AFRICA

The principal aim of this work is to provide a forum for leading international lawyers with experience and interest in Africa to address a broad range of intellectual challenges concerning the contribution of African states and peoples to international law. As such, the volume addresses orthodox topics of international law—such as jurisdiction and intervention—but tackles them from an African perspective, and seeks to ask whether, in each case, the African perspective is unique or affirms existing arrangements of international law. The book cannot come at a more important time. While international legal discourse has been captured by the challenge of terrorism since 11 September 2001, there are clear signs that other issues are returning to the fore. Political interest in Africa has undergone a global revival, and the Organization of African Unity has been transformed into the African Union. Infrastructural challenges, along with those taking place in regional contexts, have effectively mapped a new politico-legal landscape for Africa. This, and more, is explored, and the key normative questions are addressed, in a series of essays by leading Africanist scholars.

Studies in International Law: Volume 16

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Africa

Mapping New Boundaries in International Law

Edited by
Jeremy I Levitt

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Foreword

Africa is the world's oldest continent and her nations, institutions and peoples are humanity's first. Ancient African civilisations are responsible for founding the original logic, structure and method of statecraft for which modern human civilisation is structured. Africa's contributions to human civilisation are indisputable and vast, spanning, for example, the areas of agriculture, arts, government, law, medicine, monotheistic religion and science. Unfortunately, these contributions, particularly those related to statecraft and trans-territorial law-making, have been conveniently forgotten and ignored by the states, nations and peoples that have benefited from them most—none more than ancient Greece and Rome and their progeny states and institutions in the Western Hemisphere.

Professor Jeremy Levitt's underlining premise that 'Africa is a legal marketplace not a lawless basket case' reminds us of the continent's historical and contemporary role as an innovator and generator of human knowledge, institutions and rules. While the myth of the 'Dark Continent' pervades nearly aspect of North/South relations, this collection is a ground-breaking addition to the study of Africa's contribution to human civilisation through international law, which forms the glue to global society.

Whilst slavery, enslavement, colonialism and neo-colonialism are primarily responsible for creating enabling environments for evil and corrupt leaders to rule over African states and peoples, the dreadfulness of interstate and intrastate war, poverty, disease, underdevelopment, foreign exploitation and international neglect that followed decolonisation have forced Africans to birth African solutions to African problems. As the chapters in this book demonstrate, perhaps more so than any other region in the world, Africa has made the most progress in generating rules, norms and doctrine to confront its aching problems.

International legal practitioners and scholars of Africa who have devoted their lives to the study, development and implementation of the rule of law in Africa have sought answers to a critical question: What contributions have African states, institutions and peoples made to the development of international law? This is a critical question because researchers have spent endless time and resources examining Africa's problems; however, few have contemplated the extent to which Africa has engineered normative solutions to such problems. On the contrary, significant energy and capital has been spent importing Western solutions to African problems without taking stock of proven indigenous approaches

when such solutions are often the raison d'être or cause of instability and underdevelopment in Africa.

Professor Levitt's path-breaking book represents the first conscientious attempt to crystallise Africa's contributions to international law in the past three-and-a-half decades. Western-orientated international law practitioners and scholars, within and outside of Africa, have fallen prey to the false notion that Europe is to be credited for originating and evolving international law—ideology that is replete in legal literature and jurisprudence. They have developed complex theories and procedures on the origination, content and character of international law and international rule-making that too often glazes over theory and practice in the developing world with rarely any reference to Africa. These jurists have presented their results to international and domestic policy-makers and other decision-makers hoping that their analyses will shape norm creation and foreign policy. Too often their hopes become reality and the states, institutions and peoples of Africa remain ignored and marginalised in the processes of norm creation and globalisation. This collection of essays is extremely important because they measure and contemplate Africa's contribution to international law and cast new light on a rather 'exclusive' subject.

The wide range of topics covered in this book signals the need for a paradigm shift in how Africa is characterised in international relations. Any conscientious reader cannot review the chapters in this volume without an appreciation of the numerous areas in which Africa is confirming existing norms of international law and spurring new ones. This book is highly relevant for legal generalists with limited regional expertise; for researchers, scholars and policy-makers seeking to understand the complexities of Africa's evolving international legal landscape; and for donor state decision-makers genuinely interested in supporting Africa to develop indigenous approaches to complex normative political, economic, social and cultural problems. The international community must be more open to supporting African-centred approaches to combat conflict, lawlessness and underdevelopment. Professor Levitt's book is valuable because it constructively illuminates Africa's contributions to international law and demonstrates that Africa is a legal marketplace constantly seeking complex legal solutions to complex societal problems.

At no other time have such a wide-assortment of legal jurists rallied around the theme of Africa and the development of international law, with such clarity and scope. Professor Levitt, one of the leading scholars of international law and Africa, is to be commended for challenging scholars and policy-makers to contemplate Africa as a subject and not simply an object of international law—as a marketplace not a basket case.

While the states, institutions and peoples of Africa strive to maximise the continent's full potential, the critical question is what role should

and will international law play in the progressive realignment and redevelopment of Africa. Professor Levitt's book provides us with a valuable normative snapshot of the various ways Africa can and will continue to contribute to the international legal order. This study opens a Pandora's box of intellectual inquiry that must continue to be studied and recorded, particularly by scholars of African descent, if Africa's contributions to international law are to be acknowledged and respected in international fora.

I know that this excellent book, a pathway to scholarship and analysis of Africa and the development of international law, will serve the academic and policy communities as we, from within Africa and from the diaspora, struggle to transform Africa and, with it, the world.

Adama Dieng
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Tribunal for Rwanda and
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International Commission of Jurists

Acknowledgements

This volume owes its existence to international law academia and its uncanny neglect of Africa as a worthy subject of international legal inquiry. The idea for this book was conceived while studying for my doctorate degree at Cambridge University in the late 1990s and pragmatically birthed at a panel titled 'Africa: Mapping New Boundaries in International Law', which I organised as Chair of the Africa Interest Group, at the 98th Annual Meeting of the American Society of International Law in Washington, DC, on 2 April 2004. The purpose of the panel was to 'examine the meaning, impact, and relevance of international law to African states with a specific emphasis on their contribution to the development of international law'. I owe a debt of gratitude to Evelyn Ankumah, Tiyanjana Maluwa, Vincent Nmehielle and Adrien Wing for serving as panellists, and especially thank the panel's attendees for their insightful questions and comments.

The examination of Africa's role in the development of international law did not begin and will not end with this volume. Among others, pioneering studies by TO Elias and NS Rembe have led the way and deserve notable mention. More than any other person, I am grateful to Henry J Richardson III for guiding my intellectual development over the years and providing me with invaluable advice while conceptualising this project. I kindly thank José Alvarez, Yoram Dinstein, Valerie Epps, Linda Greene, Craig Jackson, Edward Kwakwa, Tiyanjana Maluwa, Makau Matua, Fernando Teson, Ruth Wedgwood, Matthew Whitaker, Adrien Wing and David Wippman for their continued support of my work on international law and Africa.

Finally, I am most indebted to my lovely wife and daughter for tolerating my busy work schedule and nevertheless giving me enduring support and unconditional love. I thank the Dean's Office at Florida International University College of Law for providing me with generous research support, and I especially thank my former graduate assistant, Jordan Dollar, for editing and formatting portions of the manuscript.

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Introduction

Africa: A Maker of International Law

JEREMY I LEVITT

I. ANCIENT AND PRE-MEDIEVAL AFRICA

Africa is a legal marketplace, not a lawless basket case. While its contemporary history has been and is being deeply and directly impacted by the variegated vestiges of the transatlantic slave trade, European colonialism and the Cold War, resulting in persistent misrule, unfettered deadly conflict, chronic underdevelopment and the spread of deadly diseases such as HIV/AIDS among others, its ancient and pre-medieval history reveals that, for millennia, Africa sat at the apex of human advancement and civilisation. The highly developed ancient African civilisations of Egypt and Nubia, among others, preceded the fall of Europe's great Roman Empire (Byzantine) to the Ottoman Turks in the middle of the fifteenth century by nearly 5,000 years and pioneered human knowledge in the arts and sciences (for example, writing, philosophy, law, biology, medicine and architecture). Africa is also credited with the world's first constitutional monarchies and governments, monotheism, commercial economies and transnational or trans-territorial rules, particularly those regulating war, diplomacy, international and intercontinental trade and commerce, and treaty-making. Early Africa, led by Egypt, Nubia, Kush and their enclaves, was so advanced that it was common for leading Greek intellectuals to travel to the continent to study under black African scholars and priests in the behavioural, theoretical and applied sciences. For example, after Thales became the first European to introduce Egyptian science into Greece, particularly geometry and astronomy, and had taught 'Pythagoras all that he knew, he advised him to follow his own example, to go and complete his training with the Egyptian priests, the true keepers of scientific knowledge at that time'.[1] Pythagoras spent 22 years studying in Egypt only to return to

[1] Cheikh Anta Diop, *Civilization or Barbarism: An Authentic Anthropology* (New York, Lawrence Hill Books, 1991) 346.

Greece to claim Egyptian science as his own—provoking 'Herodotus to say that Pythagoras was nothing but a vulgar plagiarist of his Egyptian masters'.[2] During this era of African enlightenment, the notion of African inferiority and myth of the 'Dark Continent' that characterises and permeates nearly every aspect of North/South relations today were alien to relations between ancient Africans and Europeans.

Africans have forged and lived under intricate and advanced rule-based systems from time immemorial. Beginning with the ancient black African empires of Egypt, Ethiopia, Kush, Nubia and Punt (commencing in 3500BC) through the pre-medieval era in old western Sudan including Ghana, Mali and Songhai (beginning in AD 800), Africa was at the forefront of creating the philosophy, structure, science of government and constitutional law, and other law-based systems with complex international dimensions millennia before Europe conceived of the modern nation-state after the Peace of Westphalia in 1648.[3] Classical Greek philosophers, historians and scientists such as Herodotus, Hippocrates, Diodrus (the Sicilian) and Strabo, among many others, openly acknowledged that Africans, namely Egyptians and Ethiopians, prepared the way for Western society.[4] In this sense, Africa exported rather the logic, structure and science of the modern law and the nation-state to the Greeks, Romans and the West generally.[5] This explains why, for example, by the First Dynasty (3500–2800BC), Egypt had already developed 'a high level of institutional and juridical development' inclusive of well-settled property law, tax law and inheritance law systems, as well as sophisticated public and private international law that regulated its interactions with foreign nations in the areas of war, peace, trade and commerce.[6] In addition, according to Aristide Théodoridés, after the 'Twenty-sixth Dynasty (644BC) the Greeks came into contact with the culture of the Nile Valley, and according to tradition it was in Egypt, in the towns of delta, that they acquired the ideas of liberty and democratic equality',[7] verifying that these were deeply entrenched features of early black Egyptian society.

Similar to Egypt, the great empire of Ghana had a highly developed constitutional monarchy with an intricate legal system, 'large number of jurists and scholars' and a system of international commerce backed by 'two hundred thousand warriors, forty thousand of them archers' nearly

[2] *Ibid* at 346–47.

[3] See generally Cheikh Anta Diop, *Precolonial Black Africa* (New York, Lawrence Hill Books, 1987).

[4] Basil Davidson, *African Civilization Revisited: From Antiquity to Modern Times* (Newark, NJ, Africa World Press, 1991) 59–69.

[5] *Ibid*. Diop, n 1 above, at 129–39, 166, 347.

[6] See generally, Aristide Théodoridés, 'The Concept of Law in Ancient Egypt' in JR Harris (ed), *The Legacy of Egypt*, 2nd edn (Oxford, Oxford University Press, 1971).

[7] *Ibid* at 319.

700 years before the birth of Europe's modern nation-state.[8] The highly advanced political structures and rules of ancient and medieval African nations became the subject of social inquiry for leading Greek, Roman and later Western European scholars and explorers, and their subsequent replication and adaptation to the European condition provided the template for Western statecraft. Hence, as Elias aptly noted:

> [A]frican communities and States have for centuries had contacts with the countries of Europe and Asia and thereby shared with these a certain measure of common experiences in international living. These would entail the observance of certain practices in the field of diplomacy, the rules and practices of warfare, treaty-making, and patterns of international behavior and of international morality.[9]

This sharing of common experiences is not surprising because, at its core, international rule-making is arguably universal in the sense that all civilised states, nations and peoples, irrespective of their origin, forged similar political structures and rules to regularise, systemise and maximise internal order and trans-territorial relations. Since Africa is the birthplace of humanity, it should come as no surprise that it is also home to the first highly advanced civilisations with intricate transnational rule-based systems.

Elias's observations of African and European commonality and complementarity are most relevant during Europe's late Middle Ages (beginning in AD 1400). Africa's ancient and pre-medieval contributions to transnational law and statecraft have been ignored and forgotten by the civilisations, states and peoples that replicated, exploited and benefited from them the most. This observation applies equally to contemporary international law scholars and practitioners who are married to the false notion that international law owes its existence to European thought, culture and practice. In spite of this neglect and Europe's eventual domination of the continent from the sixteenth century onward, which stagnated Africa's development, there remained in large areas of Africa:

> similar political and economic conditions and, therefore, similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles in African customary law that is not essentially dissimilar to the broad principles of European law.[10]

Notwithstanding, with the advent of European colonisation and statecraft after the Peace of Westphalia, the European states became leaders in moulding and evolving the transnational rules that are largely

[8] Diop, n 1 above, at 90–92.

[9] TO Elias, *Africa and the Development of International Law* (Leiden, Kluwer Academic Publishing, 1972) 43.

[10] *Ibid*.

responsible for birthing contemporary international law and the modern international system.

This book seeks to unearth, examine and document Africa's contribution to contemporary international law in an international system constructed on the false ideal that Africa is wholly disadvantaged and ineffectual.

II. SCOPE OF STUDY

The theme of this book, Africa's contribution to international law, has deep roots located in the history, theory and practice of African internationalism; that is, the legacy of empire-building and conquest inside Africa and its vast intercontinental trade and transcontinental commerce outside Africa. This project is indeed novel: the contemplation of Africa as a subject, an evolver and generator of international law, not its object. Elias's remarkable observation, in 1972, that the

> contribution which the third world in general, and Africa in particular, is making to contemporary international law will in time increase both in quality and in quantity especially within the framework of the United Nations

best captures the essence of this volume. This book builds upon and expands Elias's and N.S. Rembe's ground-breaking works.[11] It dispels the popular and still widely held myth that Africa is an object of international law, a dark continent being acted upon by external forces—a basket case, not a legal marketplace.

The volume's principal objective is to provide a forum for leading international lawyers and academicians with significant experience in and expertise on Africa to examine Africa's contribution to the development of international law. The volume simply asks: 'What contributions have African states, institutions and peoples made to the development of international law?' In doing so, it includes chapters relating to orthodox topics of international law—such as those of jurisdiction, human rights and intervention—but tackles them from an African perspective and asks whether, in each case, the African perspective is unique or affirms existing arrangements of international law.

The volume probes whether, for instance, there is any singular African position on a given matter (as in the form of the intervention principles of the Constitutive Act of the African Union), or what divergences exist within African practice (as in the form of shared sovereignty, variegated constitutional models for multilateral governance and self-determination).

[11] Elias, n 7 above. NS Rembe, *Africa and the International Law of the Sea* (Germantown, Sijthoff & Noordoff, 1980). See also FC Okoye, *International Law and the New African States* (London, Sweet and Maxwell, 1972).

Are these divergences confirming existing trends? Are they reflective of the broader picture of international law? Do they portend a possible new future for international law? The idea is to invoke a much better sense of the relationship between Africa—broadly constructed, so as to include the continent both north and south of the Sahara—and modern international law and to redress the imbalance, both perceived and real, of the different ways in which African state practice has affected and impacted the normative enterprise of international law when considered as a whole.

This enquiry not only examines the extent to which African states have contributed to the evolution of international law but demonstrates the extent to which they have been marginalised in international law discourse, practice and scholarly literature. In this respect, the value of the broad spectrum of topics that have been engaged form a crucial part of the intellectual enquiry and the effort of the authors to mark out the contours of this broader, larger picture. The aim of this book is to increase knowledge about the relationship between Africa and international law. Notwithstanding, several substantive law areas are not covered: they include the protective regimes against child soldiers, small arms and light weapons; land mines; mercenarism; and terrorism; and those related to the international law of communications, decolonisation, intellectual property and maritime affairs. These and other topics must be explored elsewhere.

This book cannot come at a more important time. While international legal discourse has been captured by the challenges of terrorism since September 11, 2001, there are clear signs that other issues which predominated political and intellectual interaction are returning to the fore. Political interest has been signalled from the outside by, for instance, the crucial creation of the African Commission by the former British Prime Minister, Tony Blair; from within, the continent has experienced its most significant institutional change since 1963 with the replacement of the Organisation of African Unity (founded in 1963) by the African Union (2002). These international shifts—along with those taking place in sub-regional contexts, particularly in the peace, security and multilateral governance spheres, with, for example, the Economic Community of West African States and the Southern African Development Community—deserve critical study in their own right, because they have effectively mapped a new landscape for addressing the key political, economic and social questions of Africa in our time. Chapters within this volume explore whether these institutional developments are mere chimeras or whether they indicate concrete change for Africa and, further afield, for international law in general.

This explorative exercise is plentiful because African states, institutions and peoples have readily engaged key normative questions, such as the codification of a right of humanitarian intervention in the Economic

Community of West African States Protocol Establishing the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. The re-conceptualisation of the notion of universal jurisdiction in the form of the 2000 Cairo–Arusha Principles—which received less notice than the Princeton Principles on Universal Jurisdiction (adopted a year later)—serves as yet another example. Important jurisprudential matters also have arisen in this respect, most notably in the creation of the Special Court for Sierra Leone as a mixed tribunal sharing sovereign functions with the United Nations, and the warrant issued by the Special Court for Charles Taylor while he was the sitting President of Liberia, which fall within the general tide of International Criminal Law developments since the rulings on Augusto Pinochet by the British House of Lords in December 1998 and March 1999. Additionally, the successful challenge to Belgium's revolutionary legislation on universal jurisdiction occurred at the instigation of the Democratic Republic of the Congo (DRC) before the International Court of Justice (ICJ). The DRC's 1999 action against Uganda in the ICJ helped confirm and evolve the *jus ad bellum* and *jus in bello*. Over the past ten years there have been key treaty law and judicial developments, such as the historic adoption of the African Union's Women's Protocol to the African Charter on Human and People's Rights in July 2003, which obligates states to mainstream women's rights in nearly every facet of society, and the operationalisation of the African Court on Human and People's Rights in 2006, which provides a critical forum for individuals to seek redress for human rights violations. Throughout Africa the notions of state sovereignty, democracy and the absolute prohibition on interference in the internal affairs of states accepted throughout the world (see the new Constitutive Act of the African Union) are now undergoing revolutionary change, as are traditional conceptions of protecting refugees and internally displaced persons who find themselves in harm's way.

Taken together, these and other developments place Africa—the continent with the largest number of states—at centre stage in confirming the status and nature of existing norms of international law and at the cutting edge of norm creation. This volume is a modest effort at documenting this phenomenon.

III. OVERVIEW OF THE BOOK

This book is divided into two major parts. Part I, titled 'Human Rights, Intervention and Armed Conflict', considers Africa's contribution to the development of international human rights law and doctrine, and the law and policy of intervention and armed conflict. Part II, titled 'Governance, Sovereignty and Development', considers the continent's role in the evolution of international law norms and doctrine on governance, sovereignty and development.

In chapter one, Adrien Katherine Wing surveys some of the most pressing problems affecting African women. She assesses the potential role of the African Union's Women's Protocol to the African Charter on Human and People's Rights to determine whether its special protections will provide any solutions to the myriad problems African women face. Wing's conclusion is that the Women's Protocol and the African human rights protective regime are innovative and trend-setting, but useful only in theory if not instituted at the grassroots level where African women suffer most.

In chapter two, Pacifique Manirakiza examines the contributions of African states and traditional institutions to the development of international criminal law. He analyses African approaches to penal justice for high crimes and argues that, because of the slowness of the international community's approach to justice, Africa has resorted to time-proven cultural and traditional mechanisms, such as the South African Truth and Reconciliation Commission and Rwanda's *Gacaca* courts, to deal with atrocities in a more culturally sensitive and global way. In both mechanisms, mediation efforts of traditional and community leaders enable victims and perpetrators along with the whole community to solve their problems. The chapter demonstrates how these alternative forms of justice and reconciliation have contributed to the development of international criminal law while simultaneously showing that Africa is not simply an object for this branch of law. It contends that in post-conflict societies where massive atrocities have been committed, local and traditional mechanisms, while not perfect, are well suited to bring about restorative justice.

In chapter three, Francis M Deng relies on his years of experience as former Special Representative of the United Nations Secretary-General on Internally Displaced Persons to examine the development of non-binding international norms, particularly the norm of internal displacement, and Africa's role as both an object and subject of norm creation. The chapter contemplates the dichotomy between normative development and implementation, focusing on the adoption of national legislation and policy on the Guiding Principles on Internal Displacement, and the interaction between the needs of African states and the demands of the international community to deal with African displacement. The chapter concludes that Africa has played both a theoretical and a practical role in the development of UN Guiding Principles on Internal Displacement, the creation of which was necessitated by a global crisis, which affects Africa the most, but has been recognised by the international community only since the late 1980s.

In chapters four and five, Jeremy I Levitt and Dino Kritsiotis consider the extent to which African states and institutions have contributed to the evolution of the *jus ad bellum* and *jus in bello* respectively. Chapter four traces the development and impact of intervention by sub-regional and

regional organisations in safeguarding democracy and human rights in Africa on the wider corpus of international law. Chapter five assesses the impact of warfare on the evolving character of African state systems, and the innovative normative solutions forwarded by African states and organisations to advance humanitarian law and preserve democracy as the best means to mitigate conflict and foster peace and security. Both chapters conclude that African states and institutions have made measurable and normative contributions to the law of the use of force and armed conflict.

Chapter six by J Peter Pham provides a concise snapshot of some of the most creative constitutional arrangements that African states have designed to meet the monumental task of democratic governance in complex and largely multi-ethnic polities. Its several case studies address the particular challenge of governance and explore another recent trend in African constitutionalism: the role of regional and sub-regional groupings of states as guarantors of democratic governance in their own states and beyond. The chapter concludes that, overall, Africa's new and emerging constitutional architectures may well prove to be the continent's signal contribution to twenty-first-century international law by pointing the way to juridical solutions to daunting national and communitarian conflicts.

In chapter seven, Emeka Duruigbo provides a critical examination of the practice of shared sovereignty arrangements in Africa, where states surrender a measure of sovereignty or sovereign powers ostensibly for the common good. The chapter considers the future of shared sovereignty as another instrument in the small arsenal of tools embraced by many domestic and international policy-makers seeking to mitigate conflict, combat impunity and fight poverty and underdevelopment. The chapter concludes that Africa's contributions to the practice of shared sovereignty are particularly evident in international criminal justice through the Special Court for Sierra Leone and in international project finance through the Chad–Cameroon Oil Pipeline Project.

In chapter eight, Joel H Samuels explores the contributions of African states to international boundary dispute law over the past half-century. Although initially carved up by Europeans in ways that ignored traditional ethnic and linguistic boundaries, Africa's experience in post-colonial boundary dispute resolution has been, on the whole, far less contentious than that of non-African nations. The chapter examines several African boundary dispute cases and mechanisms used to resolve territorial disputes as well as the doctrine and practice they have generated. The chapter concludes that African states have shown that resort to international tribunals can lead to the meaningful resolution of boundary disputes; these examples have enriched the law governing territorial disputes and helped to ensure that future conflicts will rely on well-established principles and legal norms.

Chapter nine, by Maxwell Chibundu, concludes the volume and examines the ways in which African states have impacted on, and been impacted by, the development of the international political economy from the decolonisation era to the present. Chibundu argues that, in the 1990s, after socialism faded as a competing theory of governance, African leaders added their voices to the new neo-liberal international political economy that sought to constrain the reach of the state in the economic sphere and to regulate the internal political relationship between the state and its subjects. Chibundu uses the New Partnership for African Development (NEPAD) as a lens for exploring the contributions of African states to the neo-liberal order. He concludes by reflecting on the ways in which the policies of African states in the private and public spheres reinforce or alter the principles and practice of the international neo-liberal order, and cautiously argues that NEPAD is fully engaged as a transcontinental participant in the process of the progressive development of international law.

Part I

Human Rights, Intervention and Armed Conflict

1

Women's Rights and Africa's Evolving Landscape: The Women's Protocol of the Banjul Charter[*]

ADRIEN KATHERINE WING

I. INTRODUCTION

WORLDWIDE MEDIA HAVE frequently focused on the bleak plight of African women. They suffer from a myriad of civil, political, economic, social and cultural problems. This chapter illustrates that Africa has recently made an important doctrinal contribution to enhancing the international human rights of women by enacting the Women's Protocol[1] to the African Charter on Human and Peoples' Rights (the Banjul Charter).[2] The Women's Protocol, which came into effect in November 2005,[3] is the first regional human rights protocol devoted specifically to women's rights. Moreover, it provides the first explicit mention of abortion in international law.[4] Additionally, it is the first human rights treaty to explicitly call for the legal prohibition of female genital surgery (FGS).[5] Despite these significant normative contributions, it remains to be seen whether the Women's Protocol will be able to curb discriminatory practices affecting African women.

[*] Many thanks to my excellent research assistant, Ozan Varol. Parts of this chapter were adopted from Adrien Katherine Wing and Tyler Murray Smith, 'The New African Union and Women's Rights' (2003) 13 *Transnational Law and Contemporary Problems* 33.

[1] See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003) <http://www.africa-union.org/home/Welcome.htm> (accessed 13 December 2005) [Women's Protocol].

[2] See African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3/rev.5 (1982) 21 ILM 58 [Banjul Charter].

[3] The Women's Protocol came into force on 27 November 2005, just over one month after the requisite fifteenth ratification, by Togo. See 'Women and Gender; Women's Rights Protocol Comes into Force' *Africa News* (5 December 2005). Mozambique ratified the Protocol right after Togo in early December. See 'Mozambique Assembly Ratifies Protocol on Rights of Women' (2005) *Africa News*, 8 December.

[4] See text accompanying n 150 below.

[5] See text accompanying n 135 below.

To provide proper context, part II of the chapter first discusses some of the inequalities and human rights challenges African women face. While extended discussion is beyond the scope of the chapter, it will highlight a list of the most pressing problems and illustrate the overwhelming nature of the task confronting the Women's Protocol. Part III then analyses the potential capabilities of the Women's Protocol for alleviating these dire conditions.

II. CURRENT CONDITION OF AFRICAN WOMEN'S RIGHTS

Women play vital roles in all aspects of African communities. Nevertheless, they continue to be repressed by a highly patriarchal culture, denied equal education, discriminated against in the workplace, excluded from economic activities and given legal minority status.[6] Also, 'women of color may be simultaneously dominated within the context of imperialism, neocolonialism, or occupation as well as local patriarchy, culture, and customs'.[7]

When African states adopt and ratify international conventions and declarations that promise to protect women's rights—protections which are sometimes even mirrored in the states' own constitutions—the conventions and declarations fail to penetrate deeply rooted patriarchal and predominantly patrilineal African cultures.[8] Thus, in spite of the numerous instruments in effect in many African states that promise to protect women's rights, cultural barriers at every legal juncture prevent their enforcement. Hence, while Africa's contribution to international law is notable, its operationalisation of the law remains a challenge. A number of African nations have ratified international legal conventions protecting women, but few have enacted implementing laws.[9] Even where the necessary implementing legislation is in place, many women are unaware of their protections.[10] Finally, the fact that the instruments incorporate African customary law—a patently patriarchal structure—often weakens the protections these instruments afford to African women.

[6] See generally Adrien Katherine Wing and Tyler Murray Smith, 'The New African Union and Women's Rights' (2003) 13 *Transnational Law and Contemporary Problems* 33.

[7] Adrien Katherine Wing, 'Introduction: Global Critical Race Feminism for the Twenty-First Century' in Adrien Katherine Wing (ed), *Global Critical Race Feminism: An International Reader* (New York, NYU Press, 2000) [hereinafter GCRF] 12.

[8] Wing and Smith, n 6 above, at 38.

[9] Juliette Ayisi Agyei, 'African Women: Championing Their Own Development and Empowerment—Case Study Ghana' (2000) 21 *Women's Rights Law Report* 117, 120.

[10] Takyiwaa Manuh, 'Women in Africa's Development: Overcoming Obstacles, Pushing for Progress', *Africa Recovery Online*, Briefing Paper, No 11 (New York, UN Department of Public Information, 1998) 12.

The horrific human rights abuses against African women affect their civil and political rights as well as their economic, social and cultural rights. While there are many such violations, here I briefly highlight the negative effects of customary law, religious law, domestic violence, FGS, lack of reproductive rights, HIV/AIDS, slavery, discrimination in education, economic disparity, women as refugees and discrimination in political participation.

A. Customary Law

During the era of colonial rule in Africa, the governing power, usually England, France, Belgium or Portugal, imposed its legal system over existing African customary law.[11] As a result, African states often have two parallel legal systems—customary law, based on the generally unwritten laws of an ethnic group, and formal or statutory law, based on the former colonial government's legal system.[12] Today, the customary laws of different African ethnic groups throughout the continent primarily consist of deeply held practices in several areas, including family law, inheritance law and property law.[13]

Many African states incorporate customary law in their modern constitutions and statutes.[14] Consequently, customary law continues to thrive today and to perpetuate, reaffirm and institutionalise discrimination against women on various fronts—including marriage, property rights, reproductive rights, domestic violence, access to education, economic independence and political participation.[15]

Under customary law in effect in most African societies, women do not own property.[16] In fact, some forms of African cultural marriage subordinate women as property to be inherited and traded; these forms include 'leviratic' marriage or widow inheritance, whereby a man marries his brother's widow; 'sororate' marriage, whereby a wife who left her marriage or died before giving birth must be replaced by her sister; and child marriage, whereby infant and adolescent females are engaged to

[11] Wing and Smith, n 6 above, at 38.

[12] Kenneth Bartschi, 'Legislative Responses to HIV/AIDS in Africa' (1995) 11 *Connecticut Journal of International Law* 169, 194.

[13] See generally Leon Shaskolsky Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London, Frank Cass & Co, 2000).

[14] South Africa Constitution (adopted 8 May 1996, amended 11 October 1996), Art 30 <www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1>.

[15] See, eg, L Amede Obiora, 'New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations' (1995) 28 *Indiana Law Review* 575, 587–90.

[16] See, eg, Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal* 381 (discussing property rights in Kenya).

men picked by their parents.[17] Most marriages involve a payment to the bride's family of a bride price, or *lobolo*,[18] a practice which many believe exemplifies the treatment of African women as marital property. A major area of marriage-related contention is polygamy, specifically polygyny—a man having more than one wife.[19] Debate exists as to whether these and other customs should be retained as an integral part of African culture or whether African governments should strictly ban them as discriminatory practices against women.

B. Religious Law

The practice of most religions around the world, including in Africa, is deeply patriarchal—whether those religions are animist, Christian, Jewish or Muslim. Due to space constraints, I will limit my discussion to an analysis of Islam.[20] Pursuant to Islamic *sharia* law, a Muslim woman must marry a Muslim man, but a Muslim man can marry a Muslim, Christian or Jewish woman.[21] A Muslim woman inherits only a half-share compared to a man of the same level (ie a sister only inherits half the share inherited by her brother),[22] and must have a male guardian to do so.[23]

Media attention highlighted several cases involving human rights violations in Nigeria, where Muslim women have been punished for violating *sharia* laws. For example, in certain Muslim-dominated federal states, Muslim women who have had babies out of wedlock have been sentenced to be stoned to death for violating the *sharia* adultery rules.[24] Islam requires people accused of adultery to be confronted by four male witnesses; a woman who gives birth outside of marriage, however, is presumed guilty.[25] Some women's sentences have been commuted,[26] yet others still face punishment, despite the fact that Nigerian President Olusegun Obasanjo has made clear that state

[17] Fitnat Naa-Adjeley Adjetey, 'Religious and Cultural Rights: Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture' (1995) 44 *American University Law Review* 1351, 1360.

[18] Adrien Katherine Wing and Eunice P De Carvalho, 'Black South African Women: Toward Equal Rights' (1995) 8 *Harvard Human Rights Journal* 57, 66.

[19] Adrien Katherine Wing, 'Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century' (2001) 11 *Journal of Contemporary Legal Issues* 811, 844 ['Polygamy'].

[20] For a discussion of Christianity, see Adjetey, n 17 above, at 1365.

[21] Wing, n 19 above, at 841.

[22] *Ibid*.

[23] *Ibid*.

[24] See, eg, Silvia Sansoni, 'Saving Amina' (2003) (March) *Essence* (New York) 156.

[25] *Ibid*.

[26] Madhavi Sunder, 'Piercing the Veil' (2003) 112 *Yale Law Journal* 1399, 1405.

statutes permitting imposition of *sharia* law violate the Nigerian Federal Constitution.[27]

Nevertheless, religious law is an improvement over customary law in several areas that relate to women's rights. For example, Islamic *sharia* law limits a man to only four wives, whom he must treat equally; there is no such limitation under customary law.[28] Under both *sharia* and customary law, however, a woman remains limited to one husband.[29] Even though African/Islamic religious law is an improvement over African customary law, religious and customary law are closely intertwined.[30] As such, any efforts aimed at improving women's rights must recognise this relationship.

C. Domestic Violence

Customary and religious perceptions of women as marital property in Africa contribute to domestic abuse at the will of the male. Some states, such as South Africa, have admitted that violence against women is very high, yet it remains seriously under-reported.[31] In an attempt to deal with the problem, South Africa's Constitution grants the right to be free from public and private violence.[32] Nevertheless, customary cultural norms permitting violence against women make it very difficult to eliminate domestic violence.

Customary law in many societies permits rape within marriage because all sex within marriage is considered consensual.[33] To make the situation even worse, women face obstacles in reporting incidences of rape to officials. For example, some courts invoke a cautionary rule—a rule which assumes that a female rape complainant is falsely accusing the man.[34] Finally, due to the importance attached to virginity in African culture, rape victims are considered less marriageable.[35]

[27] Sansoni, n 24 above, at 156.

[28] 'Polygamy', n 19 above, at 812, 839.

[29] *Ibid* at 841.

[30] See Abdullahi A An-Na'im *et al*, 'Cultural Transformations and Human Rights In Africa: A Preliminary Report' (1997) 11 *Emory International Law Review* 287, 332.

[31] Paula C Johnson, 'Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa' (1998) 1 *Journal of Gender Race and Justice* 472, 496–7.

[32] See South Africa Constitution, n 14 above, Art 12(1)(c).

[33] Adjetey, n 17 above, at 1359.

[34] Penny Andrews, 'Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law' (1999) 8 *Temple Political and Civil Rights Law Review* 425, 454.

[35] Oluyemisi Bamgbose, 'Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl' (2002) 10 *University of Miami International and Comparative Law Review* 127, 137 at n 25.

D. Female Genital Surgery

Female genital surgery (FGS), also known as female circumcision or female genital mutilation, is among the best-known reproductive health issues confronting African women. FGS is symbolically linked to the female's passage into adulthood/womanhood and is an important part of a young woman's initiation and rite of passage.[36]

The practice has drawn much attention from human rights institutions, such as the United Nations, and non-governmental organisations for its serious potential impact on the health and well-being of African females. In the short term, FGS often results in post-operative shock, haemorrhaging and infections.[37] Long-term effects of FGS include infertility, chronic infections, painful sexual intercourse, menstruation complications and obstructed childbirth.[38] FGS is often performed in unhygienic conditions, adding further complications to women's health.[39]

The occurrence of FGS varies geographically. Thus, its prevalence ranges from 60 per cent to 90 per cent, in Ethiopia and Nigeria respectively, to relatively insignificant occurrences in South Africa and Zimbabwe.[40]

E. Reproductive Rights

Today, many African women often lack the ability to make decisions with respect to all issues involving reproductive autonomy—including 'sexuality, pregnancy, childbearing, and formation of families'.[41] Polygamy,[42] bride price,[43] arranged marriages, widow inheritance, sister marriages, child marriages,[44] FGS[45] and other customs affect reproductive autonomy. Some states, such as South Africa, have made it clear that women have reproductive choices, including legalised abortion.[46] Nonetheless, in general, African women's reproduction-related health problems have not been adequately addressed.[47] Finally, domestic practices such as spousal veto,

[36] *Ibid* at 132.
[37] Adjetey, n 17 above, at 1362.
[38] *Ibid*.
[39] Bamgbose, n 35 above, at 132.
[40] *Ibid* at 134.
[41] Adjetey, n 17 above, at 1351.
[42] See n 19 above and accompanying text.
[43] See n 18 above and accompanying text.
[44] See n 17 above and accompanying text.
[45] See II.D above.
[46] Audrey Haroz, 'South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International Human Rights to Black South African Women' (1997) 30 *Vanderbilt Journal of Transnational Law* 863.
[47] Jok Madut Jok, 'Health Consequences of War and Health Relief: Challenges of Assessment' (1993) 21 *UFAHAMU* 50, 55.

which affords a husband the right to forbid his wife from seeking family planning advice or receiving health care, continue to deny African women their reproductive rights.[48]

F. HIV/AIDS

Lack of control over reproductive choices is a particularly grave concern for African women, given the prevalence of HIV/AIDS on the continent. Africa and its people have suffered more than any other region from the HIV/AIDS pandemic.[49] While at first glance HIV/AIDS itself appears non-discriminatory, both the disease and its economic and social effects are particularly harmful to African women. According to recent studies, women are biologically more susceptible than men to HIV infection through intercourse.[50] Very young women, victims of rape and women who have undergone FGS are even more susceptible to HIV due to micro-lesions that might form during intercourse and serve as entry points for the virus.[51] Women also bear the risk of getting infected by men who have multiple partners and/or wives.[52]

Due to their economic dependence on their husbands, African women are in a weak bargaining position to ask their men to wear condoms.[53] Compounding the problem is the fact that 'African women with AIDS tend to die within six months of diagnosis due to a lack of adequate medical care'.[54] As such, it is unrealistic for most HIV-infected women to pursue human rights claims in such a short period of time.[55]

Those women who are not infected with HIV/AIDS are also directly affected by the disease. Because African women are responsible for taking care of the sick at the family level, they bear the heavy burden of caring for the afflicted.[56] Moreover, most women do so without basic necessities, such as easy access to sterile devices, and water to keep their patients clean.[57] Furthermore, women who have been widowed by an HIV/AIDS-infected husband are left to care for their children without

[48] Adjetey, n 17 above, at 1358.
[49] Peri Alkas and Wayne Shandera, 'HIV and AIDS in Africa: African Policies in Response to AIDS in Relation to Various National Legal Traditions' (1996) 17 *Journal of Legal Medicine* 527, 527.
[50] See Alexandra Arriaga, 'HIV/AIDS and Violence Against Women' (2002) 29 *Human Rights* 18.
[51] *Ibid.*
[52] Joy K. Asiema, 'Gender Equity, Gender Equality, and the Legal Process: The Kenyan Experience' (2000) 10 *Transnational Law and Contemporary Problems* 561, 576.
[53] Bartschi, n 12 above, at 194.
[54] *Ibid.*
[55] *Ibid.*
[56] Asiema, n 52 above, at 576.
[57] *Ibid.*

a viable income or any economic alternatives.[58] When the women die, grandmothers or other female children often shoulder the burden of caring for the children.[59] Finally, the strong stigma associated with HIV/AIDS in Africa may isolate those women who care for the sick from sharing their experiences with others, including family members.[60]

G. Slavery

Sadly, the practice of slavery still persists in parts of Africa. For example, in 1997, 90,000 descendants of slaves in Mauritania still worked for their owners without wages and lacked the capacity to marry without their owners' permission.[61] Slavery also continues to exist on a large scale in the Sudan.[62]

A lesser-known example of slavery is occurring in Ghana, where it is reported that tens of thousands of teenage and pre-teenage girls are indentured as sex slaves and unpaid servants by voodoo priests to atone for the sins of the girls' families against traditional African spirits.[63] The practice is known as *Trokosi*, meaning 'slaves of the gods'.[64] Many times, the girls offered as sex slaves were not even born when their families committed the offence.[65] Reliance on international conventions banning all forms of slavery, as well as the Ghana Constitution, which also flatly bans slavery,[66] has not resulted in the eradication of *Trokosi*.

