016* was an alliance of seven (7) Gambian political parties and one independent candidate that was created to provide the opposition with a framework that they could use to present a single candidate to compete against Jammeh in the December 2016 presidential election. *See, e.g*, David Perfect, *The Gambian 2016 Presidential Election and Its Aftermath*, 106 THE ROUND TABLE 323, 330 (2017).

245. *Id.* at 223, 235.

246. Ruth Maclean & Emma Graham-Harrison, *The Gambia's President Jammeh Concedes Defeat in Election*, THE GUARDIAN (Dec. 2, 2016), https://www.theguardian.com/world/2016/dec/02/the-gambia-president-jammeh-concede-defeat-in-election; *Jammeh Concedes Defeat in Gambia Election Upset*, VOA NEWS (Dec. 2, 2016), https://www.voanews.com/a/jammeh-concedes-defeat-gambia-election-upset/3621484.html.

247. Yahya Jammeh, President, Gam., Presidential Concession Speech (Dec. 2, 2016).

248. *Gambia leader Yahya Jammeh rejects election result*, BBC NEWS (Dec. 10, 2016), https://www.bbc.com/news/world-africa-38271480.

"abnormalities" and called for new elections to take place.[249] Jammeh's reversal was condemned promptly by both domestic and international actors, including civil society organizations in The Gambia. Among regional and international institutions condemning Jammeh's actions were the ECOWAS, the AU, and the UNSC. Although a diplomatic initiative was launched by African Heads of State to convince Jammeh to reverse course and allow Barrow to assume the position of president of The Gambia, the incumbent president refused and insisted that a new presidential election be held.[250]

At the 647th Meeting of the Peace and Security Council (PSC) of the AU in Addis Ababa on January 13, 2017, the PSC commended the "ECOWAS for its principled stand with regard to the situation in The Gambia, and [reaffirmed] its full support to the decisions adopted by the 50th Ordinary Summit of the ECOWAS Authority, . . . including the consideration to use all necessary means to ensure the respect of the will of the people of The Gambia."[251] The PSC appealed to Jammeh, whom it called the "outgoing President," "to respect the Constitution of [The] Gambia, the ECOWAS and AU instruments, in particular the [Constitutive Act] and the African Charter on Democracy, Elections and Governance, by handing over power, on 19th January 2017, as stated in the Constitution, to the newly-elected President of The Gambia, Adama Barrow, as decided by the people of the country."[252]

The PSC, taking into consideration Articles 24 and 25 of the African Charter on Democracy, Elections and Governance, as well as Article 7(m) of the PSC Protocol,[253] declared that it would take certain steps with respect to the situation in The Gambia:

> • Solemnly declare[] the inviolable nature of the outcome of the presidential elections held on 1st December 2016 in The Gambia. In this respect, Council strongly reaffirms the AU's zero tolerance policy with regard to coup d'état and

249. *Id.*

250. *See* Dionne Searcey & Jaime Yaya Barry, *Yahya Jammeh, Gambian President, Now Refuses to Accept Election Defeat*, N.Y. TIMES (Dec. 9, 2016), https://www.nytimes.com/2016/12/09/world/africa/yahya-jammeh-gambia-rejects-vote-defeat-adama-barrow.html; *Gambia Talks Fail as President Refuses to Step Down*, BBC NEWS (Jan, 14, 2017), https://www.bbc.com/news/world-africa-38621092.

251. African Union Peace and Security Council Doc. PSC/PR/COMM. (DCXLVII), ¶ 3 (Jan. 13, 2017).

252. *Id.* ¶ 4.

253. African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (July 9, 2002).

unconstitutional changes of government;

- Further declare[] that, as of 19th January 2017, outgoing President Yahya Jammeh will cease to be recognized by the AU as legitimate President of the Republic of The Gambia;
- Warn[] outgoing President Yahya Jammeh of serious consequences in the event that his action causes any crisis that could lead to political disorder, humanitarian and human rights disaster, including loss of innocent lives and destruction of properties.[254]

The PSC then proceeded to ask "outgoing President Yahya Jammeh and his Government to refrain from any action that could undermine the process leading up to the swearing in of the president-elect, on 19th January 2017."[255] The PSC then warned "all Gambian stakeholders, including the defense and security forces, to exercise utmost restraint and to strictly abide by the Constitution and uphold the rule of law, including the respect for the freedom of speech."[256]

It appears that President Jammeh's actions following the Gambian presidential election had finally given the AU the opportunity to live up to its obligations in accordance with one of the Lomé Declaration's situations that constitute an unconstitutional change of government: "the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections."[257] Through the PSC, the AU informed President Jammeh that the continental organization would no longer recognize Jammeh as the legitimate president of The Gambia as of January 19, 2017, the date of expiry of his constitutional mandate and the day on which president-elect Adama Barrow was expected to be sworn in.[258] The PSC statement warned Jammeh and his government of "serious consequences" if his actions led to or produced any "loss of innocent lives."[259]

254. *Id.* ¶ 5.

255. *Id.* ¶ 6.

256. PSC/PR/COMM. (DCXLVII), *supra* note 251, ¶ 6.

257. *Lomé Declaration*, *supra* note 180.

258. *See* Yomi Kazeem, *Persona Non Grata: African Union Will Stop Recognizing Yahya Jammeh as Gambian President from Jan. 19*, QUARTZ AFR. (Jan. 13, 2017), https://qz.com/africa/885234/gambias-yahya-jammeh-will-no-longer-be-recognized-as-president-by-the-african-union-from-jan-19/; *Gambia Dispute: African Union 'Will Not Recognize' President Jammeh*, BBC NEWS (Jan. 13, 2017), https://www.bbc.com/news/world-africa-38614234.

259. PSC/PR/COMM. (DCXLVII), *supra* note 251, ¶ 5.

At the 50th Ordinary Session of the Authority of Heads of State and Government of the Economic Community of West African States (ECOWAS Authority) at Abuja, Nigeria, on December 17, 2016, the ECOWAS Authority declared that it will "respect the will of the Gambian people as expressed by the Presidential election results of 1st December 2016."[260] The ECOWAS Authority also decided to appoint President Muhammadu Buhari of Nigeria to serve as the Mediator for the Gambian constitutional crisis and then Ghanaian President John Dramani Mahama, as the Co-Chair of the mediation committee.[261] Finally, the ECOWAS Authority declared that it would "take all necessary measures to strictly enforce the results of the 1st December 2016 elections."[262] In sending a delegation to negotiate with President Jammeh, the ECOWAS Authority had hoped to convince or cajole him to step down and allow the transition to proceed peacefully.

The swearing-in of the winner of the December 1, 2016 presidential election, Adama Barrow, took place in Dakar (Senegal) at 16h00 GMT on January 19, 2017.[263] Later that same day, the UNSC passed Resolution 2337[264] and shortly thereafter, the ECOWAS Mission in The Gambia (ECOMIG)[265] forces entered The Gambia.[266] Apparently, the ECOWAS' show of force was good enough to extract a favorable decision from President Jammeh. On January 21, 2017, Jammeh finally decided to abandon his efforts to remain in power and signed a political agreement which set out the terms of his departure.[267] Jammeh subsequently left the

260. Econ. Cmty. of W. African States, Final Communiqué on Its Fiftieth Session, ¶ 38(e) (Dec. 17, 2016).

261. *Id.* ¶ 38(f).

262. *Id.* ¶ 38(h).

263. *Adama Barrow sworn in as Gambia's president in Senegal*, AL JAZEERA (Jan. 19, 2017), HTTPS://WWW.ALJAZEERA.COM/NEWS/2017/01/GAMBIA-PRESIDENT-ADAMA-BARROW-TAKES-OATH-SENEGAL-170119170745954.HTML.

264. S.C. Res. 2337 (Jan. 19, 2017). This resolution was adopted unanimously by the UNSC on January 19, 2017 to support the efforts of the ECOWAS to peacefully resolve the constitutional crisis in The Gambia following the December 2016 presidential election. Part of the resolution states that the UNSC "[e]xpresses its full support to the ECOWAS in its commitment to ensure, by political means first, the respect of the will of the people of The Gambia as expressed in the results of the 1st December elections." *Id.* ¶ 6.

265. ECOMIG is the acronym for the ECOWAS military intervention in The Gambia, which was code-named "Operation Restore Democracy." Iyobosa Uwgiaren et al., *ECOMIG Troops Converge on The Gambia as Barrow is Inaugurated President*, THIS DAY, (Jan. 20, 2017), https://www.thisdaylive.com/index.php/2017/01/20/ecomig-troops-converge-on-the-gambia-as-barrow-is-inaugurated-president/.

266. *Id.*

267. *See* Spokesperson for the U.N. Secretary-General, *Note to Correspondents-Joint Declaration on the Political Situation in The Gambia* (Jan. 21, 2017),

country for Guinea.[268] He has since settled permanently in Equatorial Guinea.[269]

Questions have arisen as to the legal basis for ECOMIG military intervention in The Gambia.[270] The UN Charter grants the UNSC the sole authority to permit or mandate intervention in any Member State by military force.[271] The UN Charter permits the use of force in two specific circumstances: first, under Article 51, Member States may use military force in self-defense.[272] As provided in Chapter VII, the UNSC may permit military intervention in response to a threat to international peace and security.[273] Since self-defense did not apply to the case of the constitutional crisis in The Gambia, the question to ask is: was the constitutional crisis a threat to international peace and security?[274]

Although the UNSC did not classify the crisis in The Gambia as a threat to international peace and security, it is important to note that the UNSC has, in the past, classified or interpreted some international constitutional crises as threats to international peace and security. For example, the UNSC classified the constitutional crisis in Haiti as a threat to international peace and security and authorized the use of military force to restore the country's ousted president, Jean-Bertrand Aristide.[275]

---

https://www.un.org/sg/en/content/note-correspondents/2017-01-21/note-correspondents-joint-declaration-political-situation.

268. Matina Stevis & Gabriele Steinhausser, *Gambian Longtime Leader Jammeh Leaves Capital on Guinea President's Plane*, WALL ST. J. (Jan. 22, 2017), https://Www.Wsj.Com/Articles/Gambias-President-Yahya-Jammeh-Steps-Down-1484981837.

269. Colin Freeman, *Gambia's Ousted Dictator is Living the Good Life in a Palace in Equatorial Guinea*, FOREIGN POLICY (Apr. 3, 2017), http://foreignpolicy.com/2017/04/03/gambias-ousted-dictator-is-living-the-good-life-in-a-palace-in-equatorial-guinea/.

270. Aldan Hehir, *The Questionable Legality of Military Intervention in The Gambia*, THE CONVERSATION (Jan. 19, 2017), http://theconversation.com/the-questionable-legality-of-military-intervention-in-the-gambia-71595.

271. *See* U.N. Charter art. 43, ¶ 1.

272. *Id.* at art. 51.

273. *Id.* at art. 42.

274. *See* Hehir, *supra* note 270, at 2.

275. *See* S.C. Res. 940, ¶ 10 (July 31, 1994). Jean-Bertrand Aristide, a former Haitian priest, became the country's first democratically elected president after winning the presidential election held during December 16, 1990–January 20, 1991. *See* Howard W. French, *Haitians Overwhelmingly Elect Populist Priest to the Presidency*, N.Y. TIMES (Dec. 18, 1990), https://www.nytimes.com/1990/12/18/world/haitians-overwhelmingly-elect-populist-priest-to-the-presidency.html. However, Aristide's government was overthrown in a military coup in September 1991. *See Haitian President Flees Country After Coup*, CHRISTIAN SCI. MONITOR (Oct. 2, 1991), https://www.csmonitor.com/1991/1002/02032.html; Howard W. French, *Haiti Pays Dearly for Military Coup*, N.Y. TIMES (Dec. 25, 1991), https://www.nytimes.com/1991/12/25/world/haiti-pays-dearly-for-military-coup.html. The military regime that emerged to rule Haiti after the 1991 coup collapsed in 1994 after U.S. military intervention under the banner of Operation Uphold Democracy. *See* Richard D. Lyons, *U.N. Authorizes Invasion of Haiti to be Led*

Chapter VIII of the UN Charter makes allowance for regional organizations and institutions, such as the ECOWAS, to play a role in the settlement of disputes and the maintenance of peace and security in their respective regions.[276] Under Article 52, regional organizations are allowed to participate in the peaceful resolution of local disputes "before referring them to the [UNSC]."[277] Under Article 53, regional organizations may take "enforcement action" but only after authorization by the UNSC.[278]

Nevertheless, the UNSC has not strictly adhered to this standard for intervention by regional organizations. Instead, the UNSC has tolerated unilateral action by various regional organizations, including, for example, the ECOWAS' intervention in Liberia in 1990[279] and in Sierra Leone in 1994 to restore the government of President Ahmad Tejan Kabbah, whose government had been overthrown by a military junta, led by Major Johnny Paul Koroma.[280]

According to Article 4(h) of the Constitutive Act, the AU has the right "to intervene in a Member State pursuant to a decision of the Assembly[281] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[282] With respect to Article 4(h), questions have arisen as to whether the AU has the exclusive authority, outside of the UNSC, to use military force to respond to threats to international peace and security on the continent.[283] In what is referred to as the Ezulwini

---

by U.S., N.Y. TIMES (Aug. 1, 1994), https://www.nytimes.com/1994/08/01/world/un-authorizes-invasion-of-haiti-to-be-led-by-us.html; Lydia Polgreen & Tim Weiner, *Haiti's President Forced Out; Marines Sent to Keep Order*, N.Y. TIMES (Feb. 29, 2004), https://www.nytimes.com/2004/02/29/international/americas/haitis-president-forced-out-marines-sent-to-keep.html.

276. U.N. Charter art 52-53.

277. *Id.* at art. 52(2).

278. *Id.* at art. 53(1).

279. *See* UN Security Council, *Resolution 866*, S/RES/866 (1993) (commending, inter alia, the ECOWAS "for its continuing efforts to restore peace, security and stability in Liberia). *See also* UN Security Council, *Resolution 813*, S/RES/813 (1993) (commending, inter alia, the ECOWAS for its efforts "towards a peaceful resolution of the Liberian conflict.").