H. Education

Women face considerable discrimination in access to education because they are expected to stay at home and tend to the children and the

[58] For more information on the impact of AIDS in Africa, see World Bank website <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTAFRHEANUTPOP/EXTAFRREGTOPHIVAIDS/0,,contentMDK:20415756~menuPK:1830800~pagePK:34004173~piPK:34003707~theSitePK:717148,00.html>.

[59] Asiema, n 52 above, at 575.

[60] *Ibid* at 576.

[61] A Yasmine Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law' (1999) 39 *Virginia Journal of International Law* 303, 321.

[62] *Ibid* at 322.

[63] Sam Kiley, 'Child Slaves Used by West Africans to Appease Spirits' (1996) *The Times* (London), 17 September, p 11.

[64] Amy Small Bilyeu, 'Trokosi—The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs Human Rights' (1999) 9 *Indiana International and Comparative Law Review* 457, 466.

[65] *Ibid* at 472.

[66] The Constitution of the Republic of Ghana (approved 18 April 1992) ch 5, Art 16(1), available at <www.ghana.gov.gh/living/constitution/chapter05.php>.

elderly.[67] Customs often favour educating male children over female children, and poverty may limit the number of children who can be educated.[68] When women do overcome barriers to higher education, they are greeted with further gender inequalities. For example, in October 2000, a committee appointed by the Vice-Chancellors of Kenya's public universities concluded that the problem of sex for marks between male lecturers and female students is rife. The committee recommended that rules be established to protect students from sexual harassment.[69]

Due to these and other barriers African women face in obtaining education, a large disparity exists between the education levels of African men and African women. For example, studies show that:

> 55% of [African] men and only 37% of [African] women are literate. Of girls between the ages of fifteen and nineteen, only 41% are in the primary and secondary levels of school. For each woman, three men are in tertiary education. Women also have less access to adult education and training.[70]

The end result is that African women have only 57 per cent of the educational opportunities available to African men.[71]

I. Economic Disparity

Even though much of African women's work has a positive economic impact, their contributions are rarely acknowledged, and they are too often denied equal benefits with men. Perhaps the largest area of economic activity in which African women are discriminated against is the agricultural sector. In sub-Saharan Africa, women constitute about 47 per cent of the total agricultural labour force.[72] This constitutes roughly 80 per cent of the active female labour force in Africa.[73] Indeed, in the developing world, land is the most valuable economic resource; however, due to discriminatory inheritance laws that are in place in these societies, a great disparity exists between male and female access to land. Moreover, governments do not recognise the contribution that African women make to the agricultural economy, as agricultural extension programmes are usually geared towards men.[74] If African women

[67] Asiema, n 52 above, at 571–2.
[68] *Ibid*.
[69] *Ibid* at 572.
[70] Janet M Sawaya, 'Rights Education as a Means of Economic Empowerment for Women in Sub-Saharan Africa' (1995) 2 *Georgetown Journal on Fighting Poverty* 329, 331.
[71] Adjetey, n 17 above, at 1377.
[72] Agyei, n 9 above, at 118.
[73] *Ibid*.
[74] Michelo Hansungule, 'The African Charter on Human and Peoples Rights: A Critical Review' (2001) *African Yearbook of International Law* 265, 325.

were to gain sufficient access to land, their economic status would be significantly increased.[75]

The rest of the African labour market also favours men to the exclusion of women, making women dependent upon men for financial support for themselves and their children.[76] The cultural duty of women to bear children further binds them to indentured domestic servitude. Women are left with no viable options after leaving abusive relationships, which can flourish under custom where male heads of the household are permitted to dominate and physically chastise their women. As a result, the collapse of the economic system affects women disproportionately more than men.[77]

In sub-Saharan Africa, women's economic status is lower than men's and is likely to decline further. It has been reported that in developing countries, women's workdays average between 12 and 18 hours, in stark comparison to men's workdays, which average between 8 and 12 hours.[78] Nevertheless, despite their bearing the burden of the workload, the women of developing countries are systemically discriminated against in the workforce and relegated to traditionally domestic roles. Faced with such situations, women may resort to prostitution.[79]

Despite their exclusion from the economic sector, African women are the key to unlocking the continent's economic future. More emphasis should be placed on the development and encouragement of female workers and women-run enterprises.[80] Studies in East Africa have also shown that women are better managers than men are.[81] 'Involving women in the development process is likely to have a greater socioeconomic impact on the continent.'[82] Therefore, improving gender equality not only promotes the stable growth and development of the African states' economic systems, but also provides social and economic benefits to African women.

[75] Radhika Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2002) 34 *George Washington International Law Review* 483, 503.

[76] Hansungule, n 74 above, at 325.

[77] *Ibid.*

[78] Jodi Jacobson, 'Worldwatch Institute, Gender Bias: Roadblock to Sustainable Development' *Worldwatch Insitute* (Washington, DC, 1992), Paper No 110 at 15.

[79] Claude Welch Jr, 'Human Rights and African Women: A Comparison of Protection Under Two Major Treaties' (1993) 15 *Human Rights Quarterly* 549, 556.

[80] Peter Nyikuli *et al*, 'Economic Development and Investment in Sub-Saharan Africa' (1999) 30 *Law and Policy in International Business* 686, 689.

[81] *Ibid.*

[82] Peter Nyikuli, 'Unlocking Africa's Potential: Some Factors Affecting Economic Development and Investment in Sub-Saharan Africa' (1999) 30 *Law and Policy in International Business* 623, 632.

J. Refugees

As Francis Deng demonstrates in chapter three, the situation of displaced persons is one of Africa's greatest problems. Indeed, 'more than fifty percent of the world's displaced population live in Africa'.[83] It is estimated that women constitute nearly 80 per cent of these displaced people.[84] Not only do African women constitute the majority of both internally displaced and external refugee populations, but they are also disproportionately disadvantaged by being in these positions.[85]

Displaced and refugee women are subject to numerous human rights atrocities, such as rape; lack of physical security; lack of access to health services; and lack of economic independence or viability. The 1994 Rwandan tragedy is an illustration. According to the Special Rapporteur of the United Nations Commission on Human Rights, rape was used as a weapon of genocide and inflicted in some 250,000 to 500,000 cases: 'Rape was the rule and its absence the exception.'[86] Moreover, women and children are often the first victims of conflicts—they are widowed and orphaned by dying soldiers and left in war-torn countries without any means of economic viability or physical protection.[87] Compounding these burdens of displaced and refugee women are their familial burdens of caring for the sick and the elderly, tending to the children, maintaining the household and providing food and water, among others.[88]

What affects displaced women even more is the limited grounds on which an asylum grant to a potential host nation is generally considered.[89] Under the prevailing standards, genuine refugees are often dismissed as 'economic migrants' and denied refugee status and protections.[90] Generally, displaced persons must meet narrowly defined standards of political persecution to qualify for refugee status—standards that rarely match the situations of the large majority of displaced persons.[91]

[83] J Oloka-Onyango, 'The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa' (1996) 24 *Denver Journal of International Law and Policy* 349, 393–4.

[84] *Ibid* at 379.

[85] *Ibid* at 350.

[86] Adrien Katherine Wing and Mark Richard Johnson, 'The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries' (2002) 7 *Michigan Journal of Race and Law* 247, 277.

[87] See Gwendolyn Mikell, 'African Women's Rights in the Context of Systemic Conflict' (1995) 89 *American Society of International Law Proceedings* 484, 490.

[88] Oloka-Onyango, n 83 above, at 383–4.

[89] *Ibid* at 361.

[90] *Ibid* at 365.

[91] Linda Dale Bevis, '"Political Opinions" of Refugees: Interpreting International Sources' (1988) 63 *Washington Law Review* 395, 396.

K. Political Participation

The human rights issues raised in this chapter contribute to the vast under-representation of African women in the political arena. African women have not been adequately represented in national or local electoral bodies either. Many African countries have women's ministries, which are not empowered with any real authority and are invariably under-funded.[92] Some countries, such as South Africa, have clauses in their constitutions that forbid gender discrimination; however, constitutions in other countries, such as Zimbabwe, do not mention gender discrimination.[93] As a result, women's issues often remain ignored or ghettoised.

Nevertheless, in recent years, there has been some groundswell of activity in political participation. The multi-party movement that gripped Africa during the late 1980s and early 1990s has galvanised women across the continent, leading to a bevy of political groups and spurring hundreds of women to run for office.[94]

Rwanda now has the highest percentage of women—49 per cent—in any parliament in the world.[95] Likewise, South Africa has demonstrated a commitment to improving the political representation of women. Through affirmative action, the African National Congress reserves one quarter of its parliamentary seats for women.[96] Finally, in 2005, Africa elected its first female president—Liberian Ellen Johnson-Sirleaf.[97] These notable, though still modest, gains in women's political representation could serve as momentum for Africa to build on women's political representation and rights advocacy.

L. Spirit Injuries

The culmination of the denial of women's rights in domestic and public spheres results in 'spirit injuries'—a critical race feminist term that

[92] Peter Harris and Ben Reilly (eds), *Democracy and Deep Rooted Conflict: Options for Negotiators* (Stockholm, International Institute for Democracy and Electoral Assistance, 1998) s 4.12.3 <http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/chapter_4.pdf#page=191>.

[93] See Paula C Johnson and Leslye Amede Obiora, 'How Does the Universal Declaration of Human Rights Protect African Women?' (1999) 26 *Syracuse Journal of International Law and Commerce* 195, 202.

[94] Stephen Buckley, 'Africa's Women Make Power Moves; Female Officials Fight Hostility to Break Grip of All-Male Rule' *Washington Post* (28 Feb. 1995) A1 <1995 WL 2080786>.

[95] United Nations Development Programme, 'Rwanda's Parliament Now Leads World in Gender Parity' (1 December 2004) <http://www.undp.org/dpa/choices/2004/march/rwanda_prfr.html> (accessed 13 December 2005).

[96] Wing and Johnson, n 86 above, at 302.

[97] See Jeremy I Levitt, 'First Female President Could Inspire Liberia' (2005) *Chicago Sun-Times*, Saturday 19 November. See also, 'Liberia; Celebrate in Joy and Gladness' (2005) *Africa News*, 12 December.

contemplates the psychological, spiritual and cultural effects of multiple assaults upon women.[98] As Patricia Williams states, racism, sexism and other forms of discrimination lead to the slow death of a person's soul or psyche.[99] The effects of spirit injury are 'as devastating, as costly, and as psychically obliterating as robbery or assault'.[100] Symptoms of spirit injury include 'defilement, silence, denial, shame, guilt, fear, blaming the victim, violence, self-destructive behaviors, acute despair/emotional death, emasculation, trespass, and pollution'.[101]

All of the human rights violations discussed in this section also result in spirit injuries upon the African women—injuries for which there are few, if any, remedies. Nonetheless, the spirit injuries inflicted upon African women as a result of decades of repression should not be taken as a sign that their cause is hopeless. Instead, they should serve as a reminder of the urgent need to address all violations against women so that African women, and the rest of Africa with them, can begin to heal their wounds.

This section has shown that African women face a daunting array of human rights issues. The next section examines whether the Women's Protocol will improve African women's rights.

III. WOMEN'S PROTOCOL OF THE BANJUL CHARTER

A. The Banjul Charter

The Banjul Charter was adopted in 1981 and entered into force in 1986.[102] The African Commission on Human and Peoples' Rights (the Commission), which was inaugurated in November 1987, is the Banjul treaty-based mechanism given the task of monitoring the implementation of the Banjul Charter.[103] Principally, 'the [Banjul] Charter sought to create a regional legal and policy framework for the protection and promotion of human rights in Africa', with the Commission fulfilling this mandate.[104]

[98] GCRF, n 7 above, at 14.

[99] See generally Patricia Williams, 'Spirit-Murdering the Messenger: The Discourse of Finger Pointing as the Law's Response to Racism' (1987) 42 *University of Miami Law Review* 127.

[100] *Ibid* at 129.

[101] Wing and Johnson, n 86 above, at 289.

[102] See Banjul Charter, n 2 above, Art 30

[103] See *ibid*, Art 30. See generally Udeme Essien, 'The African Commission on Human and Peoples' Rights: Eleven Years After' (2000) 6 *Buffalo Human Rights Law Review* 93.

[104] Chidi Anselm Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359, 362–3.

For many, the Banjul Charter and the Commission became the symbol of hope for some enforcement of human rights in Africa during the era of the Organization of African Unity (OAU). Some considered the Banjul Charter an example of the African commitment to finally 'take rights seriously', especially considering the relative lack of international pressure under which the Charter was adopted.[105] Some hailed the Charter as unique in its 'African conception of human rights taking cognizance of African culture, but at the same time … incorporat[ing] other conventional norms of human rights that are not typically or exclusively African'.[106] Nevertheless, others have questioned the effectiveness as well as the legitimacy of the Banjul Charter.[107] Indeed, just like the OAU and the African Union (AU) which has now replaced the OAU, the Banjul Charter was adopted without input from Africans at the grassroots level.[108]

Under the Banjul Charter's 'open-door policy,' any African state could ratify the Charter without questions asked of its human rights record.[109] Nonetheless, no state was eager to ratify a treaty that mandated the implementation of non-discrimination policies which that would shed light on its human rights record and seem to compromise its sovereignty. For that reason, a number of African states parties to the Convention for the Elimination of All Discrimination Against Women (CEDAW) ratified the Charter, but with extensive lists of reservations.[110] These reservations indicate the overall dissatisfaction of African states with CEDAW's outspokenness on women's rights.

In contrast to CEDAW, the context in which the Banjul Charter was adopted two years later suggests that its lack of bite with regard to women's rights was quite intentional. Only two countries entered reservations to the Charter, which suggests countries are satisfied with its much more ambiguous and conservative approach to women's rights.[111] Moreover, the 'tradition' and 'culture' provisions in the Banjul Charter, which aspire to preserve African tradition and culture, opened the floodgates for human rights violations[112] and institutionalised myriad practices of gender discrimination inherent in African culture.

[105] See Philip Aka, 'The Military, Globalization, and Human Rights in Africa' (2002) 18 *New York Law School Journal of Human Rights* 361, 396.

[106] Adjetey, n 17 above, at 1374.

[107] See, eg, Makau Mutua, 'The African Human Rights System in a Comparative Perspective' (1993) 3 *Review of African Commission on Human and Peoples' Rights* 5, 1.

[108] Wing and Smith, n 6 above, at 58.

[109] *Ibid.*

[110] See Sunder, n 26 above, at 1425–6, fn 129, which mentions Egypt, Libya, Morocco, Niger and Tunisia.

[111] Hansungule, n 74 above, at 283.

[112] See Banjul Charter, n 2 above, at Preamble, p 4 (stating that 'the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights').

Nonetheless, the Banjul Charter does make direct reference to gender issues. It has an anti-discrimination clause that includes 'sex'.[113] Moreover, Article 18 of the Charter calls on states to eliminate discrimination against women as 'stipulated in international declarations and conventions'. Nonetheless, the language of many sections of the Charter evidences ambiguous drafting with respect to gender. They begin in a gender-neutral fashion—'every individual'—but continue with only the male pronoun 'he'.[114] Elsewhere, the language remains gender-neutral.[115]

Even though the Banjul Charter prohibits discrimination on the basis of gender, the interpretation of what constitutes prohibited discrimination remains ambiguous.[116] This ambiguity allows individual states to promote and protect the morals and traditional values recognised by the community.[117] As this chapter has demonstrated, traditional community morals and values are often patriarchal and systemically oppressive towards women.[118]

It appears that some of the principles in Banjul Charter were, from the beginning, in conflict with one another, given its attempt to reconcile deep-seated African values—which arguably subjugate women's gender roles—and the emerging global values of non-discrimination and gender equality.[119] One commentator has stated that the Banjul Charter put women's rights in a 'legal coma'.[120] In many ways, the Charter embraced the OAU principle of protecting state sovereignty at the expense of women's rights.[121]

B. The Women's Protocol

The AU, which came into being in June 2000, has among its objectives the achievement of greater solidarity among the African states and peoples, defending its member states' sovereignty, accelerating development and promoting and protecting human rights, especially with respect to the Banjul Charter. In accomplishing these stated objectives, the AU is committed to the principles of promotion of gender equality, respect

[113] *Ibid*, Art 2.
[114] Eg Art 10(1) says 'every *individual* shall have the right to free association provided that *he* abides by the law' (emphasis added).
[115] Eg Art 10(2) says '*no one* may be compelled to join an association' (emphasis added).
[116] Adjetey, n 17 above, at 1374.
[117] *Ibid.*
[118] See part II above.
[119] Welch, n 79 above, at 554–5.
[120] *Ibid.*
[121] Hansungule, n 74 above, at 274.

for human rights and the promotion of social justice to ensure balanced economic development.[122]

The Women's Protocol, adopted in July 2003,[123] is the first regional human rights protocol devoted to women's rights. It is perhaps the most promising vehicle at the AU's disposal for promoting and protecting the rights of African women. The Preamble of the Women's Protocol acknowledges the international commitment to women's rights and Africa's acceptance of it, but also admits that 'women in Africa still continue to be victims of discrimination and harmful practices'.

One of the key objectives of the Women's Protocol is to bring about gender equality in the national constitutions and other laws of African states.[124] As this chapter has discussed, there are still countries, such as Zimbabwe, that do not have gender equality provisions in their constitutions.[125] Moreover, many nations that enshrine customary or religious practices in their national laws, particularly in the areas of family law, property and trusts and estates, overtly discriminate against women. The Women's Protocol requires that such countries alter their constitutions and national laws to ensure that women have equal protection of the law.[126]

Next we examine in detail these areas addressed in the Women's Protocol: customary practices, political participation, employment opportunities, health and reproductive rights, and other rights. Then we turn to discussion of the implementation of the Women's Protocol and whether it will make a contribution to women's rights on the continent.

i. Customary Practices

Changing laws on paper too often does little to change actual practices. Thus, the Women's Protocol requires that states use education and communication 'to modify the social and cultural patterns of conduct' which perpetuate sexual discrimination.[127] It encourages education for more women as well.[128] Undoubtedly, this will be a multi-generational task. Perhaps seeing women in positions of leadership, such as Ellen Johnson-Sirleaf, the newly elected President of Liberia, will be helpful.

[122] Preamble to Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc CAB/LEG/23.15 <http://www.africa-union.org/About_AU/Constitutive_Act.htm>.
[123] Women's Protocol, n 1 above.
[124] *Ibid*, Art 2(1)(a).
[125] See n 93 above and accompanying text.
[126] Women's Protocol, n 1 above, Art 8.
[127] *Ibid*, Art 2(2).
[128] *Ibid*, Art 12.

Females are entitled to a right to dignity under the Women's Protocol, which precludes exploitation or degradation.[129] It is difficult to know how the term 'dignity' will be interpreted. Rape, forced marriages and prostitution should certainly qualify as violations. A more radical interpretation might allege that polygamy and bride price should be included as violations of 'dignity' as well.

Like the South African Constitution, the Women's Protocol prohibits violence from both public and private sources.[130] Thus, Article 4(2)(a) would ban all rapes, including those by loved ones or soldiers during wartime. Moreover, the Women's Protocol undercuts the idea of women as property to be chastised or kept in check by male physical power.

The Women's Protocol also assists with the refugee problem discussed earlier[131] because it calls for women to have equal status with men in their refugee classification.[132] Children also benefit from this provision as they are usually in the physical care of women in refugee situations. According to the Women's Protocol, states must increase participation of women in the planning and management of refugee camps and post-conflict situations.[133] Since women constitute a large portion of the refugee population, it is important that their needs be directly communicated to the relevant authorities and addressed at all stages. A specific Article in the Women's Protocol deals with the need to protect women from armed conflict.[134]

The Women's Protocol is the first human rights treaty to explicitly call for the legal prohibition of FGS.[135] This ban includes medicalised forms as well, where FGS may be conducted in more hygienic conditions.[136] Thus, proponents of FGS will not be able to claim: 'it's just custom!' Signatory states will be violating international law if they fail to take action to abolish the practice.

The Women's Protocol does not ban polygamy but declares a preference for monogamy as the preferred form of marriage,[137] and states that women are entitled to keep their own names and nationality.[138] Under the Women's Protocol, females can also acquire property, which is against many customary practices,[139] and they have the same ability to separate or terminate marriages as their husbands and to obtain a share of marital property if the

[129] *Ibid*, Art 3.
[130] *Ibid*, Art 4(2)(a).
[131] See II.J above.
[132] Women's Protocol, n 1 above, Art 2(k).
[133] *Ibid*, Art 10.
[134] *Ibid*, Art 11.
[135] *Ibid*, Art 5.
[136] *Ibid*.
[137] *Ibid*, Art 6.
[138] *Ibid*.
[139] *Ibid*.

marriage breaks down.[140] This provision makes clear that deeply routed practices should not result in a denial of equal rights for women.

Under most customary law systems, when husbands die, all the marital property is taken by the husband's birth relatives, including the children, which often leaves the wife homeless, penniless and heartbroken.[141] The provisions of the Women's Protocol on widows' rights and inheritance contravene custom and make clear that widows retain custody of their children.[142] Moreover, widows have a right to inheritance and to 'continue to live in the matrimonial house'.[143] Finally, widows may remarry the person of their choice, a provision which undercuts forced marriage practices.[144] Thus, the Women's Protocol makes clear that females are entitled to the same rights as males in these matters.

ii. Political Participation

The Women's Protocol encourages female political participation through affirmative action, adopting an approach used by South Africa and other countries.[145] Once again, the example of the first African female president, from Liberia, may serve as a role model for women to run for public office, including the highest offices. Rwanda's achievement of near-gender parity in its parliament may be inspirational too. In reality, however, poverty and the rearing of large families, coupled with the need to work outside the home, leave most African women little time for political involvement of any kind. Even in the most developed countries, where households have fewer children and more resources, female participation in the political process can still be very difficult. Few women in any country have successfully competed for the highest levels of public office.

iii. Employment Opportunities

Since women need access to employment opportunities, the Women's Protocol requires states to promote access and equal pay.[146] It calls for a minimum age for work to prevent child labour exploitation.[147] Even though Africa is a poor continent, the same provision calls for paid pre- and post-natal maternity leave.[148] Employers are also required to

[140] *Ibid*, Art 7.
[141] See, eg, Cynthia Grant Bowman, 'Theories of Domestic Violence in the African Context' (2003) 11 *American University Journal of Gender Social Policy and Law* 847, 852 at n 19.
[142] Women's Protocol, n 1 above, Art 20.
[143] *Ibid*, Art 21.
[144] *Ibid*, Art 20.
[145] *Ibid*, Art 9.
[146] *Ibid*, Art 13.
[147] *Ibid*.
[148] *Ibid*.

give women the same benefits and allowances as men to break customary practices that treat women as excess labourers.[149]

iv. Health and Reproductive Rights

Article 14 of the Women's Protocol covers health and reproductive rights. Significantly, this Article provides the first explicit mention of abortion in international law.[150] Given the ongoing controversial nature of abortion in many countries around the world, it is noteworthy that the African continent has chosen to address the issue forthrightly. Moreover, customary practices around the world favour procreation. Yet the Women's Protocol authorises medical abortion in cases of rape and incest and to preserve the health of the mother from a dangerous or life-threatening pregnancy.[151] This Article holds special significance on the continent, as many African women have been raped and impregnated during various conflicts, including the genocides in Rwanda and Darfur, Sudan. Even though the Women's Protocol does not promote abortion rights on demand, it does go further than many national, regional and international laws on the subject.

v. Other Rights

Other provisions call for states to provide women with adequate food, water and housing.[152] Moreover, the Women's Protocol also mentions the third-generation rights to a healthy and sustainable environment as well as to sustainable development.[153] Finally, it includes special protections for the elderly and those with disabilities.[154]

C. Implementation of the Women's Protocol

Success in interpretation and implementation of the Women's Protocol will depend in large part on the new African Court on Human and Peoples' Rights ('the Court'), which has that authority under the Protocol.[155] The Court came into legal existence in December 2003, when Comoros became the 15th country to ratify the Protocol establishing the Court.[156]

[149] *Ibid.*
[150] See Chad Gerson, 'Toward an International Standard of Abortion Rights: Two Obstacles' (2005) 5 *Chicago Journal of International Law* 753, 753.
[151] Women's Protocol, n 1 above, Art 14(2).
[152] *Ibid,* Arts 15, 16.
[153] *Ibid*, Arts 18, 19.
[154] *Ibid*, Arts 22, 23.
[155] *Ibid*, Art 27.
[156] Mark Wojcik and Melinda Lord, 'Human Rights Law' (Summer 2004) 38 *International Lawyer* 499, 505.

Non-governmental organisations (NGOs) or individuals can file claims before the Court if the Court permits.[157] Eleven judges were sworn in on 2 July 2006.[158] Article 14 of the Protocol of the Court requires gender diversity in the judges, and there are several women among its members.[159] The Court is based in Arusha, Tanzania, and uses the facilities developed for the International Criminal Tribunal for Rwanda.

As it is starting with a fresh slate, the Court may possibly be 'a watershed moment in human rights enforcement in Africa'.[160] It may be able to enforce the Women's Protocol in a way that was not possible for the Commission, which did not have effective mechanisms to ensure compliance. It merely considered state reports under the Banjul Charter, collected documents, did studies, distributed information and communicated with states.[161] It is hoped that the Court will meet international standards of independence and responsiveness and still maintain its 'African' character.[162] If the Court is properly supported in its mission, the Women's Protocol will have a significant chance of being properly enforced.

D. Does the Women's Protocol Make a Contribution?

As the first regional treaty of its kind, the potential theoretical contribution of the Women's Protocol to international law and the achievement of women's rights is great. As has been stated, its codification of a right of abortion and explicit prohibition on FGS are truly unique. It will be interesting to see if or how other regions follow the African practice on these issues. If the Court begins hearing cases under the Women's Protocol in the near future, and if its judgments are respected by its member states, the long-term practical impact of the Women's Protocol will be significant. Unfortunately, most members of the African Union have not yet ratified the Women's Protocol, but, as signatory states, they still have a duty not to defeat the object and purpose of the Women's Protocol. Although the Protocol will not have binding authority in the majority of African states, even if all African nations were to ratify the Women's Protocol in the

[157] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 1 January 2004), Art 5 <http://www.achpr.org/english/_info/court_en.html>, accessed 13 December 2005.

[158] See Scott Lyons, 'The African Court on Human and Peoples' Rights' (2006) 10 *Africa Insight*, 19 September <http://www.asil.org/insights/2006/09/insights060919.html>.

[159] *Ibid.*

[160] *Ibid.*

[161] *Ibid.*

[162] *Ibid.*

near future, its reach could be limited if deeply rooted cultural, religious and institutional biases that perpetuate female inferiority do not evolve beyond the status quo.

A multi-dimensional approach is required for improving women's rights—incorporating legal and non-legal remedies and utilising individuals, civil society, NGOs, and corporate and governmental sectors in all African countries, whether they are parties to the Women's Protocol or not. If African leaders take seriously the issues that affect African women and men at a grassroots level, the Women's Protocol may have some hope of long-term success. Perhaps, with the adoption of the Protocol, the newly elected female President of Liberia, Ellen Johnson-Sirleaf, will shake up the 'boys' club' approach prevalent in the past. Unfortunately, female leaders in the Muslim world have not necessarily affected sexist practices in those countries.

IV. CONCLUSION

This chapter introduced a new and unique contribution by Africa to international law, and particularly women's rights: the Women's Protocol. It began with an overview of the issues currently facing women on the continent in the private and the public spheres in areas such as customary law, religious law, domestic violence, FGS, lack of reproductive rights, HIV/AIDS, slavery, discrimination in education, economic disparity, women as refugees, and discrimination in political participation. Next it discussed various aspects of the Women's Protocol in areas affecting customary practices, political participation, employment opportunities, health and reproductive rights and other rights, discussed the implementation of the Women's Protocol and considered whether it will make a contribution to women's rights on the continent.

The Women's Protocol has great normative value and the potential to make a viable contribution at the doctrinal and practical levels. Nevertheless, it is unlikely to have short-term practical effects due to Africa's deeply rooted patriarchal practices. Since change is likely to be glacial, it is important that the men who will continue to dominate African politics remember that women's issues are also men's issues, family issues and human issues. The neglect of women's rights has already imposed tremendous social, cultural, economic, developmental, and political costs on the continent. Accordingly, although the Women's Protocol is a weighty step in the right direction, African decision-makers will need to fully implement it and stop ignoring the hardened plight of African women if the continent is to develop in a sustainable fashion.

2

Customary African Approaches to the Development of International Criminal Law

PACIFIQUE MANIRAKIZA

I. INTRODUCTION

Crime is a phenomenon inherent to each community, and each community adopts mechanisms to prevent and, if necessary, suppress crime. Some communities, however, are unable to stop its downward spiral; hence there has been an unfortunate increase in the number of grotesque international crimes committed in weak states including genocide, crimes against humanity and war crimes.[1] Societies confronted with such massive atrocities often find it difficult to tackle the issues and pull themselves out of these crises. The international community therefore intervenes, offering to help them engage in peace and national reconciliation processes. In most cases, the international community initiates or ensures the mediation of peace negotiations. At the same time, it supports state criminal justice systems or sometimes participates in the implementation of judicial mechanisms aimed at bringing to justice those individuals who bear the greatest responsibility for committing serious crimes; thereby ending impunity.[2] State or international criminal justice systems based on individual responsibility, however, do not address or curb the most serious crimes nor provide an

[1] This was the case in Rwanda, former Yugoslavia, Sierra Leone, Burundi, Colombia, etc.

[2] See, for example, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) (the ICTY Statute was adopted on 25 May 1993 by the UN Security Council acting under Chapter VII of the Charter of the United Nations, UN Doc S/RES/827 (1993)); the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (ICTR) (the ICTR Statute was adopted on 8 November 1994 by the UN Security Council acting under Chapter VII of the Charter of the United Nations,

approach to avoiding them in the future. Moreover, international judicial mechanisms are often very costly[3]—since they operate at a distance, far away from the victims and communities affected by international crimes. In view of the inaccessibility of international criminal justice, and the inefficiency of state judicial apparatuses, their true contribution to the national reconciliation process is limited. This justifies, therefore, the search for new mechanisms ensuring a justice that is more transparent and that has a broader impact.[4]

This chapter aims to examine African approaches to contending with serious violations of international humanitarian law and human rights law in post-conflict environments. It will evaluate their merit in the struggle against impunity and the development of international criminal law by briefly highlighting the workings of the South African Truth and Reconciliation Commission and more fully scrutinising the *Gacaca* traditional justice system in Rwanda.

II. TRANSITIONAL JUSTICE MODELS: SOUTH AFRICA AND RWANDA

Rwanda and South Africa have gone through exceptionally challenging times. As genocide devastated Rwanda, a tiny and impoverished Central African country, in 1994, South Africa was emerging from the throes of the apartheid system. Both countries had to draw from their respective cultures to confront these human tragedies. South Africa adopted a form of accountability, both collective and individual, through the Truth and Reconciliation Commission, while Rwanda invested the traditional judicial institutions with the power to prosecute those most responsible for committing serious international crimes.

A. The South African Truth and Reconciliation Commission

For several decades, the political and legal system in place in South Africa was oppressive and justified the systematic suppression of human rights of black South Africans and other ethnic minorities living in the country. In the 1990s, following the liberation and election of Nelson Mandela as President, the African National Congress and other political stakeholders

UN Doc S/RES/955 (1994)); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, in *Report on the Planning Mission on the Establishment of the Special Court for Sierra Leone*, UN Doc S/2002/246, 8 March 2002, Annex II.

[3] For example, the ICTR costs from 1995 to the end of 2007 are estimated at 1,032,692,000 US dollars; see Fondation Hirondelle, 'Cost of the ICTR to Reach One Billion USD by the End of 2007', 9 May 2006.

[4] 'Justice must not only be done but it should be seen to be done.'

instituted a national reconciliation process, headed by the Truth and Reconciliation Commission (TRC), under the leadership of Archbishop Desmond Tutu.[5] The Commission presented itself as a non-judicial alternative seeking new bases of cohabitation and social harmony. Indeed, in a society confronted with massive and complex conflict leading to serious violations of universal values and serious social upheavals, the sole resort to classical mechanisms, such as criminal justice, would be of little assistance to correct the situation.[6] In South Africa, what was necessary was a body that could provide a neutral and impartial historical account of the atrocities committed during apartheid,[7] contribute to the fight against impunity, hear the complaints of victims and attempt to resolve them—in part or in whole, whenever possible—and, finally, formulate recommendations regarding appropriate measures to prevent further atrocities of the same sort.[8] Victims would then meet their offenders in a non-confrontational context, and could relate their suffering to a compassionate audience. Noticeably, hearings began with prayers and were punctuated with emotional and tearful moments, from victims as well as the President and other members of the Commission. As Archbishop Tutu now affirms, with some hindsight, the Commission was a 'forum where victims of the most egregious violence were given not just a national, but an international stage to tell of their experiences under the apartheid regime'.[9]

The South African Commission was not only interested in individuals but in state institutions, or civil society, as well. It sought to determine their respective responsibility in anchoring this system of serious and systematic human rights violations. The TRC therefore examined violations from a broader perspective, taking into consideration the whole historical, social, cultural and political picture, since this in fact is the context ensuring the proper environment and conditions for the perpetration of crime.[10] Without this situational framework, it is practically impossible to

[5] The TRC was established pursuant to the Promotion of National Unity and Reconciliation Act, No 34 of 1995.

[6] For Snyder and Vinjamuri, 'trials do little to deter further violence and are not highly correlated with the consolidation of peaceful democracy'; see Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003–04) 28(3) *International Security* at 17. For Professor Scharf, 'criminal prosecutions … which by their nature focus on individual liability, … fail to tell the whole story of abuses'; see Michael P Scharf, 'The Case for a Permanent International Truth Commission' (1997) 7 *Duke Journal of Comparative & International Law* 375 at 400.

[7] TRCs differ from the Commissions of historians: a TRC establishes the facts without consideration or interpretation; historians analyse and interpret the facts. That is why their truth is neither neutral nor transparent.

[8] Scharf, note 6 above, at 379.

[9] Desmond M Tutu, 'Reflections on Moral Accountability' (2007) 1 *The International Journal of Transitional Justice*, vol 6 at 6.

[10] Martti Koskenniemi, 'Between Impunity and Show Trials', *Guest Lecture Series of the Office of the Prosecutor*, The Hague, ICC, 5 August 2004, at 12–13.

grasp the truth fully and truly render justice to victims. The Commission therefore chose to confront the South African people and their institutions with their past, to draw lessons therefrom outside of the formal judicial framework, which at any rate was judged inadequate to understand the full breadth of the problem and to find appropriate solutions. The results were good, as stated by the TRC President recently: 'South Africa today stands as a model of merciful justice; of what can be achieved when enemies choose dialogue over violence.'[11]

B. *Gacaca* Courts and the Prosecution of International Crimes

There exists in Rwanda a traditional forum—*Gacaca*—where internal conflicts between family and community members are resolved with the aim of maintaining the cohesiveness and social harmony essential for the smooth functioning of all human communities. The elders of the hill, commonly called *Inyangamugayo*,[12] either of their own initiative or following a complaint, summon the wrongdoer and the victim of wrongdoing in order to settle the issue amicably. Originally, the *Gacaca* court had jurisdiction to hear local disputes over lands, pastures, family or contracts issues,[13] in short, to hear civil and criminal affairs of lesser importance, which were not complex in nature.[14] It should be pointed out, however, that criminal issues under modern law were treated as civil affairs.[15] Remedies owed to the victim by the guilty party are in kind or equivalent nature, but where a remedy is impossible, the victim is asked to forgive the wrongdoer. Moreover, the wrongdoer is generally required to pay a fine, often consisting of jugs of beer. To celebrate the recovered social peace, all members of the community, including the wrongdoer, his or her family, the *Inyangamugayo* judges, the victim and his or her relatives, share this beer.