280. *See* Press Release, Security Council, Security Council Establishes UN Mission for Sierra Leone to Aid with Implementation of Lomé Peace Agreement, U.N. Press Release SC/6742 (Oct. 22, 1999) (indicating, inter alia, the "incorporation of officers and men from the [ECOWAS] countries into the new [UN] mission" and renewing the appeal "to donors to contribute generously to the [ECOWAS'] Monitoring Observer Group.").

281. That is, the AU Assembly of Heads of State and Government is one of several decision-making bodies within the AU.

282. Constitutive Act, *supra* note 179, at art. 4(h).

283. The conflict arises from the fact that the UN Charter grants the UNSC the exclusive right to make decisions regarding the use of force in situations where international peace and security are threatened. *See* U.N. Charter art. 39.

Consensus,[284] the AU provided clarification for the conflict between the AU's right to intervene under its Article 4(h) and the requirement that prior authorization be obtained from the UNSC before the use of force to intervene in the internal affairs of any Member State of the AU.

The Executive Council of the AU argued that given the fact that the UNSC and the UNGA are often far away from the continent, where the conflict may be taking place and hence, may not be in a position to quickly assess and fully appreciate the nature of the conflict, it is necessary and indeed, imperative, that regional organizations and institutions, which are close to the conflicts and hence, can appreciate their nature, be empowered to take action to deal with the conflicts.[285] Although the Executive Council agreed that intervention by regional organizations should be undertaken with the approval of the UNSC, it, nevertheless, argued that in situations requiring urgent response, the approval of the UNSC could be granted "after the fact."[286]

In the "after the fact" doctrine, in cases or situations where urgent and rapid response is required, the AU Assembly is willing to grant a sub-regional body, such the ECOWAS, the power to intervene and then seek approval from the UNSC at a later time.[287] Although ratification of the decisions of sub-regional bodies to intervene "after the fact" by the UNSC has taken place on several occasions, including the ECOWAS' interventions in Liberia, Sierra Leone, and Guinea-Bissau,[288] this has not yet occurred in the context of AU decisions to intervene because the AU has not yet invoked its authority under Article 4(h) of the Constitutive Act.[289] As argued by Jeremy Sarkin, the ECOWAS' interventions in Liberia (1990) and Sierra Leone (1998) were undertaken without prior approval from the UNSC.[290] Nevertheless, "after they occurred, the UN . . . welcomed the ECOWAS interventions."[291] The UN did not

284. The Elzulwini Consensus is a position on international relations and reform of the UN, which was agreed by Member States of the AU. *See* HANDBOOK OF AFRICA'S INTERNATIONAL RELATIONS 199 (Tim Murithi ed., 2014) [hereinafter HANDBOOK]; *see also* African Union [AU] Ext/EX.CL/2 (VII), The Common African Position on the Proper Reform of the United Nations: The Ezulwini Consensus, at 6 (Mar. 7–8, 2005) [hereinafter Ezulwini Consensus]. The Elzulwini Consensus calls for reforms to the UN to make the global governance system more democratic. *See* HANDBOOK, *supra*, at 199; *see also* Ezulwini Consensus, *supra*, at 6.

285. Ezulwini Consensus, *supra* note 284, at 6.

286. *Id.*

287. *See* Jeremy Sarkin, *The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and Responsibility to Protect*, 53 J. AFR. LAW 1 (2009).

288. *See id.* at 25.

289. Constitutive Act, *supra* note 179, at art. 4(h).

290. Sarkin, *supra* note 287.

291. *Id.* at 25.

condemn the ECOWAS intervention in Liberia as a dangerous precedent, instead it praised it in UNSC Resolution 788 in which it commended "[the] ECOWAS for its efforts to restore peace, security and stability in Liberia."[292] Hence, it would not be farfetched to argue that the decision by the ECOWAS to send ECOMIG to The Gambia was based on the sub-regional organization's understanding that, as with its past interventions to restore peace and security in the sub-region, UNSC approval could be obtained after the fact.[293]

II. INFRIGEMENTS ON AFRICAN STATES' SOVEREIGN RIGHTS AND IMPLICATIONS FOR HUMAN RIGHTS

It is clear that efforts by the AU and sub-regional groups, such as the ECOWAS, to intervene in the internal affairs of African States in order to restore peace, security and stability form an important infringement on the sovereign right of African States to freely determine how to govern themselves and deal with their domestic conflicts. As argued by Professor Fombad, such intervention creates a "multiplicity of legal and practical constraints on domestic constitutions."[294] During the last several decades, African countries have been forced to take cognizance of their obligations under international law. It is argued that the adoption of international standards becomes almost inevitable and perhaps imperative where a purely domestic response will not resolve a crisis that threatens regional or international peace and stability."[295] In addition, argues Fombad, "evolving principles of the internationalization process will have the effect of reinforcing constitutionalism by putting oppressive regimes on notice that the international community is watching and may intervene when massive atrocities are being committed."[296] Hence, the pressure is for these States to create constitutions that provide the effective foundation for constitutionalism, democracy, the rule of law, the protection of fundamental human rights, and good governance. Doing so, of course, invariably constrains the sovereign right of these states to determine, by themselves, the content of their national constitutions and domestic law, as well as govern themselves without interference from outside actors or institutions.

---

292. S.C. Res. 788, ¶ 1 (Nov. 19, 1992).

293. *See generally* Sarkin, *supra* note 287, at 25 (stating that the ECOWAS interventions in Liberia and Sierra Leone that were undertaken without prior approval from the UNSC were later welcomed by the UN).

294. Fombad, *supra* note 83, at 463.

295. *Id.* at 464.

296. *Id.*

But, are such infringements on the sovereign right of African countries to determine the content of their domestic law good for the citizens of these countries? Given the fact that the demands of international human rights instruments, such as the UDHR, if successfully met, could potentially minimize impunity and improve domestic governance, the only losers from any internationalization process are opportunistic African civil servants and politicians whose power and fortunes are tied to dysfunctional institutional arrangements and bad governance.[297]

It has been argued that the application of "international law standards and principles" to any State is usually not intended as a replacement for domestic law. Instead, international law principles and standards are supposed to supplement domestic law and enhance good governance. For example, where domestic law is deficient and hence, is incapable of adequately protecting human rights, international human rights norms may "replace deficient domestic law or complement them."[298] This is very important for many countries in Africa where domestic constitutions have not, for example, outlawed customs and traditions that infringe on the rights of vulnerable groups (e.g., women, girls, and infants).[299] Examples include traditions that consider the extremely painful and harmful practice of "breast ironing" an essential part of the culture of

297. Governance systems that are not undergirded by the rule of law are usually pervaded by high levels of corruption and hence are preferred by many of the continent's opportunistic political elites, many of whom have been able to use their public positions to amass large personal fortunes. *See* John Mukum Mbaku, *Corruption and Democratic Institutions in Africa*, 27 TRANSNAT'L. L. & CONTEMP. PROBS. 311, 312 (2018) (arguing, inter alia, "that many African countries, which since the early 1990s have transitioned into democracies (e.g., Ghana, Kenya, Nigeria), are still pervaded by corruption" and this is due to the fact that they are "still struggling to deepen and institutionalize their democratic systems."). Such elites see provisions of international human rights instruments as detrimental to their personal interests and hence, would oppose all humanitarian intervention. For example, when Ghana's Kofi Annan was UN Secretary-General, he worked hard to promote humanitarian intervention in Africa, but "encountered strong opposition from many African and other Third World leaders, who feared that such interventions could be used to threaten their own power and be abused by powerful states to launch illegitimate attacks against weaker states." Adekeye Adebajo, *The Revolt Against the West: Intervention and Sovereignty*, 37 THIRD WORLD Q. 1187, 1194 (2016).