Important criminal affairs were decided by customary tribunals under the jurisdiction of the *Mwami* (the King) or his subordinates, the *Abaganwa*

[11] Tutu, n 9 above, at 7.

[12] *Inyangamugayo* means people who repel dishonour. Literally translated, it refers to people of integrity and honesty (author's translation).

[13] Charles de Lespinay, *Valeurs traditionnelles, justice de proximité et institutions (Rwanda et Burundi),* online: <http://droit.Francophonie.org/acct/rfj/actu/11Lepin.htm>. See also Jean Bosco Iyakaremye, 'Les juridictions "Gacaca" ou un pis-aller à l'insoluble problématique de la répression du génocide au Rwanda' (2003) 1(3) *Le courrier juridique* 1 at 2–3.

[14] Professor Ntampaka maintains that 'traditional laws do not distinguish between public and private law or between criminal and civl law'; see Charles Ntampaka, 'Le gacaca: une juridiction pénale populaire', online: <http://droit. Francophonie.org/acct/rfj/actu/11Lepin.htm>.

[15] Felip Reyntjens, 'Le gacaca ou la justice du gazon au Rwanda' (1990) 40 *Revue politique Africaine* 31, 'Le droit et ses pratiques' at 36.

(the princes). When customary jurisdictions were abolished to implement modern written law in the context of a reform introduced by the Belgian administration in 1948,[16] the *Gacaca* retained its jurisdiction over civil affairs, but criminal affairs were attributed to township tribunals. The *Gacaca* therefore is not a tribunal per se, but rather a conciliatory dispute resolution forum. This was confirmed by the Lawyers Committee on Human Rights in one of its reports on Rwanda: 'A traditional system of justice known as *Gacaca* covers land disputes, family matters and small commercial disagreements; its purpose is to resolve problems while promoting reconciliation.'[17] According to Rusagara, the *Gacaca* 'is a conflict management strategy by means of restorative justice, and plays a historical role in facilitating unity and cohesiveness in society'.[18]

However, in 2001, the Rwanda legislator decided to create a new version of *Gacaca* jurisdictions, with power to prosecute the most serious crimes committed in Rwanda between 1 October 1990 and 31 December 1994.[19] The institution of the *Gacaca* tribunals and their involvement in the control of international crimes satisfy the Rwanda government's concern, on the one hand, to speed up proceedings in respect of the crime of genocide and international crimes and unclog overpopulated prisons and, on the other hand, to ensure the population's participation in the administration of justice.

i. Unclogging of the Classic Justice System and Acceleration of Judicial Proceedings

When judicial proceedings of cases arising from the atrocities first started in Rwanda in 1994, prisons were overcrowded. In 1995, there were 61,210 detainees.[20] By the end of 1996, the number had escalated

[16] The organisation of ordinary courts was dictated by a decree of 5 July 1948, see *Bulletin Officiel*, 1948, at 856.

[17] Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: the ICTR and national trials*, July 1997.

[18] Frank K Rusagara, 'Gacaca as a Reconciliation and Nation-building Strategy in Post-genocide Rwanda' (2005) 2 *Conflict Trends Magazine* 20 at 20 <http://www.accord.org.za/ct/2005-2FR.htm>.

[19] Organic Law No 40/2000 of 26/01/2001 setting up 'Gacaca Jurisdictions' and organising prosecutions offences constituting the crime of genocide or crimes against humanity, committed between October 1, 1990 and December 31, 1994, see *JORR* No 14 of 15 July 2001 at 15. This Law has been amended several times; the latest version dates back to March 2007: see Organic Law modifying and complementing Organic Law No 16/2004 of 19/06/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994, in *JO* No 5, 1 March 2007.

[20] Report on the situation of human rights in Rwanda submitted by Mr René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Resolution S-3/1 of 25 May 1994, UN Doc E/CN.4/1996/68, 29 January 1996, para 89, at 27.

to 120,000[21] and went up to 150,440 in 1999. Of this number, at least 135,000 (or 89.7%) of detainees were accused of genocide.[22] In June 2001, the number of detainees was estimated at more or less 130,000[23] or 150,000,[24] depending on the sources, while Rwandan prisons could only accommodate 18,000 detainees.[25] The Rwandan population was estimated at approximately 6 million in 2001, meaning that for every 40 persons, one was incarcerated.

The classic justice system made it simply impossible to deal with so many cases within a reasonable time. The government therefore decided to turn to *Gacaca* courts, as stated below in the summary of motives of the law on the *Gacaca* courts:

> The strategy and the efforts the government and the legal institutions deployed to improve and accelerate the pre-trial investigation and trial of cases did not produce results that met the specific needs for justice caused by the atrocities committed. From the beginning the courts were overwhelmed by a very large number of genocide cases in addition to the usual common law litigations. The marked slowness and delay in trying these threatened to impede the efforts undertaken to reconcile Rwandans. Consequently, it then seemed necessary to re-examine the difficulties that impeded trying these cases.[26]

ii. Community Participation in the Administration of Justice

In addition to unclogging overcrowded prisons and accelerating judicial proceedings, the *Gacaca* courts that were instituted served two imperatives: national reconciliation through active involvement in the judicial process of people who had witnessed the events, and participation of the Rwandan population in the disposal of claims arising out of the Rwanda genocide. This is also reflected in the summary of motives behind the law:

[21] F Nzirabatinyi, 'Prosecuting Crimes: Preventive Detention versus the Presumption of Innocence: Contradiction or Complementarity?' (author's translation—original in French) in *Le Verdict*, No 2, 15 March 1999, at 19.

[22] Félicien Kamashabi, 'Genocide Trials Progress' (author's translation—original in French) in *Le Verdict*, No 15, 15 March 1999, at 3.

[23] Ligue rwandaise pour la promotion et la défense des droits de l'homme (LIPRODHOR), *Evidence Administration in Genocide Trials: Is the Imminent Creation of Gacaca Courts a Panacea?* (author's translation—original in French) (Kigali, Information and Documentation Center on Genocide Trials, June 2000) [LIPRODHOR Report] at 50.

[24] Rally for the Return of Refugees and Democracy in Rwanda (RDR), Press release 03/2000, 25 September 2000; see also Claudien Ndabahariye, *Gacaca Courts, a Reconcilation or Division Tool?* (author's translation—original in French), <http//mitglied.lycos.de/FDLR/nouvelles/juridictions_gacaca.html>.

[25] Amnesty International, *Gacaca: A question of justice*, Index AFR 47/007/02 (London, November 2002), AI [AI Report AFR 47/007/02] at 9.

[26] Organic Law No 8/96 of 30 August 1996 organising prosecutions of the crime of genocide or other crimes against humanity, committed from October 1, 1990, see *JORR* No 17, 1 September 1996.

> The establishment of such a legal system is justified by the fact that offences that constitute the crime of genocide or crimes against humanity were committed publicly in full view of the population. This nondissimulation resulted from the fact that the public authorities, whose role is to plot the course for the population to follow, themselves incited the population to commit crimes in order to generalize participation in them and thus be able to leave no survivors. This inspired the population, manipulated by the politicians, not even to attempt to conceal its criminal actions, since it was confident it was following the path indicated by the very persons who should have apprehended the population. For that reason, it is essential that all Rwandans participate on the ground level in producing evidence, categorizing the perpetrators of the offences by taking into consideration the role they played, and establishing their punishments without applying the classic system of repression of offences, but instead, re-establishing peace and the return of citizens who were manipulated to commit crimes to the right path. As a result, the population who witnesses the atrocities committed shall achieve justice both for the victims and the persons suspected of being perpetrators of offences, a justice based on evidence and not passion. This justice shall be implemented within the framework of the *Gacaca* jurisdictions, meeting at the cell, sector, commune, and prefecture level and composed of honourable persons appointed by their neighbours.

Indeed, since these most serious violations were committed publicly, the population must relate the facts, reveal the truth, and participate in the prosecution and judgment of presumed culprits.[27] This participatory form of justice[28] gives the people a voice in the characterisation and suppression of genocide and associated crimes.[29] It is a means of deterring the criminality anchored in Rwanda's society.[30]

In an interview given to the bimonthly *Le Verdict* in August 2000, President Kagame again justified the project, confident in its efficiency:

> The role of the new *Gacaca* jurisdictions will be to decide cases of genocide taking into account the level of responsibility. This popular form of justice is especially well suited given that the genocide was committed in full sight of the population and everywhere in the country. People can more easily testify if trials are held in villages rather than in courthouses. This procedure can only hasten the reconciliation process.[31]

Contrary to the South African model, the *Gacaca* model is a formal justice system with a broad involvement of the local population.

[27] Law 40/2000, n 19 above, Preamble.
[28] Interview with Justice Minister, M Jean de Dieu Mucyo, in *Le Verdict*, No 15, 15 March 1999, at 7.
[29] *Le Verdict*, No 15, 15 March 1999, at 17.
[30] LIPRODHOR Report, n 23 above, at 51.
[31] *Le Verdict*, No 17, August 2000 (author's translation—original in French).

iii. Implication of Involving Traditional Courts in the Prosecution of International Crimes and its Legality in International Law

Given the recognised judicial role of traditional *Gacaca* courts in the specific field of international criminal law, the question arises whether international law can, in some way, provide a legal basis for the intervention of traditional or local institutions in the prosecution of international crimes. In my view, the answer is yes. Indeed, states are habilitated and even obliged by international law conventions to bring to justice individuals suspected of committing the most serious international crimes. For example, on the issue of war crimes, the Geneva Conventions provide:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.[32]

With respect to the crime of genocide, Article VI of the Genocide Convention states that: 'Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed.'[33] Similarly, the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity stipulate that 'Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be

[32] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, UNTS, 1950, No 970 at 32, Art 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, UNTS, 1950, No 971 at 86, Art. 50; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, UNTS, 1950, No 972 at 136, Art.129; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, UNTS, 1950, No 973 at 288, Art 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, UNTS, 1979, No 17512 at 271, Art. 85. These international humanitarian law instruments can be found online on the ICRC website at <http://www.icrc.org/ihl>.

[33] Convention on the Prevention and Punishment of the Crime of Genocide (approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948, entry into force 12 January 1951, in accordance with Article XIII), Art VI.

subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes.'[34]

Although the aforementioned principles are not per se legally binding on states, Belgian[35] and French[36] courts recognise their imperative nature based on the normative formulation ('must') of section 1 of Resolution 3074 (XXVIII) establishing the practice for states willing to comply with what amounts to a legal rule.[37] This jurisprudence therefore confirms the positive evolution of the law by recognising the customary character of this Resolution, thereby, arguably, creating an obligation for all states.[38]

Furthermore, the Rome Statute establishing the International Criminal Court (ICC) grants states judicial priority in the prosecution of crimes it prohibits, according to the fundamental principle of complementarity of the ICC to state courts.[39]

These international instruments clearly indicate that state courts have solid judicial foundation in international law for the suppression of international crimes.[40] Moreover, it should be noted that international law does not create distinctions in the judicial hierarchy of a given state: that is, it does not favour modern states' tribunals over traditional or community tribunals—where the latter exist—or vice versa. It rather encourages

[34] Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 3 December 1973, UN Doc A/RES 3074 (XXVIII), principle 5.

[35] Justice Vandermeersch considers that 'there exists a customary rule or even a jus cogens rule that recognises universal jurisdiction allowing national authorities to prosecute and try, in any case, persons suspected of having committed crimes against humanity' (author's translation—original in French): see Tribunal de première instance (Bruxelles), Instruction Judge's Office, Order No 216/98, (1999) 2 *Rev de dr pén et de crim* 286 at 288

[36] See *Javor et al*, case as summarised in M Sassoli and AA Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, ICRC, 1999) at 1252. In this case, Justice Getti holds: 'Contrary to the prosecution position, *Principles of international co-operation in the detection and punishment of persons guilty of war crimes* are binding and have a Convention effect' (author's translation—original in French).

[37] Order No 216/98, n 35 above, at 288.

[38] It should be noted that this jurisprudence on the binding force of this Resolution may find a solid foundation in the ICJ Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*. In this Advisory Opinion, the Court notes:

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule.

See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, at para 70.

[39] ICC Statute, Art 1.

[40] State courts should base their jurisdiction on the territoriality principle. As C Beccaria, a proponent of territoriality, suggests: 'the place of punishment should necessarily be where the crime was committed, since it is there, and not elsewhere, where a duty to prosecute

state-wide action to ensure that war criminals do not enjoy impunity. Consequently, it is my view that the implication of community and traditional jurisdictions in the suppression of international crimes is consistent with international law, in principle at least. The question therefore arises: 'What role, if any, should traditional or community justice mechanisms play in the prosecution of international crimes?' I will address this question in the sections that follow.

III. ADVANTAGES AND DISADVANTAGES OF RESORTING TO TRADITIONAL JUSTICE MECHANISMS IN THE FIGHT AGAINST INTERNATIONAL CRIMES

A. Advantages of Traditional Justice Mechanisms

The utilisation of traditional justice mechanisms to combat impunity has several advantages for states emerging out of conflict. The use of traditional justice mechanisms in the suppression of heinous crimes is beneficial to all stakeholders and interested parties, including the international community. This system is attractive because of its proximity to the population, its ability to accommodate or allow victims to actively participate, its sensitivity to socio-cultural factors, and its inherent protection of community interests. since such mechanisms typically complement national and international efforts to prosecute those responsible for egregious international crimes.

i. Proximity Justice

Traditional structures, where they exist and still function, are advantageous because proceedings are held in proximity of the victims and the location where crimes were perpetrated. The accused are tried in their own milieu by judges to whom they are accustomed and who are familiar with their language and culture. Victims are not required to move elsewhere to relive their pain in a setting that may be uncompassionate[41] or to participate in unexpected and often invasive proceedings.[42] Justice is therefore rendered in proximity to the parties to the proceedings and is very accessible in all respects. The impact or deterring effect of judgments rendered by citizen-judges is greater. This compares advantageously

exists in order to defend public order' (author's translation—original in French): see C Beccaria, *Des délits et des peines* (Geneva, Droz, 1965) ch. XXIX at 55.

[41] ICTR judges laughed during the rigorous cross-examination of a prosecution witness, who was a rape victim.

[42] In international proceedings, for example, victims appearing as prosecution witnesses are cross-examined by defence counsel; however, it is debatable whether or not cross-examination, although it is a legal and relevant tool, is appropriate when dealing with people who are genocide survivors or victims.

to international tribunals sitting far away from both the actual location where the crimes were committed and the principal interested parties and stakeholders reside.[43]

Moreover, parties to the proceedings are familiar with the system headed by citizen-judges who, in fact, are their 'natural' judges. Traditionally these judges are tribal chiefs, ethnic or religious leaders, or elders of a certain age who know the customs of their community and have significant experience in dispute settlement. At present, because the control and moral authority of traditional leaders is being supplanted by state authority and due to a lack of judicial infrastructure, citizen-judges are generally local elected officials.[44]

ii. Cultural Sensitivity of Citizen-judges

The proximity of local structures implies both a factual knowledge and cultural sensitivity often absent in the context of international criminal proceedings. The lack of sensitivity on the part of international judges impacts negatively on the receptivity of their decisions and tarnishes the reputation of the international judicial system. It should be noted that experts and politicians usually welcome international decisions with greater enthusiasm than populations directly affected by the conflicts.[45]

Serious crimes are often committed in a particular social, historical, political, and cultural context that present subtleties frequently not obvious to foreigners.[46] In my opinion, all attempts at social recovery that do not consider these factors are likely to fail. This is why traditional mechanisms constitute a more appropriate forum for the settlement of claims related to genocide, war crimes or crimes against humanity. The decisions they render are expected to have a positive impact on the peace and reconciliation process, a factor at present largely neglected in the sentencing process by international tribunals.

iii. Expeditiousness of Proceedings

In addition to proximity and socio-cultural sensitivity factors of traditional and community justice mechanisms, it is important to highlight

[43] Chandra Lekha Sriram, 'Universal Jurisdiction: Problems and Prospects of Externalizing Justice', (2001) 12 *Finnish Yearbook of International Law* at 47–70.

[44] This is the case in Uganda, Rwanda and several other African countries.

[45] In Sierra Leone, the population strongly criticised the decision to arrest and prosecute Mr Hinga Norman, who created and organised the Civil Defence Force (CDF) in order to protect the population from the brutal atrocities of Foday Sankoh's Revolutionary United Front.

[46] In the *Akayesu* case, the ICTR emphasised the difficulties in understanding Rwandan language and culture, through which witnesses and accused persons explain themselves; see *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, at 155–6 (ICTR, Chamber I).

that proceedings held before local justice institutions are dealt with swiftly. In general, depending on the seriousness of the case, a verdict is rendered within a day or two. Proceedings are rapid because they are greatly simplified. There are neither adversarial debates nor lawyers attaching extreme importance to rules of procedures, which normally will slow down proceedings. Rules of evidence are also simplified because facts are more or less well known by the majority of people since they were present at the time the crimes were committed.[47] As in other restorative justice mechanisms, little time is spent in establishing facts and guilt. The main focus is on sentencing.[48]

The procedural expeditiousness is a definite plus for the future of the society—disputed claims are dealt with in a matter of days and to the advantage of all stakeholders: the accused, victims and the community as a whole. Horrible pages of history are turned rapidly, allowing the community to focus on reconstruction and development. The importance of this procedural expeditiousness comes out clearly in light of the slow progress in international criminal justice, where it is commonplace for an international proceeding to go on for more than five years.[49] This constitutes a serious handicap in social reconciliation and rebuilding, the Damocles' sword remaining dangling over individuals' heads, not allowing them to plan for the future with a positive and outgoing outlook.

iv. Permanent Willingness to Protect Social Interests

The Western concept of criminal justice focuses on individual rights in an attempt to determine a winner and a loser. This concept, inherited from colonial times, has been maintained by classic African states' tribunals. However, where customary law and written law tribunals co-exist, the focus is on collective, conciliatory and restorative justice.[50] Traditional jurisdictions favour reconciliation, group interests and conflict conciliation.[51] Their objective is social harmony and the settlement of disputes

[47] Rwanda is an exceptional case, since people who are involved in the *Gacaca* process came from foreign countries, after the Rwandan Patriotic Front (RPF) victory, where they were refugees at the time genocide occurred.

[48] Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice', Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999, at 6.

[49] The *Nyiramasuhuko et al* case, in the ICTR, started in June 2001 but is still under way in trial chambers six years later. This case is not exceptional; the trial of *Bagosora* is now in its fourth year, etc. In addition, the time spent in pre-trial detention is usually four years or more.

[50] Mutoy Mubiala, *Le système regional africain de protection des droits de l'homme* (Bruxelles, Bruylant, 2005) at 7; TW Bennet, *A Sourcebook of African Customary Law in Southern Africa* (Cape Town, Juta, 1991) at 54.

[51] RBG Choudree, 'Traditions of Conflict Resolution in South Africa' (1999) 1(1) *African Journal on Conflict Resolution* 9 at 10–11.

among opposing members of a given community. In all African conflict resolution procedures the focus is put on the protection and promotion of community values and interests as the community forms a part of the law irrespective of its form (clan, tribe, and so on). This concept reinforces the solidarity between members of the same community.[52] Similarly in communities founded on the *Ubuntu*[53] value:

> a dispute between fellow members of a society is perceived not merely as a matter of curiosity with regard to the affairs of one's neighbour; but in a very real sense an emerging conflict is seen to belong to the whole community. According to the notion of *Ubuntu*, each member of the community is linked to each of the disputants, be they victims or perpetrators.[54]

The objective of reinstating cohesiveness and social harmony is achieved by ricochet, by dealing with interpersonal conflicts. The African concept of collective justice was even enshrined in the African Charter on Human and Peoples' Rights, a Charter that protects both individual and collective rights,[55] with no equivalent in the Western world.

v. Appropriate Forum to Compensate Victims

The current growing concern over the fate and place of victims in criminal proceedings justifies the active involvement of local institutions and populations in the suppression of the most serious crimes. Traditionally, especially in common law countries and in international criminal proceedings for hideous crimes, the administration of justice places focus on the protection of society in general and the rights of the accused in particular, namely on the right to a fair trial. Victims are not, as such, taken into consideration by criminal courts; they have no standing before international ad hoc tribunals, except as witnesses for the prosecution. Nevertheless, the present tendency recognises victims as part of the proceedings and not just as passive parties (witnesses). Today, several international legal instruments and judicial doctrine recognise that victims can benefit from international protection.[56] Despite this formal acknowledgement of

[52] Keba M'Baye, 'The African Concept of Human Rights', (1996) 6(3) *African Human Rights Bulletin* 1 at 3. (author's translation—original in French).

[53] The concept *Ubuntu* is difficult to translate; it relates to a 'very high sense of humanity'. This value is promoted in most Bantu societies scattered in various Central and Southern African countries.

[54] Tim Murithi, 'African Approaches to Building Peace and Social Solidarity' (2006) 6(2) *African Journal on Conflict Resolution* 9 at 19.

[55] African Charter of Human and Peoples' Rights (adopted in Nairobi, 27 June 1981, entered into force 21 October 1986), OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

[56] See eg Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/Res/40/34, 29 November 1985; see also the ICC Statute, Arts 75 and 79, UN Doc A/CONF. 183/9; Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious

victims' rights at the international level, the latter still have difficulties convincing international judges of their victim status; this occasionally produces preliminary judicial quarrels before the examination of the merits of the motions for remedy.[57]

The advantage of traditional justice mechanisms is that their inherent knowledge of local crises allows them to proceed without much delay. The system is conceived so that victims have a near-automatic status as a party to the proceedings. They can, as such, present their claims and find a solution the same day or within a few days. Generally, material assets confiscated are restored quickly and other remedies for other crimes are also executed through compensation granted by the citizen-judges themselves and not by another external body. The victims' situation can be clarified within a few days, which enables them to focus on their survival and their future.

vi. Complementarity of National and International Criminal Justice Efforts

The breadth of international criminality surpasses the capacity of state and international judicial structures to respond adequately. In fact, tribunals in post-conflict states are generally in ruins, preventing them from functioning correctly,[58] and usually form part of the infrastructure to be built or rebuilt in the aftermath of massive and systematic conflict and atrocities. Nearly all international tribunals have been conceived to prosecute a small minority of alleged war criminals—those most responsible for committing international crimes.[59] Consequently, the paralysis of the state judicial system as well as the inability of the international system

violations of international humanitarian law, UN Doc A/RES/60/147, December 2005; see also Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr Theo van Boven pursuant to Sub-Commission decision 1995/117, UN Doc E/CN.4/Sub.2/1996/17, para 7 at p 4.

[57] *Situation in Uganda in the Case of The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, Case No ICC-02/04-01/05 (ICC, Chambre préliminaire II), Decision on legal representation, appointment of defence counsel, protective measures and time-limit for the submission of observations on applications for participation, a/0010/06,a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 Fabruary 2007, paras 1–3; ICC Statute, Art 68(3); CPI (RPP), r 89, para 2.

[58] Hansjörg Strohmeyer, 'Collapse and reconstruction of a judicial system: the United Nations Mission in Kosovo and East Timor' (2001) 95 AJIL 1 at 48; Hon J Lachapelle and WASchabas, *Pour un système de justice au Rwanda*, Revised Report of an Exploratory Mission in Rwanda, 27 November to 6 December 1994 (Montreal, Rights and Democracy, 1994).

[59] Kriangsak Kittichaisaree, *International Criminal Law* (Oxford, Oxford University Press, 2001) at 326. Art 1 of the Nuremberg Charter was clear about the Court's jurisdiction. The Tribunal was established for 'a just and prompt trial and punishment of major war criminals of the European Axis'. Likewise, the UN Security Council took 'note of the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors': UN Doc S/Res/1329 (2000), 30 November 2000 at para 7 of the preamble. Moreover, in his Report on the Special Court for

to suppress all crimes committed result in a large majority of criminals residing in a zone of impunity that can only be revealed by community judicial institutions. Although the relations between states' tribunals and the International Criminal Court are regulated by the complementarity principle underlying the Statute of the Court, the relationship between the latter and local institutions is not clear.

Thus, the recourse to local justice mechanisms in prosecuting heinous crimes attributes a capital importance to both the protection of victims' interests and those of the society in general. Nevertheless, the entire system is not perfect and is subject to criticisms by some international legal scholars who believe that some of these characteristic features can undermine its credibility.

B. Criticism of Traditional Justice Mechanisms

Community involvement in suppressing war crimes has its drawbacks and presents several dangers that can compromise its impact or its chances of success. These drawbacks are in reference to certain international judicial guarantees regarding a just and fair trial as it is known in international criminal law, as well as to the male-dominated composition of the tribunals. Moreover, proceedings are characterised by the absence of a legal representation system for the accused, the double status of citizen-judges acting as prosecutors and judges at the same time, the risk of selective prosecutions and the risk of local judges being subject to political pressure from officials. However, the system also includes corrective measures that minimise the negative impact of these drawbacks.

i. Risk of Infringement of the Right to Legal Counsel while facing Charges

Formal legal representation is not a feature of most traditional judicial systems.[60] This raises important constitutional questions because most countries' constitutions recognise the right to legal counsel for any judicial proceedings. Nevertheless, this shortcoming is inherent to the customary nature of the courts, which are typically recognised by state constitutions, and to the law applicable before them. It is justified by the

Sierra Leone, the Secretary-General of the United Nations extends the term of 'persons most responsible' to include not only the political or military leadership but also other persons in command authority down the chain of command considering the severity of the crime or its massive scale: see *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc ONU S/2000/915, 4 October 2000, paras 29–31.

[60] 'In traditional African society, every man was his own lawyer, and his neighbours too, in the sense that litigation involved whole communities, and all the local men could and did take part in forensic debate': see Abbie Sachs, *Justice in South Africa* (Berkeley, University of California Press, 1973) at 96–7.

absence of procedural formality as well as by the concern to preserve the equality between the parties.[61] In fact, poor people can confront the rich without the latter being able to tap into their fortune in order to secure a defence lawyer. In South Africa, for example, the National Development and Restoration of Traditional Customs Forum, an organisation of traditional chiefs, holds that 'no legal representation is necessary as the procedure is so uncomplicated that anyone can prosecute and defend a case'.[62] These institutions are generally considered more as a forum for dispute arbitration than true courts of justice.[63] It follows that, even in countries where traditional courts have criminal jurisdiction, their main goal is rather aimed at re-establishing social harmony. This is affected by pursuing, as far as possible, the restoration of the pre-crisis situation,[64] which ultimately excludes the adversarial character found in formal legal proceedings.

Granting traditional courts the jurisdiction to prosecute international crimes would appear to be incompatible with the right of legal representation that characterises the traditional and community judicial systems. This 'omission' arguably collides with the international law principle that all alleged perpetrators are entitled to a fair trial, a basic facet of international human rights law.[65] In my view, the nature and aim of proceedings in traditional justice systems (that is, reconciliation, restoration of social harmony, protection of community interests) justifies this dichtomy. It therefore seems acceptable to conduct prosecutions without the accused being assisted by lawyers, especially when they do not run the risk of severe criminal sanction and when there is no confrontation between parties. The moral integrity, the good judgement, the wisdom and the inherent equity of local judges as well as the people's participation should suffice to guarantee a just and fair trial that aims to restore social harmony by ways of dispute mediation. Incidentally, the procedure before these traditional tribunals is considered to be 'substantially informal and less intimidating, with the people who utilise these courts being more at ease in an environment that is not foreboding'.[66]

[61] Bennet, n 50 above, at 80.

[62] South African Law Commission, *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders*, Project 90, May 1999, at 10.

[63] *Ibid* at 6.

[64] South African Law Commission, n 62 above, at vii, para 2: 'These communities … should aim at reconciling the disputants and establishing harmony in the community.'

[65] *The Prosecutor v Hinga Norman, Fofana et Kondewa*, SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self-representation under Article 17(4)d of the Statute of the Special Court (8 June 2004) at para 23 (Special Court for Sierra Leone (SCSL), Trial Chamber); see also *The Prosecutor v Slobodan Milosevic*, IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel (22 September 2004) at para 32 (ICTY, Trial Chamber).

[66] Choudree, n 51 above, at 13.

ii. Local Judges as Prosecutors

In traditional judicial proceedings, judges also serve as prosecutors: they both prosecute and judge parties. However, this form of justice is not without controversy, especially when political and/or ethnic tensions arise when judges are representatives—even in appearance—of an ethnic group and/or a political wing rival to that of others.[67] In this case, the risk of perverted justice is high. However, I must emphasise that this risk is not as great as it appears. In fact, the appearance of exorbitant powers is counterbalanced by the people's participation during the entire proceedings: ordinary citizens of a certain age and social rank interrogate and cross-examine the parties; they may participate in deliberations if they have passed the initiation tests required to sit as a citizen-judge, and so on.[68] In several African countries adults possess the right to interrogate the parties and/or witnesses and, if need be, give their perspective on the legal issues and ensure that the system does not fail. As such, the tribunal does not depend solely on judges but also on the community, which monitors and limits abuses of the judicial process.

iii. Risk of Selective Prosecutions

The way traditional judicial mechanisms function is very critical to their legitimacy as well as their credibility. In fact, if local judges exercise broad discretion like international prosecutors and distinguish victim groups from perpetrator groups while criminals and victims can be found on both sides, this is likely to perpetuate conflict and violence even though the purpose of criminal prosecutions is to put an end to them. This has been the case in Rwanda, where the *Gacaca* courts only prosecute genocide suspects.[69] In this context, 'genocidals' are identified as members of the Hutu ethnic group, while victims belong to the Tutsi ethnic group. In so doing, Tutsi war criminals go unpunished. This is a sad reality for Hutu victims given that not a single Tutsi has been prosecuted before the ICTR for war crimes despite the existence of criminal evidence that would underwrite Tutsi prosecutions.[70] Therefore, Hutu victims of the Rwandan genocide

[67] In Rwanda, for example, the judiciary is dominated by Tutsi and specifically, members of the RPF. That is what Professor Cousineau refers to as the judiciary 'tutsification', see Marc Cousineau, 'L'établissement de l'État de droit au Rwanda: un but irréalisable' (1996–97) 28 *Ottawa Law Review* 171 at 183.

[68] I would mention here, eg the initiation ceremony called *Ukwatirwa*, in force in Burundi, where the assembly of wise people recognise and publicly confer upon candidates the quality of persons of integrity (*UMUSHINGANTAHE*). They can then sit and take part in deliberation meetings on completion of public hearings.

[69] See the explicit title of the Organic Law, n 19 above.

[70] Report on the situation of human rights in Rwanda submitted by Mr René Degni-Ségui, n 20 above; Tumba Tutu-De-Mukose, 'Rwanda Genocide: Why Carla Del Ponte was toppled from the ICTR by the UNO' (author's translation—original in French), *Afrique*

will not receive justice before international bodies nor before local *Gacaca* courts. This situation creates societal resentment among unrecognised victims and presents a potential risk for long-term peace, reconciliation and social stability.[71] In such situations of selective prosecutions based on discriminatory criteria which are unlawful under international law, the principle of complementarity of the ICC could, where applicable, be set in motion to correct a potential drift of local institutions.

iv. Lack of Legitimacy and Risk of Manipulation of the Local Process by Government Authorities

One objection to the legitimacy of local and community institutions can reasonably be raised. If their purpose is mainly to maintain social harmony, why were they unable to prevent society from collapsing? In my opinion, this objection is not valid enough to deny local and community institutions jurisdiction to prosecute perpetrators of international crimes. In fact, during societal conflict most local institutions are not spared, as the shock waves of conflict are felt in every sphere of the society with few layers or social institutions being exempt.[72] In most cases, traditional justice institutions cannot withstand being impacted by deadly conflict; hence, just as the validity of the ICTR was not questioned on the sole ground that the international community failed to prevent or to stop the Rwandan genocide (even though it anticipated genocide), community justice institutions possess legitimacy to take part in the national recovery.

Moreover, the impartiality and the independence of the citizen-judges make traditional judicial institutions more credible; indeed, judges know that only the law and the facts dictate their behaviour, not governmental instructions or orders. Thus, any interference by public authorities in the operation of these mechanisms will be likely to have side-effects on the respect and status they enjoy within the community. Yet this risk is not at all remote, because post-conflict society leaders often have a societal

Éducation, No 195–196, 1–30 January 2006, see online: <http://www.afriqueeducation.com/archive/sommaire/article.php?id=298&version=195-196>; A Guichaoua, 'Rwanda: Intimidated Justice: Under Rwandan Government's pressure, diplomacy slows down the ICTR' (author's translation—original in French), *Libération*, 23 May 2006.

[71] In one of its reports, the Gacaca Courts Department concluded that obstacles to war crimes prosecutions include the persistence of a genocidal ideology, and the intimidation and terrorist acts towards genocide survivors and witnesses: see online: <http://www.inkiko-gacaca.gov.rw/Ppt/Realisation et perspectives.ppt>.

[72] In Uganda, for example, 'local systems have broken down over the course of the conflict, raising concerns about the neutrality and capacity of elders and cultural leaders to adapt local approaches to crimes committed during the conflict': see Erin K Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *The International Journal of Transitional Justice* 91 at 97.

vision that they seek to mould. The reconciliation aspect is particularly interesting to them as they hope to influence its achievement in their preferred direction. The fact that citizen-judges are locally elected and sometimes representative of intellectuals who are more often driven by material benefits rather than by real concern for righteousness and the restoration of social harmony[73] is likely to have a great influence on the independence of the local courts. Indeed, these educated participants are likely to monopolise the floor and intimidate the non-educated witnesses and other judges.

v. The Risk of Trivialising Justice for Community Sanctions

The law applicable before national courts adjudicating war crimes matters also appears to be problematic. In fact, citizen-judges apply a flexible customary law and procedure. This law is known to all lay judges as to most other community members of a certain age since it follows customs and local practices relevant to peaceful dispute resolution. As the South African National Development and Restoration of Traditional Customs Forum confirms, 'the procedure is so uncomplicated that anyone can prosecute and defend a case'.[74]

Community sanctions differ from formal criminal sanctions recognised by the international criminal law, namely imprisonment as the main[75] or the exclusive[76] sanction. Community sanctions are primarily designed to allow the convicted to amend and to promote their reintegration into society. In Rwanda, the law on *Gacaca* courts provides only for civil remedies to property offences;[77] criminal sanctions or community services[78] are possible in other cases. The latter sanctions are carried out in public or by private host institutions.[79]

[73] Baines, n 72 above, at 95.

[74] South African Law Commission, n 62 above, at 10.

[75] The ICC can apply monetary sanctions in addition to imprisonment: see ICC Statute, Art 77.

[76] ICTR Statute, Art 23 (1): 'The penalty imposed by the Trial Chamber shall be limited to imprisonment.'

[77] Organic Law No 40/2000, n 19 above, Art 71; Organic Law No 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994.

[78] Community service is an alternative form of punishment for genocide or crimes against humanity rather than imprisonment because unpaid work serves the general interest or public welfare. See Presidential Decree No 26/01 of December 10, 2001 relating to community services as sanctions alternative to prison (author's translation—original in French), section 2, in *JORR* No 3, 1 February 2002, at 92; see also Penal Reform International, *Monitoring and Research Report on the Gacaca: Community Service (TIG)—Areas of Reflection* (London, March 2007).

[79] Organic Law No 40/2000, n 19 above, Art 2, para 2.

Even if imprisonment is not an option, I do not believe that any process of accountability that builds on community sanctions would trivialise the essence of justice. In fact, imprisonment is not the only form of public sanction. Local courts resort to other forms of punishment, namely victim compensation, community work, requests for forgiveness, expressions of remorse and withdrawal of the right to participate actively in meetings aimed at settling disputes. Thus, community sanctions, even if they differ from classical criminal sanctions, constitute a full criminal accountability and not an alternative to punishment.[80] So, 'rather than being softer on accountability than courts, [these mechanisms] deliver a differently textured accountability by moving beyond overly proceduralized forms of adversarial justice as adjudications of individual guilt toward a more complex account of individual, communal and institutional accountability'.[81]

In terms of effectiveness, these community sanctions can sometimes be tougher and more humiliating than foreign prisons, since the condemned must serve their sentences in their communities under the direct surveillance of their relatives and their victims. Thus, the deterrent effect of sanctions on the convicted and their peers will be more effective than an imprisonment pronounced by an international tribunal and enforced abroad. Similarly, their rehabilitation or their reintegration is made easier since the sentence is served in the community. Finally, it should be noted that traditional and community courts shall also take into account the gravity of the crimes to determine the applicable sentence. Thus, sanctions other than imprisonment do not constitute a kind of an amnesty but rather another form of accountability for criminal acts. In the end, the main goal of international criminal justice is to avoid the impunity of serious crimes. This can be done through local, state or international judicial institutions.

vi. Challenges of Traditional Justice Mechanisms

In many African countries, it is worth noting that traditional judicial bodies are strongly influenced by the patriarchal system and are too often discriminatory against women. The latter cannot actively participate in traditional justice trials.[82] Thus, they cannot sit as judges; they can attend

[80] This is also the position of Antony Duff, 'Alternatives to Punishment—or Alternative Punishments?', in W Cragg (ed), *Retributivism and Its Critics* (Stuttgart, Franz Steiner, 1992) at 44–68; see also Daly, above n 48 at 11–12.

[81] Paul van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52 *Journal of International Affairs* 647–67; Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay' (2007) 1 *The International Journal of Transitional Justice* 23 at 40.

[82] In Uganda, women are not associated with decision-making or with *Acholi*, traditional mediation forums, see eg, Baines, n 73 above, at 107.

hearings but they have no right to ask questions unlike their fellow men.[83] They do not take part in the deliberations; in short, they are not involved in the process of judicial settlement of social conflicts. Besides the lack of a strong legal argument backing this exclusion, such a situation seems to be unacceptable given the current social place of women, as I will discuss below.

In short, in spite of its multiple advantages, the traditional system of justice also presents critical disadvantages as enumerated above. Nevertheless, these are not fatal for the system. On certain occasions, I noted that the system comprises self-regulating elements. Therefore, given the long experience of local courts in the peaceful settlement of disputes, they are undoubtedly a forum to which one can also resort in an attempt to complement national and international justice efforts. For this reason, the *Gacaca* system may prove beneficial for states emerging from deadly conflict.