298. Fombad, *supra* note 83, at 463.

299. Muna Ndulo, *African Customary Law, Customs, and Women's Rights*, 18 IND. J. GLOBAL LEGAL STUD. 87, 89 (2011) (arguing, for example, that although "[m]any African constitutions contain provisions guaranteeing equality, human dignity, and prohibiting discrimination based on gender, . . . the same constitutions recognize the application of customary law and they do this without resolving the conflict between customary law norms and human rights provisions.").

some ethnocultural groups;[300] forced child labor in farms and mines;[301] and forced sexual service by young girls in fetish shrines.[302] Provisions of international human rights instruments, for example, the Convention on the Elimination of All Forms of Discrimination Against Women,[303] can replace deficient domestic laws or complement them and significantly enhance the ability of the law to recognize and protect human rights and improve the living standards of citizens, including especially historically marginalized groups, such as women, children and ethnic and religious minorities.

International human rights standards and principles have become especially important in African countries with highly dysfunctional constitutional orders, including those countries, such as South Sudan, Central African Republic, Somalia, and the Democratic Republic of Congo, where sectarian violence remains pervasive and domestic legal responses are no longer capable of resolving the crises and restoring peace and security.[304] In such environments, where both regional and

300. Nkepile Mabuse, *Breast ironing tradition targeted in Cameroon*, CNN NEWS (July 27, 2011), http://www.cnn.com/2011/WORLD/africa/07/27/cameroon.breast.ironing/index.html.

301. For example, in Ghana, children are forced to work long hours in cocoa fields, harvesting pods and slicing them with large machetes to get to the beans. *See, e.g.*, OLIVIA ABENYEGA & JAMES GOCKOWSKI, LABOR PRACTICES IN THE COCOA SECTOR OF GHANA WITH SPECIAL FOCUS ON THE ROLE OF CHILDREN: FINDINGS FROM A 2001 SURVEY OF COCOA PRODUCING HOUSEHOLDS 10–11 (2003); George Clerk, *Child Labor in Ghana: Global Concern and Local Reality*, *in* CHILDREN'S RIGHTS IN GHANA: REALITY OR RHETORIC? 99 (Robert Kwame Ame, DeBrenna LaFa Agbényiga & Nana Araba Apt eds., 2011). On the Burkina-Ghana border, many children, as young as seven (7) years, are forced to work long hours in gold mines, smashing large "boulders into pebbles and pebbles into grit with primitive hammers and sticks." *See* Ellen Rolfres, *One Million Children Labor in Africa's Goldmines*, PBS NEWS HOUR (July 10, 2013), https://www.pbs.org/newshour/world/world-july-dec13-burkinafaso_07-10.

302. *See* ANDREA PARROT & NINA CUMMINGS, SEXUAL ENSLAVEMENT OF GIRLS AND WOMEN WORLDWIDE 50 (2008); Robert Kwame Ame, *Traditional Practices, and the Trokosi System: A Critical Socio-legal Perspective*, *in* CHILDREN'S RIGHTS IN GHANA: REALITY OR RHETORIC? 131 (Robert Kwamen Ame et al. eds., 2011).

303. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 19, 1979).

304. *See, e.g.*, HUM. RTS. WATCH, *World Report 2008: Events of 2007*, at 116 (2008) (detailing human rights abuses by Ethiopian troops in Somalia); HUM. RTS. WATCH, *"So Much to Fear": War Crime and the Devastation of Somalia*, at 42 (Dec. 8, 2008) (detailing the abuse of human rights by the Transitional Federal Government Forces in Somalia); SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, HUMAN RIGHTS AND DEMOCRACY: THE 2012 FOREIGN & COMMONWEALTH OFFICE REPORT, 2013, Cm. 8593, at 217 (UK) (detailing the deterioration of the human rights situation in South Sudan); HUM. RTS. WATCH, *State of Anarchy: Rebellion and Abuses Against Civilians*, at 22 (Sept. 7, 2007) (detailing attacks on civilians, including looting and destruction of property, in Central African Republic); HUM. RTS. WATCH, *The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo*, at 23 (June, 2002) (detailing the use of sexual violence as a weapon in the eastern region of the Democratic Republic of Congo); HUM. RTS. WATCH, *Democratic Republic of Congo: Casualties*

international peace and security are threatened, it is argued that "evolving principles of the internationalization process will have the effect of reinforcing constitutionalism by putting oppressive regimes on notice that the international community is watching and may intervene when massive atrocities are being committed."[305]

In the last several decades, thanks to the influence of international law, there has been a movement towards the harmonization of constitutional law, especially with respect to those constitutional provisions that deal with human rights. For example, many of Africa's post-1990 constitutions now have provisions that (1) recognize and protect human rights; (2) provide for the separation of powers with checks and balances; (3) provide for an independent judiciary; and (4) elaborate specific procedures for amending the constitution.[306]

One visible consequence of the gradual internationalization of constitutional law in Africa has been the emergence of "more independent judiciaries with judges who are more educated, confident and increasingly more assertive in their role to creatively promote the course of constitutional justice in every facet of their judgments."[307] This is evident in the performance of the Kenyan Supreme Court during the 2017 general elections in the country. In addition to the fact that the Supreme Court exercised the authority granted to it by the Constitution of Kenya, 2010, to independently adjudicate all electoral-related matters, the judges were able to stand up to what had gradually become an imperial presidency.[308] In South Africa, the judiciary also showed a significant level of independence., ruling against the government in

of War: Civilians, Rule of Law, and Democratic Freedoms, Vol. 11, No. (A) (Feb. 1, 1999) (detailing the failure of the DRC government to protect civilians), https://www.hrw.org/reports/1999/congo/.

305. Fombad, *supra* note 83, at 464.

306. *See, e.g.*, CONSTITUTION arts. 19–57, 160, 255–57 (2010) (Kenya). Note, however, that despite this significant progress in constitutional design in the continent, the content of the constitutions of Francophone African countries is still influenced significantly by the Constitution of the French Fifth Republic—that is, French Constitution of October 4, 1958. *See* Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 184 (1997) (noting that, of the constitutions of the Francophone African countries, the "resemblance [of the African constitutions] to the French system was certainly more than nominal since the text of several of [the Francophone African constitutions], especially in sections dealing with the presidency, followed the French document almost word for word.").

307. Fombad, *supra* note 83, at 464.

308. *See* John Mukum Mbaku, *Kenya: Presidential Elections and the Rule of Law*, BROOKINGS INSTIT. (Sept. 6, 2017), https://www.brookings.edu/blog/africa-in-focus/2017/09/06/kenya-presidential-elections-and-the-rule-of-law/; John Mukum Mbaku, *Kenyan Democracy and the Rule of Law*, GEO. J. OF INT'L AFFAIRS (Mar. 28, 2018), https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/3/28/kenyan-democracy-and-the-rule-of-law.

several cases. For example, on October 19, 2016, the Government of South Africa, under the leadership of President Jacob Zuma and the African National Congress, submitted a notice of withdrawal from the Rome Statute to the UN Secretary-General.[309] Arguing that "[t]he notice of withdrawal is in breach of section 231 of the Constitution, as it was delivered without first securing a resolution of Parliament authorizing withdrawal from the Rome Statute," the opposition Democratic Alliance brought action in court to have the notice invalidated.[310] On February 22, 2017, the Gauteng Division of the South African High Court at Pretoria ruled, in the case *Democratic Alliance v. Minister of International Relations and Cooperation and Others*,[311] that the executive did not have the authority to terminate an existing international agreement and ordered the government to revoke the notice.[312] On March 7, 2017, the South

309. Kevin Sieff & Krista Mahr, *South Africa says it will quit the International Criminal Court*, WASH. POST (Oct. 21, 2016), https://www.washingtonpost.com/world/africa/south-africa-says-it-will-quit-the-international-criminal-court/2016/10/21/0eb8aa66-978f-11e6-9cae-2a3574e296a6_story.html?utm_term=.d730fbfacfd1. The South African Government had submitted the notice in accordance with the provision under the Rome Statute on withdrawal from the agreement, which states that any state that wishes to withdraw its membership in the ICC must first submit a written notification of such intention to do so to the UN Secretary-General. *See* Rome Statute, *supra* note 49, at art. 127.

310. Paul Herman, *Decision to withdraw from ICC is in breach of Constitution—DA*, MAIL & GUARDIAN (Oct. 24, 2016), https://mg.co.za/article/2016-10-24-decision-to-withdraw-from-icc-is-in-breach-of-constitution-da.

311. *Democratic Alliance v. Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP) (S. Afr.).

312. The High Court ruled as follows:

> 1. The notice of withdrawal from the [Rome Statute], signed by the first respondent, the Minister of International Relations and Cooperation on 19 October 2016, without prior parliamentary approval, is unconstitutional and invalid;
> 2. The cabinet decision to deliver the notice of withdrawal to the [UN] Secretary-General without prior parliamentary approval, is unconstitutional and invalid;
> 3. The first, second and third respondents—the Minister of International Relations and Cooperation, the Minister of Justice and Correctional Services and the President of the Republic of South Africa, are ordered to forthwith revoke the notice of withdrawal."

Democratic Alliance v. Minister of International Relations and Cooperation and Others 2017 (3) SA 212 (GP) at 2 (S. Afr.); *see* Robbie Gramer, *South African Court Tells Government It Can't Withdraw from the ICC*, FOREIGN POLICY (Feb. 22, 2017), http://foreignpolicy.com/2017/02/22/south-african-court-tells-government-it-cant-withdraw-from-the-icc/; *see also* Hannah Woolaver, *Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court*, 111 AJIL Unbound 450, 450 (2017).

African government acted in accordance with the court ruling and revoked the notice of withdrawal from the Rome Statute.[313]

In interpreting the constitution, African judges are now being encouraged to recognize and take into consideration the standards and values of modern governance provided in various international human rights instruments.[314] As argued by Justice Anthony Gubbay, former chief justice of the Republic of Zimbabwe, "[a] judicial decision has greater legitimacy and will command more respect if it accords with international norms that have been accepted by many jurisdictions, than if it is based upon the parochial experience or foibles of a particular judge or court."[315] In other words, these countries are being informed that they would have to voluntarily agree to have their sovereignty infringed upon in order for their domestic laws to conform with internationally recognized standards and principles of governance. Such conformity and harmonization is a necessary condition for good governance, as well as, acceptance into the global society of civilized nations. Of course, African countries are not being advised to give up robust constitutional discourse and simply copy other countries' constitutions. Instead, they are being reminded that they can no longer continue to ignore, for example, the responsibility to protect their populations against international crimes.

Some experts on constitutions and constitutionalism in Africa argue that constitutional designers in each African country should seek to benefit from the concept of "cross-systemic fertilization."[316] Through this concept, constitutional designers can borrow from other constitutional systems, as did South Africa during its 1994–1996 constitutional exercise,[317] to produce a constitution that reflects the values of the

313. Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html.

314. For example, art. 39(1)(b) of the Constitution of the Republic of South Africa, 1996, mandates that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law." S. AFR. CONST., 1996, § 39. Similarly, article 10(2)(c) states that "[i]n interpreting the provisions of this Constitution a court of law shall—(c) where applicable, have regard to current norms of public international law and comparative foreign case law." Constitution of the Republic of Malawi § 10 (2010).

315. LISA TORTELL, MONETARY REMEDIES FOR BREACH OF HUMAN RIGHTS: A COMPARATIVE STUDY 175 (2006) (quoting Justice Anthony Gubbay).

316. *See* Fombad, *supra* note 83, at 465–66; *see also* Adjami, *supra* note 125, at 112–13 (arguing, inter alia, that "the actual use of international law and comparative case law in domestic courts, regardless of the binding or nonbinding status of their sources . . . results in the cross-fertilization of international law and comparative case law in domestic courts in continents around the globe.").

317. For example, post-apartheid South Africa's Bill of Rights was shaped by the National Party's Charter of Fundamental Rights," which, to a considerable extent, "flowed from the work

country's relevant stakeholders, but, at the same time, meets the standards for good governance and the protection of human rights provided in various international human rights instruments. Unfortunately, while many Anglophone countries in Africa have made efforts to benefit from cross-systemic fertilization in their constitutional design exercises, the Francophone African countries remain almost totally dependent on the Gaullist constitutional model[318] and in the process, have ignored even the contributions of domestic stakeholders to the constitution-making process.

The emerging scholarship on constitutions and constitutionalism in the African countries, of course, is not simply advising African constitutional designers to import and impose on their local populations foreign constitutional models. Instead, what the literature is revealing is that, in designing national constitutions, African countries can benefit significantly from the experiences of other countries in providing themselves with constitutions and governing processes that minimize impunity, promote inclusive economic growth, and enhance peaceful coexistence and human development. For example, from the United States, African countries can learn how a country with an extremely diverse population, has been able to make democracy work. Specifically, African countries can learn about some of the ideas that have helped the United States resolve some of its most important governance problems. These ideas include, but are not limited to, separation of powers with checks and balances; judicial review; federalism; freedom of the press; and a robust and politically active civil society.[319]

---

of the Law Commission, whose report drew heavily upon comparative constitutional law, particularly the law of the United Stated of America, Canada, Germany, and the European Convention on Human Rights." D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT'L J. CONST. L. 181, 186 (2003).

318. *See* Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 184 (1997) ("The resemblance [of Francophone African governmental systems] to the French system was certainly more than nominal since the text of several of their constitutions, especially in the sections dealing with the presidency, followed the French document [i.e., French Constitution of October 4, 1958] almost word-for-word.").

319. *See, e.g.*, MBAKU, *supra* note 80, at 108 (arguing that African countries can benefit from the experiences of the United States with constitutional design, constitutionalism and constitutional government).