IV. AFRICAN CONTRIBUTIONS TO THE CONCEPTION OF INTERNATIONAL CRIMINAL JUSTICE

In this final part of the chapter, I will examine the impact of traditional justice mechanisms on the development of international criminal law, and suggest ways to improve the system. African conceptions have influenced theory and practice on the role of traditional judicial structures in the adjudication of international crimes.

A. The South African Model and the Development of International Criminal Law

The South African model of a TRC has recently been adopted by many countries emerging from cyclic crises. The TRC Chairman, Archbishop Desmond Tutu, is proud of its global expansion. Indeed, even if South Africa was not the first country to develop such a Commission, Tutu maintains that it was 'the first country to employ public hearings for victims in a belief that public truth, through its delivery of both knowledge and acknowledgement, serves as a form of justice in and of itself'.[84] He adds that: 'South Africa today stands as a model of merciful justice; of what can be achieved when enemies choose dialogue over violence. In the years since our TRC process, other countries emerging from civil

[83] In some countries, like Pakistan, only men can sit in traditional judicial panels called *jirgas*; women do not appear before tribal courts, either as accused, complainants or witnesses, or even as mere spectators. Amnesty International, *Pakistan—The Tribal Justice System*, ASA 33/024/02, London, August 2002, at 14.

[84] Tutu, n 9 above, at 6.

conflict have embarked upon their own such commissions.'[85] South Africa has made a monumental contribution to the field of transitional justice through its own experience including the 'expansion of the concept to include mechanisms designed to address "truth" and the incorporation of wider social concepts such as reconciliation, memory and identity, religious ideas like forgiveness, and perspectives from political science and sociology that consider the relationship of transitional justice to state-building, democracy, and institutional change'.[86]

Another obvious and positive sign of the success of the South African experience and its overall impact can be witnessed at the United Nations (UN) practice level. Currently, UN bodies such as the Security Council are encouraging states emerging from cyclic crises to consider both a process of judicial accountability as well as truth and reconciliation commissions. In its Resolution of 31 March 2005 by which the UN Security Council decided to refer the situation in Darfur to the ICC Prosecutor, the Council

> *emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore longlasting peace, with African Union and international support as necessary.[87]

Not only has the General Assembly adopted a resolution that recognises the importance of protecting the rights of victims,[88] but several Reports of the Secretary-General to the UN highlight the importance of community justice initiatives to bring about long-term peace, security, reconciliation and the rule of law.[89]

A well-designed TRC system offers another viable alternative to criminal prosecutions, which are no longer seen as the only way to hold persons responsible for committing international crimes or for delivering justice. At best, to the extent that TRCs engage societies in the search for solutions to their problems; they appear to be complementary to the efforts of classic judicial institutions and tend to contribute to real justice considered in this context as a profound transformation of a state's social,

[85] *Ibid*.

[86] Editorial note, (2007) 1 *The International Journal of Transitional Justice* 1 at 2.

[87] Resolution 1593 (2005) (adopted by the Security Council at its 5158th meeting, 31 March 2005) at para. 5.

[88] See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

[89] See *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,* Report of the Secretary-General, UN Doc S/2004/616, 23 August 2007; Diane Orentlicher, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005.

political and legal order.[90] This helps to achieve the wider objectives of peace, justice and national reconciliation. As Diane Orentlicher states:

> If societies that have descended into the abyss of inhumanity bear a special burden of reckoning with their past, the work of highly respected truth commissions can facilitate a broader and more complex understanding of the machinery of mass atrocity than the circumscribed verdict of a criminal proceeding can do. At their best, moreover, truth commissions can advance a process of social inclusion and empowerment of previously marginalized—even brutalized—sectors of society, who may figure prominently in the work of a commission.[91]

Finally, TRCs provide a supplementary and sometimes more effective forum than national judicial systems to redress victims.[92] Indeed, it can be extremely difficult or impossible for victims to obtain compensation before such courts. Victims are sometimes not able to identify those responsible for their injuries. Moreover, even when perpetrators can be identified there is no guarantee that a remedy will be forthcoming. In this case, the TRC mechanism can fill these gaps in the judicial system and decide a general compensation system for all identified victims. This has been done in South Africa, for example.

Therefore, TRCs not only bring some semblance of criminal accountability for perpetrators of international crimes but also signal the need for collective and moral responsibility on the part of the whole society and its institutions.

B. The Rwandan Model and the Development of International Criminal Law

The *Gacaca* tribunal in Rwanda is serving as an example for other states such as Uganda where the Acholi ethnic group is eager to resort to traditional justice systems to deal with war criminals of the Lord's Resistance Army (LRA). Indeed, although this ethnic group is the victim of various atrocities committed by the warring parties (the LRA and the Ugandan Defense Forces), the Acholi leaders are insisting that the ICC withdraw charges against LRA leaders so that they can be dealt with through traditional mechanisms of justice.[93] In Sudan, the authorities are also

[90] Kader Asmal, 'Stopping Crimes through Negotiations: The Case of South Africa', Guest Lecture Series of the Office of the Prosecutor, 14 March 2006, at 12.

[91] Diane Orentlicher, 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency' (2007) 1 *The International Journal of Transitional Justice* 10 at 16. She adds that 'Truth commissions can, moreover, speak to the future through their recommendations for institutional reform': *ibid.*

[92] See Resolution 60/147, n 88 above.

[93] Kasaija Phillip Apuuli, 'Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda', (2005) 5(2) *African Journal on Conflict*

considering traditional judicial institutions to curb crimes committed in Darfur by the Janjaweed militias. Rwandan *Gacaca* courts are therefore a model for community involvement in the administration of international criminal justice. Even though the *Gacaca* courts have faced some challenges, the concept itself is attractive, and countries emerging from conflict can resort to and benefit from it. Ideally, traditional judicial mechanisms will produce positive results if they are not overwhelmed by, for example, being granted exorbitant subject-matter jurisdiction that is beyond their capabilities or being required to apply complex international rules as is the case with the *Gacaca* courts.

The merit of the African experience is to have considered other forms of justice outside of the conventional legal system with its specific sentencing goals. In so doing, African state practice has spawned academic reflection on the current opportunity and the legitimacy of traditional and community judicial mechanisms.[94] This reality is captured and recognised in the editorial of a new international journal on transitional justice:

> [T]he impact of non-Western cultures and different beliefs about justice have forced us to re-examine the mechanisms that have emerged; we have begun to ask ourselves about local practices of justice and the ways in which these may interrelate with the idea of universal jurisdiction and resistance to impunity.[95]

Some authors consider traditional justice mechanisms as indispensable to conventional justice mechanisms. Referring to the case of Uganda, Diane Orentlicher believes that an approach 'toward the LRA that is rooted in local culture is inherently more likely to be meaningful to victims—and in other important respects to "work"—than prosecutions that seem alien to Acholi culture'.[96] However, she expresses some reservations on the general amnesty measures because they would perpetuate a culture of impunity already present on the African continent. On this issue, Jackson Maogoto asserts that beyond the criminal prosecutions conducted before the ICTR and the Rwandan courts, public inquiries should be

Resolution 33 at 36. IRIN News, 'Acholi Leaders in The Hague to meet ICC over LRA Probe', Kampala, 15 March 2005; Bishop Baker Ochola, 'Uganda: The Acholi Traditional Justice is Enough for Kony', *New Vision*, 28 August 2006, Opinion.

[94] *International Journal of Transitional Justice*, vol I(1). For example, Diane Orentlicher has been advocating for criminal prosecutions for years; now, she is questioning her position: 'Does justice inevitably entail prosecutions or does its meaning instead turn upon each society's historically and culturally specific experiences?': see Orentlicher, n 91 above, at 10.

[95] Editorial note, n 86 above, at 2; Baines, n 2 above, at 96.

[96] Orentlicher, n 91 above, at 21.

conducted to identify structural and systemic institutional weaknesses.[97] He argues that

> the ICTR's almost exclusive focus on concrete entities, perceiving the individual actor as a building block of the genocidal reality, distorts and obscures the structural reality that converted tens of thousands of Hutus into a mass of killers.[98]

By doing so, the Rwandan genocide is characterised as 'an event' and not as 'a state of affairs'.[99] The ICTR's approach of focusing on individual defendants has been criticised by Maogoto, who suggests that one should combine this method with a collective perspective centered on systemic and structural failures.[100] This explains the relevance of using mechanisms other than conventional courts to deal with the reality of massive atrocities.[101] Hence, this would enable the promotion of international law

> that truly permeates the human populace not stopping at the gates of State but bridging the gap between collective and individual actors better than it has done before. The key condition for such a change is consciousness and more sensitivity to the actor-structure relationship.[102]

Despite its unquestionable contribution, the African idea of international criminal justice is not perfect, as noted above.[103] In order to maximise its potential, some improvements could strengthen its foundation and its respectability.

C. Suggestions for Improvements to the Traditional and Community African System

The community justice system could be improved to ensure female representation and compliance with certain minimum standards of procedural fairness, and by the provision of legal assistants (see further below). Likewise, distorting the system by imposing international criminal law or heavy material jurisdiction should be avoided.

[97] Jackson Nyamuya Maogoto, 'The International Criminal Tribunal for Rwanda: A Distorting Mirror; Casting Doubt on its Actor-oriented Approach in Addressing the Rwandan Genocide', (2003) 3(1) *African Journal on Conflict Resolution* 55 at 84.

[98] *Ibid* at 70.

[99] *Ibid*.

[100] *Ibid* at 84.

[101] In Rwanda, for example, 'the international justice process must not erase the fact that the inter-ethnic conflict, while not genetically inbred, is firmly embedded in the socio-cultural and subconscious mind of the Rwandese society, and thus addressing these structural defects is a part of the process of deterrence': see *ibid* at 68.

[102] *Ibid* at 84.

[103] *Ibid* at 19–23.

I mentioned above that traditional and community institutions sometimes discriminate against women. However, I believe that the system would gain tremendously by reviewing the gender-biased way in which judges are selected to ensure some degree of gender equity. In fact, it is untenable to pretend that righteousness, the sense of fairness and the knowledge of customs are restricted only to men. Beyond mainstreaming women into traditional justice systems, women should also participate in the design of these mechanisms so that they adequately reflect their needs.[104]

The traditional African system should also provide the accused with legal representation, or at the least permit criminal defendants to employ legal counsel. As previously noted, the right to a fair trial is a fundamental tenet of justice to which, according to human rights law, every human being is entitled. The position is also supported by the principles of the African Commission on Human and Peoples' Rights, which has determined that 'as a minimum, to all proceedings before traditional courts [*there is*] an entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court'.[105] For the Commission, 'an accused person … has right to choose his or her own legal representative at all stages of the case'.[106] This right is so important that the Commission decided to extend it to procedures that take place before traditional courts. In order to avoid professional lawyers from yielding undue influence or intimidating traditional judges, it is suggested that the rules of practice should be simplified to safeguard the independence of lay judges as well as their freedom to resolve disputes or adjudicate crimes amicably.

In this specific context of serious crimes, it is essential that traditional and community courts are assisted in carrying out their duties by a body of people equipped with legal training in law and customary procedure. These legal assistants would notably take records of the proceedings and prepare brief reports of the hearings. For instance, the South African Law Commission maintains that

> trained para-legals should be appointed by the Ministry of Justice to assist traditional courts as clerks of court. This would help the courts to assess and

[104] Bell and O'Rourke, n 81 above, at 31. See also Orentlicher, n 89 above, principles 6, 7, 32 and 35.

[105] *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, African Human and Peoples Rights Commission, Doc OS(XXX)247 [*African Commission Principles*], para Q(b)(8), at 22 (emphasis added).

[106] *Ibid*, para H(d) at 7; see further where it is asserted that 'the accused has the right to choose his or her counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available', para N(2)(d) at 14.

> avoid decisions that might be in violation of the Constitution or the law or that are beyond the jurisdiction of the court.[107]

This proposal should apply a fortiori to situations where lay judges are faced with heinous, systematic and widespread crimes. Rwanda implemented this through Law 40/2000, which provides that *Gacaca* courts can, if needed, resort to the assistance of legal advisors appointed by the *Gacaca* Department of the Supreme Court.[108] For that purpose, teaching customary laws in law schools should have a significant place in order to get a better understanding of the socio-cultural roots of the legal rules applicable before traditional judicial institutions.

In the case of traditional institutions such as *Gacaca* that are being conferred with jurisdiction to prosecute international crimes, I believe that their material jurisdiction should be limited to low-level criminals rather than senior military and political officials, since high-ranking criminals would not go unpunished, as state courts or international criminal courts would retain the right to prosecute them. Traditional courts could also deal with children who committed crimes in the course of widespread atrocities. Indeed, traditional and community lay judges are best able to understand the conditions that produce child soldiers and to assist them. Traditional judicial institutions can therefore provide an ideal forum for the rehabilitation and re-socialisation of children who committed egregious acts during armed conflict.

As for the law applicable before local judicial mechanisms, it is important that local courts apply customary laws and procedures that they understand. Customary rules are not set in stone; their flexibility allows them to reach effective and fair solutions in all situations.[109] In this way social harmony, the main goal for procedures before local institutions, can be easily achieved. Again, local institutions are not best suited to apply complex international criminal rules because lay judges are not trained in international law. In addition, international criminal law has no socio-cultural foundation; it consists of an importation of legal principles and concepts whose maturation occurred in other cultures, namely Western culture. It is, therefore, to some extent, out of touch since it inadequately meets the needs of African societies that have experienced cyclic crises. That is the central reason why the *Gacaca* system has had difficulty: lay judges have been asked to interpret and apply international criminal law with no legal training whatsoever.

[107] South African Law Commission, n 62 above, at para 5.7.

[108] Law 40/2000, n 19 above, Art 29.

[109] For Mr Choudree, 'traditional courts have a major advantage in comparison with the other types of courts in that their processes are substantially informal and less intimidating, with the people who utilise these courts being more at ease in an environment that is not foreboding': see Choudree, n 51 above, at 13.

Traditional justice institutions are not national court systems and should not be treated as such, especially when applying written law and classic criminal sanctions. Such approaches confuse lay judges and undermine the credibility and the reputation of local mechanisms responsible for the administration of post-conflict justice. The application of international criminal law should be restricted to states and international tribunals staffed by professional judges with solid international legal training and experience. Empowering lay judges to adjudicate international law creates misunderstanding, as is currently the case between the ICC and the Acholi people of Uganda.[110] The problem is not yet resolved. As Katherine Southwick points out,

> the Rome Statute does not appear to have contemplated such a scenario; the approaches to justice reflected in the statute are seen to be universal. The apparent clash of an international conception of justice with local approaches raises basic questions of when and how the former must compromise with the latter.[111]

Consequently, it is likely that the ICC will set up some guidelines dictating its own relationships with local mechanisms. It would not be counterproductive if the court decided to affirm the legitimacy, the importance and the complementarity of these other conflict resolution mechanisms.[112]

Thus, despite the international nature of crimes they deal with, citizen-judges cannot apply international criminal law that governs these offences. This law is not accessible to them as they do not possess the necessary basic legal training to understand and apply it. They should continue to apply customary law, which includes rules prohibiting inhumane behaviour, and where international criminal law must be applied, the principles which underpin it should be packaged for lay judges in digestible form.

V. CONCLUSION

Africa is not simply an object of international criminal law; it actively participates in its development and its maturation. In opting for the involvement of traditional institutions in the prosecution of serious crimes, African countries have demonstrated that criminal prosecutions before classic states courts do not necessarily provide adequate

[110] See n 93 above.

[111] Katherine Southwick, 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court', (Summer/Fall 2005) *Yale Journal of International Affairs* at 113–14.

[112] Hans Hendrik Brydensholt, 'Peace, Justice and the Challenge of Amnesties' (2005) 16 Crim LF at 385 (book review of Jeremy Sarkin, *Carrots and Sticks: the TRC and the South African Amnesty Process* (Antwerp/Oxford, Intersentia, 2004)).

responses to problems emerging from massive and systematic criminal phenomenon. This new thinking allows community members to engage in the settlement of problems which have shaken societal foundations. It is therefore important that everyone play a part in the healing process. Conversely, community involvement should not be a form of disguised formal justice. That would exceed the capacity of traditional and community courts and could even undermine their legitimacy. Nevertheless, traditional mechanisms are not a panacea; they complement other mechanisms, namely national or international courts, which can greatly benefit from traditional mechanisms in the management of conflict. Therefore, instead of having suspicions about traditional institutions, the international community should respect and accept them as complementary judicial mechanisms. African models of transitional justice are far less expensive, arguably more effective, and certainly more participatory than international tribunals.

In this sense, the South African Truth and Reconciliation model and *Gacaca* system represent clear examples of the critical role non-traditional and traditional institutions can play in ending impunity and restoring the rule of law. They represent the best examples of the application of international law from below, and evidence that even at the most local level African states, institutions and peoples are shaping and evolving international law.

3

Africa's Internally Displaced and the Development of International Norms: Standards versus Implementation

FRANCIS M DENG

I. INTRODUCTION

Norms constitute the code which regulates the conduct of members of a given community and the way they relate to others. Norms are therefore fundamental to social order. While they provide guidelines, they are adhered to in varying degrees, and sometimes they are violated. But to the extent that they enjoy legitimacy and at least moral, if not binding, authority, such violations carry with them punitive sanctions, even if enforced only by the internal police in the conscience of the violator. As noted elsewhere:

> The dramatic paradox is that, in the absence of a legislating and enforcing authority, norms are established (and changed) by the same process by which they are broken—by being tested. Like a muscle, a norm is kept in shape by challenge and exercise. Norms themselves of course do not prevail, since they are not actors; they are made to prevail by the actions of parties who uphold them by sanctioning a violator in a range of ways—from words of condemnation and guidance to acts of opposition and punishment. If such reaction fails too often and the challenge to the norm succeeds too often, the norm is defeated or changed.[1]

This chapter examines the development of non-binding international norms, particularly Africa's role as both an object and a subject of norm creation. Africa played both a theoretical and a practical role in the idea and conception of the United Nations Guiding Principles on Internal Displacement, which were necessitated by a global crisis that has been

[1] Francis M Deng and I William Zartman, *A Strategic Vision for Africa: The Kampala Movement* (Washington DC, Brookings Institution, 2002) 140.

recognised by the international community only since the late 1980s and in which Africa is the most affected continent. In 1992, at the request of the UN Human Rights Commission, the then Secretary-General, Boutros Boutros-Ghali (an Egyptian), designated the author (a native of Sudan) as Representative of the Secretary-General on Internally Displaced Persons, a position that was confirmed by Secretary-General Kofi Annan (a Ghanaian), and which I held until 2004.[2] Hence, the idea, conception and operationalisation of the Guiding Principles arguably made it an African initiative in both theoretical and practical terms.

Shortly after my appointment, I put together a team of dedicated human rights experts and advocates to assist me in developing a normative framework for effectively responding to the spiralling global crisis of internal displacement. As a native of Sudan, which boasts one of the largest internally displaced populations in the world, I was determined to develop a viable framework. We recognised that persons forced to flee their homes for such reasons as armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, but who remained within the borders of their own countries—internally displaced persons, or IDPs as they became known—had particular assistance and protection needs that were not being met either by national authorities or by the international community. Our primary mechanism for addressing the problem was an attempt to create or restate a set of international norms in favour of the rights of IDPs based on existing human rights, humanitarian and analogous refugee law. We deliberately chose to try to do so by means of a 'soft law' instrument, derived by experts rather than directly by states. This endeavour eventually led to the formulation of the Guiding Principles on Internal Displacement in 1998. Our consultations with African leaders were critical to the establishment of these principles.

This chapter tries to illuminate the theoretical debate about norms in general, norm-building, especially Africa's role, and the impact of norms through the lens of the Guiding Principles. Part II begins with a discussion of the general conceptual issues and theoretical debates about norms, particularly those pertaining to rights. Part III presents an overview of the global crisis of internal displacement, and Part IV presents the response of the international community to these crises. Part V highlights the approach I used in my dialogue with governments in dealing with the issue of

[2] In addition to building on my experience generally, this chapter specifically derives from two sources. One is a study I conducted for the Social Science Research Council, 'The Guiding Principles on Internal Displacement and the Development of International Norms'. I am deeply indebted to David Fisher and Sophie Haspeslagh for their substantive contribution to the preparation of that study. The other is a two-version paper I prepared for the Center on Conflict Resolution in South Africa and for Macalster College. Central to all of them is my experience as Representative of the Secretary-General on IDPs.

sovereignty. Part VI describes the process by which the Guiding Principles were developed, the reasoning behind our recourse to 'soft law' and the reception to the Guiding Principles at the international, regional and national levels. Part VII analyses the development of the African Union's (AU's) evolving protective regime on IDPs. Part VIII concludes with some reflections on the current and potential impact of the Guiding Principles as a budding international normative framework and discusses what general conclusions about norms can be drawn from their development and the progress made thus far in utilising them.

II. CONCEPTUAL ISSUES

There is a broad consensus across the fields of international relations and legal studies that a 'norm' represents a shared standard of behaviour for a given set of actors.[3] Along these lines, norms have variously been described as 'standard[s] of appropriate behaviour',[4] 'collective expectations for the proper behaviour of given actors',[5] 'shared (thus social) understandings of standards of behavior',[6] and 'prescriptions for action in situations of choice carrying a sense of obligation, a sense that they *ought* to be followed'.[7] Some scholars also refer to the other vernacular understanding of the term 'norm' as 'average,' 'typical' or 'common',[8] asserting that norms refer not only to what ought to be done, but also to 'actual patterns of behavior' which 'give rise to expectations as to what will in fact be done in a particular situation'.[9] However, these two meanings are frequently at odds. As Thakur points out, corruption is ubiquitous in

[3] Eg, Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887 at 891; Peter Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Ithaca, NY, Cornell University Press, 1996) 5. In this chapter, I will be concentrating on *international* norms, and I therefore rely primarily upon the work of international relations and international legal scholars. However, I note that our goal in developing and promoting the Guiding Principles was to affect not only the behaviour of states but 'all authorities, groups and persons irrespective of their legal status' who have some role or impact upon IDPs: Guiding Principles on Internal Displacement (11 February 1998) UN Doc E/CN.4/1998/53/Add.2, at Principle 2.

[4] Finnemore and Sikkink, n 3 above, at 889.

[5] Katzenstein, n 3 above, at 5.

[6] Audrie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca, NY, Cornell University Press, 1996) 14.

[7] Abram Chayes and Antonia Handler Chayes, 'Regime Architecture: Elements and Principles' in Janne Nolan (ed), *Global Engagement Cooperation and Security in the 21st Century* (Washington, DC, Brookings Institution Press, 1994) 65.

[8] *The Oxford English Dictionary* (Oxford, Oxford University Press, 1995) provides, as one definition of 'norm', a 'standard or pattern, especially of social behavior, that is typical of a group'.

[9] See, eg, Andrew Hurrell, 'Norms and Ethics in International Relations' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (London, Sage Publications, 2002) 143.

many countries, but revulsion against corruption is unquestionably universal; thus, whereas corruption may be the 'norm' in the sense that it is common, it is certainly not the 'norm' in the sense of a socially approved standard of behaviour.[10] In other words, inconsistent behaviour does not necessarily negate the existence of a norm.[11]

At the social level, norms spring from numerous sources, including religious, ethical and cultural beliefs. Risse and Sikkink assert that they derive fundamentally from 'principled ideas', which are 'beliefs about right and wrong held by individuals'.[12] Finnemore and Sikkink elaborate that there is therefore an inherent moral element to all norms, at least from the vantage point of those who espouse them.[13] In this sense, norms are necessarily distinct from 'interests' or the economic concept of 'rational choice'.[14] At the level of international relations, however, the notion that norms are necessarily 'moral' is contested. Regime theorists, for instance, posit that norms are merely collective rules meant to overcome difficulties in achieving co-operation in an anarchical environment.[15]

Norms may be embodied in laws, codes, guidelines and similar mechanisms. Conversely, the absence of a formal and legally binding requirement does not necessarily imply the absence of a norm. Finnemore and Sikkink note as an example the many explanations that the United States felt it needed to give for its use of land mines in South Korea, notwithstanding the fact that it is not a party to the Ottawa Landmine Treaty, thereby indicating its recognition of an emerging norm against the use of such weapons.[16]

A. The Function of Norms

While the basic elements of norms are relatively uncontroversial, the equally important question of how they function is at the heart of the

[10] Ramesh Thakur 'Global Norms and International Humanitarian Law: An Asian Perspective' (2001) 841 *International Review of the Red Cross*, 31 March, 19–44.

[11] See Daniel Thomas, *The Helsinki Effect: International Norms, Human Rights and the Demise of Communism* (Princeton, NJ, Princeton University Press, 2001) 7. However, as discussed below, the combination suggested by Hurell, n 9 above, of a prescriptive standard and actual practice is crucial to the recognition of a binding custom in international law.

[12] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, Cambridge University Press, 1999) 7.

[13] Finnemore and Sikkink, n 3 above, at 892. Not all commentators agree with this equation of norms with morality. See Katzenstein, n 3 above, at 5, and n 12 above.

[14] Gary Goertz, *Contexts of International Politics* (Cambridge, Cambridge University Press, 1994) 226.

[15] Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ, Princeton University Press, 1984) 25–7.

[16] See Finnemore and Sikkink, n 3 above, at 892.

battleground between various schools of thought within international relations and international legal theory.[17] Scholarly opinion in this area ranges from the conviction that norms are nothing more than window-dressing to the assertion that they are as important as self-interest in guiding state behaviour. Moreover, the extent to which norms guide the behaviour of non-state actors in the international arena has only recently come under the scrutiny of these fields of inquiry.

Modern international relations theory was born out of disappointment, in light of the devastation of the Holocaust and World War II, with the formerly ascendant Wilsonian worldview, which foresaw progressive perfectibility of the social order through increasingly legalised relationships between states.[18] Reacting against this idealism, so-called realists such as Hans Morganthau and EH Carr (as well as their more recent intellectual progeny, the 'neo-realists') argued that interaction between states could only be explained through their clash of interests, with power as the determining factor.[19] Accordingly, norms had no independent force to shape behaviour, figuring in international discourse only as a means to cloak expressions of raw interests by the most powerful states.[20]

Other schools of thought have challenged this view. Liberal theorists, for example, such as Andrew Moravcsik and Anne-Marie Slaughter, see domestic politics as the determining factor of the international behaviour of states.[21] States are controlled by individuals and private groups that act according to their own interests but also their own values. As we have argued elsewhere:

> Some international relations theory claims that norms do not constrain behaviour of states for they observe them or not as their power and interests dictate; even if states do seem to observe norms, they are only doing what they would do anyhow, norms or not. For all its seeming correspondence with reality, such thinking has its limitations. States do not act; people act for them. People follow norms, imperfectly as people do anything. To claim then that people are never constrained by norms is to misunderstand human nature and to build a fantasy

[17] Ole Waever convincingly argues that subdividing the discipline of international relations into 'schools of thought' obscures the subtleties of complex authors and favours those who fit in only one 'box'. See, eg, Ole Waever, 'Figures of International Thought: Introducing Persons Instead of Paradigms' in Iver Newmann and Ole Waever (eds), *The Future of International Relations: Masters in the Making* (London, Routledge, 1996) 2. For lack of a better organising mechanism, however, like Waever himself, I will have to run that risk here.

[18] See Friedrich Kratochwil, 'How Do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (New York, Oxford University Press, 2000) 37.

[19] *Ibid*; Hans Peter Schmitz and Kathryn Sikkink, 'International Human Rights, Relations' in Walter Carlsnaes, Thomas Risse and Beth Simmons (ed), *Handbook of International Relations* (London, Sage Publications, 2002) 521.

[20] See Hurrell, n 9 above, at 144.

[21] See Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *International Organizations* 513–53.

> world filled with actors called states who do not act like real people. Norms are used to do three things—to make unthinkable acts unthinkable, to correct challenging behaviour, and to justify opposition to persisting infractions.[22]

The position of a state on a given norm will be based on the ruling group's determination about the impact of the norm on its own internal political situation.[23] Human rights norms are more likely to be adopted and championed by liberal states because of the concordance with domestic values. In particular, new democracies are likely to adopt human rights norms as a means of shoring up the legitimacy and power of a new ruling class.[24] Entrenched democracies, however, will resist infringements on their autonomy, unless political advantage can be gained from supporting unenforceable norms.[25]

Proponents of rationalist or regime theory posit that states will act in compliance with international regimes, made up of collectively agreed rules, norms and principles, even when it is contrary to their 'myopic self-interests,' in order to further their long-term interests in certainty and order and to maintain their reputations with other states as dependable partners.[26] Each of these elements facilitates collective action to their mutual benefit.[27] Unlike norms or regimes having to do with trade, military intervention, environment or resource usage, however, human rights norms do not inherently optimise collective outcomes and hence state interests.

Unlike the foregoing theorists, constructivists such as Kratochwil, Finnemore, Sikkink and Schmitz argue that norms have independent weight in international relations and draw strength from their intrinsic quality of 'appropriateness'.[28] Most importantly, the acceptance of norms helps to shape the identity of states (and other actors) and therefore their behaviour.[29] These theorists consider the reflection on a nation's values and style to be important; nations want a reputation of principled behaviour, which will lead to a 'virtuous circle' that can establish more inclusive notions of identity.[30] Actors will seek to behave in accordance with norms that are relevant to their identity. There is a mutually constitutive relationship among states, international structure and norms.[31]

[22] Deng and Zartman, n 1 above, at 140–41.
[23] See Thomas, n 11 above, at 10.
[24] *Ibid* at 11.
[25] *Ibid*.
[26] See Keohane, n 15 above, at 103–6.
[27] See Andreas Hasenclever, Peter Mayer and Volker Rittberger, *Theories of International Regimes* (Cambridge, Cambridge University Press, 1997) 4.
[28] See Schmitz and Sikkink, n 19 above, at 522.
[29] *Ibid* at 521–2.
[30] See Kratochwil, n 18 above, at 57.
[31] See Thomas, n 11 above, at 15.

There is a similar tension about the function of norms in the debate among international legal scholars and legal institutions. Early figures in international legal thought, such as Grotius, identified two bases for international law: consent of states, and 'natural law' based on biblical prescription.[32] Thus, religious norms directly justified certain rules of law. Since the time of the Renaissance, however, the focus on 'natural law' had fallen out of favour, although it continued to play a role in international law and legal theory up to the late eighteenth century. Positivism assumed the dominant position in the nineteenth century as the principal basis for international law.[33] For positivists, the primary constitutive force of law is the consent of states to be bound by it.[34] Like the international relations realists, positivists hold that the international scene is anarchical, at least in its natural state, where states are free to act in their own interests. However, states can and do create islands of order within the chaos through agreements with each other. This may be by way of express agreement, as through treaty, or through implied agreement, that is, customary law. Whether the resulting rules derive from 'norms' in the sense of ethically required standards of behaviour or from mere co-operative self-interest is irrelevant for purposes of the legal analysis.[35] This view was widely shared by legal scholars and legal institutions alike.

The rise in human rights since World War II, however, has shaken assumptions concerning the primacy and form of consent. For example, it has been well established that binding custom is created by two elements: (1) general state practice, and (2) *opinio juris et necesitatis,* or the belief by states that the practice is legally required.[36]

Traditionally, custom has been determined by an inductive process looking first for a pattern of state action over a substantial period of time and then seeking contemporary statements indicating the required *opinio juris*.[37] The Permanent Court of International Justice demonstrated this mode of analysis in arriving at its determination about the jurisdiction over ships on the high seas in the *SS Lotus* case.[38]

[32] See John Head, 'Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of International Law' (1994) 42 *Kansas Law Review* 605, 615.

[33] *Ibid*.

[34] See Peter Malanczuk, *Akehurst's Modern Introduction to International Law,* 7th edn (London, Routledge, 1997) 47.

[35] See, eg, Philip R Trimble, 'A Revisionist View of Customary International Law' (1985) 33 *UCLA Law Review* 665, 684 (contrasting the judicial commitment to 'principled' decisions with shifts in customary law, which are 'not necessarily guided by principle').

[36] See Malanczuk, n 34 above, at 39.

[37] See Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757, 758.

[38] *Ibid*, citing *SS 'Lotus'* (7 September 1927) [1927] PCIJ (Ser A) no 10 at 18, 29.

Scholars such as Schachter have subsequently recognised that: 'Whether human rights obligations have become customary law cannot readily be answered on the basis of the usual process of customary law formation.'[39] The order of inquiry has therefore increasingly been reversed to a deductive process which looks first to general statements of rules and then seeks out instances of practice.[40] The International Court of Justice employed this 'modern' type of inquiry in the *Military and Paramilitary Activities in and Against Nicaragua* case, deriving customs of non-use of force and non-intervention primarily from the text of General Assembly Resolutions.[41]

The former 'traditional' method of analysis of custom favours description (that is, what states are already doing) and is therefore more likely to accord to their consent than the latter method, which favours 'normativity' (that is, what states should be doing).[42] A number of scholars have suggested that the degree to which practice or *opinio juris* is favoured should be determined according to a sliding scale based on the moral substance of the rule involved.[43]

An even greater blow to the ascendancy of consent is the phenomenon of *jus cogens* or 'peremptory' norms, which has gained increasing acceptance over the last few decades.[44] The Vienna Convention on Treaties defines *jus cogens* as:

> a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[45]

Any treaty provision contravening a *jus cogens* norm is void.[46] Thus, in contrast to treaties and general customary law,[47] a *jus cogens* or peremptory norm is deemed to be binding on all states, even those that object. Exactly which norms have attained the status of *jus cogens* is subject to dispute,[48]

[39] Oscar Schachter, *International Law in Theory and Practice* (New York, Springer, 1991) 336.
[40] See Roberts, n 37 above, at 758.
[41] *Ibid* (citing *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua. v US)*, Merits (27 June 1986) [1986] ICJ Rep 14).
[42] *Ibid* at 762.
[43] *Ibid* at 778.
[44] See Schachter, n 39 above, at 343.
[45] Vienna Convention on the Law of Treaties (adopted 22 May 1969), UN Doc A/Conf 39/28, UKTS 58, (1980) 8 ILM 679, at Art 53.
[46] *Ibid.*
[47] Customary law is not binding on a state that openly and persistently objects to the standard: see Malanczuk, n 34 above, at 39.
[48] *Jus cogens* 'is a comparatively recent development and there is no general agreement as to which rules have this character': Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law,* 9th edn (New York, Longman, 1992) 7.

but the highly regarded treatise Restatement of the Foreign Relations Law of the United States asserts that prohibitions on genocide, slavery, murder, disappearance, torture, arbitrary detention and systematic racial discrimination all qualify.[49]

Academic legal theory has also accorded increasing importance to norms in its reflection on law. Feminist scholars have sought to demonstrate how supposedly neutral processes and rules are based on norms favouring men.[50] The 'New Haven School' views international law as a means to create a 'world public order of human dignity'.[51] Even natural law has its modern representatives, such as Teson, who insist that international law must be girded by principles of justice.[52] Somewhat similarly, Franck posits that international law's power to compel springs mainly from perceptions of its legitimacy.[53] Although legal positivism retains many academic adherents[54] and important political support among policy-makers, a more dynamic view of law is gaining momentum. Norms related to human dignity play an important role in world public order and, more specifically, in the development of human rights law.[55] The development of customary international law has become a source of 'transnational protection of human rights', humanitarianism in laws of war and the doctrine of humanitarian intervention.[56] It has indeed been observed that there seems to be a long-term trend towards 'humanizing the other', which resonates with basic ideas of human dignity common to most cultures.[57] Finnemore and Sikkink see this point as an explanation for why certain norms succeed at reaching a 'tipping point' (a concept described below) and some do not.[58] A norm that has a strong moral backing even if it is not a legal norm can have an important impact on behaviour. The fact that the sanctioning power is diffused and not legally binding will not hinder the effect of the norm since it is

[49] See Restatement (Third) of the Foreign Relations Law of the United States (1987) sec 702.

[50] See Robert Beck, 'International Law and International Relations: The Prospects for Interdisciplinary Collaboration' in Robert Beck et al (eds), *International Rules: Approaches From International Law and International Relations* (New York, Oxford University Press, 1996).

[51] As originally expounded by Myres McDougal, Harold Lasswell and Lung-Chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New York, New York Law School, 1980).

[52] See Fernando Teson, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53.

[53] Thomas Franck, *Fairness in International Law and Institutions* (New York, Oxford University Press, 1995).

[54] See, eg, Gennady Danilenko, *Law-Making in the International Community* (New York, Springer, 1993); Trimble, n 35 above.

[55] See McDougal, Lasswell and Chen, n 51 above, Preface.

[56] See *ibid* at 181.

[57] See Finnemore and Sikkink, n 3 above, at 907.

[58] *Ibid*.

driven by compelling values.[59] The moral forces of a norm will lead it to be prescriptive and thus affect behaviour (norms are a cause rather than an effect).[60]

Assuming that norms do have an effect on the behaviour of states and other actors, the next important question is how they develop. Inasmuch as they see norms primarily as instruments for the promotion of state interests, realists, liberals and regime theorists generally have little to say about how to create a norm. As a norms-based theory, however, constructivism provides an important model.