III. THE MODERATING IMPACT OF INTERNATIONAL LAW ON TRADITIONAL LAWS IN AFRICA

Since the early-1990s, many African countries have adopted new constitutions or amended existing ones in an effort to bring their laws[320] to conform with international human rights standards and norms. For example, in 1996, the Republic of South Africa adopted a new constitution, which abolished the dreaded apartheid system, introduced a non-racial democracy, and provided constitutional protections to groups that had, historically, been discriminated against.[321] In 2010, the people of Kenya adopted a new constitution, which introduced many democracy-enhancing provisions, including separation of powers with checks and balances, an independent judiciary, and devolution of powers away from the center.[322] Kenya's 2010 constitution specifically introduced a system of administrative, political and fiscal devolution that was expected to significantly improve governance by bringing government closer to the people and reducing the powers of what had, since independence in 1964, evolved into an imperial presidency.[323]

Constitutional exercises in countries such as Kenya and South Africa have been designed to improve governance and bring domestic law in line with international human rights standards and norms. Consider the following provisions in South Africa's post-apartheid constitution: "[a]ny legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that . . . the legislation is consistent with the [South Africa's] obligations under international law applicable to states of emergency";[324] "[w]hen

320. These include the customs and traditions of each country's various ethnocultural groups.

321. *See* S. AFR. CONST., 1996, at Chapter 1, art. 1; *see also* Fabrice Tambe Endoh, *Democratic Constitutionaism in Post-apartheid South Africa: The Interim Constitution Revisited*, 7 AFR. REV. 67, 71 (2015) (arguing that "[t]he post-apartheid era in South Africa saw the birth of a new constitution the values of which were founded on the humane principles of democracy and the respect for human rights and fundamental freedom."); G.A. Res. A/RES/48/258, ¶ 1 (June 23, 1994) (UNGA expressing "its profound satisfaction at the entry into force of South Africa's first non-racial and democratic constitution on 27 April 1994, the holding of one-person/one-vote elections from 26 to 29 April 1994, the convening of South Africa's new parliament on 5 May 1994 and the installation on 10 May 1994 of its State President and the Government of National Unity.").

322. *See* CONSTITUTION arts. 1, 6, 160, (2010) (Kenya). (creating three branches of government—executive, legislative and judiciary; providing for an independent judiciary; and creating several sub-national political units called "counties" through a process called "devolution.").

323. *See* Othieno Nyanjom, *Devolution in Kenya's New Constitution* 9–12, 19–25 (Soc'y for Int'l Dev., Constitution Working Paper Series No. 4, 2011).

324. S. AFR. CONST., 1996. § 37(4)(b)(i).

interpreting the Bill of Rights, a court, tribunal or forum must consider international law";[325] "[n]ational security must be pursued in compliance with the law, including international law";[326] "[t]he security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the [South Africa]";[327] "[South Africa] is bound by international agreements which were binding on [the country] when [the] Constitution took effect";[328] "[c]ustomary international law is law in [South Africa] unless it is inconsistent with the Constitution or an Act of Parliament";[329] and "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[330]

In other countries, however, constitutional exercises have not served to improve governance. Instead, they have been used by opportunistic politicians to enhance their ability to stay in power indefinitely and continue to act with impunity, exploit citizens, and enrich themselves. Presidents in countries such as Cameroon, Burundi, Equatorial Guinea, Republic of Congo, Uganda, and Rwanda, have manipulated the constitutional amendment process to eliminate presidential term limits and extend their mandates.[331] In addition to the fact that these presidents have ignored national obligations under international law,[332] they have engaged in behaviors that have actually threatened international peace and security.[333] When President Pierre Nkurunziza of Burundi decided to

325. *Id.* § 39(1)(b).

326. *Id.* § 198(c).

327. *Id.* § 199(5).

328. *Id.* § 231(5).

329. *Id.* § 232.

330. *Id.* § 233.

331. *See, e.g.*, Takudzwa Hillary Chiwanza, *African Presidents and Their Love for Changing the Constitutions*, AFRICAN EXPONENT (Oct. 10, 2017), https://www.africanexponent.com/post/8604-african-presdidents-are-always-chaging-their-constitutions; Isaac Mufumba, *Presidents who amended constitution to stay in power*, DAILY MONITOR (Sept. 18, 2017), http://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html.

332. For example, the continued violation of the rights of the Anglophone minority and the suffocation of the opposition under the government of Paul Biya in Cameroon. *See* Amnesty Int'l, *A Turn for the Worse: Violence and Human Rights Violation in Anglophone Cameroon*, AI Index AFR 17/8481/2018 (June 12, 2018). The killing of Anglophone civilians and the burning of their villages are violations of rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR), to which Cameroon is a State Party. *Id.*

333. For example, the decision by the Biya government in Cameroon to use brutal force to suppress peaceful protest has created a major humanitarian crisis and threatened peace and security in the country and the region. *See, e.g.*, Phyllis Taoua, *Cameroon's Anglophone crisis*

manipulate the national constitution to abolish the two-term presidential limit and empower himself to run for a third term in 2015, he sparked a crisis that has torn apart Burundian society and intensified tensions between the country's two major subcultures—the Hutu and Tutsi.[334] In fact, Nkurunziza's constitutional manipulations and the activities of members of his government have reopened the wounds of the country's past and fueled the type of ethnic hatred that was, in the past, responsible for significant threats to national, regional, and international peace and security.[335]

While it has become evident that international law can play a significant role in helping African countries improve governance generally and to recognize and protect human rights in particular, its most important impact is likely to be seen in attempts to resolve conflicts between traditional and customary laws and practices and how they affect vulnerable groups (e.g., women and children). One can examine the treatment of women under customary law in the African countries to determine the extent to which domestic courts can use international human rights law to challenge and invalidate customs and traditions that discriminate against women and violate their rights. The Tanzanian High Court case of *Ephrahim v. Pastory*[336] provides the opportunity for us to examine how courts in various African countries are dealing with the conflict that exists between protecting fundamental human rights and respecting customary and traditional treatment of women.

Holaria Pastory, a Tanzanian woman, had inherited some clan land from her father through a will.[337] She later sold the land to one Gervazi

---

has brought the country to the brink of civil war, QUARTZ AFRICA (June 26, 2018), https://qz.com/1313745/cameroons-anglophone-crisis-has-brought-the-country-to-the-brink-of-civil-war/; Siobhán O'Grady, *Africa's next civil war could be in Cameroon*, WASH. POST (May 30, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/05/30/africas-next-civil-war-could-be-in-cameroon/?utm_term=.3a74f0604084.

334. *See* Simon Tisdall, *Violence Grips Burundi as President Nkurunziza Cleared to Run for Third Term*, THE GUARDIAN (May 5, 2015), https://www.theguardian.com/world/2015/may/05/violence-grips-burundi-president-nkurunziza-cleared-run-third-term (stating that responses to President Nkurunziza's decision to run for a third term have included "street protests in the capital, Bujumbura, [which] have left dozens of people dead or injured at the hands of the police."); Aislin Laing, *Tutsis 'Threatened with Mass Slaughter' in Burundian Constitutional Crisis*, THE TELEGRAPH (May 5, 2015), https://www.telegraph.co.uk/news/worldnews/africaandindianocean/burundi/11584094/Tutsis-threatened-with-mass-slaughter-in-Burundian-constitutional-crisis.html (stating that "[m]embers of the Tutsi ethnic community living in Burundi, . . . claim that they have been threatened with mass slaughter if they do not back their president's bid to overstay his time in office.").

335. Int'l Crisis Grp., *Burundi: A Dangerous Third Term*, Report No. 235 (May 20, 2016).

336. *Ephrahim v. Pastory* (1990) LRC (Const.) 757 (Tanz.).

337. *Id.* at 1.

Kaizilege, a stranger and a non-member of her clan.[338] After the land sale was finalized, one Bernado Ephrahim, a member of Pastory's clan, filed a law suit in the Primary Court at Kashasha, seeking a declaration that the land sale was void under Haya Customary law and arguing that women have no right to sell clan land.[339] Ephrahim's argument was in line with the Haya Customary Law (Declaration) (No. 4) Order of 1963, which declares that "[w]omen can inherit, except for clan land, which they receive in usufruct but may not sell."[340] The Primary Court granted Ephrahim's petition, declaring that the sale violated Haya Customary law and hence, was void.[341] Pastory appealed to the District Court and the latter quashed the Primary Court's decision, arguing that the ruling had violated the Bill of Rights in Tanzania's Constitution, which granted equality to both men and women.[342] Not satisfied with the District Court's decision, Ephrahim appealed it to the High Court of Tanzania at Mwanza.[343]

Justice Mwalusanya wrote the decision for the High Court and in doing so, he recognized that Haya Customary law is clear on the matter at hand since it is codified in the Laws of Inheritance of the Declaration of Customary Law, 1963.[344] In addition, he also stated that consideration must be given to the fact that there is precedent in Tanzanian law that courts in situations such as the one at issue, are bound by customary law.[345] He went on to argue, however, that the precedent in question must be reexamined because of the incorporation into the Constitution of the United Republic of Tanzania of the Bill of Rights, which includes a non-discrimination provision.[346] He declared that "[w]hat is more is that since the Bill of Rights was incorporated in our 1977 Constitution vide Act No. 15 of 1984 by Article 13(4) discrimination against women has been prohibited."[347]

Justice Mwalusanya then went on to list international human rights instruments that have been ratified by the United Republic of Tanzania and which also guarantee a policy of nondiscrimination.[348] Cognizant of

338. *Id.*
339. *Id.*
340. *Id.* at 2.
341. *Id.*
342. *Id.*
343. *Id.*; *see* Adjami, *supra* note 125, at 153.
344. *Ephrahim v. Pastory* (1990) LRC (Const.) 757 at 2 (Tanz.).
345. *Id.* at 2.
346. *Id.* at 4.
347. *Id.*
348. These international human rights instruments include the UDHR, which is part of the Constitution of Tanzania by virtue of Article 9(1)(f) and prohibits discrimination based on sex as

Tanzania's commitment to international human rights norms, Mwalusanya, J. declared as follows:

> The principles enunciated in the above named [international human rights instruments] are a standard below which any civilized national will be ashamed to fall. It is clear from what I have discussed [that] the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.[349]

Once Justice Mwalusanya had determined that the Haya Customary Act was unconstitutionally discriminatory, he turned to the case at hand to determine what appropriate action the High court should take. First, he referenced Section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984[350] and academic writings on Section 5(1), which "holds the view that courts in Tanzania can modify discriminatory customary law in the course of statutory interpretation."[351]

As provided by Section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984, with effect from March 1988, the courts must construe the existing law, including customary law "[w]ith such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Fifth Constitutional Amendment Act, 1984 i.e. Bill of Rights."[352] Adopting a purposive approach to statutory interpretation, Justice Mwalusanya determined that, in enacting Section 5(1) and the Bill of Rights, it was Parliament's intention to "do away with all oppressive and unjust laws of the past."[353]

Next, Justice Mwalusanya borrowed from the judicial experiences of Zimbabwe after that country introduced a bill of rights into its constitution. He noted that Zimbabwe's Constitution also had a similar provision like Tanzania's Section 5(1) of Act 16 of 1984.[354] He then

---

per Article 7; Convention on the Elimination of All Forms of Discrimination Against Women, 1979; African Charter on Human and Peoples' Rights, 1981 which prohibits discrimination on account of sex in Article 18(3); and the ICCPR which prohibits discrimination based on sex in Article 26. *Id.* at 4.

349. *Id.*

350. *Id.* Section 5(1) was added to the Constitution of Tanzania after the latter was amended to include the Bill of Rights. *See* Adjami, *supra* note 125, at 154.

351. *Ephrahim v. Pastory* (1990) LRC (Const.) 757 (Tanz.), at 8.

352. *Id.* at 7.

353. *Id.* at 9.

354. *Id.* at 10. Section 4(1) of the Constitution of Zimbabwe states as follows: "That existing laws must be construed with such modifications, adaptations, qualifications and exceptions as

concluded that the "case from Zimbabwe is persuasive authority for the proposition . . .that any existing law that is inconsistent with the Bill of Rights should be regarded as modified such that the offending part of that statute or law is void."[355] He then ruled as follows:

> I have found as a fact that Section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963 is discriminatory of females in that unlike their male counterparts, they are barred from selling clan land. That is inconsistent with Article 13(4) of the Bill of Rights [the Tanazanian] Constitution which bars discrimination on account of sex. Therefore under Section 5(1) of Act 16 of 1984 I take Section 20 of the Rules of Inheritance to be now *modified* and *qualified* such that males and females have now equal rights to inherit and sell clan land.[356]

In concluding his opinion, Justice Mwalusanya made a powerful statement on women's rights in Tanzania. He declared as follows:

> From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land and self-acquired land of their father's is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in the other spheres. One thing which surprises me is that it has taken a simple, old rural woman to champion the cause of women in this field but not the elite women in town who chant jejune slogans years on end on women's liberation but without delivering the goods.[357]

The *Ephrahim* court was faced with an important conflict: the recent internationalization of constitutional law[358] in Tanzania and the existence of customary laws that conflict with the country's modernized constitution. These new modifications to the Tanzanian Constitution, which included a Bill of Rights, guaranteed nondiscrimination and equal treatment before the law. The High Court recognized its role to modify

---

may be necessary to bring them into conformity with the Constitution." Constitution of Zimbabwe § 4 (1980).

355. *Ephrahim v. Pastory* (1990) LRC (Const.) 757 (Tanz.), at 11.

356. *Id.* at 13.

357. *Id.* at 14.

358. By 1990, when the *Ephrahim* decision was rendered, Tanzanians had revised their constitution to incorporate a Bill of Rights and other provisions reflecting those found in various international human rights instruments. *See* Chris Maina Peter, *Five Years of the Bill of Rights in Tanzania: Drawing a Balance-Sheet*, 4 AFR. J. INT'L & COMP. L. 131, 131 (1992) (stating that "[t]he Bill of Rights was incorporated into the Constitution of the United Republic of Tanzania of 1977 in 1984 following the Fifth Amendment of Constitution.").

customary law and bring it into line with provisions of the Constitution of Tanzania, which themselves had, through recent amendments, been brought into line with provisions of international human rights instruments. The *Ephrahim* court essentially modified customary law to allow women to realize the rights guaranteed them under the Constitution of Tanzania. In doing so, Justice Mwalusanya concluded that whenever there exists a conflict between customary law and fundamental rights, the latter must be "regarded as the basic norm of the whole legal system."[359] In other words, in the case of a conflict between international standards of human rights and customary law, the former should prevail at the expense of the latter.[360]

CONCLUSION

Since the collapse of the Soviet Union and the end of the Cold War, there has been an acceleration in globalization, where the latter can be defined as "a process of interaction and integration among the people, companies, and governments of different nations, a process driven by international trade and investment and aided by information technology."[361] As a consequence, it has become increasingly difficult for national governments to fully control what happens within their territorial boundaries. In fact, globalization has made it much more difficult for national governments to have full control over their domestic economies and political processes.[362] The end result is that national institutions are no longer the sole foundation for domestic governance. As argued by Professor Fombad, since the end of the Cold War, "the capacity of national constitutions to serve as the sole framework for governance has been progressively eroded."[363] One of the most important

359. *Ephrahim v. Holaria Pastory* (1990) LRC (Const.) 757 at 7 (Tanz.).