For constructivists, international norms develop through a process of 'socialisation'.[61] Risse, Ropp and Sikkink identify three types of socialisation: (1) tactical adaptation in the face of pressure (for instance, from human rights activists), (2) persuasion of state actors as to the moral imperative of the norm and (3) institutionalisation and habituation.[62] Similarly, Finnemore and Sikkink describe a three-stage 'life cycle' of norms.[63] The first stage, 'norm emergence,' is facilitated by 'norm entrepreneurs' or 'meaning architects', who focus attention on new norms by creatively 'framing' them within political discourse.[64] The norm entrepreneurs make use of organisational platforms, such as inter-governmental and non-governmental organisations, to promote their new norms. If they are successful, states gradually begin to accept the norm. The second stage comes about when a 'tipping point' is reached in the adoption of the norm, after which a 'norms cascade' occurs, with numerous states rapidly adopting the norm, even without domestic pressure.[65] This happens through a pattern of international socialisation of target states by others that have accepted the norm. The third stage is internalisation, the point at which norms have been accepted so widely as to be taken for granted and compliance with them becomes uncontroversial.[66] Koh, a legal scholar, describes a similar concept, which he calls the 'transnational legal process'.[67] States move from mere 'compliance' (norm-conforming behaviour imposed by outside pressure) to 'obedience' (norm-conforming behaviour based on internal value systems) through the work of networks of domestic 'transnational actors' (individuals, non-governmental organisations [NGOs], civil society, corporations and government agents) in interaction

[59] *Ibid* at 243.
[60] See Goertz, n 14 above, at 237–8.
[61] See Risse, Ropp and Sikkink, n 12 above, at 11.
[62] *Ibid* at 11–17.
[63] See Finnemore and Sikkink, n 3 above, at 895.
[64] *Ibid* at 896–7.
[65] *Ibid* at 902.
[66] *Ibid.* at 904.
[67] Harold Hogju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

with international actors (international NGOs, regional and international organisations).

'Acceptance' of a norm can take a number of different forms, including political, moral and legal obligations. For legal scholars, a central question is whether a norm has reached the status of 'law'. With the caveats just discussed, treaties and customary law remain the backbone of international law, and the basics of how they may be formed are well established. However, recent years have seen an important rise in the use and status of 'soft law'. Although much discussed in legal literature,[68] there is no universally accepted definition of the term.[69] One particularly useful and broad description of soft law holds that it:

> range[s] from treaties, but which include only soft obligations …, to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organizations …, to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.[70]

Thus, it may be safely said that soft law is something less than an entirely binding and enforceable rule and something more than mere political statement.[71]

The use of soft law instruments can facilitate and signal the emergence of a norm where states are not yet ready to bind themselves formally.[72] These instruments can serve as an exploratory step towards the creation of 'hard law' instruments[73] and may in some cases evolve into 'hard law' themselves. The classic example of the latter case is the Universal Declaration of Human Rights, originally agreed to as a non-binding set of principles, but now generally regarded as having passed (at least in some of its parts) into customary law.[74]

Even in their 'soft' status, soft law instruments can intrude into hard law as interpretative guides for courts, arbitral tribunals and other fora at the international and national levels when hard law is unclear.[75] Most importantly, they serve as tools of political persuasion and consensus-building.[76] A potent example of the latter function is the 1975 Helsinki

[68] CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

[69] Tadeusz Gruchalla-Wesierski, 'A Framework for Understanding Soft Law' (1984) 30 *Revue De Droit De McGill* 37, 44.

[70] Chinkin, n 68 above, at 851.

[71] See Malanczuk, n 47 above, at 54.

[72] *Ibid*.

[73] *Ibid*.

[74] See *ibid* at 213; Henry Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd edn (New York, Oxford University Press, 2000) 143.

[75] See Gruchalla-Wesierski, n 69 above, at 65.

[76] *Ibid* at 66.

Final Act, which formed the Conference on Security and Co-operation in Europe (now known as the Organisation for Security and Co-operation in Europe) and which was instrumental to promoting human rights in Europe and bringing an end to the Cold War.[77]

Of particular interest here is the last type of soft law instrument just described: instruments drafted by experts without state involvement or endorsement. Somewhat surprisingly, a number (although by no means all) of such instruments have achieved wide acceptance. Instruments such as the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,[78] the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights,[79] and the Principles Relating to the Status and Functioning of National Institutions for the Promotion of Human Rights (the Paris Principles),[80] as well as the many draft Declarations, Conventions and Articles produced by the United Nations International Law Commission have been widely utilised by human rights advocates and states alike.

B. Compliance with Norms

Once a norm is 'accepted', the final and perhaps most important question is to what extent the relevant actors comply with it. It is generally assumed that legalised norms (that is, those codified in treaties or having become recognised as binding custom) are more likely to achieve compliance than others. However, there is evidence that this is not always the case, and theorists have therefore sought to identify other factors that may explain compliance or non-compliance with norms.

Compared with domestic legal systems, mechanisms on the international level for effective sanctions against law violators have traditionally been weak or non-existent. Nevertheless, Henkin has famously declared that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[81] Chayes and Chayes point out that it is effectively impossible empirically to prove or disprove Henkin's maxim,[82] although Weiss notes

[77] See Thomas, n 11 above, at 4.

[78] International Decade of the World's Indigenous People (1996) UN Doc E/CN.4/1996/39.

[79] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (1984) UN Doc E/CN.4/1984/4.

[80] Principles relating to the Status and Functioning of National Institutions (1992) UN Doc E/CN.4/1992/54, Annex.

[81] See Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn (New York, Columbia University Press, 1979) 47.

[82] See Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47 *International Organizations* 175, 177. The authors rhetorically ask 'how would Iraq's unbroken respect for the borders of Turkey, Jordan, and Saudi Arabia count in the reckoning against the invasions of Iran and Kuwait?'.

that it has been demonstrated that states neither fully comply with all obligations nor ignore them entirely.[83] Despite certain challengers, Henkin's assumption is widely shared among legal scholars, less so among political scientists.[84]

There is growing anecdotal evidence that the formal acceptance of a norm does not necessarily guarantee better compliance with it. Thomas's study of the Helsinki Final Act concludes that 'a state's formal acceptance of human rights norms does not necessarily guarantee significant changes in its behavior, much less in its identity and interests'.[85] Similarly, a 1999 study found that there was no significant statistical correlation between the increase in ratifications of the International Covenant on Civil and Political Rights and state behaviour on the ground as measured by the 'Political Terror Scale'.[86] This unfortunately also seems to be the case with respect to the African Charter on Human and Peoples' Rights. At the same time, a number of studies indicate that compliance with certain soft law instruments is quite high.[87] In this vein, Handl has noted the growing 'discrepancy between formal status and legal significance' of normative instruments.[88]

A number of potential factors other than legal status have been suggested as possible reasons for the success of some norms, and the failure of others, to obtain compliance:

1. the power (realists), identity (liberals), and numbers (constructivists) of existing adherents to a norm;
2. the simplicity of the norm;
3. the 'fit' or 'concordance' of the norm with a particular state's domestic situation and with other existing norms;
4. the perceived legitimacy of the norm itself and the process by which it was developed;
5. the durability (that is, the 'taken-for-grantedness' of long-standing norms);
6. the availability of monitoring mechanisms.[89]

[83] See Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 *University of Richmond Law Review* 1555.

[84] *Ibid.*

[85] See Thomas, n 11 above, at 287.

[86] See Schmitz and Sikkink, n 19 above, at 529.

[87] See Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walther Carlsnaes, Thomas Reese and Beth A. Simmons (eds), *Handbook of International Relations* (London, Sage Publications, 2002) 552.

[88] See 'A Hard Look at Soft Law', Proceedings of the 82nd Meeting of the American Society of International Law (20–23 April 1998) (remarks by Professor Handl) 372.

[89] See Finnemore and Sikkink, n 3 above, at 905–9; Richard Price, 'Compliance with International Norms and the Mines Taboo' in Maxwell Cameron et al (eds), *To Walk Without Fear: The Global Movement to Ban Landmines* (New York, Oxford University Press, 1998) 347–59.

Moreover, different environments may produce different results. Thus, Thakur argues that norms are more effective as social mores than as laws at the local and regional level, laws are more effective at the national level, and both are important at the international level.[90] The truth of all of these hypotheses has yet to be demonstrated empirically. It is therefore useful to turn to the phenomena of IDPs in Africa and the development of international law norms to determine whether they are descriptive of our experience 'on the ground'.

C. Africa and the Development of Norms

As other chapters in this volume demonstrate, Africa has been actively involved in the development of norms, and some normative principles developed in the African context have reinforced and strengthened international norms development at the international level. One of the first and leading areas in this regard has been the development of norms pertinent to decolonisation. I William Zartman and I outline some of the areas in which the development of norms has both shaped African normative frameworks and contributed to global norm-making.[91]

African states were born out of a successful normative challenge to the old order of legitimate colonialism that established a new norm of self-determination. The nationalist movements in Africa did not change this norm in isolation from global developments. Coming towards the end of the post-war decolonisation movement, the movements benefited from the impact of the earlier independence of Middle Eastern and Asian states and, before that, from the impact of World War II on the colonising states. Had Africa not taken up the movement, it might have been construed to be limited to Middle Eastern and Asian civilisations, in the same way as the self-determination movement after World War I was restricted to nationalities in Europe.

Independence movements began to bear tangible fruits in the 1950s, with the independence of the Sudan in 1956, followed by Ghana a year later. Once they were independent, African states contributed towards turning the norm into international law through the UN General Assembly, which stipulated the legitimacy of self-determination by a wide range of methods. The UN General Assembly reinforced the emerging norm that resistance to colonial rule was not to be considered aggression.

By 1963, most African countries had become independent. They created the Organization of African Unity (OAU) as a continent-wide organisation. In the OAU Charter, seven guiding principles, which were

[90] See generally Thakur, n 10 above.
[91] Much this section draws heavily on Deng and Zartman, n 1 above, at 141–4.

to form the normative basis of a new system of international relations, were created. They included sovereign equality of all member states, non-interference in internal affairs, respect for territorial integrity and political independence, peaceful settlement of disputes, condemnation of assassination and subversion, liberation of all colonial Africa and non-alignment.

Territorial integrity was reinforced at the 1964 OAU Summit, by a resolution reasserting the principle that guaranteed the inviolability of the borders inherited from colonial rule. Citing the Pandora's box effect as the alternative, not only did African leaders consistently reference the norm in the coming years, but the principle had a major impact on their policies in several cases, and the world community supported the OAU position against separatist movements.

Another African norm referred to the 'total emancipation' of all dependent African territories, words carefully chosen to cover South Africa as well as the European colonies. That norm became the basis of the unrelenting African campaign to have South Africa treated as a pariah state. The OAU Charter has not been the only source of African norms on this issue. A Manifesto on Southern Africa, voted at a summit of 13 East and Central African states at Lusaka in 1969, considered the South African situation and concluded that unless radical reform was effected, armed struggle was inevitable. The manifesto and the subsequent South African campaign generated a vigorous debate among African states on the alternative policy of dialogue, leading to strong condemnation of those who supported dialogue and a restatement of the armed struggle option at the 1971 OAU summit.

Yet another example of the African normative mechanisms is reflected in the OAU's 1969 African Refugee Convention, which provides asylum for political refugees, thereby widening the definition of the 1951 Refugee Convention. This, together with the Carlegena Declaration of Refugees of 1984, has significantly broadened the international refugee definition.[92] African states and institutions have also played a key role in the development and affirmation of the principles as definitive guidelines ('soft law') for the treatment of displaced persons in Africa and beyond.

Several conditions influence the strength and weakness of norms in Africa as elsewhere. First, norms are stronger when they have been set down in writing and strongest when they are endorsed in a signed and ratified statement. However, the norm of colonial independence was fully asserted by African national liberation movements and observed by the colonial powers before it could be codified; the norm worked to

[92] See Roberta Cohen and Francis M Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, DC, Brookings Institution Press, 1998) 16.

delegitimise the colonialist policies. While ratified Conventions have the force of international law, the declarations of heads of states and their representing ministers are often as powerful when they meet the needs of the parties concerned.

Second, norms become even stronger when, after being challenged, debated and contested, they are reaffirmed. Although unanimity is not required or expected, supportive action by the parties concerned is. If norms are not strengthened by being defended against internal opposition, they need to be kept alive by being applied. Norms that are not acted upon could be revived at a later date, but the strongest norms are those that are continually applied and thereby reaffirmed.

Third, norms are the tracks and signposts for political relations. They guide action in the paths decided by the framers and subscribers, constrain choices, justify policies and orient thinking. When relations go off track, the norms indicate where they should be restored and reaffirmed. When the tracks lead where the consensus does not want to go, the tracks can simply, if rarely, be abandoned, or, more frequently, the relations can be retracked. In this way the norms serve as a formula for negotiations and a method for problem solving. As such, they provide order for both ends and means in important relations.[93]

These conceptual issues are pertinent to the development of the Guiding Principles, the way they have so far been received and the prospects for their application, both in Africa and globally. But first, it is necessary to introduce the magnitude of the crisis, the needs involved, how they are being addressed and what is needed normatively, institutionally and operationally to provide a regime of protection and assistance to the displaced.

III. CRISIS OF INTERNAL DISPLACEMENT

Some 25 million persons in over 50 countries are uprooted and forced to flee from their homes or areas of habitual residence as a result of internal conflicts, communal violence or egregious violations of human rights, but remain within their national borders. As a consequence of their forced displacement, they are deprived of such essentials of life as shelter, food, medicine, education, community and a resource base for a self-sustaining livelihood. Worse, internally displaced persons remain within the borders of a country at war with itself. Even when they move to safer areas, they are viewed as strangers, discriminated against and often harassed. Although entire communities are often affected, those persons who are uprooted

[93] Deng and Zartman, n 1 above, at 144.

from their homes have been shown to be especially vulnerable to physical attack, sexual assault, abduction, disease and deprivation of basic life necessities. They have been documented to suffer higher rates of mortality than the general population, sometimes as much as 50 times greater.[94]

While the crisis is global, some regions of the world are more affected than others. By far the worst hit is Africa, with over half the world's internally displaced. Sudan, with 4.5 million displaced by the war in the South, and nearly 2 million in Darfur, is the most affected country in the world. By 2004, an estimated 1.4 million people had been displaced by conflict in Uganda, and at least 1.5 million in the Democratic Republic of Congo (DRC).[95] Countries that have also been much affected in Africa include Angola, Liberia, Sierra Leone and Somalia, where the crisis is compounded by state collapse. The problem on the African continent, however, is far more pervasive than these examples indicate.

Although the concept of state responsibility to guarantee the protection and general welfare of citizens and all those under state jurisdiction is becoming increasingly accepted in international law, it poses practical problems in countries where groups differentiate themselves on the basis of race, ethnicity, religion, language or culture. Often the most affected are minorities or marginalised groups. In most cases, elements of these marginal groups are in conflict with the dominant group. Either because they support rebels or dissidents or are victims by mere association, marginalised groups tend to be identified as part of the enemy. Far from being protected and assisted as citizens, they tend to be neglected and even persecuted. Under these circumstances, citizenship becomes only of paper value, without the enjoyment of the rights normally associated with the dignity of being a citizen. As I have argued elsewhere, marginalisation becomes tantamount to statelessness.[96]

Findings from my country missions around the world in my capacity as Representative of the Secretary-General underscore the degree to which the expectation of internal protection by states is for the most part a myth. During these missions, I would meet and speak with the authorities, visit the internally displaced for an on-site assessment of their conditions and needs and then return to brief the authorities on my findings and offer

[94] See Cohen and Deng, n 92 above, at 23–9; United Nations High Commissioner for Refugees (UNHCR), *The State of the World's Refugees* (Geneva, UNHCR, 1998) 112–15; and World Health Organization, 'Internally Displaced Persons: Health and WHO', Paper presented at the humanitarian affairs segment of the substantive session of the UN Economic and Social Council (New York, 5 April 2000) 5.

[95] UNHCR, *The State of the World's Refugees* (UNHCR, 2006).

[96] See Francis M Deng, 'Ethnic Marginalization as Statelessness: Lessons from the Great Lakes Region of Africa' in Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Washington, DC, Carnegie Endowment for International Peace, 2001) 183–208.

preliminary conclusions and recommendations. Typically I asked the displaced persons what messages they wanted me to take back to their leaders. In one Latin American country, the response I received was: 'Those are not our leaders. In fact, to them, we are criminals, not citizens, and our only crime is that we are poor.' In a Central Asian country, the response was: 'We have no leaders there. None of our people is in that government.' In an African country, a senior UN official explained to the Prime Minister, who had complained of inadequate support for refugees in his country, that UN capacity to assist refugees in the country was constrained by the need to assist 'your people', the internally displaced and other war-affected communities. The Prime Minister's response was: 'Those are not my people. In fact, the food you give those people is killing my soldiers.' These anecdotes highlight the cleavages of identity which often characterise the conflicts that generate internal displacement and the resulting vacuums of responsibility into which IDPs fall.

Far too often these populations are not only dispossessed by their own governments but are outside the reach of the international community because of the negative approach to sovereignty. While international humanitarian and human rights instruments offer legally binding bases for international protection and assistance to needy populations within their national borders, those people are for the most part at the mercy of their national authorities for their security and general welfare. International access to the internally displaced can be constrained and even blocked by states in the name of sovereignty. Diplomacy and the art of persuasion can help to tear down the barriers, but, in extreme circumstances, more assertive intervention may be imperative.

IV. GENESIS OF INTERNATIONAL RESPONSE

The plight of the internally displaced emerged into international consciousness in the late 1980s and the early 1990s for reasons connected to the end of the Cold War. Foremost among these reasons was the steady rise in the number of IDPs associated with the increase in internal conflicts. When first counted in 1982, it was estimated that there were 1.2 million IDPs. By 1992, the number had increased to 24 million.[97] Concomitantly, as superpower rivalry came to an end, Western governments' geopolitical advantage in accepting refugees was diminished and their willingness to do so began to wane. This situation led to a desire to find a way to protect and assist displaced persons in their own countries so as to discourage

[97] Francis M Deng, 'Report of the Representative of the Secretary-General on Internally Displaced Persons' (21 January 2003), submitted pursuant to Commission on Human Rights Resolution 2002/56, E/CN.4/2003/86 at para 4. Today the figure is higher than ever, with an estimated 25 million internally displaced persons displaced in 50 countries worldwide: *ibid.*

them from seeking asylum abroad.[98] The end of the Cold War also marked a shift in the international attitude towards intervention in domestic affairs, particularly where states caused, or failed to react to, massive humanitarian crises within their own borders.[99]

During the Cold War, most domestic and regional conflicts were in one way or another perceived as part of the proxy confrontation of the superpowers. Similarly, internal or regional crises and their humanitarian consequences used to be managed through the bipolar control mechanisms of the superpowers, who offered effective support to their less capable ideological allies. The outcome was that such domestic crises as internal displacement were not visible to the outside world.

With the end of the Cold War and the withdrawal of the strategic interests of the superpowers, these conflicts began to be seen in their proper national or regional contexts. The support of the major powers also disappeared, leaving former allies with significantly reduced capacity for suppressing or managing conflicts and responding to their humanitarian consequences. Consequently, the post-Cold War era witnessed the proliferation of internal conflicts, which have tended to target civilians, including women, children and the elderly. Without external support, both in the management of conflicts and in addressing their humanitarian consequences, governments were confronted with mounting crises they could hardly manage.

Human rights and humanitarian concerns began to replace strategic national interests as the driving norms in international politics. By the same token, human rights and humanitarian and development organisations began to intensify their activities as watchdogs of the degree to which universal standards were being adhered to or violated within national borders. To reinforce their capacities for their new responsibilities, NGOs began to receive increased support from the donor community, which saw them as more transparent and credible than governments in meeting the humanitarian needs of the affected populations. With these new developments, the rigid observance of sovereignty as a barricade against international scrutiny began to fall. In the name of human rights and humanitarian concerns, media spotlights began to focus attention on the human tragedies within state borders. The narrow view of sovereignty became increasingly challenged as the media and NGOs exposed the plight of millions who fell victim to the new types of wars that were fought internally, with devastating loss of lives, egregious violations of human rights and dehumanisation of the civilian populations.

[98] Cohen and Deng, n 92 above.
[99] *Ibid*.

As a result of these factors, the late 1980s saw the stirrings of an international response to internal displacement. The issue of the reintegration of IDPs figured prominently in two major international conferences at the end of the decade: the 1988 Conference on the Plight of Refugees, Returnees, and Displaced Persons in Southern Africa, and the 1989 International Conference on Central American Refugees.[100] Likewise, in 1989, the UN General Assembly called upon the Secretary-General to consider mechanisms for co-ordination of relief programmes for IDPs.[101] In 1990, the UN Economic and Social Council requested the Secretary-General to initiate a system-wide review of UN entities with regard to relief and protection of refugees and the internally displaced.[102]

Importantly, however:

> the major impetus behind international recognition of the problem of internal displacement lay with a group of NGOs, mobilised as a result of problems encountered in gaining access in the field to large numbers of 'internal refugees' who were in need of assistance and protection.[103]

They set in motion a process which eventually resulted in the United Nations becoming keenly aware of the issue of internal displacement.[104] After considering and rejecting various avenues within the UN, they decided to approach the Commission on Human Rights as the forum most accessible for NGOs. The issue was then raised at a meeting of diplomats and NGOs during the 1991 session of the Commission and won the support of Austria, which introduced a draft resolution on IDPs based on that statement.[105]

The resolution called upon the Secretary-General to prepare 'an analytic report on internally displaced persons'.[106] The resulting report of the Secretary-General concluded that there was 'no clear statement of the human rights of internally displaced persons, or those at risk of becoming displaced', and recommended the elaboration of guidelines which,

> would consist, at least in part, of clarifying the implications of existing human rights law for persons who are internally displaced and fashioning from existing

[100] *Ibid* at 5.

[101] International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (8 December 1988), UNGA Res 43/116.

[102] ECOSOC Res 1990/78. A report on this study was prepared by a consultant, Jacques Cuenod, and presented to ECOSOC in 1991. See Report on Refugees, Displaced Persons and Returnees (1991) UN Doc. E/1991/109/Add.1.

[103] Simon Bagshaw, 'Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network' (Geneva, Global Public Policy, 1999), <www.globalpublicpolicy.net/fileadmin/gppi/Bagshaw_Developing.pdf>.

[104] *Ibid* at 7.

[105] *Ibid*.

[106] Report of the Secretary-General (1991) UN Doc E/CN.4/1991/25.

> standards one comprehensive, universally applicable body of principles which addressed the main needs and problems of such persons.[107]

The report further recommended the creation of a 'focal point within the human rights system' to facilitate the co-ordination of the UN response to internal displacement.[108] In response to this report, Austria introduced another draft resolution to call for a comprehensive study,

> identifying existing laws and mechanisms for the protection of internally displaced persons, possible additional new measures to strengthen implementation of these laws and mechanisms and alternatives for addressing protection needs not adequately covered by existing instruments.[109]

The establishment of a focal point was also an important point of the resolution. As noted in the Secretary-General's report, various parties had recommended mechanisms ranging from a working group to a 'world court' on the rights of the internally displaced.[110] However, the concerns of many states regarding encroachment upon their sovereignty rendered such options unacceptable. The initial draft of the resolution asked for the designation of an 'independent expert', but in response to India's preference that the mandate remain with the Secretary-General, the final version of the resolution was changed to call upon the Secretary-General to 'designate a representative' to seek the views of governments, UN agencies, regional and non-governmental organisations and experts to perform the requested task.[111] In July 1992, Secretary-General Boutros Boutros-Ghali designated me as the representative.

V. SOVEREIGNTY AS RESPONSIBILITY

The fundamental norm of sovereignty as responsibility which has guided my work on internal displacement is, in significant part, the result of post-Cold War developments. As the Cold War era was beginning to unravel, it became necessary to speculate on the implications of the emerging new order on intrastate and interstate conflict. It was obvious that these conflicts would no longer be viewed in the context of the proxy confrontation between the superpowers. But what new conceptual framework would influence response to these conflicts in the post-Cold War era? I was involved in two initiatives which would help shape my perspective on the emerging challenge. One was the development of an African Studies

[107] UN Doc E/CN.4/1991/23 (1992).
[108] *Ibid*.
[109] UN Doc E/CN.4/1992/73 (1992).
[110] *Ibid*.
[111] Bagshaw, n 103 above, at 9; UN Doc. E/CN.4/1992/73, n 109 above.

Project of the Foreign Policy Studies Program at the Brookings Institution. The other was participating in the initiative of the then former Head of State of Nigeria and now the twice-elected president, Olusegun Obasanjo, towards a Helsinki-like Conference on Security, Stability, Development, and Co-operation in Africa (CSSDCA).

Our Brookings Africa Project began with a conference that made an overall assessment of conflicts in Africa and the challenges of the post-Cold War era. The conference papers were edited and published by Brookings under the title *Conflict Resolution in Africa*.[112] We then undertook national and regional case studies to deepen our understanding of the issues involved. Several publications resulted from these studies.[113] A synthesis of these case studies led to the main conclusion that as conflicts became internal, they also primarily became the responsibility of governments to prevent, manage and resolve. Governance was perceived primarily as conflict management. State sovereignty was then postulated as entailing the responsibility of conflict management. Indeed, the concluding volume in the Brookings African series was titled *Sovereignty as Responsibility.* The envisaged responsibility involved managing diversity, ensuring equitable distribution of wealth, services and development opportunities, and participating effectively in regional and international arrangements for peace, security and stability. A subsequent volume, *African Reckoning*, tried to put more flesh on the skeleton of the responsibilities of sovereignty, building largely upon human rights and humanitarian norms and international accountability.[114] Since internal conflicts often spill over across international borders, their consequences also spill across borders, threatening regional security and stability. In the 'apportionment' of responsibilities in the post-Cold War era, regional organisations become the second layer of the needed response. And yet, the international community remains the residual guarantor of universal human rights and humanitarian standards in the quest for global peace and security.

The development of the Helsinki process for Africa was motivated by the concern that the post-Cold War global order was likely to result in the withdrawal of the major powers and the marginalisation of Africa. It was therefore imperative for Africa both to take charge of its destiny and to observe principles which would appeal to the West and thereby provide a sound foundation for a mutually agreeable partnership. These principles were found in the Helsinki framework of the Economic and

[112] Francis M Deng and I William Zartman (eds), *Conflict Resolution in Africa* (Washington, DC, Brookings Institution Press, 1991).

[113] Francis M Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I William Zartman (eds), *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC, Brookings Institution Press, 1996).

[114] Francis M. Deng and Terrence Lyons (eds), *African Reckoning: A Quest for Good* (Washington, DC, Brookings Institution Press, 1998).

Security Cooperation in Europe (ESCE), which became the Organisation for Security and Co-operation in Europe (OSCE). A series of meetings culminated in the 1991 conference in Kampala, Uganda, which was attended by some 500 people, including several heads of state, and representatives from all walks of life. The conference produced the *Kampala Document*, which elaborated the four 'calabashes', so termed to distinguish them from the OSCE 'baskets' and give them an African orientation. The calabashes are security, stability, development and co-operation. The adoption of the CSSDCA by the OAU was initially blocked by a few governments which felt threatened by its normative principles. When Obasanjo returned to power as the elected President of Nigeria, he was able to push for the incorporation of CSSDCA into the OAU Mechanism for Conflict Prevention, Management and Resolution.[115]

In connection with these initiatives, I began to focus attention on promoting the need to balance conventional notions of sovereignty with the responsibility of the state to provide for the protection and general welfare of citizens and all those under state jurisdiction.[116] Given the sensitivity of the mandate on internal displacement, I concluded that the way to build a bridge between the need for international protection and assistance for the internally displaced and the barricades of the negative approach to sovereignty was to build on the fundamental norm of sovereignty as a positive concept of state responsibility towards its citizens and those under its jurisdiction. In my own experience, this approach has been quite effective in the dialogue with governments. On all the missions I undertook to countries around the world, no government authority has ever argued: 'I don't care how irresponsible or irresponsive we are, this is an internal matter and none of your business.'

The principle of sovereignty as responsibility has been strengthened and mainstreamed by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS).[117] In a book on the work

[115] Deng and Zartman, n 1 above.

[116] For my various contributions to the normative theme of the responsibility of sovereignty, see these books, chapters and articles: Terrence Lyons and Francis M Deng (eds), *African Reckoning: A Quest for Good Governance* (Washington, DC, Brookings Institution Press, 1998); Francis M Deng, 'Sovereignty and Humanitarian Responsibility: A Challenge for NGOs in Africa and the Sudan' in Robert Rotberg (ed), *Vigilance and Vengeance* (Washington, DC, Brookings Institution Press and The World Peace Foundation, 1996); Francis M Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I William Zartman (eds), *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC, Brookings Institution Press, 1996); Francis M Deng, 'Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action,' in John Harbeson and Donald Rothchild (eds), *Africa in World Politics* (Boulder, CO, Westview Press, 1995); Francis M Deng, 'Frontiers of Sovereignty: A Framework of Protection, Assistance and Development for the Internally Displaced' (1995) 2 *Leiden Journal of International Law* 8.

[117] ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Center, 2001).

of my mandate, Thomas G Weiss and David A Korn traced the development of the principle from what they called the 'Brookings doctrine' of the Africa Project, its application to the IDP mandate and its endorsement and elaboration by the ICISS. The Commission's final report, the authors note, 'open with words that could have come from Deng's pen':

> State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-interference yields to the international responsibility to protect.[118]

The authors, one of whom led the Secretariat of the Commission, note further that:

> [A]lthough the commission never formally acknowledged the parentage of the 'responsibility to protect,' a paraphrase of sovereignty as responsibility … among individual commissioners and staff, there are individuals who are aware of the connection.[119]

Furthermore, they quote former Canadian Foreign Minister Lloyd Axworthy, who was responsible for the establishment of the Commission:

> The first time I heard the notion of 'responsibility to protect' was when Deng visited me in Ottawa and argued for a clear commitment by the international community to deal with the IDP issue.[120]

In a paper entitled 'Sovereignty as Responsibility', Amitai Etzioni discusses the work of the Brookings Africa Project, which laid the foundation for the approach I adopted for my mandate:

> Francis Deng and associates at the Brookings Institution published a book in 1996 challenging what had been the key principle of international relations since the signing of the Treaty of Westphalia in 1648: that sovereign states are not to interfere in one another's internal affairs. Their book, Sovereignty as Responsibility: Conflict Management in Africa, argues that when nations do not conduct their internal affairs in ways that meet internationally recognized standards, other nations not only have the right, but also have a duty, to intervene. Deng et al propose that those governments that do not fulfill their responsibilities to their people forfeit their sovereignty. In effect, the authors redefine sovereignty as the responsibility to protect the people in a given territory.[121]

[118] Thomas Weiss and David Korn, *Internal Displacement: Conceptualization and Its Consequences* (London, Routledge, 2006) 97.
[119] *Ibid*.
[120] *Ibid* at 98–9.
[121] Amitai Etzioni, 'Sovereignty as Responsibility', (2006) 50(1) (Winter) *Orbis* 71.

Noting that the ICISS and the Secretary-General's High-Level Panel on Threats, Challenges and Change 'affirmed Deng et al's proposals,' he added:

> Deng et al realized that the sovereignty-as-responsibility principle was not observed as a universal doctrine but held that it is becoming increasingly recognized as the centerpiece of sovereignty.[122]

In his view:

> A concept of sovereignty as responsibility that includes both the duty to protect and the duty to prevent has broad appeal across the political spectrum. Progressives can support the assertion that nations have a duty to intervene in failing or authoritarian states on humanitarian grounds, while neoconservatives hold that intervention in such states is necessary to preserve national and international security.[123]

Etzioni concludes with this appraisal:

> The new conception of sovereignty as responsibility is a telling sign of the new, shared moral understandings. In the long run, all this points to the normative theses that ultimately the only sovereign that can provide the final authorization for acts of coercion is the people of the world, the so-called international community, not those of one nation or the other or even a grouping of such nations.[124]

The principle has continued to gain wide support from the international community. As the UN prepared for its sixtieth anniversary celebration, the Secretary-General pleaded that 'we must embrace the responsibility to protect'.[125] The World Summit of Heads of State and Government, which convened in New York in September 2005,

> stressed the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.[126]

Former High Commissioner for Refugees Sadako Ogata, in a foreword to Weiss and Korn's book on the work of my mandate, wrote that the book 'explores "sovereignty as responsibility"', which she describes as

> the most powerful idea that has emerged in the international arena in the last decade. Evolving rapidly from a humanitarian issue, the question of internally

[122] *Ibid* at 73.
[123] *Ibid* at 76.
[124] *Ibid* at 84–5.
[125] United Nations Report of the High-Level Panel on Threats, Challenges, and Changes, *A More Secure World: Our Shared Responsibility* (New York, UN, 2004) paras 199–203; and Kofi Annan, in *Larger Freedoms: Toward Development, Security and Human Rights for All* (21 March 2005) UN Doc A/59/2005, para 135.
[126] World Summit Outcome (15 September 2005) UNGA Res A/60/L1, para 139.

displaced persons (IDPs) came to challenge state sovereignty as the founding principle of international relations.[127]

The challenge that postulating sovereignty as responsibility poses for the international community is that it implies accountability. Obviously, the internally displaced themselves, marginalised, excluded, often persecuted, have little capacity to hold their national authorities accountable. Only the international community, including sub-regional, regional and international organisations, has the leverage and clout to persuade governments and other concerned actors to discharge their responsibility or otherwise fill the vacuum of irresponsible or irresponsive sovereignty. Often it is a fact that governments of affected countries, particularly those in Africa, lack resources and the capacity to discharge the responsibility of assisting and protecting their needy populations, even if they wanted to do so. Offering them support in a way that links humanitarian assistance with protection in a holistic, integrated approach to human rights should make the case more compelling. No government deserving any legitimacy can request material assistance from the outside world and reject concern with the human rights of the people on whose behalf it requests assistance. Doing so would be like asking the international community to feed the people without ensuring their safety and dignity.

VI. DEVELOPING A NORMATIVE FRAMEWORK

Over the years, the role of the mandate crystallised into raising the level of awareness about the displacement crisis worldwide and acting as a catalyst for an international response. Specifically, the activities of the mandate focused on several pillars, among them:

- developing an appropriate normative framework for responding to the protection and assistance needs of the internally displaced;
- fostering effective institutional arrangements at the international and regional levels to these same ends;
- focusing attention on specific situations through country missions;
- co-operating with regional and civil society organisations;
- undertaking further research to broaden and deepen understanding of the problem in its various dimensions.

This section focuses on the development of a normative framework of response to the IDP crisis.

Soon after my appointment, I circulated a questionnaire and engaged in extensive consultations with states and other interested parties, both within and outside the UN framework, eliciting in particular the support

[127] Weiss and Korn, n 119 above, at XIV.

of legal scholars at Harvard and Yale universities to assist in identifying existing legal rights. My so-called comprehensive study was presented to the Commission on Human Rights ('the Commission') in 1993.[128] The study concluded that, with the exception of some important gaps, existing international law provided wide coverage for the protection needs of internally displaced persons.[129] The principal problems lay not only in the lack of implementation, but also in the fact that the existing protections were spread throughout a wide variety of instruments and not focused on the needs of IDPs.

The study noted that a new legal instrument specifically addressing the needs of IDPs might both bridge the gaps in the existing normative framework and encourage greater compliance. However, the urgent need for international guidance required the development in a 'transitional phase' of an initial, non-binding set of principles to 'focus international attention, raise the level of awareness and stimulate practical measures for alleviating the crisis'. At that time, a process involving three steps was envisaged for the 'transitional phase': (1) a compilation of existing law; (2) the drafting of 'guiding principles' as an informal code of conduct and (3) an authoritative legal document, perhaps in the form of a declaration. I suggested that, given the urgency of need, those steps might be pursued simultaneously.

In response to my report, the Commission adopted a resolution specifically 'noting' my recommendations for the compilation of existing legal norms and developing guiding principles, 'taking note with appreciation' of my study generally 'and of the useful suggestions and recommendations contained therein' and calling upon the Secretary-General to extend my mandate for two years.[130] Thereupon Roberta Cohen[131] and I proceeded to convene a series of meetings in collaboration with the American Society of International Law and the Human Rights Law Group in Washington, under the auspices of the Brookings Institution and in collaboration with international legal experts, to assist in the compilation of existing law and to develop guiding principles. Professor Robert Goldman of the American University Law School became a critical legal partner. The team was soon joined by Manfred Nowak of the

[128] Comprehensive study prepared by Francis M Deng, representative of the Secretary-General on the human rights issues related to internally displaced persons, pursuant to the Commission on Human Rights Resolution 1992/73 (1993) UN Doc E/CN.4/1993/35 (later revised and published by the Brookings Institution, 1993).

[129] *Ibid* at para 281.

[130] *Ibid* at paras 1, 3, 4. The mandate was renewed three times, each for a period of three years. See UN Docs E/CN.4/1995/57, E/CN.4/1998/50 and E/CN.4/2001/54.

[131] Cohen is a human rights expert and activist whom I had invited to join the Africa Studies Program at a Brookings to assist me in IDP work and who later became Associate Director and then Co-director of the Brookings Project on Internal Displacement.

Boltsman Institute in Vienna. Goldman and Nowak oversaw the work of researchers in their respective institutions towards the completed standards in human rights law, humanitarian law and analogous refugee law pertinent to the needs of IDPs. The task of bridging the gaps between the differing approaches of the two teams was accomplished largely through the genius of Walter Kalin of the University of Berlin, who chaired the meetings of the legal team.

Out of this process emerged what became known as the Compilation and Analysis, consisting of two complementary phases. The first examined international law applicable to persons who had already been displaced and was presented to the Commission in 1996.[132] The second focused on protections against displacement in the first instance and was presented in 1998.[133] Both studies concluded, as with the 1992 report, that existing law theoretically provided wide coverage of the protection needs of IDPs, but that grey areas and gaps existed which needed to be remedied. Moreover, the existing standards were dispersed in a number of different instruments without specific focus on IDPs.

In response to the first part of the compilation, the Commission adopted a resolution in 1996 directing me to

> continue, on the basis of [the] compilation and analysis of legal norms, to develop an appropriate framework in this regard for the protection of internally displaced persons.[134]

In this respect, there was a subtle resistance to the development of a legal instrument. In the informal consultations, the term 'normative framework' was suggested, but some states objected that it implied 'legal'. The formulation of an 'appropriate framework' was therefore considered less controversial. Yet everyone knew that what was meant was a legal framework.

While the second part of the study was under way, we began to work on an 'appropriate framework' without worrying about its eventual label or whether it would be a declaration, a convention, a code of conduct or only a set of guidelines. Once again, we engaged in extensive consultations, consistently chaired by Walter Kalin, with representatives of various UN agencies, NGOs and other interested actors, in particular through a series of consultative meetings which solicited the substantive input of the various

[132] Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission on Human Rights Resolution 1995/57, 'Compilation and analysis of legal norms' (1996) UN Doc E/CN.4/1996/52/Add.2.

[133] Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission on Human Rights Resolution 1997/39, 'Compilation and analysis of legal norms Part II: Legal Aspects Relating to the Protection Against Arbitrary Displacement' (1998) UN Doc E/CN.4/1998/53/Add.1.

[134] See Report of the Representative of the Secretary-General, note 134 above, at para 9.

parties and encouraged their commitment to the success and acceptance of the eventual product.[135] Of particular importance was reaching out to and addressing the concerns of the International Committee of the Red Cross (ICRC), which had warned about the possibility that new guidelines might weaken the standing and application of existing humanitarian law. The participation of ICRC in the process became one of the most significant elements in the development of the Guiding Principles.[136]

As we were finalising the framework in a meeting of the expert team, we decided by spontaneous consensus that although in my 1992 report to the Commission, I had raised the possibility of seeking a declaration or even a legal instrument, we should instead concentrate on presenting the framework as a set of non-binding principles. In doing so, we were guided in part by the concerns of the ICRC about the negative potential of reopening the door on already accepted rights, thereby undermining them, and also by the desire to avoid the delay inherent in state negotiations on such a potentially contentious issue in light of the urgent need for action on the ground.[137]

The resulting Guiding Principles on Internal Displacement restate, interpret and apply standards from human rights, humanitarian and analogous refugee law,[138] including, as chapters in this volume highlight, those developed and spawned by African states, peoples and institutions. They are divided into four sections addressing protection against displacement, protection and assistance during displacement, access to humanitarian assistance, and return, resettlement, and reintegration. The Guiding Principles apply not only to states, but also to 'all other authorities, groups and persons in their relations with internally displaced persons'.[139] These included non-state actors, intergovernmental and non-governmental organisations and IDPs themselves. Underlying the Guiding Principles is the fundamental notion that the primary responsibility for ensuring the protection and assistance of IDPs resides with states as an aspect of their sovereignty. Should they fail to discharge their responsibility for lack of capacity or will, the international community has the right and the responsibility to intervene.

[135] See Bagshaw, n 103 above, at 212.

[136] Jean-Philippe Lavoyer, Deputy Head of the ICRC legal division, was involved in this process and offered his assessment of the Guiding Principles in light of ICRC concerns in a 1998 article: see Jean-Philippe Lavoyer, 'Guiding Principles on Internal Displacement: A Few Concerns on the Contribution of International Law' (1998) 324 *International Review of the Red Cross*, 30 September, 467–80.

[137] See Walter Kalin, 'How Hard Is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework' in *Recent Commentaries About the Nature and Application of the Guiding Principles on Internal Displacement* (Washington, DC, Brookings Institution Press, 2002) 3–7.

[138] Guiding Principles on Internal Displacement, an 3 above.

[139] *Ibid* at para 2.

The draft principles were finalised at an expert consultation, hosted by the Government of Austria in Vienna in January 1998 and attended by representatives of the UN agencies, NGOs and regional organisations. Following the consultation, we held a strategic meeting with our core team to agree on how to approach the Commission. The plan agreed upon was that we should not aim for formal adoption by the Commission, which was bound to be controversial, but should instead have it take note of the principles. The Austrian draft resolution for the Commission accomplished this task.

Soon after the Guiding Principles were finalised and before they were presented to the Commission, I shared them with the Inter-Agency Standing Committee (IASC), a forum created in 1991 to enhance co-ordination among the agencies. The IASC adopted a decision at its March 1998 meeting welcoming the Guiding Principles and encouraging its members to share them with their executive boards and their staff, especially those in the field, and to apply them in their activities on behalf of IDPs.

The momentum of the IASC decision provided important support for the reception of the Guiding Principles at the Commission several weeks later. Despite years of resolutions encouraging me to proceed with the development of an 'appropriate' normative framework, consultations by the Austrians about the relevant draft resolution 'taking note' of the principles indicated that a number of states were still fearful about potential encroachment on national sovereignty. In the end, however, only the representative of Mexico expressed reservations on the manner in which the principles had been developed. But even he voted for the resolution, which took note of the Guiding Principles and my intention to use them in my dialogues with governments and inter-governmental and non-governmental organisations as well as the prior decision of the IASC to make use of them.[140] African states' representatives, typically among the most conservative on issues related to state sovereignty, were very important supporters of the Principles.

Since their presentation to the Commission on Human Rights in 1998, the Guiding Principles have been acknowledged widely by UN bodies. The UN Secretary-General has cited them as a major achievement in the humanitarian area.[141] He recommended to the Security Council that, in

[140] Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of the Work of the Commission (1998) UN Doc E/CN.4/1998/50 at paras 1, 6. During my mission to Mexico in 2002, the delegate of Mexico who had expressed reservations on the Guiding Principles on the Commission, and who was now legal advisor in the Ministry of Foreign Affairs under the former President Fox's government, strongly advocated the Guiding Principles as a valuable statement of the law relating to IDPs.

[141] Strengthening of the Co-ordination of Emergency Humanitarian Assistance of the United Nations (1998) UNGA Res A/53/139-E/1998/67.

cases of massive displacement, it encourage States to be guided by the Principles.[142] The Council has, indeed, begun to refer to them in regard to specific situations.[143] The General Assembly and the Commission on Human Rights requested that I make use of the Guiding Principles in my dialogue with governments, inter-governmental organisations and NGOs.[144]

The Brookings Project on Internal Displacement together with the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the IASC have produced two additional publications on the Guiding Principles: *Handbook for Applying the Guiding Principles* and *Manual on Field Practice in Internal Displacement*.[145] These documents spell out the Guiding Principles in more understandable language and explain their practical application in the field. Furthermore, the Brookings Project, in collaboration with the American Society of International Law, has produced Professor Walter Kalin's *Annotations* on the Guiding Principles, which explain their sources in human rights law, humanitarian law and analogous refugee law.[146]

The General Assembly and the Commission encouraged the wide dissemination and application of the Guiding Principles by international, regional and non-governmental organisations. Several regional organisations, among them the OAU (now the African Union), the Inter-American Commission on Human Rights of the Organization of American States, and the OSCE, have indeed begun to disseminate the Principles, to use them as a basis for measuring conditions on the ground and to sponsor workshops featuring the Principles. In October 1998, the OAU co-sponsored with the UN High Commissioner for Refugees (UNHCR) and the Brookings Project a workshop on Internal Displacement in Africa. Subsequent workshops were held in Bogotá, Colombia, in May 1999; Bangkok, Thailand, in February 2000; Tbilisi, Georgia, in May 2000 (in co-operation with the OSCE); Jakarta, Indonesia, in June 2001; Yerevan, Armenia, in October 2001; Tbilisi, Georgia, in February 2002; and Baku,

[142] Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict (1999) UN Doc S/1999/957.

[143] UNSC Res 1286 (2000), UN Doc SC/RES/1286.

[144] See Protection of and Assistance to Internally Displaced Persons (2000) UNGA Res A/RES/54/167; and Commissioner on Human Rights Res 47 (1999) UN Doc E/CN.4/RES/1999/47.

[145] Susan Forbes Martin, *The Handbook for Applying the Guiding Principles on Internal Displacement* (Washington, DC, The Brookings Project on Internal Displacement and OCHA, 2000), <www.reliefweb.int/ocha>olpub/IDPprinciples.PDF>, accessed 27 July 2006; and *Manual on Field Practice in Internal Displacement*, Inter-Agency Standing Committee Policy Paper Series No 1 (Washington, DC, OCHA, 1994).

[146] *Guiding Principles on Internal Displacement: Annotations* (Washington, DC, American Society of International Law and the Brookings Project on Internal Displacement, 2000). Walter Kalin, who chaired the legal team and was a close collaborator on the activities of my mandate, succeeded me in 2004 as Representative of the Secretary-General on the Human Rights of Internally Displaced Persons.

Azerbaijan, in February 2002. A number of additional country and sub-regional workshops have since followed. In addition, NGOs, such as the Norwegian Refugee Council, have held training workshops on the Guiding Principles in Burundi, Colombia, India, Liberia, and Sierra Leone. Following the workshops, projects are undertaken to help strengthen local capacities, with the support of partner organisations.

To assist in the promotion, dissemination and application of the Guiding Principles at the national level, and indicative of their increasing use and relevance in different parts of the world, the principles continue to be translated into an increasing number of languages. Initially made available in all the official languages of the UN (Arabic, Chinese, English, French, Russian and Spanish) for their submission to the Commission in 1998, the principles have since been translated into many local languages relevant to particular situations of internal displacement: Abkhaz, Albanian, Armenian, Assamese, Azeri, Bahasa Indonesia, Bengali, Burmese, Cebuano, Chin, Dari, Dinka, Georgian, Hausa, Kirundi, Kurdish, Luo, Macedonian, Maguindanaon, Mandarin, Nepali, Nuer, Pashtu, Portuguese, Rutoro, Serbo-Croatian, Serbo-Croatian Cyrillic, Sgaw Karen, Sinhala, Somali, Swahili, Tagalog, Tamil, Tetum, Thai, Turkish, Urdu and Yoruba. Efforts to translate and publish the Guiding Principles have been undertaken at the initiative of a variety of actors: the UN and its agencies, international and local NGOs and governments, often working in partnership.

At a colloquy on the Guiding Principles convened in collaboration with the government of Austria in Vienna in September 2000, national NGOs throughout the world reported on their use of the Principles in their dialogue with local and national authorities.[147] Regional inter-governmental organisations also cited the Guiding Principles as an effective protection tool; and in Asia, national human rights commissions acknowledged the utility of the Guiding Principles, both in their monitoring activities and in advising government officials and legislators on the content of draft legislation. Furthermore, the principles have been cited by UN treaty bodies in their interpretation of the law relevant to internally displaced populations.

Governments also have found the Guiding Principles a useful guide for the development of laws on internal displacement and as a yardstick for measuring conditions in their countries. In this context, African governments have been among the most progressive. In Angola, for example, the Guiding Principles form the basis of the Norms on the Resettlement of the Internally Displaced, and in Burundi they have been used as a base for a permanent framework for the protection of IDPs. The Ugandan

[147] *Report of the International Colloquy on the Guiding Principles on Internal Displacement* (Washington, DC, Brookings Project on Internal Displacement, 2000).

Government developed a national policy for IDPs and an implementation plan, both of which draw heavily on the Guiding Principles on Internal Displacement. In the Sudan, even before the Comprehensive Peace Agreement was concluded, the Government and the Sudan People's Liberation Movement adopted a joint policy on IDPs based on the Guiding Principles. Meanwhile, states outside of Africa have also sought to implement the principles. In Colombia, a presidential directive of November 2001 recalls two decisions of the Constitutional Court citing the Guiding Principles and elaborating the responsibilities of government authorities for protecting and assisting IDPs. The government of Georgia informed the UN that it is committed, through a special parliamentary commission, to bringing its electoral laws in line with the Guiding Principles.

It must be noted that a small number of governments questioned the innovative process by which the Guiding Principles were developed. At the July 2000 session of ECOSOC, these governments expressed the view that principles not drafted or formally adopted by governments cannot have real standing. In the Third Committee of the General Assembly of 2000, the same group of governments tried to prevent the reference to the Guiding Principles in an 'omnibus' resolution on the work of the UNHCR, despite the fact that such reference had been part of the resolution adopted unanimously by the General Assembly for the preceding two years. In the end, at the insistence of Egypt, the resolution was adopted by a majority of 118, with none against and 30 abstentions. The same governments raised similar concerns during the 2001 General Assembly meeting and argued for the submission of the Guiding Principles for formal consideration by the General Assembly. After intensive and extensive consultations, the resolution on internal displacement was adopted by consensus.[148] In collaboration with the UN's Emergency Relief Co-ordinator (ERC), who is also the Under-Secretary-General for Humanitarian Affairs and the head of OCHA, we conducted informal consultations with these and other delegations to promote understanding and develop a common ground on the Guiding Principles. As a result, a broader consensus has developed in support of the Principles.

Ironically, those governments that expressed reservations had voted for the Commission and General Assembly resolutions encouraging the development of the Guiding Principles over the years, recommending their wide dissemination and requesting me to use them as the basis for dialogue with governments. The outcome of the vote itself testifies to the increasing recognition that the Guiding Principles are receiving, which in turn reaffirms that they indeed fill a normative vacuum.

[148] Protection of and Assistance to Internally Displaced Persons (2001) UNGA Res A/RES/56/164.

VII. DEVELOPING AN AFRICAN UNION FRAMEWORK

The principles enshrined in the 2000 Constitutive Act of the African Union include the protection of internally displaced persons. The Act calls for the protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights. The institutions established in consequence—the AU and the African Court on Human and People's Rights—seek to strengthen African states' response to displacement at the regional and sub-regional levels.[149] Moreover, the Union's legal framework, which permits intervention in cases of war crimes, genocide and crimes against humanity, is more compatible than that of the OAU was in responding to internal conflicts and the displacement that results. In May 2004, the African Commission on Human and Peoples' Rights appointed Bahame Tom Nyanduga as Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa. The Special Rapporteur is mandated to investigate situations of internal displacement and improve protection mechanisms for internal displacement in Africa. During the First Regional Conference on Internal Displacement in West Africa in April 2006 (co-sponsored by the Brookings Institution–University of Bern Project on Internal Displacement, the Economic Community of West African States (ECOWAS), UNHCR and my successor, Walter Kalin, the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons), Mr Nyanduga stated that he is committed to supporting the AU's initiative to establish a legal framework on IDPs and integrating the Guiding Principles into the legal systems of African states.[150]

As this chapter has explained, work on the Guiding Principles was a protracted, incremental process that initially involved requesting legal scholars to produce drafts building on three sources: human rights law, humanitarian law and analogous refugee law. These drafts were then thoroughly discussed by a team of senior legal scholars over several sessions, with each session advancing the text and raising issues for further research and consideration. The discussion groups that considered the texts were broadened to include representatives of relevant UN agencies, regional organisations and NGOs. In retrospect, and despite the fact given that African states, institutions and leaders have played a valuable role in helping to develop the IDP regime, we should have sought even greater

[149] Constitutive Act of the African Union (July 2006); and African Union (AU) Decision on the Situation of Refugees, Returnees and Displaced Persons, Executive Council Dec EX/CL/Dec 127.

[150] 'First Regional Conference on Internal Displacement in West Africa', unpublished conference doc (Abuja, Nigeria), ECOWAS, Office of the UNHCR, Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons and The Brookings Institution—University of Bern Project on Internal Displacement, April 2006) 30.

African participation at the inception, considering that the continent is the worst affected. Once the draft was finalised and endorsed by the UN Inter-Agency Standing Committee, comprised of the heads of all the UN humanitarian, human rights and development agencies, it was submitted to the Commission on Human Rights and later to the General Assembly.

The response that the Guiding Principles have received has already been presented. In our co-operation with the regional organisations, the OAU took the lead in organising meetings on the Guiding Principles and called for strong language for their dissemination and application.

The question now is whether the AU should start from scratch or build on what has so far been achieved. This is a critical question because the phenomenon of IDPs will be a permanent feature of Africa's development landscape for decades to come. In this sense, focusing on what has been accomplished but relating it to the African context is the most constructive way to proceed. Indeed, since Africa would not be re-inventing the wheel, the process would be less protracted. In my view, this would mean commissioning a small team of legal experts to compare the Guiding Principles with the relevant AU instruments, such as the Charter and the Convention on Human and Peoples' Rights of 1981, to ensure that the Guiding Principles conform with the African normative outlook and meet the needs of the displaced on the continent. The group's report would then be presented to an enlarged team of representative experts from each of the five African sub-regions to consider and develop an integrated text. An even broader forum involving pertinent stakeholders, including African civil society, NGOs and external actors such as the relevant UN agencies, would then be organised to finalise the text before presentation to the member states of the AU for formal adoption.

Efforts are already under way to utilise the Guiding Principles in Africa's sub-regions. The International Conference on the Great Lakes, for example, devised a legal framework under which the Guiding Principles were adopted and are to be implemented.[151] In terms of human resources, the project of developing a legal framework for the AU could be co-ordinated through the AU's Division of Humanitarian Affairs, Refugees and Displaced Persons to assist with the operational management of the project. A group of experts representative of Africa's sub-regions would be convened to discuss the text at its various stages, before formal submission to the appropriate AU body for adoption. While this should be an African initiative, using African expertise and owned by Africans, it would be unwise not to collaborate with non-African experts experienced with the international response to the global crisis of internal displacement.

[151] International Conference on the Great Lakes, 'Protocol on the Protection and Assistance to Internally Displaced Persons' (2006).

VIII. CONCLUSION

Africa is home to more than half of the world's internally displaced people. The most affected country in the world is Sudan, with nearly 6 million people displaced due to the prolonged war in the south and now the conflict in Darfur.[152] Over the course of the last decade, the magnitude of the IDP crisis has grown more visible. The world's displaced are forced to flee their homes because of internal armed conflicts, communal violence and egregious violations of human rights. The internal displacement of people is a symptom of deep structural problems—the same troubles that generate conflict in the first place. Displacement calls for constructing societies in which all citizens are equal, whereby their human rights and fundamental liberties are respected without discrimination on the grounds of race, national origin, ethnicity, religion, culture, gender or other grounds. Internal displacement is thus a challenge to the state; indeed, it is a responsibility of the state.

As the UN Secretary-General's Representative on IDPs, I approached sovereignty as a *positive* concept entailing responsibility for the protection and general welfare of the citizens and of those falling under state jurisdiction. The Guiding Principles are premised on the notion of state responsibility and the complementary or supportive role of the international community. The principles provide a normative framework which can be and are being utilised as a tool for shaping Africa's response to displacement.

Although the Guiding Principles are far from perfect, our experience indicates that it is possible to invigorate or create new norms at the international level, and to do so relatively quickly. If there is such a thing as a 'tipping point' after which a norm finds quick and comprehensive acceptance around the globe, we have not yet reached it, and we can still count our successes in the area of internalisation of the Guiding Principles into domestic law on one hand. However, I am confident that we are well on our way.

The jury is still out, however, on the question of effectiveness. One does not need to be an expert in global politics to realise that, if state behaviour is driven only by narrow interests, the rights of the internally displaced are unlikely ever to be assured. Absent other reasons for rivalry, it is rarely in one state's interest to complain about how another treats its own citizens, and states with large displaced populations frequently are unable or unwilling to deal with the issue in a manner respectful of the dignity and needs of those affected. For their sake, and although I am not above appealing to state interests where it appears useful, I hope that the Guiding Principles eventually will prove that norms, irrespective of

[152] UNHCR, n 95 above.

interests, can substantially improve the behaviour of states and other actors and bring real change into the lives of human beings.

Although Africa has been a crucial partner in the development of the Guiding Principles, it also has a distinct contribution to make towards an appropriate regional and international response to the crisis of internal displacement by building on African cultural values and normative principles to reinforce a positive interpretation of sovereignty as responsibility. As Salim Ahmed Salim, then Secretary-General of the OAU, said in advocating a mechanism for preventing or resolving internal conflicts in Africa, in African cultures and normative behaviours 'we are our brothers' keepers', a concept essentially akin to the responsibility to protect.[153] We know that in Africa whenever there is a dispute in the family, including between spouses, relatives and neighbours intervene on their own initiative to mediate. There is no notion of privacy or '"internal affairs'" because the entire village has a stake in the vitality of the community. This area is one in which Africa has much to offer the international community to foster the notion both of sovereignty as responsibility and of the responsibility of outsiders to assist when states fail to discharge their national responsibility towards their needy citizens.

[153] See Report of the Secretary-General on Conflicts in Africa, Proposals for an OAU Mechanism for Conflict Prevention and Resolution (1992), cited in Deng *et al*, n 113 above, at 15, and Deng and Lyons, n 114 above, at 159–60.

4

*Pro-democratic Intervention in Africa**

JEREMY I LEVITT

I. INTRODUCTION

In the past 20 years, the people of the African continent have experienced human suffering on a scale unparalleled in human history. Millions of Africans, especially women and children, have been killed by deadly conflict in the Democratic Republic of Congo (3 million), Sudan (2.5 million), Rwanda (1 million), Burundi (300,000), Liberia (250,000), Angola (650,000), Sierra Leone (75,000) and Uganda (40,000).[1] Besides these huge fatalities, warfare has also affected democratisation and human, social and economic development; has led to the breakdown of the rule of law; and has allowed the catastrophic impact of the HIV/AIDS pandemic to reap havoc on Africa's human architecture.[2]

The international system of peace and security, including the scheme provided under the United Nations Charter framework, has not offered a viable strategy to reduce armed conflict and human suffering

* This chapter is dedicated to the loving memory of my dear friend, mentor and brother, Advocate James Thomas, former Associate Dean of Admissions and Financial Aid at the University of Wisconsin-Madison Law School. This chapter is a slightly modified version of an earlier article by the author: Jeremy I Levitt, 'Pro-Democratic Intervention in Africa' (2006) 25 *Wisconsin Journal of International Law* 785–833. Sections of this chapter were derived from that article and taken with the permission of the American Society of International Law, Ashgate Publishing, *Global Dialogue*, *Temple Journal of International and Comparative Law* and *Wisconsin Journal of International Law* from the following works of the author: Jeremy Levitt, 'The Evolving Intervention Regime in Africa: From Basket Case to Market Place?' (2002) 96 *ASIL Proceedings* 136; Jeremy Levitt, 'The Law on Intervention: Africa's Pathbreaking Model' (2005) 7 *Global Dialogue* 50; Jeremy Levitt, 'African Interventionist States and International Law' in Oliver Furley and Roy May (eds), *African Interventionist States* (Aldershot, Ashgate Publishing, 2001); Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal* 333; Jeremy Levitt, 'Illegal Peace?: Examining the Legality of Power-sharing with Warlords and Rebels in Africa' (2006) 27 *Michigan Journal of International Law* 495.

[1] See generally Jeremy Levitt, 'The Law on Intervention: Africa's Pathbreaking Model' (2005) 7 *Global Dialogue* 50 [hereinafter Levitt, 'The Law on Intervention'].

[2] *Ibid.*

and solidify democracy in Africa. For its part, the UN Security Council (UNSC) has been uninterested in, or too slow to react to, illegal seizures of power and armed conflict on the continent.[3] It has also failed to put forward an effective approach to assist states emerging from conflict to build, or rebuild, and sustain democracy—with the result too often being democratic elections without authentic democratic transitions. Consequently, African states and their organisations have sought to fashion African solutions to African problems by creating innovative rules and mechanisms for pro-democracy and human rights–based intervention. These rules and structures are, in turn, evolving the law of intervention and, in my view, have been the most credible examples and the single most important force in the development of pro-democratic intervention (PDI) and humanitarian intervention norms.

For the past decade, I have examined and documented the evolution of Africa's peacekeeping, peace enforcement, regional collective security and conflict management landscape as well as Africa's contribution to international law, particularly as it relates to the *jus ad bellum* (the law of the use of force). Although an abundance of scholarly work and official studies have examined the complexities of humanitarian intervention,[4] only a select body of credible work has considered the phenomenon of PDI, very little of which has made mention of Africa. Given that Africa has developed the most radical and unique approach to PDI in the world, the lack of study is unfortunate.

This chapter offers a conceptual framework to locate PDI in international law. It is limited to the identification of PDI as an emerging norm of international law deeply rooted in the African experience. As Fernando Tesón notes, PDI is anchored in the belief that 'the principle of democratic rule is today part of international law'[5] and that state practice has 'evaluated the principle of democracy to the category of a rule which is fully enforceable through appropriate regional collective mechanisms.'[6] While Tesón's analysis focuses primarily on the development of democracy through the experiences of nations and institutions in Europe and the Americas, his central thesis is enormously strengthened and far more compelling when considered against the revolutionary evolution of

[3] *Ibid*.

[4] See, eg, International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect: Research, Bibliography, Background' (December 2001) (prepared by Thomas G Weiss and Don Hubert) <http://www.iciss.ca/pdf/Supplementary-Volume.pdf>; see also ICISS, 'The Responsibility to Protect' (December 2001) < http://www.iciss.ca/pdf/Commission-Report.pdf >.

[5] Fernando Tesón, 'Collective Humanitarian Intervention' (1996) 17 *Michigan Journal of International Law* 335.

[6] *Ibid*; Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality,* 3rd edn (Ardsley, NY, Transnational Publishers, 2006) 185.

Africa's PDI and humanitarian intervention regimes, which surpass in every conceivable way those of any other region.[7]

Africa's intervention regime is derived from African state practice and treaty law fashioned on the continent. Consequently, this chapter examines several case studies where the preservation of democracy was a central rationale for intervention, employing a structural approach to highlight the normative development of the frameworks governing intervention on the continent. The chapter is meant to be a snapshot rather than a comprehensive treatment of the law and practice of PDI in Africa. The central cases under review include the interventions by the Economic Community of West African States (ECOWAS) in Liberia, Sierra Leone, Guinea-Bissau, Guinea, Côte d'Ivoire and Togo; the Mission for the Implementation of the Bangui Agreement (MISAB) in the Central African Republic (CAR); the Southern African Development Community (SADC) operation in Lesotho; and African Union (AU) action in São Tomé Príncipe.[8] I also discuss the binding treaty law and security mechanisms of the AU, ECOWAS and SADC that gave impetus to these interventions[9] and lay to rest questions about the existence of a right to PDI insofar as it relates to the African region.[10] In a sense the chapter confirms Tom Farer's prediction that a group of democratic states might one day form a pact that:

> in the event of an unconstitutional seizure of power in one pact member, others will continue to recognize the displaced elected officials as the only legitimate authority and, at their request, will take appropriate measures to reestablish constitutional government. If the officials are unable to communicate an

[7] Levitt, 'The Law on Intervention', n 1 above, at 51.

[8] For an analysis of the legality of several of the aforementioned interventions, see Jeremy Levitt, 'African Interventionist States and International Law' in Oliver Furley and Roy May (eds), *African Interventionist States* (Aldershot, Ashgate Publishing, 2001).

[9] According to Art 26 of the Vienna Convention on the Law of Treaties, the international principle *pacta sun servanda* states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith': Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 338 at Art 26. Accordingly, all member states of the AU and ECOWAS are legally bound to abide by and perform, respectively, their organisational rules/frameworks and duties. Since, as this analysis will reveal, PDI and humanitarian intervention are critical features of both the constitutive acts and subsequent protocols that codified them, good faith compliance with them is essential. The only lawful way for a member state of the AU and/or ECOWAS to avoid being subject to PDI is to formally withdraw as a member of the organisation. There are provisions for withdrawal under Arts 32 and 91 of the AU and ECOWAS constitutive acts, respectively: Charter of the Organization of African Unity (adopted 25 May 1963) 479 UNT.S. 39 (OAU Charter), Art XXXII; Treaty of the Economic Community of West African States (28 May 1975) 1010 UNTS 17 (ECOWAS Charter), Art 64. For an interesting and controversial analysis of the legality of treaty-based intervention, see David Wippman, 'Treaty-based Intervention: Who Can Say No?' (1995) 62 *University of Chicago Law Review* 607.

[10] See generally Oscar Schacter, 'The Legality of Pro-Democratic Invasion' (1984) 78 *American Journal of International Law* 645.

> appeal for assistance, the other pact members will consult and may by a vote of two-thirds or more of the member states choose to intervene militarily to restore democracy.[11]

As my analysis will reveal, the question is no longer whether states will form a pact to protect against unconstitutional seizures of government. Rather, the questions have become: At what stage of development is the 'doctrine' of PDI? And when and under what circumstances might the threat or use of force be employed to safeguard democracy?

PDI is an evolving term and phenomenon, namely because the *jus ad bellum*, human rights law and the emerging regime on democracy are in flux and because PDI seems to import several independent international law norms, including, among others, the doctrines of consent, self-determination and humanitarian intervention. All of these doctrines intersect with the evolving norm of democracy or what Thomas Franck has termed the 'democratic entitlement'.[12] PDI appears to be evolving in five contemporaneous and perhaps interdependent ways. The direction of its evolution will depend upon the political factors which underlie future threats to democratically constituted governments and the responses to them by states and their organisations. In Africa, a norm of PDI has crystallised through: (1) the *consent* doctrine (whether treaty-based or ad hoc); (2) *customary regional law*;[13] (3) the doctrine of *self-determination* (an *jus cogens* norm); (4) the emerging doctrine on *democracy* (emerging customary international law); and (5) perhaps, customary international law similar to the doctrine of humanitarian intervention. Although it is beyond the scope of this chapter to examine the development of all of these doctrines—all of which are controversial to varying degrees—their thorough examination in the context of PDI is sorely needed.

In the legal context, PDI may be defined in several ways, depending upon the legal basis or authority used to justify it. Because the law is in flux, it is difficult to determine definitively which rules ultimately

[11] Tom Farer, 'A Paradigm of Legitimate Intervention' in Lori Fisler Damrosh (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York, Council on Foreign Relations Press, 1993) 316, 332.

[12] See Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46 (arguing that representative democracy is evolving into an international legal obligation). See also Gregory H Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539, 607 (arguing that 'parties to the major human rights conventions have created an international law of participatory rights'). See generally Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (Cambridge, Cambridge Press, 2000).

[13] While today PDI in Africa is based on consent and customary regional law, a norm of PDI in customary international law is fast developing and likely will not require prior consent of an embattled democratically constituted government—let alone a junta that has unlawfully seized power—as the notion of PDI is based on the illumination of democracy as an enforceable right.

will comprise the legal authority of any norm of PDI; for this reason, this chapter analyses concrete state and regional organisational practice and treaty law in the only region that has adopted it as an enforceable right: Africa.[14] State practice and treaty law in Africa indicate that, today, PDI is an intervention by a state, a group of states or a regional organisation in another state involving the threat or use of force in order to protect or restore a democratically constituted government (DCG) from unlawful and or violent seizures of power,[15] especially when the circumstances that underpin such seizures threaten a substantial part of a state's population with death or suffering on a grand scale.

PDI is preoccupied with serving the twin aims of protecting existing and future governments and peoples and preserving DCGs from illegal seizures of power from within rather than the 'right of a state to use armed force to overthrow a despotic government in another country'.[16] PDI seeks to safeguard DCGs irrespective of their character, except for those which rise to power unconstitutionally, interfere with a people's right to self-determination or act in an unduly repressive manner.[17] Hence, in Africa, PDI appears to place a positive duty upon states to remove threats to DCGs (eg unlawful rebellion and insurgency) and a negative duty upon them not to support evil regimes or save repressive regimes from democratic revolution. Thus, PDI is meant to safeguard DCGs and legitimate regimes and accomplish the broader aims of maintaining peace, security, and law and order in states. In nascent and even

[14] The Latin America region has also made significant strides in developing a right of PDI through the Organization of American States (OAS). The US-led OAS mission in Haiti in 1994 was the first authorisation of the use of force to protect democracy by a regional organisation. See generally Domingo E Acevedo, 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy' in Fisler Damrosh, *Enforcing Restraint: Collective Intervention in Internal Conflict*, n 11 above, at 119.

[15] For purposes of this analysis, the term *intervention* is broadly construed to connote the deployment of diplomatic representatives (coercive diplomacy) or military measures (dispatching of troops) in a target state. The term *democratically constituted governments* is broadly construed to mean those that are democratically elected or otherwise rise to power lawfully and/or those that are widely recognised as legitimate.

[16] Schachter, n 10 above, at 645.

[17] See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (24 October 1970) UN Doc A/8082 at 123–4; Definition of Aggression, UNGA Res 3314 (14 December 1974) UN Doc A/9619, Art 7; Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UNGA Res 42/22 (18 November 1987) UN Doc A/42/766 at para 22. In this context, the term *unduly repressive* connotes the systematic and violent repression of citizens of a state in order to prevent them from freely participating in government. This may include, among other things, the torture and killing of political opposition and other government detractors and the stifling of political participation, unwillingness to conduct free and fair elections, rigging elections and silencing the media.

intolerant democracies,[18] PDI in Africa endeavours to maintain law and order to ensure an enabling environment for transition to authentic democracy. Again, it does not seek to establish democracy where it does not exist but to preserve democracy where it does exist.

The logic underpinning PDI in Africa focuses upon how a regime came to power rather than its behaviour while in power. Stated differently, under international law, an unpopular regime or state is no less entitled to exist free from external intrusion in its internal affairs than a popular one; however, as already noted, international law does not necessarily prohibit internal forces within a state from removing an unduly repressive regime. Nevertheless, DCGs which do not necessarily have a democratic orientation have benefited and will likely continue to benefit from PDI. The democracy-based interventions of the AU, ECOWAS and SADC in budding democracies in Sierra Leone (1997), Guinea-Bissau (1998), Côte d'Ivoire (1998), Lesotho (1998), São Tomé Príncipe (2003) and Togo (2005) are cases in point.

While there is no evidence in either African treaty law or state practice to conclude that a right of PDI exists against autocratic, corrupt or 'politically', as opposed to 'violently', oppressive regimes—in contrast to the purported American neo-realist approach[19]—external intervention simply to unseat a bad DCG would be unlawful. Under Africa's current legal framework, a DCG or legitimate government would have to be unduly oppressive to its citizens for outside actors to invoke a right of PDI against it. However, if the international community were unwilling or unable to stop a government from being unduly repressive, external intervention aimed at preventing a population from forcefully removing a democratically constituted but repressive government would debatably interfere with their 'democratic entitlement',[20]: their right to safeguard their own human rights and their right to self-determination.[21] In terms of Article 2(4) of the UN Charter, such action would arguably be an intervention

[18] See generally Gregory H Fox and George Nolte, 'Intolerant Democracies' (1995) 36 *Harvard International Law Journal* 1 (exploring 'the legal issues raised by the presence of anti-democratic actors in an otherwise *generally* "free and fair" electoral process').

[19] The 'neorealists see the use of force as an effective instrument to further other principles that they believe are integral to the UN Charter: self-determination, human rights, and above all democracy'. However, the American neo-realist school as, perhaps, best articulated by the Reagan Doctrine, 'reject any norm of international law that would forbid military assistance (including direct American intervention) to a prodemocratic insurgency fighting to overthrow a totalitarian government dependent upon external support': David Scheffer, 'Use of Force after the Cold War: Panama, Iraq, and the New World Order' in David Scheffer (ed), *Right v Might: International Law and the Use of Force* (New York, Council on Foreign Relations Press, 1991) 1, 11.

[20] See generally Franck, n 12 above.

[21] David Wippman, 'Practical and Legal Constraints on Internal Powersharing' in David Wippman (ed), *International Law and Ethnic Conflict* (Ithaca, NY, Cornell University Press, 1998) 211, 227–8.

against the sovereignty and political independence of a state engaged in a war of liberation—that is, a war aimed at establishing democracy and thwarting human atrocities.[22] As Oscar Schachter noted:

> No state today would deny the basic principle that the people of a nation have the right, under international law, to decide for themselves what kind of government they want, and that this includes the right to revolt and to carry on armed conflict between competing groups.[23]

It follows that DCGs may come to power through democratic processes or by democratic revolution when the behaviour of a state is so egregious and repressive that its removal from power by indigenous or other forces is justified under international law.

Yet it is often not clear when states and regional organisations in Africa have relied upon democracy, human rights or broader humanitarian considerations as opposed to national strategic interests as the basis for intervention; many of the civil conflicts that have necessitated intervention have had mixed motives and multiple objectives. Hence, for purposes of this analysis, it is important to briefly distinguish some of the major differences between PDI and humanitarian intervention because both doctrines are, at least in part, applicable to the case studies under review. Several of the interventions in this study could arguably have been justified under both paradigms. The next section contrasts PDI and humanitarian intervention.

II. PRO-DEMOCRATIC INTERVENTION AND HUMANITARIAN INTERVENTION

There are several notable similarities and differences between pro-democratic intervention and humanitarian intervention.[24] In the African context, both derive their legality from general international law, treaty

[22] Oscar Schachter, 'International Law: The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1641.

[23] *Ibid*.

[24] Again, state practice and treaty law in Africa indicate that, today, PDI is an intervention by a state, group of states, regional organisation or the UN involving the threat or use of force in order to protect or restore a democratically constituted government from unlawful and/or violent seizures of power, especially when the circumstances underpinning such seizures threaten a substantial part of the state's population with death or suffering on a grand scale. I have defined *humanitarian intervention* as an 'intervention in a state involving the use of force (UN action in Iraq and Somalia, or ECOWAS action in Liberia, Sierra Leone and Guinea-Bissau) or threat of force (UN action in Haiti), where the intervener deploys armed forces and, at the least, makes clear that it is willing to use force if its operation is resisted—as it attempts to alleviate conditions in which a substantial part of the population of a state is threatened with death or suffering on a grand scale': Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal* 333, 335.

law and customary regional law and have the ultimate aims of protecting fundamental human rights and maintaining peace, security, stability, and law and order within states. Today PDI is typically, but not exclusively, based upon state consent (whether treaty-based or ad hoc) or authorised by the UNSC. Conversely, humanitarian intervention is not based upon valid state consent, takes place without UNSC authorisation and is concerned primarily with curbing mass human suffering. Both PDI and humanitarian intervention can be conducted by states acting upon their own initiative (eg Nigeria in Liberia), collectively through ad hoc groupings (eg MISAB in the CAR) or through regional organisations (eg ECOWAS in Sierra Leone).[25] PDI in Africa does not raise the same 'legal barriers' as humanitarian intervention because it does not abrogate the well-settled international law doctrines on state sovereignty, territorial integrity and non-intervention in the internal affairs of states. Again, today PDI generally derives its legality from the doctrines of consent (ad hoc or treaty-based), but not yet from customary international law, wherein proponents of humanitarian intervention argue its legal basis.

Today PDI and humanitarian intervention are also not deterred by a government's lack of effective control—its ability to validly consent to intervention. Whether a government is in effective control does not seem to seriously affect the legality and legitimacy of either type of intervention, although for different reasons. Humanitarian intervention is aimed at using force against a state to remedy grave human suffering. The goal of curbing ongoing human torment alone provides the legal basis for the intervention; state consent is moot. While PDI can be based on state consent, it seeks to safeguard DCGs irrespective of who is in de facto control because the intervention is on behalf of the government that acquired power democratically or is otherwise considered legitimate. Hence, those that have unlawfully acquired power cannot rely on the de facto control rationale to deter PDI. In this sense, even ousted regimes lacking effective control can make a valid request for intervention.[26] Consequently, at present, under Africa's new democracy and governance framework, de facto control no longer guarantees rebels or brokers of unconstitutional changes in power formal recognition or a seat at the table of power; when there have been unconstitutional regime changes, democratic governance appears to have attained a more prominent status than the effective control doctrine.[27] As one analyst has noted, 'the statist version

[25] However, there is a general consensus among states, scholars and practitioners that collective interventions are the most legally credible.