360. *See* Adjami, *supra* note 125, at 155.

361. DONALD J. BOUDREAUX, GLOBALIZATION 1 (2008).

362. This is due, for example, to the internationalization of production, investment and trade, as well as the demands of the global community for national governments to conform to certain generally accepted forms of behavior, especially when it comes to the treatment of individuals and groups within the borders of States. It has been argued, for example, that "globalization is the triumph of the market over the nation-state and the consequent end of national sovereignty. Economic forces are said to be eroding national boundaries so that governments lost control over their economies, and national economic systems converge toward a common model." ROBERT GILPIN, THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21 CENTURY 311 (2000). It is also argued that globalization has "generated new forms of advocacy [for human rights] such as transnational professional networks (Doctors without Borders), global groups for conflict monitoring, and coalitions across transnational issues (Sierra Club-Amnesty International)." Alison Brysk, *Introduction: Transnational Threats and Opportunities, in* GLOBALIZATION AND HUMAN RIGHTS 2 (Alison Brysk ed., 2002).

363. Fombad, *supra* note 83, at 471.

aspects of globalization has been the internationalization of constitutional law.[364]

The gradual but steady internationalization of constitutional law has meant a virtual disappearance from almost all countries of the concept of complete and absolute sovereignty—many States now enjoy only an attenuated form of sovereignty, one characterized by the failure of nations to have complete control over the determination of the content of their national constitution law.[365] In constitutional design and interpretation, States must now take cognizance of international law, with particular attention paid to international human rights instruments. As a consequence, national constitutions are no longer the sole regulators of "the totality of governance in a comprehensive sense."[366]

But, what are the reasons for this significant erosion in state sovereignty or "reconfiguration of constitutional law?"[367] The answer lies in the desire by the global community to transform governance systems, both at the national and international levels so that they can fully confront emerging risks and challenges (e.g., international crimes).[368] Nevertheless, not all national constitutional self-government or autonomy has been lost through the internationalization of constitutional law. What the latter process has done is simply to make up "for [the] deficiencies of domestic constitutionalism in an era of increased global interdependence."[369]

---

364. Although globalization has led to increased internationalization of constitutional law, that process is "stronger and more revealing in some parts of the world than in others. While the EU presents a clear case for internationalization of constitutional law and even for constitutionalization of international law, the United States as well as many Association of Southeast Asian Nations (ASEAN) countries continue to stress their distinctiveness in the course of constitutional development." *See* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1173 (Michel Rosenfeld and András Sajó eds., 2012); *see also* Tom Gingsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEG. STUD. 27, 34 (2010) (arguing, inter alia, that "Asian countries do not seem to be major proponents of global governance that undermines national sovereignty, particularly not in spheres related to human rights. Instead, the emphasis is on sovereign prerogatives and noninterference.").

365. *See* NIKOLAY STARIKOV, ROUBLE NATIONALIZATION: THE WAY TO RUSSIA'S FREEDOM 8 (2013) (arguing that "[i]n the modern world only a very small number of countries can proudly claim Absolute State Sovereignty; *see also* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MAKING OF JUSTICE 375 (1997) (stating that "absolute sovereignty no longer exists for an modern state because of international interdependence and the interpenetration of domestic and international politics, the mobility and globalization of capital and information, and the rising influence of transnational social movements and organizations.").

366. Fombad, *supra* note 83, at 471.

367. *Id.* at 472.

368. *See* CARRIE BOOTH WALLING, ALL NECESSARY MEASURES: THE UNITED NATIONS AND HUMANITARIAN INTERVENTION 58–59 (2013).

369. *Id.*

The changing attitudes of the global community towards such issues as the treatment of citizens by their governments, particularly vulnerable groups (e.g., women, children, and ethnic and religious minorities), are embodied in various international instruments, including international human rights treaties and conventions.[370] Constitutional drafting committees and interpreters in African and other countries are being told that they can no longer ignore international demands on them to internationalize their constitutional law and provide themselves with an institutional environment more conducive to the recognition and protection of human rights. Constitutional designers in the African countries, hence, must entrench within their constitutions, "principles and practices that promote constitutionalism and good governance."[371]

Where States have failed to abolish or reform customary laws that discriminate against women and other historically marginalized groups,[372] judges can use their interpretive powers to strike down or modify discriminatory customary law provisions and generally bring all law into conformity with the provisions of international human rights instruments. As more African countries provide themselves with independent and progressive judiciaries, there is likely to emerge in these countries "a progressive and global approach to interpreting constitutional rights," a development that could significantly enrich national or domestic constitutional law.[373]

Granted, the internationalization of constitutional law can be viewed as an infringement on the sovereign right of African countries to determine the content of their national laws.[374] Nevertheless, it is

370. *See, e.g.*, International Convention on Civil and Political Rights art. 2, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (stating that "[e]ach State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); ICESCR, *supra* note 108, at art. 3 (stating that "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (stating that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

371. Fombad, *supra* note 83, at 472.

372. For example, children and ethnic and religious minorities.

373. Fombad, *supra* note 83, at 472–73.

374. *See, e.g.*, ADEMOLA YAKUBU, HARMONISATION OF LAWS IN AFRICA 39 (1999) (arguing that "[m]ost developing countries view harmonization of laws as an infringement on their sovereignty.").

important to recognize the fact that such interference, either through the direct incorporation of provisions of international human rights instruments into national constitutions or reliance upon international and comparative sources as an interpretive device, is critical and important for the promotion of good governance and the protection of citizens from international crimes.[375] While a national constitution will continue to reflect the values that are important to each country's relevant stakeholders, a certain level of international harmonization is necessary so that the constitutions of States can also reflect those values (e.g., the protection of human rights, including those of vulnerable groups, such as women and children) that are important to the global community.

Today, in Africa, some of the customary laws and traditions of each country's various subcultures harm certain groups and deprives them of opportunities for self-actualization. As analysis of the Tanzanian case, *Ephrahim v. Pastory*, has shown, customary law discriminates against women and deprives them of their fundamental rights. Nevertheless, this also demonstrated that courts can use their powers to interpret the constitution to strike down offending or discriminatory customary laws and to bring national laws into line with internationally accepted standards and norms.

375. The Rome Statute defines international crimes as "the most serious crimes of concern to the international community as a whole." Rome Statute, *supra* note 49, at art. 5. These include "genocide," "crimes against humanity," "war crimes," and "the crime of aggression." *Id.*