[26] For example, Jean Bertrand Aristide's plea for US intervention in Haiti in 1994 and Tejan Kabbah's request for ECOWAS action in Sierra Leone in 1997 are cases in point.

[27] See nn 287–98 below and accompanying text for a discussion of Africa's new democracy and governance framework.

of legitimacy grounded on the logic of "defactoism" or effectiveness ought to be abandoned as it has masked the worst violations of civil and political rights'.[28] Simply put, the democratic entitlement which underlies PDI is chiselling away at traditional conceptions of the effective control doctrine.[29]

African states and regional organisations, historically among the most conservative subscribers to the international law principles of state sovereignty, non-intervention and territorial integrity, have adopted, operationalised and acted under norm-creating mechanisms which are eroding traditional prohibitions on the use of force enshrined in the UN Charter and general international law.[30] In fact, Africa is the first region to advance a comprehensive collective security regime.[31] From a normative standpoint, the continent's intervention regime is more advanced and legally coherent than any other, including that of the North Atlantic Treaty Organization (NATO); this fact deserves greater attention in the scholarly literature and among policy-makers.

III. WESTERN MYOPIA

As previously noted, in international law and studies, Africa is viewed as a pariah—a basket case, not a marketplace. Most policy-makers, international lawyers and legal academics outside of the continent consider African states to be objects rather than subjects of international law. This fact explains why a significant portion of the wide body of literature on the law of the use of force and, more specifically, peacekeeping and intervention is heavily biased and flawed.[32] The geopolitical, Eurocentric and linear bias in Western legal academia, among other areas, is truly

[28] Reginald Ezetah, 'The Right to Democracy: A Qualitative Inquiry' (1997) 22 *Brooklyn Journal of International Law* 495, 526–7.

[29] The three most authoritative legal sources that provide for a norm of PDI in Africa, and perhaps beyond, are found in African state practice, treaty law and regional organisational practice; however, regional customary law, UN law, the doctrine of self-determination and the emerging doctrine on democracy also provide legal bases for PDI.

[30] Levitt, 'The Law on Intervention', n 1 above, at 51.

[31] *Ibid*.

[32] For example, at first glance, recent articles on democracy, sovereignty and intervention appears to be solid and convincing; however, upon further review, the article suffers from spotty research and apparent geopolitical bias because it fails to examine the phenomenon of intervention in Africa. Consequently, it makes shamefully inaccurate conclusions. The authors of the article claim that 'minimal international and regional procedures exist for responding to unconstitutional seizures of power': see Andrew Coleman and Jackson Maogoto, 'Democracy's Global Quest: A Noble Crusade Wrapped in Dirty Reality?' (2005) 28 *Suffolk Transnational Law Review* 175, 197. They assert that regional organisations 'lack consensus on strengthening institutional capacity to promote democracy' and that 'Any departure from present practice [of non-intervention in the internal affairs of states] must survive the scrutiny of … potentially hostile regional blocs in … Africa': *ibid* at 198.

unfortunate. This predisposition is to a large degree based upon a lack of interest and training in, and regional expertise on, particularly the developing world, among Western intellectuals and international lawyers.

As a result, topical discussions on PDI and humanitarian intervention in Africa are either uninformed or inadequately analysed. More often than not, when analysts assess Africa's security landscape, they do so with a Eurocentric, or, even worse, colonial, voice: paternalistic and unaware. This phenomenon is unfortunate because it creates an environment for geopolitical bias and analytically weak scholarship that often fails to acknowledge Africa's contribution to international law, particularly as it relates to the law *jus ad bellum*.[33]

The sections that follow assess the evolution of the PDI regime in Africa by analysing African state practice, treaty law, regional organisational practice and UN responses, or lack thereof, to them. Primary attention is given to ECOWAS, SADC and the AU and the states that compose them. As the analysis shows, PDI has been conducted by states acting in an ad hoc fashion or through regional actors.

IV. ECONOMIC COMMUNITY OF WEST AFRICAN STATES

In 1975, ECOWAS was founded by treaty.[34] Its main aim at the time was to spur economic integration and development in West Africa.[35] Regional security was an important but not vital concern.[36] ECOWAS adopted a Protocol on Non-Aggression in 1978 and a Protocol Relating to Mutual Assistance on Defence in 1981.[37] Neither the treaty nor the protocols empowered ECOWAS to launch peacekeeping missions (although the 1981 Protocol did empower it to intervene in conflicts that were 'externally engineered'). In 1989, the eruption of the Liberian civil war tested ECOWAS[38]; owing to international inaction, the organisation was forced

The article makes no mention of African state practice or treaty-law developments, nor does it reference Africa's emerging democracy and intervention regime. These omissions are unacceptable given that, as this analysis will demonstrate, Africa has forwarded the world's most radical legal doctrine and security mechanisms to protect human rights and democracy. Such analysis illuminates the linear bias and open ignorance about Africa's interventionist regime and contributions to international law, particularly the *jus ad bellum*. Unfortunately, such unintended bias and piecemeal analysis in international law is not the exception but the rule.

[33] This point is elaborated on in more detail in the book's introduction.
[34] Levitt, 'The Law on Intervention', n 1 above, at 51.
[35] *Ibid*.
[36] *Ibid*.
[37] *Ibid*.
[38] The civil war lasted from 1989 to 1997: see Levitt, 'Humanitarian Intervention by Regional Actors' n 24 above, at 342; see also Jeremy Levitt, *The Evolution of Deadly Conflict*

to intervene unilaterally (ie without Security Council authorisation) to halt the conflict.[39]

A. Liberia

The Liberian civil war began in 1989, when Charles Taylor and a group of so-called dissidents launched an attack against security personnel in Nimba County (located on the Liberia–Côte d'Ivoire border) and advanced towards the Liberian capital city of Monrovia.[40] The group led by Taylor called themselves the National Patriotic Front of Liberia (NPFL).[41] The NPFL recruited soldiers from many ethnic groups, foremost among them the Mano and the Gio, and proceeded to crush the US-backed Armed Forces of Liberia (AFL) of President Sergeant Samuel K Doe. By May 1990, the NPFL controlled significantly more territory than Doe's collapsing regime, which had lost effective control of the state.[42]

Liberian security forces suffered enormous losses on the battlefield, which led Doe, who was facing certain defeat, to make several unsuccessful appeals to the people of Liberia, the United Nations and the US government for military assistance.[43] Finally he appealed to ECOWAS to introduce a peacekeeping force into Liberia to 'forestall increasing terror and tension' (that is, to restore his decrepit government to power).[44]

On 7 August 1990, the ECOWAS Standing Mediation Committee (hereinafter the Committee) agreed to establish an ECOWAS Cease-fire Monitoring Group (ECOMOG) in Liberia to halt the 'wanton destruction of human life and property … [and] … massive damage … being caused by the armed conflict to the stability and survival of the entire Liberian nation'.[45] ECOMOG was mandated to 'restor[e] law and order

in Liberia: From 'Paternaltarianism' to State Collapse (Durham, NC, Carolina Academic Press, 2005) 206–7 [hereinafter Levitt, *Conflict in Liberia*].

[39] *Ibid*.

[40] Levitt, 'Humanitarian Intervention by Regional Actors', n 24 above, at 342; see also Levitt, *Conflict in Liberia*, n 38 above, at 206.

[41] Levitt, *Conflict in Liberia*, n 38 above, at 206.

[42] Levitt, 'Humanitarian Intervention by Regional Actors', n 24 above, at 342.

[43] *Ibid*.

[44] Letter addressed by President Samuel K Doe to the chairman and members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee (14 July 1990), reprinted in M Weller (ed), *Regional Peace-keeping and International Enforcement: The Liberian Crisis* (Cambridge, Cambridge University Press, 1994) 60–61 [hereinafter Weller, *The Liberian Crisis*].

[45] See ECOWAS Standing Mediation Committee, 'Cease-fire and Establishment of ECOWAS Cease-fire Monitoring Groups for Liberia, Banjul, Republic of Gambia' (7 August 1990) Dec A/DEC.1/8/90, reprinted in Weller, *The Liberian Crisis*, n 44 above, at 67.

to create the necessary conditions for free and fair elections'.[46] On 24 August, ECOMOG entered Liberia to forestall the killing, restore law and order, and prevent the state from descending into further anarchy.[47] The NPFL, which by then controlled approximately 90 per cent of the country, abducted and attacked ECOMOG forces upon their entry into the country.[48]

The situation worsened when, in September 1990, Doe was murdered by the Independent National Patriotic Front, an NPFL splinter group.[49] ECOWAS eventually stabilised the situation and nearly two years later, on 19 November 1992, the UNSC adopted Resolution 788, calling for the restoration of peace and a complete weapons embargo against Liberia and authorised ECOWAS to enforce its terms.[50] Ten months later, on 22 September 1993, the Security Council adopted Resolution 866,[51] which called for the creation of the UN Observer Mission in Liberia (UNOMIL), stating 'that this would be the first peace-keeping mission undertaken by the United Nations in co-operation with a peace-keeping mission already set up by another organisation, in this case the ECOWAS'.[52]

I have argued elsewhere that the Security Council's stance affirmed the legality of the ECOWAS action and placed a retroactive de jure seal on its Liberia operation, confirming that the breakdown of law and order, protection of human rights and restoration of the rule of law were valid justifications for intervention by ECOWAS, and later the UN.[53] ECOWAS's action was also arguably the first genuine case of humanitarian intervention.[54] At the very least, the approach by ECOWAS and the Security Council in this case confirmed that an intervention taken outside the authority of the UN Charter to maintain law and order and protect human rights could indeed be lawful.[55]

[46] *Ibid* at 68.

[47] Levitt, *Conflict in Liberia,* n 40 above, at 208.

[48] *Ibid* at 206.

[49] *Ibid* at 207.

[50] *Ibid* at 209; see also UNSC Res 788 (19 November 1992) UN Doc S/RES/788 at paras 8, 10.

[51] UNSC Res 866 (23 September 1993) UN Doc S/RES/866.

[52] *Ibid.*

[53] Moreover, 'Between 22 January 1991 and 27 November 1996, the [Security] Council adopted fifteen resolutions directly relating to the situation in Liberia, in addition, the President of the Security Council issued nine statements in this connection': UN Department of Public Information, 'The United Nations and the Situation in Liberia' (1997) UN Doc [ST/] DPI/1697/Rev.1 at 35. Almost every resolution and statement commended ECOWAS for its efforts, asked UN member states to support it financially, requested African states to contribute troops to its mission and condemned attacks against it by rebel factions; not once was ECOWAS condemned for unlawful action or inappropriate conduct: Levitt, 'Humanitarian Intervention by Regional Actors', n 24 above, at 347.

[54] See Levitt, 'Humanitarian Intervention by Regional Actors', n 24 above, at 350–51.

[55] Some commentators have perhaps legitimately criticised the conduct of certain ECOMOG officials in Liberia, but none, in the author's view, have credibly challenged the

Although it has yet to be widely recognised as such, the ECOWAS intervention was a watershed in the *jus ad bellum* and should be considered not only as the first authentic post-Cold War case of humanitarian intervention, but also one aimed at creating an enabling environment for democracy. The fact that the Credentials Committee of the UN refused to accredit, recognise or grant UN General Assembly representation to the so-called government of Charles Taylor in Liberia (until he won elections in 1997),[56] despite the fact that he was in effective control of the state, speaks volumes about the rising status of the democracy regime and legitimacy of ECOWAS law in relation to the fledgeling status of the effective control doctrine. It also signals the validity of an intervention with pro-democratic components; the Committee's decision not to accredit belligerents seems to have rested primarily 'upon whether the applicant government was democratic and whether the applicant government originally came to power by overthrowing a democratic government'.[57]

B. ECOWAS Revised Treaty of 1993

In July 1993, three years into its peace-creation mission in Liberia,[58] ECOWAS adopted the Revised Treaty of 1993, in part to provide a treaty basis for future peacekeeping.[59] The contracting parties to the Treaty affirmed and declared their adherence to the 'maintenance of regional peace, stability, and security',[60] 'recognition, promotion, and protection of human and peoples' rights'[61] and the 'promotion and consolidation of a

legality of the intervention itself. The highly controversial operation of NATO in Kosovo came four years after the ECOMOG operation, making the latter the legitimate watershed case of humanitarian intervention and, debatably, PDI.

[56] Jeremy Levitt, 'Illegal Peace? Examining the Legality of Power-sharing with Warlords and Rebels in Africa' (2006) 27 *Michigan Journal of International Law* 495, 570.

[57] Matthew Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through Its Accreditation Process, and Should It?' (2000) 32 *New York University Journal of International Law & Policy* 725, 725–6. In fact, the Credentials Committee accredited representatives of Samuel Doe's government even though it lost power and Doe was killed in 1990: *ibid* at 746. According to Griffin, the central consequence of not being accredited is the inability to participate in the business of the General Assembly: *ibid* at 732.

[58] Funmi Olonisakin, 'Conflict Management in Africa: The Role of the OAU and Sub-Regional Organizations' in *Building Stability in Africa: Challenge for the New Millennium*, ISS Monograph 46 (South Africa, Institute for Security Studies, 2000) <http://www.iss.co.za/Pubs/Monographs/No46/Conflict.html>.

[59] Revised Treaty of the Economic Community of West African States (July 1993) [hereinafter Revised Treaty], Arts 58(f), 68, reprinted in Jeremy Levitt (ed), *Africa: Selected Documents on Constitutive, Conflict and Security, Humanitarian and Judicial Issues* (Ardsley, NY, Transnational Publishers 2003) 63, 95 [hereinafter *African Selected Documents*].

[60] Revised Treaty, Art 4(e), reprinted in *Africa: Selected Documents,* n 59 above, at 63, 68.

[61] Revised Treaty, Art 4(g), reprinted in *Africa: Selected Documents,* n 59 above, at 63, 68.

democratic system of governance in each member State'.[62] As part of its regional security aims, ECOWAS obligates itself, at the request of member states, to provide assistance for the observance of democratic elections[63] and to 'establish a regional peace and security observation system and peace-keeping forces where appropriate'.[64] The Treaty also provides for the adoption of protocols detailing additional provisions governing political co-operation and regional peace and stability.[65]

C. Sierra Leone

On 25 May 1997, approximately six months after the end of the civil war in Sierra Leone and shortly after the country's democratic elections, several junior military elements led by Major Johnny Koromah and the Revolutionary United Front (RUF) carried out a successful coup d'état against President Ahmed Tejan Kabbah's democratically elected government, forcing him to flee to Guinea.[66] Before leaving Sierra Leone, however, Kabbah requested that Nigeria and ECOWAS intervene to forestall the conflict and restore constitutional order to the country.[67] Additionally, the international community, including the UN and Organization of African Unity (OAU) sternly condemned the coup.[68] The OAU formally requested ECOWAS to intervene to restore Kabbah's regime to power, and UN Secretary-General Kofi Annan made similar pleas.

In response to Kabbah's request, on 26 May 1997, Nigeria (not ECOMOG) sent forces to Sierra Leone to forestall the conflict and restore constitutional order (that is, return Kabbah to power).[69] When the Nigerian forces initially landed, they were met with strong resistance from the junta and were forced to retreat, but later they were able to push back the rebels and secure sections of the country.[70] Likewise, in early August 1997, pursuant to requests by ECOWAS member states, General Sani Abacha, former Nigerian head of state and ECOWAS chairman, apparently issued an executive directive authorising an economic blockade against Sierra Leone to be enforced by ECOMOG.[71] On 30 August, during the 20th

[62] Revised Treaty, Art 4(j), reprinted in *Africa: Selected Documents* n 59 above, at 63, 68.
[63] Revised Treaty, Art 58(2)(g), reprinted in *Africa: Selected Documents,* n 59 above, at 63, 68.
[64] Revised Treaty, Art 58(2)(f), reprinted in *Africa: Selected Documents,* n 59 above, at 63, 68.
[65] Revised Treaty, Art 58(3), reprinted in *Africa: Selected Documents,* n 59 above, at 63, 68.
[66] Levitt, *African Interventionist States*, n 8 above, at 22.
[67] 'Military Coup' in *African Research Bulletin* (Oxford, May 1997) 12695.
[68] Levitt, 'Humanitarian Intervention by Regional Actors', n 24 above, at 365.
[69] Levitt, *African Interventionist States*, n 8 above, at 23.
[70] Levitt, 'Humanitarian Intervention by Regional Actors', n 24 above, at 366.
[71] Levitt, *African Interventionist States*, n 8 above, at 23.

Summit of ECOWAS in Abuja, ECOWAS *officially* mandated ECOMOG to enforce sanctions against the junta and restore law and order to the country.[72] On 8 October, the UNSC supported these various efforts by adopting Resolution 1132, which deplored the coup and the junta's unwillingness to restore the 'democratically elected Government' and constitutional order.[73] Acting under its Chapter VII enforcement powers, the UNSC also demanded that the junta 'relinquish power' and 'make way for the restoration of the democratically-elected Government and a return to constitutional order',[74] and strongly supported ECOWAS efforts to restore Kabbah's government to power.[75] Acting under its Chapter VIII authority, the UNSC sanctioned ECOWAS to enforce an arms and petroleum embargo and travel restrictions against the junta, and halt, inspect and verify the cargo and destinations of all inward-shipping vessels.[76]

On 5 February 1998, 'responding to an attack by junta forces on their position at Lungi, ECOMOG launched a military attack on the junta,' which led to its removal from power and expulsion from Free Town, the capital city, on 12 February.[77] By early March, 'ECOMOG [had] established itself successfully across most of the country'.[78] On 10 March, Kabbah returned to Free Town to resume his position as President of Sierra Leone.[79] The leaders of Nigeria, Guinea, Mali and Niger and the Vice-president of the Gambia accompanied him.[80]

From a legal standpoint, it is important to note that there were *two* separate interventions in Sierra Leone: the first was taken under the authority of the Republic of Nigeria; the second was undertaken by ECOWAS. While each intervention arguably had multiple legal bases, the primary rationale for both was to restore the democratically elected government of Tejan Kabbah.

The Nigerian intervention in Sierra Leone was justifiable on several legal bases[81]; however, it was the first PDI by a single state—one which was applauded by the whole of the international community. The ECOWAS intervention in Sierra Leone was also lawful for several

[72] *Ibid*.
[73] UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132, Preamble.
[74] *Ibid* at para 1.
[75] *Ibid* at para 3. The UNSC called on the international community to support and co-operate with the ECOWAS operation: *ibid* at para 18.
[76] *Ibid* at para 8.
[77] The Secretary-General, 'Fourth Report of the Secretary-General on the Situation in Sierra Leone' (18 March 1998) UN Doc S/1998/249 at para 6.
[78] *Ibid* at para 19.
[79] Levitt, *African Interventionist States*, n 8 above, at 23.
[80] *Ibid*.
[81] For an in-depth analysis of the legal bases for the Nigerian intervention, see Levitt, *African Interventionist States*, n 8 above, at 22–6.

reasons[82]; however, it should be regarded as the most authoritative case of PDI by a regional organisation, given the swiftness with which it took place and the global unanimity concerning its legitimacy.[83] Both interventions were retroactively sanctioned through UNSC Resolution 1132.[84]

The ECOWAS intervention into Sierra Leone debatably could be classified as both a humanitarian intervention and a PDI. I have stated elsewhere that although Kabbah requested outside intervention as he fled to Guinea, his regime was still in effective control of the state,[85] even if it was not in control of Free Town at that time. Moreover, his government 'was still recognised as the de jure government by the whole of the international community'.[86] More importantly, however, the civilian population of Sierra Leone continued to recognise Kabbah as their leader and actively protested and took up arms against the junta.[87] Since it appears that Kabbah lawfully consented to the intervention, by definition it cannot serve as an example of humanitarian intervention. I nonetheless have argued:

> Shortly after the coup, the situation in the country became chaotic. Yet it was not consumed by anarchy nor, arguably, at this juncture, had the junta and RUF committed human rights abuses that would have warranted humanitarian intervention. Nevertheless, ECOWAS could lawfully invoke a right of humanitarian intervention because the democratic government of Sierra Leone was illegally and violently dislodged against the will of its civilian populace,[88] who because of their opposition to the junta were threatened with death and suffering on a grand scale.[89] Moreover, civilian opposition by way of armed resistance and nationwide employment strikes against the junta intensified

[82] *Ibid.*
[83] *Ibid.*
[84] Note 73 above.
[85] Levitt, *African Interventionist States*, n 8 above, at 22–4.
[86] *Ibid*.
[87] 'This is perhaps the first time in contemporary African history that well over 95 per cent of the civilian population of a state actively resisted the toppling of a democratically elected regime and refused to co-operate with and recognize its illegal incumbent': *ibid*.
[88] For more on this issue see Levitt, 'Humanitarian Intervention by Regional Actors', n 24 above, at 369–71. See also Jeffrey C Tuomala, 'Just Cause: The Thread that Runs So True' (1994) 15 *Dickson Journal of International Law* 1 (examining the 1989 US intervention in Panama and discussing just war theory in this context).
[89] However, without a genuine threat of death or grand suffering to the domestic populace of a state, it has yet to be resolved whether a right to pro-democratic intervention exists. Nevertheless, based on the diversity of justifiable circumstances that led to the recent AU action in São Tomé Príncipe, the US-led UN mission in Haiti, the ECOMOG operations in Sierra Leone, Guinea-Bissau and Togo, MISAB intervention in the CAR, and SADC operation in Lesotho, it appears a pro-democratic norm that does not include such suffering and falls outside of the purview of humanitarian intervention is fast developing: Levitt, *African Interventionist States*, n 8 above, at 26.

> the situation and caused the state infrastructure to collapse. Had ECOMOG not intervened, fighting between the junta and the RUF on the one hand and the Kamajors and other civilians loyal to Kabbah on the other would have escalated, resulting in untold destruction and loss of life.[90]

While the ECOWAS intervention in Sierra Leone arguably would not qualify as a humanitarian intervention under a strict interpretation of the term, I defined it broadly enough to include what I identified as an emerging practice of PDI. I included the unlawful and violent seizure of DCGs against the will of a threatened civilian populace within the paradigm of humanitarian intervention because of the inseparable and interdependent link between violent coups d'état, civil war and massive human rights violations, and because when the coup in Sierra Leone took place, there was not sufficient state practice or treaty law to claim that an independent right of PDI existed.[91] Nevertheless, statements made by Secretary-General Kofi Annan were instructive here because they seemed to validate the emergence of a *pro-democratic* right of intervention when DCGs are overthrown. In the wake of the coup in Sierra Leone, Annan commented:

> Africa can no longer tolerate, and accept as faits accomplis, coups against elected government, and the illegal seizure of power by military cliques, who sometimes act for sectional interests, sometimes simply for their own[92]

and hence must take whatever action is necessary to restore constitutional order.

Today there appears to be sufficient state practice and treaty law development to demonstrate the ripening of an independent norm of PDI which 'falls outside the scope of humanitarian intervention, and may be better associated with the doctrine of self-determination' or the emerging right of democracy.[93] In this case, ECOWAS action in Sierra Leone was a watershed case in the shift towards the hardening of a PDI norm. UN practice seems to support this assertion, given its avid support of ECOWAS action through Resolution 1132 and the decisions of the UN Credentials Committee, which refused to accredit UN General Assembly representation for the supposed government of Johnny Paul Koromo in Sierra Leone in 1997 (after he overthrew Kabbah's democratically

[90] *Ibid* at 25–6.

[91] Again, this labelling was based on state practice in the Africa region, the nexus between state collapse and human rights violations in the continent, and a lack of consensus inside and outside of Africa as to the existence of a norm of PDI.

[92] Press Release, Secretary-General, 'Secretary-General Calls for Efforts to Unleash African "Third Wave" Based on Democracy, Human Rights, and Sustainable Development' (2 June 1997) UN Doc SG/SM/6245/Rev.1 AFR/9/Rev <http://www.un.org/News/Press/docs/1997/19970602.sgsm6245.r1.html>.

[93] Levitt, 'Humanitarian Intervention by Regional Actors', n 24 above, at 337, fn 18.

elected regime), despite the fact that Koroma was in de facto control of the state.[94] As was the case in Liberia, the decision not to credit insurrectionists in Sierra Leone seems to have rested upon whether the applicant government was democratic and whether it came to power by toppling a democratic government.[95] Hence, the case of Sierra Leone arguably signalled the first clear case of a shift in the law *de lege ferenda* towards a right of PDI, and the second time (the first was Haiti) that the acceptability of a government would formally be judged by international actors, perhaps evidencing the 'rise of popular sovereignty'.[96]

D. ECOWAS Conflict Framework

In October 1998, some 14 months after the intervention in Sierra Leone, ECOWAS adopted a binding mechanism to allow for interstate collaboration in the collective management of regional security: the Framework Establishing the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security [hereinafter the Framework].[97] The Framework sets out an elaborate scheme for ECOWAS–ECOMOG enforcement operations, including a coherent command and control structure.[98] It calls for the creation of an ECOWAS Mediation and Security Council to authorise all forms of military intervention.

Regarding internal conflicts that are sustained from within, paragraph 46 of the Framework provides for military intervention by ECOWAS when crises: (1) threaten to trigger a humanitarian disaster[99]; (2) pose a serious threat to peace and security in the sub-region[100]; and (3) erupt following the overthrow or attempted overthrow of a *democratically elected government* (emphasis added).[101] Except for the new AU, no other regional organisation has laid down a normative framework for unilateral military intervention.[102] Furthermore, paragraph 52 of the Framework provides

[94] Griffin, n 37 above, at 725. In fact, despite its removal from power, the Credentials Committee 'accredited the delegation of the deposed, democratically elected government of President Kabbah of Sierra Leone': *ibid* at 747.

[95] *Ibid* at 725–6.

[96] See Louis E Fielding, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy' (1995) 5 *Duke Journal of Comparative and International Law* 329, 338.

[97] Framework Establishing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (adopted 24 July 1998) [hereinafter ECOWAS Conflict Management Framework], reprinted in *Africa: Selected Documents,* n 59 above, at 285.

[98] *Ibid*, reprinted in *Africa: Selected Documents,* n 59 above, at 285.

[99] *Ibid* at para 46(i), reprinted in *Africa: Selected Documents,* n 59 above, at 285, 298.

[100] *Ibid* at para 46(ii), reprinted in *Africa: Selected Documents,* n 59 above, at 285, 298.

[101] *Ibid* at para 46(iii), reprinted in *Africa: Selected Documents,* n 59 above, at 285, 298.

[102] Unilateral military intervention means the willingness, if necessary, to employ enforcement measures without authorisation from the UNSC. It does appear that in 2001 the OAS

that ECOMOG may undertake military operations for peacekeeping,[103] humanitarian intervention in support of humanitarian actions[104] and the enforcement of sanctions and embargos.[105] ECOWAS is thus the first regional arrangement to codify both humanitarian and pro-democratic rights of intervention.

One year after the ECOWAS intervention in Sierra Leone, its capacity to maintain peace and security and law and order in West Africa was tested again by the conflict in Guinea-Bissau.

E. Guinea-Bissau

On 7 June 1998, the democratically elected government of President Bernardo Nino Vieira was threatened with a mutiny by high-ranking officers of the Armed Forces of Guinea-Bissau, led by Army Chief of Staff Ansoumane Mane.[106] The mutiny was initiated after President Vieira fired Mane for not investigating claims that his officers were smuggling arms to the Casamance rebels in southern Senegal.[107] The mutineers also opposed government plans to reduce the military by 50 per cent from its 1996 strength of 20,000.[108] By the end of June, fighting between the mutineers and loyalist forces resulted in the deaths of several hundred civilians and caused over 250,000 persons to be displaced.[109] Nevertheless, Vieira's government always remained in effective control of the state.[110]

At the request of Vieira and pursuant to bilateral defence pacts, Senegal and Guinea intervened to quell the mutiny, evacuate their nationals and those of other countries and restore security and constitutional legality to the country.[111] They did not intervene to enforce the peace but rather to safeguard Vieira's government.[112] Vieira also requested that ECOWAS

codified a right to democracy within its member states that is enforceable through PDI; however, it appears that prior authorisation from the UNSC was required. See Inter-American Democratic Charter (11 September 2001) 40 ILM 1289, Arts 1, 17–18; OAS, 'Table Comparing the Texts of the Inter-American Democratic Charter-draft Resolution Rev 7', The OAS Charter, and Representative Democracy (16 July 2001) OAS Doc GT/CDI-1/01, Resolution AG/RES. 1080 (XXI-O/91) <http://www.oas.org/charter/docs/tables_en.htm>.

[103] ECOWAS Conflict Management Framework, n 99 above, at para 52(ii), reprinted in *Africa: Selected Documents,* n 59 above, at 285, 287.

[104] *Ibid* at para 52(iii).

[105] *Ibid* at para 52(iv).

[106] 'Manes' Men: An Army Mutiny Has Quickly Become a Security Problem for the Neighbouring States' *Africa Confidential* (London, 26 June 1998) 3.

[107] *Ibid.*

[108] *Ibid.*

[109] Levitt, *African Interventionist States*, n 8 above, at 27.

[110] *Ibid*.

[111] Senegal and Guinea immediately sent 1,300 and 400 troops, respectively, to the country: *ibid.*

[112] *Ibid*.

deploy ECOMOG in the country.[113] During the 18th Foreign Ministers' Conference on Security in Abidjan, Côte d'Ivoire, from 30 June to 3 July 1998, ECOWAS foreign ministers made tentative plans to intervene in Guinea-Bissau to restore law and order to the country.[114]

However, after a series of peace talks sponsored by the ECOWAS Committee on Guinea-Bissau and the Community of Portuguese Speaking Countries (CPLP) between August and December 1998, President Vieira and chief mutineer Mane agreed to the deployment of ECOMOG to monitor the peace and the institution of a government of national unity.[115] The ECOMOG force would provide security along the Guinea-Bissau–Senegal border, keep the warring parties apart, guarantee free access to humanitarian organisations attempting to provide humanitarian relief to the domestic population and ensure that the conflict did not have any destabilising effects on the sub-region.[116] The Abuja Accord specifically provided for the deployment of ECOMOG to replace the Senegalese and Guinean contingents.[117] On 26 December 1998, less than a week before ECOMOG was to be deployed in Guinea-Bissau, the UNSC adopted Resolution 1216, which 'welcomes' the role of ECOMOG in the implementation of the accord, 'approves' the ECOMOG mandate, 'commends' ECOWAS efforts to restore peace and security and 'affirms' that 'the ECOMOG interposition force may be required to take action [ie, use force] … in the discharge of its mandate'.[118] Between December 1998 and March 1999, Benin, the Gambia, Niger and Togo deployed approximately 600 ECOMOG troops in Guinea-Bissau to 'guarantee security along the Senegalese/Guinea-Bissau border, keep the warring parties apart and guarantee free access to humanitarian organizations'.[119]

It is important to note that, like the interventions in Sierra Leone, there were *two* separate interventions in Guinea-Bissau: the first was by Senegal and Guinea; the second by ECOWAS. While each intervention had multiple legal bases,[120] the primary rationale for each was to protect

[113] 'ECOWAS Puts Out Plan to End Bissau Mutiny', Panafrican News Agency (Dakar, Senegal, 5 July 1998) available at LEXIS (search 'News, All (English, Full Text)' database for 'ECOWAS puts out plan').

[114] Levitt, *African Interventionist States*, n 8 above, at 27.

[115] *Ibid* at 28–9.

[116] Secretary-General, 'Report of the Secretary-General Pursuant to Security Council Resolution 1216 Relative to the Situation in Guinea-Bissau' (17 March 1999) UN Doc S/1999/294 at para 3(c).

[117] *Ibid* at paras 3(b), 11–12. The second round of peace talks, which produced the Abuja Accord, were held in Abuja, Nigeria, on 1 November 1998: *ibid* at para 3.

[118] UNSC Res 1216 (21 December 1998) UN Doc S/RES/1216 at paras 3, 4, 6.

[119] *Ibid* at para 3(c).

[120] For an in-depth analysis of the legal bases for the Senegalese, Guinean and ECOWAS intervention in Guinea-Bissau, see Levitt, *African Interventionist States*, n 8 above, at 28–38.

Vieira's controversial yet democratically elected government from being overthrown by the military.[121]

The central aim of the Senegalese and Guinean intervention was to quash the mutiny, and political elites inside and outside of Africa generally applauded the action. The consent-based intervention served as yet another example of the willingness of African states to challenge unconstitutional regime changes. The swiftness and robust nature of the action by Senegal and Guinea was yet another signal of a trend toward PDI in Africa.

The situation in Guinea-Bissau threatened Vieira's government and posed a genuine threat of death and great suffering to the civilian population; hence, the ECOWAS operation safeguarded Vieira's regime and Bissauns and likely prevented civil war. ECOWAS leaders clearly realised that the preservation of weak and arguably authoritarian but democratically constituted government was fundamental to long-term peace and security in the sub-region.[122] Like the cases of Sierra Leone and Haiti,[123] the Bissaun case also confirmed that an intervention taken to preserve democracy could be lawful and legitimate. This assertion is further supported by the UN's formal sanction of the operation as well as the lack of any formal protest regarding its legality.

In the wake of these peace operations, ECOWAS established a new conflict mechanism to prevent, manage and resolve future conflicts.

F. ECOWAS Conflict Protocol

In December 1999, approximately one year after the introduction of the Framework and the launch of the Guinea-Bissau operation, ECOWAS adopted the Protocol Establishing the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security [hereinafter the Conflict Protocol], which aims to implement further Article 58 of the Revised Treaty.[124] The Conflict Protocol recognises that peace, security, stability, democracy and good governance are central to the development of the West African region[125]; one of its key objectives is to protect member states from being 'affected by the overthrow or attempted overthrow of

[121] Levitt, *African Interventionist States*, n 8 above, at 26–31.

[122] See generally Fielding, n 96 above, at 329.

[123] See generally Acevedo, n 14 above, at 119 (providing an authoritative analysis of the legality of the OAS response to the 1993 Haitian crisis).

[124] Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security (10 December 1999) ECOWAS Doc A/P10/12/99, Preamble <http://www.sec.ecowas.int/sitecedeao/english/ap101299.htm> [hereinafter ECOWAS Conflict Protocol], reprinted in *Africa: Selected Documents*, n 59 above, at 259, 261–4.

[125] *Ibid*.

a democratically elected government'.[126] It also affirms its commitment to promoting and consolidating democratic government and institutions in each member state, supporting processes for the political restoration of collapsed governments or those that have been seriously eroded, and protecting fundamental human rights and freedoms.[127]

The ECOWAS Conflict Protocol also aims to prevent, manage and resolve internal and interstate conflict—and here it states that paragraph 46 of the Framework governs these matters.[128] Like the Framework, Article 22 of the Conflict Protocol states that peacekeeping and the restoration of peace, *humanitarian intervention* during humanitarian disasters and the enforcement of sanctions, including embargoes, are key responsibilities of ECOMOG.[129] Article 25 of the Conflict Protocol complements paragraph 46 of the Framework, stating that ECOWAS may take enforcement action in internal conflicts: (1) that 'threaten to trigger a humanitarian disaster or that pose a serious threat to peace and security in the sub-region'; (2) where there has been a 'serious and massive violation of *human rights* and the rule of law'; and (3) when there has been an '*overthrow or attempted overthrow of a democratically elected government*'.[130] Invoking these considerations, ECOWAS sought to establish an ECOMOG force along the border areas of Guinea and Liberia in December 2000 to prevent skirmishes between the two countries from escalating into full-blown conflict.[131] The ECOWAS conflict mechanism also served as first responder to the crisis in Côte d'Ivoire in October 2000.

G. Côte d'Ivoire

In October 2000, Côte d'Ivoire's current president, Laurent Gbagbo, was declared the winner of a bitterly contested national election that was decided in his favour by the country's Supreme Court.[132] Since that time he has not been able to bring sustainable peace to the embattled nation.[133]

[126] *Ibid*.
[127] *Ibid*, Arts 2, 45, reprinted in *Africa: Selected Documents*, n 59 above, at 259, 264, 281.
[128] *Ibid*, Art 3, reprinted in *Africa: Selected Documents*, n 59 above, at 259, 265.
[129] *Ibid*, Art 22, reprinted in *Africa: Selected Documents*, n 59 above, at 259, 272 (emphasis added).
[130] *Ibid*, Art 25, reprinted in *Africa: Selected Documents*, n 59 above, at 259, 274 (emphasis added).
[131] Decision Establishing a Force of ECOMOG Armed Monitors along the Border Areas of Guinea and Liberia (16 December 2000) Dec 4/12/00 <http://www.sec.ecowas.int/sitecedeao/english/adec04122000.htm>.
[132] Levitt, 'The Law on Intervention', n 1 above, at 54.
[133] *Ibid*.

The root of the current crisis in Côte d'Ivoire dates back to September 2002, when approximately 800 discontented soldiers calling themselves the Patriotic Movement of Côte d'Ivoire overthrew Gbagbo's government and attacked military installations in the commercial, administrative and diplomatic centre, Abidjan, and in the second-largest city, Bouake.[134] The rebels feared being dismissed from the army for disloyalty,[135] and they wanted to challenge the government's so-called prejudicial Ivoirité policy, which required all inhabitants of the country to carry identification cards prior to the issuance of a ballot in all national and regional elections.[136] The revolt ultimately divided the country between the rebel-controlled North and the loyalist South.[137] As a result, Gbagbo's government lost de facto control of the country.

France, which had 20,000 nationals in Côte d'Ivoire, dispatched paratroopers to protect its citizens after initial hostilities broke out in 2000.[138] It provided transportation and security to an ECOWAS mediation team which met with the junta.[139] The mediation team communicated the organisation's position of not supporting the overthrow of DCGs and threatened to deploy ECOMOG in the country if the warring parties could not resolve the situation, including a return to constitutional order.[140]

In October 2002, at the request of President Gbagbo, ECOWAS, acting under the authority of its Conflict Protocol, instituted a peacekeeping force to monitor the ceasefire agreement in Côte d'Ivoire.[141] Efforts by ECOWAS, the UN, France and the AU culminated in the Linas–Marcoussis Agreement of January 2003.[142] In early February 2004, the UNSC adopted Resolution 1527, which fully supported efforts by ECOWAS and France to 'promote a peaceful settlement of the conflict' and empowered the ECOWAS mission in Côte d'Ivoire to stabilise the

[134] 'The Nightmare Scenario: An Army Rebellion May Send the Once-Prosperous Country Down the Same Road as Its Unstable Neighbors' *Africa Confidential* (London, 27 September 2002) 1 [hereinafter 'The Nightmare Scenario'].

[135] *Ibid*. But see 'Ivory Coast Troops Prepare to Attack Rebels Holding Major City' (2002) *New York Times*, 22 September, 13 (ahowing that there is a discrepancy in the number of rebels in the group—the article cites 750 men compared to *Africa Confidential*'s 789 men).

[136] 'The Melting Pot Cracks' Economist.com (London, 3 October 2002) 64.

[137] 'The Nightmare Scenario', n 134 above, at 2.

[138] Alistair Thomson, 'West African Ministers Set to Talk to Ivorian rebels', *Reuters News* (London, 3 October 2002), LEXIS (search the 'Reuters News' database for 'West African Ministers' and 'Thomson'); see also 'The Nightmare Scenario', n 134 above, at 1.

[139] 'Cote d'Ivoire; With No Ceasefire in Ivory Coast, War Threat Looms' *Africa News* (6 October 2002) LEXIS (search 'News, All (English, Full Text)' database for 'No Ceasefire in Ivory Coast').

[140] 'Cote d'Ivoire Fighting Continues to Pose Significant Threat to Government', *War, Defense, & Foreign Affairs Daily* (8 October 2002) LEXIS (search 'News, All (English, Full Text)' database for 'Cote d'Ivoire Fighting Continues').

[141] Levitt, 'The Law on Intervention', n 1 above, at 54–5.

[142] The Agreement was a comprehensive peace agreement that established a framework for peace, security and reconciliation, including a government of national unity.

nation.[143] The resolution authorised France to support ECOWAS.[144] In late February, the Security Council adopted Resolution 1528 establishing the UN Operation in Côte d'Ivoire (UNOCI) to guarantee the terms of the peace agreement.[145] ECOWAS forces were integrated into UNOCI, and French peacekeeping forces were authorised to 'use all necessary means' to support the UNOCI mission.[146]

After the ECOWAS action in Liberia, Sierra Leone, Guinea-Bissau and Côte d'Ivoire, the organisation sought to develop a systematic approach to promoting and protecting democracy in its member states and adopted a bold protocol in this regard.

H. ECOWAS Democracy Protocol

The ECOWAS Protocol on Democracy and Good Governance [hereinafter the Democracy Protocol] is the most recent articulation of West Africa's approach to the creation, preservation and protection of democracy.[147] It recognises that in order for ECOWAS to be an effective peace-broker, it must pay special attention to the inherent linkages between 'internal crises, democracy and good governance, the rule of law, and human rights'.[148] In this context, the ECOWAS Democracy Protocol requires ECOWAS member states to establish mechanisms that promote, protect and enforce democracy and human rights as a matter of law and policy and obligates them to enshrine democracy as, in Samuel Barnes's phrase, 'an institutionalized process of decision making and societal learning, not a substantive formula for a regime'.[149] The Democracy Protocol also forbids all cruel, inhuman and degrading treatment of civilians and combatants during times of war and peace.[150] It specifically endorses the notion of empowering the ECOWAS Court of Justice to adjudicate cases 'relating to violations of human rights' after domestic remedies have been exhausted[151] and deems as essential the elimination of 'all forms of discrimination and harmful and degrading practices against

[143] UNSC Res 1527 (4 February 2004) UN Doc S/RES/1527.
[144] *Ibid*.
[145] UNSC Res 1528 (27 February 2004) UN Doc. S/RES/1528 at para 1.
[146] *Ibid* at para 8.
[147] Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (21 December 2001). ECOWAS Doc A/SP1/12/01. <http://www.sec.ecowas.int/sitecedeao/english/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf>.
[148] *Ibid*, Preamble.
[149] Samuel H Barnes, 'The Contribution of Democracy to Rebuilding Post Conflict Societies' (2001) 95 *American Journal of International Law* 86, 89.
[150] ECOWAS, n 147 above, Art 22(2).
[151] *Ibid*, Art 39.

women'.[152] Last, it confirms that, in West Africa, democracy is an entitlement to be respected, promoted and preserved by PDI, if necessary.

One month before it received its eighth ratification (Niger in March 2005; nine are needed for it to enter into force), ECOWAS's commitment to peace, security and democracy was tested in Togo.

I. Togo

On 5 February 2005, after 38 years of authoritarian rule,[153] President Gnassingbe Eyadema of Togo died of a heart attack, leaving a power vacuum which led to a legislature-backed unconstitutional transition of power to his son, Faure Gnassingbe Eyadema.[154] The succession was backed by the army, which sealed the country's borders shortly after Eyadema's death.[155] Togo's constitution provides that the President of the National Assembly is to succeed the President in the event of death or incapacity until special elections are held.[156] However, the army redirected National Assembly Speaker Fanbore Natchaba's plane to Benin in a bid to keep him from claiming the presidency.[157] On 6 February 2005, Togo's assembly elected Faure President of the National Assembly, which under Togolese law meant that he was to succeed to the presidency.[158] The Assembly also passed a constitutional amendment allowing him to fulfil his father's term, which was to last until 2008.[159] This unconstitutional manoeuvre was directed by General Zakary Nandja, Chief of Staff of the Forces Armées Togolaises. Nandja had been a close adviser to President Eyadema and shared his Kabyé ethnic background.[160] The strategy was also allegedly engineered by Esso Solitoki, the Law Commission President.[161]

Ethnic tensions were the root cause of the 'coup.'[162] Simply stated, the army leadership wanted to maintain power in the hands of the Kabyé

[152] *Ibid*, Art 40.

[153] Jonathan Clayton, 'Togo "Military Coup" Hands Leadership to President's Son' (2005) *The Times*, 7 February.

[154] 'Gnassignbe Eyadema Dies' (2005) 42 *Africa Research Bulletin: Political, Social, and Cultural Series* (Oxford), 1–28 February, 1.

[155] *Ibid*.

[156] *Ibid*.

[157] *Ibid*.

[158] *Ibid*. See also 'The Struggle Continues in Togo' (2005) *Africa Analysis* (London, 11 February) 1 <ProQuest> (search the Ethnic Newswatch database for 'Struggle Continues Togo').

[159] Ebow Godwin, 'President's Son Takes Power in West African Coup: New Leader of Togo Named without Required Elections' (2005) *Chicago Sun Times*, 7 February, 35. See also 'The Struggle Continues in Togo', n 158 above.

[160] 'The Struggle Continues in Togo', n 158 above.

[161] *Ibid*.

[162] 'Dynastic Dictatorship' (2005) *Africa Confidential*, 18 February, 5.

ethnic group.[163] The military is reportedly 80 per cent Kabyé.[164] Given the demographics of Togo, the military feared that free and fair elections would lead to an increase in power by the Ewe ethnic group.[165] The Kabyé ethnic group comprises 12 per cent of the population, while the Ewe ethnic group in the South comprises about 21 per cent.[166] Natachaba is a member of the Chokossi ethnic group.[167]

The unconstitutional seizure of power was swiftly condemned as a military coup d'état by the UN, the AU and ECOWAS.[168] For example, Secretary-General Annan publicly expressed concern over the extra-constitutional transfer of power in Togo in 2005, commenting that it had 'not been done in full respect of the provisions of [Togo's] Constitution'.[169] Mamadou Tandja, President of Niger and ECOWAS chairman, commented that the seizure of power was unjustifiable.[170] Alpha Oumar Konare, the AU's West African commissioner, referred to it as a military coup d'état.[171] The AU threatened sanctions against Togo unless there was a restoration of 'constitutional legality'.[172] Tensions in Togo escalated as protestors took to the streets in opposition to Faure.[173] ECOWAS placed sanctions on Togo, suspending it from participating in the organisation, placed a travel ban on its leaders and imposed an arms embargo against the country.[174] After on-and-off negotiations and hard diplomacy by ECOWAS, and massive street protests by thousands of Togolese resulting in violent clashes with police and numerous deaths,[175] the situation in the country became increasingly tense. A week after the protest-related killings, over 100,000 citizens flooded the streets of Lomé, the capital of Togo, to challenge Faure's succession.[176]

[163] *Ibid*.
[164] *Ibid*.
[165] *Ibid*.
[166] 'Presidential Candidates' (2005) 42 *Africa Research Bulletin*: *Political Social, and Cultural Series* (Oxford), 1–28 March, 16142.
[167] 'Dynastic Dictatorship', n 162 above, at 6.
[168] Clayton, n 153 above; see also 'Pressure Mounts on Gnassignbe' (2005) *Africa Analysis* (London) no 465, 25 February 1 <ProQuest> (search the Ethnic Newswatch database for 'Pressure Mounts Gnassingbe') (showing that ECOWAS and the AU called for Faure's resignation and the return of constitutional order).
[169] 'Annan Calls on Togolese to Respect Own Constitution in Appointing Presidential Successor' *UN News Service* (7 February 2005) 1 <http://www.un.org/apps/news/printnewsAr.asp?nid=13261> (accessed 9 September 2006).
[170] Clayton, n 153 above.
[171] *Ibid*.
[172] Nico Colombant, 'Protest Mounts Against Togo's New Leader' (2005) *Voice of America* (Washington, DC), 8 February,.
[173] Bryan Mealer, 'Three Killed in Togo Coup against Military President', (2005) *Sunday Independent* (Dublin), 13 February; see also 'Pressure Mounts on Gnassingbe', n 168 above.
[174] World in Brief, 'Sanctions Placed on Togo after Coup' (2005) *Observer* (London), 20 February, 26.
[175] 'Pressure Mounts on Gnassingbe', n 168 above.
[176] *Ibid*.

Simultaneously, the African Union Peace and Security Council (AUPSC) demanded a return to constitutional rule, authorised sanctions against Togo[177] and openly supported those sanctions imposed by ECOWAS.[178] A few days after ECOWAS imposed sanctions, Faure Gnassingbe resigned as interim president of Togo,[179] causing some discord among the various stakeholders as to whom should succeed Eyadema.[180] However, political muscle by ECOWAS managed to forge a solution that eventually led to presidential elections. To the dismay of the AU and ECOWAS leadership, Faure Gnassingbe was elected President with approximately 60 per cent of the vote.[181]

Actions taken by ECOWAS and the AU to ensure a lawful and constitutional transition of power in Togo succeeded. This was the second time that an acting African president resigned due to internal and external pressure, the resignation of Charles Taylor in Liberia in August 2003 being the first. What makes the case of Togo unique is that a 'state-sanctioned' and unconstitutional transition of power by a duly elected legislature was peacefully and successfully reversed by a regional organisation; albeit domestic protests were critical. Moreover, African leaders themselves levied the central political pressure on Faure Gnassingbe to resign, not Westerners, as was the case in Liberia. This also was the second time in Africa that there was clear and unambiguous condemnation of an unconstitutional change in power by the AU, ECOWAS, the UN and wider international community; Sierra Leone was the first. The actions of ECOWAS and the AU in Togo serve as yet another example of their willingness to employ force to protect democracy and the rule of law.

This is the background to the development of ECOWAS law, which has evolved over the past 14 years to meet the growing security challenges in West Africa. ECOWAS has developed from an organisation created to spur regional economic integration and development into a viable regional collective security arrangement. The harsh consequences of warfare on security, democratisation and development in West Africa have forced the organisation to establish an innovative collective security system. ECOWAS law not only lays down an unambiguous framework for the protection of democracy, human rights and the rule of law, it also

[177] William Eagle, 'AU Reiterates Support for West African Efforts to End Togo Crisis' (2005) *Voice of America*, (Washington, DC), 25 February; see also Press Release, 'AU Condemns "Military Coup", Suspends Togo, AU Peace and Security Council', 25 February 2005, <www.africafocus.org/docs05/togo0502.php>.

[178] 'AU Condemns "Military Coup", Suspends Togo', n 177 above.

[179] Lydia Polgreen, 'West Africa Wins Again, with a Twist' (2005) *New York Times*, 27 February, 18.

[180] 'Faure Falters' (2005) *African Confidential* (London), 4 March, 5.

[181] 'Fears of Armed Insurrection', (2005) *Africa Analysis* (London), 6 May, 1 <ProQuest> (search the Ethnic Newswatch database for 'Fears Armed Insurrection' and select 6 May 2005 article from the results).

codifies rights to PDI and humanitarian intervention. The revolutionary evolution of ECOWAS law demonstrates the willingness of African states to forfeit sovereignty for peace, security and democracy. These developments have no doubt influenced the wider corpus of international law, particularly the *jus ad bellum*, and similarly have been influenced by it.

In the West Africa region, the development of PDI has occurred not only within the context of regional organisations such as ECOWAS, but also by ad hoc coalitions composed of states from West and Central Africa. The most vivid example is the 1997 Mission for the Implementation of the Bangui Agreement operation in the Central African Republic, which was primarily composed of ECOWAS member states, including Burkina Faso, Côte d'Ivoire, Gabon, Mali, Senegal and Togo.

J. Central African Republic

On 18 April 1996, the government of President Angel-Felix Patasse (of the Sara group) was destabilised by the first of a series of mutinies by segments of the Armed Forces of the CAR, due namely to 'widespread public discontent over social and economic problems exacerbated by prolonged non-payment of salary arrears'.[182] Many public servants, including members of the armed forces, demanded payment of salary arrears from 1992.[183] According to Premier Jean-Paul Ngoupande, the mutineers sought to overthrow Patasse's government.[184] However, the crisis was temporarily halted when Paris unblocked 700 million CFA francs, 'alongside CFA three hundred million from the CAR Treasury, to meet the arrears'.[185]

Nevertheless, conditions in the country worsened due to severe economic problems precipitated by the 1996 mutinies and acute poverty, which affected 35.5 per cent of the population.[186] As a result, the country underwent successive army mutinies throughout 1996, the last of which was thwarted by robust military intervention by French Legionnaires

[182] Secretary-General, 'Report of the Secretary-General Pursuant to Resolution 1136 Concerning the Situation in the Central African Republic' (23 January 1998) UN Doc S/1998/61 para 4 [hereinafter 'Report of the Secretary-General Pursuant to Resolution 1136']; see also 'Angel on a Pinhead', (1996) *Africa Confidential* (London), 10 May, 3; 'Mutineers' Mistake', (1996) *Africa Confidential* (London), 7 June, 8. One interesting point here is that the mutineers appeared to be more concerned with receiving salary arrears than toppling the government. In fact, it may be argued that the May 1996 mutiny was apolitical and corporatist.

[183] 'Angel on a Pinhead', n 182 above, at 3.

[184] 'Echoes of Zaire', (1996) *Africa Confidential* (London), 29 November, 4.

[185] 'Angel on a Pinhead', n 182 above, at 3.

[186] Secretary-General, 'Report of the Secretary-General on the United Nations Mission in the Central African Republic' (19 June 1998) UN Doc S/1998/540 at para 30.

(primarily of African origin).[187] The intervention resulted in the deaths of two French soldiers and eventually led to France's withdrawal.[188] The situation in the country, however, continued to deteriorate, leading to two more military uprisings that further destabilised Patasse's government.[189]

On 18 May 1996, Sergeant Major Isidore Mathurin Dokodo, one of the leaders of the April mutiny, and Lieutenant Zao, along with 300 men from the Regiment Mixte d'Intervention, took over about two-fifths of Bangui, the capital city, for four days.[190] Both men are of Yakoma origin.[191] The mutiny garnered a moderate amount of support for the coup from the civilian populace.[192] Nevertheless, Patasse's government remained in effective control of the state. France, said to have 2,500 legionnaires in the country, took the lead role in countering the mutiny.[193] It decided to launch a retaliatory attack against the rebels for killing several French Legionnaires, not to preserve Patasse's government.[194] Although no official death toll was released, some in the CAR believed that several hundred civilians died along with 13 French Legionnaires.[195] As a result, French action was severely scrutinised in Paris, and amidst growing pressure from the French Parliament and President Patasse, who held the country's former colonial patron in disdain, France began to withdraw troops from the CAR in late September 1997.[196]

Pursuant to requests by Patasse during the 19th Summit Meeting of Heads of State and Government of France and Africa held in Ouagadougou,

[187] 'Echoes of Zaire', n 184 above, at 5; 'Mutineers' Mistake', n 182 above, at 8.
[188] 'CAR: French Leave' (1997) *Africa Confidential* (London), 10 October, 7.
[189] Levitt, *African Interventionist States*, n 8 above, at 32.
[190] 'Mutineers' Mistake', n 182 above, at 8; See also 'Echoes of Zaire', n 184 above, at 4.
[191] Levitt, *African Interventionist States*, n 8 above, at 32.
[192] 'Echoes of Zaire', n 184 above, at 4. The mutiny was in part a manifestation of deep-seated ethno-political tensions between followers of ex-President Andre Kolingba, who was from the Yakoma group, and his successor Patasse, who was from the Sourmah-Kaba clan of the Sara (constituting 15% of the population). The mutiny was triggered when the Presidential Guard [hereinafter the Guard] attempted to arrest Captain Anicet Saulet Yavro for financial irregularities. Yavro was a senior representative of the Yakoma group and former head of the Société Centrafricaine de Télécommunications under the Kolingba regime. Yavro attempted to evade arrest and shot and killed a member of the Guard. Thereafter, the same Yakoma troops who orchestrated mutinies earlier that year came to his aid and attacked the Guard and other loyalist forces. To make matters worse, the military did not trust that Patasse would honour or implement a general amnesty to which they were entitled under an earlier peace agreement between the government and military stemming from mutinies in April 1996. They believed that he would arrest their leaders and disband their regiment: 'Mutineers' Mistake', n 182 above, at 8. The participants of the May mutiny, led by Sergeant Major Isidore Mathurin Dokodo, were the same group that mutinied earlier that year.
[193] 'Mutineers' Mistake', n 182 above, at 8. This represented the fourth time that French troops had intervened to save Patasse's regime: 'French Leave', n 188 above, at 7.
[194] 'Mutineers' Mistake', n 182 above, at 8.
[195] 'Echoes of Zaire', n 184 above, at 4.
[196] Levitt, *African Interventionist States*, n 8 above, at 32.

Burkina Faso, in December 1996, the Presidents of Gabon, Burkina Faso, Chad and Mali formed an International Mediation Committee (IMC) to help resolve the conflict.[197] In accordance with the Conference on Consensus-Building and Dialogue, held in Bangui in late January 1997 and in response to requests by Patasse, the member states of the IMC, chaired by President Omar Bongo of Gabon, established an Inter-African Force to Monitor the Implementation of the Bangui Agreements (MISAB) on 31 January 1997.[198] MISAB was mandated to restore peace and security to the country and monitor the implementation of the Bangui peace agreements.[199] In this regard, it was sanctioned to conduct operations to disarm the former rebels, the militia and all other unlawfully armed persons, and maintain peace and security.[200]

To support MISAB's efforts, on 6 August 1997, the UN Security Council adopted Resolution 1125, which deemed the situation in the CAR a threat to international peace and security and authorised MISAB to take enforcement action to ensure the security and freedom of movement of its personnel.[201] The Security Council adopted additional resolutions in this connection. For example, on 27 March 1998, it adopted Resolution 1159 creating the UN Mission in the CAR (MINURCA) to: assist in the maintenance of peace, security, law and order; ensure security and freedom of movement of UN personnel and the safety and security of UN property; and provide police training for the national police and technical support to national electoral bodies.[202] The UNSC mandated Secretary-General Annan to 'secure a smooth transition between MISAB and MINURCA by 15 April 1998'.[203]

While there were several legal bases for the intervention,[204] what is unique about the MISAB operation is that it marked the first time that an ad hoc group of states in Africa collectively deployed forces in a

[197] *Ibid* at 33.

[198] 'Letter dated 4 July 1997 from Mr. Ange-Félix Patasse, President of the Central African Republic, addressed to the Secretary-General', reprinted in 'Security Council, Identical Letters Dated 18 July 1997 from the Chargé D'affaires AI of the Permanent Mission of the Central African Republic to the United Nations Addressed to the Secretary-General and to the President of the Security Council' (22 July 1997) UN Doc S/1997/561.

[199] 'Mandate of the Inter-African Force to Monitor the Implementation of the Bangui Agreements', reprinted in 'Security Council, Identical Letters Dated 18 July 1997 from the Chargé D'affaires AI of the Permanent Mission of the Central African Republic to the United Nations Addressed to the Secretary-General and to the President of the Security Council' (22 July 1997) UN Doc S/1997/561, Art 2.

[200] *Ibid*.

[201] *Ibid* at para 9.

[202] UNSC Res 1159 (27 Mar 1998) UN Doc S/RES/1159 at paras 9–10. Approximately 1,350 personnel partook in the mission.

[203] *Ibid* at para 11.

[204] For an analysis of the legal bases for the MISAB intervention in the CAR, see Levitt, *African Interventionist States*, n 8 above, at 31–5.

state outside of their region to prevent civil war by safeguarding a feeble DCG.[205]

The interventions by ECOWAS in Liberia, Sierra Leone, Guinea-Bissau, Côte d'Ivoire and Togo, the institution of new conflict mechanisms and the MISAB operation in the CAR were all premised in part on the notion that the threat or overthrow of a DCG was a root cause of under-development and insecurity in West Africa, and Africa generally. These threats or coups therefore were prohibited in law and protected against in practice.

As the next section illustrates, like ECOWAS and certain states in Central Africa, the South African region has also taken assertive action to fashion new security structures and employ force to safeguard democracy.

IV. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

ECOWAS has fashioned the most radical law and collective security framework on intervention, but it is not alone in its efforts. The Southern African Development Community (SADC) has also established a new regime and dynamic framework to ensure peace, security and democracy in southern Africa.

A. SADC Treaty

The SADC emerged in January 1992 as the successor organisation to the Southern African Development Co-ordination Conference, which had been founded by the then front-line states in order to reduce regional dependence on apartheid South Africa.[206] The succession appears to have been partly inspired by the changing political environment in South Africa following Nelson Mandela's release from prison in 1990 and the ongoing efforts to fully dismantle the country's apartheid system.[207] In October 1993, the new SADC Treaty entered into force.[208] It is concerned with involving the people in the southern Africa region in the process of development, particularly through the 'guarantee of democratic rights, observance of human rights and the rule of law'.[209]

[205] It is important to note that the MISAB mission in the CAR was composed entirely of West African states, with the exception of Chad: *ibid* at 35.

[206] Levitt, *The Law on Intervention*, n 1 above, at 55; see also Treaty of the Southern African Development Community (Angola–Botswana–Lesotho–Malawi–Mozambique–Namibia–Swaziland–Tanzania–Zambia–Zimbabwe) (17 August 1992) 32 ILM 116 [hereinafter SADC Treaty].

[207] Levitt, *The Law on Intervention*, n 1 above, at 55.

[208] SADC Treaty, n 206 above, at 116.

[209] *Ibid*, Preamble.

In fact, one of its core principles is that the SADC and its member states respect and protect 'human rights, democracy, and the rule of law'.[210] In this context, two of SADC's key objectives are to 'evolve common political values' and 'promote and defend peace and security'.[211]

In an effort to build capacity and systematise its approach to conflict management and security, SADC adopted an important security instrument.

B. SADC Organ

In June 1996, SADC adopted the Organ on Politics, Defence and Security (OPDS).[212] Like the SADC Treaty, one of its key principles is the observance of 'human rights, democracy and rule of law'.[213] While the OPDS has numerous objectives, protecting the people and the development of the region from instability from the 'breakdown of law and order', including all types of conflict, and the promotion of democratic institutions and practices are central.[214] Objective (g) states that where diplomatic efforts fail, the OPDS is responsible for recommending punitive measures to the summit of the heads of state of SADC members.[215] It also states that measures to be taken in this regard will be further elaborated in a protocol on peace, security and conflict resolution.[216]

The SADC system was tested in 1998 when the government of the small landlocked nation of Lesotho was challenged from within.

C. Lesotho

The root causes of the Lesotho crisis in 1998 can be traced back to events in 1993, when the Lesotho Congress for Democracy (LCD) was elected into power.[217] Political party rivalry stemming from the adoption of the constitution of Lesotho, which entered into force on 2 April of that year, was severe, and structural tensions between elements of the security forces and the executive in 1994 also combined to ignite the 1998 crisis.[218]

[210] *Ibid*, Art 4(c).
[211] *Ibid*, Art 5(b), (c).
[212] Communiqué from the 1996 Extra-Ordinary SADC Summit to Launch the SADC Organ (1996) <http://www.sadc.int/news/news_details.php?news_id=215> [hereinafter SADC 1996 Communiqué]; see also *Africa: Selected Documents*, n 59 above, at 327; Willie Breytenbach, 'Failure of Security Co-operation in SADC: The Suspension of the Organ for Politics, Defence and Security' (2000) 7 *South African Journal of International Affairs* 85, 86; Levitt, *The Law on Intervention*, n 1 above, at 55.
[213] SADC 1996 Communiqué, n 212 above.
[214] *Ibid*.
[215] Levitt, *The Law on Intervention*, n 1 above, at 55.
[216] *Ibid*.
[217] Levitt, *African Interventionist States*, n 8 above, at 35.
[218] *Ibid*.

From 1997 on, political tensions escalated as political rifts continued unabated between LCD on one hand and the Basotho National Party (BNP), Basotholand Congress Party (BCP) and Maramatlou Freedom Party (MFP) on the other.[219] In early September 1998, such tensions found overt political expression when approximately 10,000 opposition protestors camped outside the palace of King Letsie III.[220] Their protests arose amid allegations from opposition party leaders that the LCD rigged the May 1998 elections in which it won 79 of Lesotho's 80 voting districts.[221] The situation was further exacerbated by the delayed release of the findings of the Troika Commission (consisting of Botswana, South Africa and Zimbabwe) with regard to the elections[222] and by Prime Minister Phakalitha Mosisili's dismissal of a well-respected military officer for sympathising with election demonstrators.[223] Taken together, these factors exacerbated political discontent among segments of the civilian populace and numerous junior military officers, creating an extremely volatile environment.[224]

On 11 September 1998, these officers began a mutiny, arguably orchestrated by Finance Minister Retselisistoe Sekonyana's BNP, against the government.[225] They arrested 20 senior military officials and forced their commander, Lieutenant General Makhula Mosakeng, to broadcast his resignation over Radio Lesotho.[226] Consequently, several violent clashes broke out between loyalist and opposition forces.[227] When Mosisili returned from a SADC meeting in Mauritius on 15 September, he found the country in turmoil. Mutinous soldiers and other protesters stole and impounded 80 government vehicles from civil servants and stoned vehicles belonging to ministers, looted local homes and businesses, burned down government buildings, prevented government employees from going to work and made death threats against Mosisili and other senior officials.[228] In addition, on 18 September, opposition parties

[219] *Ibid* at 36.
[220] *Ibid*.
[221] Levitt, *African Interventionist States*, n 8 above, at 36.
[222] The Troika Commission (or Langa Commission) was established by the parties to the conflict to investigate allegations of foul play by Lesotho's Independent Electoral Commission and was presided over by Pius Langa, the deputy president of South Africa's Constitutional Court: 'Militants and Monarchs' (1998) *Africa Confidential* (London), 25 September, 6.
[223] *Ibid* at 6 (text box titled 'Military Mayhem').
[224] Levitt, *African Interventionist States*, n 8 above, at 36.
[225] *Ibid*.
[226] 'Militants and Monarchs', n 222 above, at 5.
[227] *Ibid*.
[228] 'SA Troop Alert as Maseru Mutinies' (1998) *Mail & Guardian Online* (Johannesburg), 24 September <http://www.mg.co.za/articledirect.aspx?articleid=181249&area=%2farchives__print_edition%2f>; 'Mayhem spreads throughout Lesotho' (1998) *Mail & Guardian Online* (Johannesburg), 24 September <http://www.mg.co.za/articledirect.aspx?articleid=214086&area=%2farchives__online_edition%2f>.

demanded the 'government's resignation, the dissolution of Parliament and the appointment by the King of an interim government including equal numbers from all major parties'.[229] The capital city, Maseru, was in chaos as elements in the Lesotho military and police force, which appeared to sympathise with the protestors, took no action to quell the mutiny.[230]

Fearing that a military coup d'état was imminent and uncertain about how long loyalist forces could maintain law and order, Prime Minister Mosisili requested that South Africa, Botswana, Zimbabwe and Mozambique *militarily* intervene to restore law and order to Lesotho in 'accordance with SADC agreements'.[231] Nevertheless, his government remained in effective control of the state.[232] On 22 September, after Zimbabwean Robert Mugabe, President and former Chairman of the OPDS,[233] allegedly refused to receive communications from Mangosuthu Buthelezi, Home Affairs Minister and Acting President, about the Lesotho crisis,[234] South Africa and Botswana sent 600 and 200 troops, respectively, to Lesotho pursuant to Mosisili's request.[235] South African forces launched a robust intervention early that morning, which resulted in the deaths of 49 soldiers on both sides and the capture of 170 mutinous Lesotho soldiers.[236] Botswana contingents arrived later in the day.[237] The arrival of forces from

[229] Levitt, *African Interventionist States*, n 8 above, at 36.

[230] *Ibid.*

[231] *Ibid.* It is doubtful that the SADC could validly invoke a right of humanitarian intervention. At the time of the intervention, there were no widespread violations of human rights that amounted to grand human suffering: the government had not collapsed, nor was it descending into anarchy. Although it is debatable whether the LCD government was in the process of being violently and illegally dislodged, the people of Lesotho were arguably ambivalent about the mutiny or attempted coup. Consequently, South Africa and Botswana were entitled to rely upon SADC law and Mosisili's request as bases for intervening.

[232] Levitt, *African Interventionist States*, n 8 above, at 37.

[233] SADC 1996 Communiqué, n 212 above. See generally 'SADC, Strategic Indicative Plan for the Organ on Politics, Defense and Security Cooperation' (5 August 2004) [hereinafter SADC Plan for the Organ for Politics, Defense & Security] <http://www.sadc.int/english/documents/legal/protocols/politics.php#2>; B Tsie, 'Regional Security Co-operation in Southern Africa' *Global Dialogue* (Dy Mth, 1998) 8–10; H Brammer, 'In Search of an Effective Regional Security Mechanism for Southern Africa' *Global Dialogue* (Dy Mth, 1999) 21–2; Breytenbach, n 212 above, at 85; Maxi van Aardt, 'The SADC Organ for Politics, Defence and Security: Challenges for Regional Community Building' (Winter 1997) *South African Journal of International Affairs* 144.

[234] Buthelezi was Acting President because President Nelson Mandela, Deputy President Thabo Mbeki, Foreign Minister Alfred Nzo and Deputy Foreign Minister Aziz Phadad were all on mission outside of the country: Levitt, *African Interventionist States*, n 8 above, at 37.

[235] South Africa and Botswana later increased these numbers to 1,000 and 460, respectively: 'To a Little Kingdom,' (1998) *African Confidential* (London), 9 October, 6–7.

[236] 'Verbatim,' (1998) *Mail & Guardian Online* (Johannesburg), 25 September <http://www.mg.co.za/articledirect.aspx?articleid=208438&area=%2farchives__print_edition%2f> (quoting Nelson Mandela).

[237] Levitt, *African Interventionist States*, n 8 above, at 37.

South Africa and Botswana exacerbated the crisis[238]; nevertheless, by the end of October 1998, Maseru began to return to normality, and the LCD and opposition parties signed a tentative peace agreement.[239]

D. South Africa and Botwana's SADC Intervention

The South African and Botswanan intervention in Lesotho can be justified legally as a SADC operation because it took place under the 'authoritative veil' of the SADC, among other reasons[240]; however, from an operational standpoint, it clearly was not co-ordinated by the SADC secretariat or other authority in the organisation. It was, rather, an ad hoc operation conducted by South Africa and Botswana in accordance with or under SADC law.[241] This point explains why some analysts have, perhaps rightly, scrutinised the political and operational problems associated with the status and function of the OPDS vis-à-vis the Lesotho crisis.[242] Hence, a distinction must be drawn between legal and operational concerns related to the mission, as the legal framework for the OPDS had already been adopted at the time of the intervention, and thus it forms an important part of the *jus ad bellum* in the southern African region.[243]

Like Doe, Kabbah, Vieira and Patasse, Mosisili requested outside assistance to restore law and order and preserve his government. What makes the Lesotho intervention unique is that it was the first intervention by a regional organisation to safeguard a DCG in the southern Africa region, and serves as yet another example of the readiness of African regional organisations to use force to protect democracy or legitimate rule.

In the wake of the Lesotho operation, SADC made concerted efforts to strengthen the legal and operational bases for future peace and security operations and eventually adopted a protocol on politics, defence and security co-operation.

[238] *Ibid*.
[239] *Ibid*.
[240] *Ibid* at 35–40.
[241] *Ibid* at 40. South Africa and Botswana's intervention in Lesotho was similar to Nigeria's in Liberia (1990) and Senegal and Guinea's into Guinea-Bissau (1998) except that the Lesotho operation was not followed by a formal SADC or UN operation as was the case in the aforementioned examples.
[242] *Ibid*. One key reason why the organ was dysfunctional was because of geopolitical tensions between Mandela and Mugabe. For example, Mandela wanted the organ to be under the political and jurisdictional control of the Summit of the Heads of State and Government of the SADC whereas President Mugabe insisted that it be autonomous.
[243] For purposes of this analysis, whether South Africa and Botswana followed internal SADC procedures before deploying forces does not appear to affect the legality of the operation in the broad sense or invalidate it from being a hard example of PDI.

E. SADC Conflict Protocol

The SADC Protocol on Politics, Defence and Security Co-operation [hereinafter the SADC Protocol] formally came into force on 2 March 2004. It aims to strengthen the OPDS by supporting co-operation in regional security through conflict management and co-ordination of member states in international and regional peacekeeping, including enforcement measures.[244] Furthermore, as with paragraph 46 of the ECOWAS framework, Article 11(2)(b) of the SADC Protocol sets out elaborate criteria for when the OPDS may authorise regional intervention in internal conflicts. These criteria include when there is: (1) large-scale conflict or violence between sections of the population of a state, or between the state and/or its armed or paramilitary forces and sections of the population; (2) a *threat to the legitimate authority of the government* (such as a military coup); (3) a condition of civil war or insurgency; and (4) any crisis that could threaten the peace and security of other member states (emphasis added).[245] Under the Protocol, the OPDS may also decide to intervene in a state when a conflict 'threatens peace and security in the region'.[246]

Hence, the laws of the SADC codify not only a right to PDI but also the right of the community to quell nearly every conceivable type of threat to legitimate authority and safeguard legitimate regimes irrespective of their political character. The development of ECOWAS and SADC rules on the preservation of DCGs coincided well with the emergence of the AU and its new framework for protecting against unconstitutional changes of government.

V. AFRICAN UNION

The Constitutive Act of the African Union came into force in March 2001.[247] The Constitutive Act lays out a completely new security and governance framework for the African continent. The AU's new European Union-like structure varies considerably from that of its predecessor, the OAU.

Article 4, on the principles of the AU, includes three very important provisions on regional security, peacekeeping and democracy: one accords the AU the 'right' to intervene in a member state when there are

[244] SADC, Protocol on Politics, Defense and Security Co-operation (14 August 2001), Art 2(f)(k).
[245] *Ibid*, Art 11(2)(b).
[246] *Ibid*, Art 11(2)(a)(iii).
[247] Constitutive Act of the African Union (11 July 2000), Art 4(h) <http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm>, reprinted in *Africa: Selected Documents*, n 59 above, at 35, 41.

'grave circumstances', namely war crimes, genocide and crimes against humanity[248]; another accords member states the 'right' to request the AU to intervene in order to restore peace and security[249]; and the third provision condemns and rejects unconstitutional changes of government.[250] These provisions complement and 'continentalise' those enumerated in ECOWAS and SADC law.

Nearly two years after the adoption of the Constitutive Act, the AU expanded its authority to employ force in AU member states with the adoption of the Protocol on Amendments to the Constitutive Act of the African Union.[251] Specifically, the Protocol expanded the scope of Article 4(h) to empower the AU with the authority to intervene in member states not only to prevent war crimes, genocide and crimes against humanity, but also when there is a 'serious threat to legitimate order', which goes beyond the hortatory and toothless 'right' of condemnation and rejection of unconstitutional changes in government provided for in the Constitutive Act.[252] Consequently, it also modifies and expands the powers enumerated in the AUPSC Protocol from merely imposing sanctions in response to unconstitutional changes of government to the use of force to reverse them. The AU's expansion of the right to use force to safeguard legitimate order essentially codifies a right to PDI in AU law and serves as yet another example of the crystallisation of a norm of PDI in Africa.

A. New Partnership for Africa's Development

The AU's new approach to safeguarding democracy was further elaborated in the New Partnership for Africa's Development (NEPAD), which is a framework of interaction and programme of action established by African leaders to renew the continent through a series of initiatives in conflict mitigation, democracy and governance, human rights, the rule of law and security, among others.[253]

[248] *Ibid*.

[249] *Ibid*, Art 4(g), reprinted in *Africa: Selected Documents*, n 59 above, at 35, 41.

[250] *Ibid*, Art 4(p), reprinted in *Africa: Selected Documents*, n 59 above, at 35, 41.

[251] African Union, Protocol on Amendments to the Constitutive Act of the African Union (adopted by the 1st Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia, on 3 February 2003 and by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique, on 11 July 2003; entered into force 25 July 2006) <www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20on%20Amendments%20to%20the%20Constitutive%20Act.pdf> [hereinafter African Union, Amendments to the Constitutive Act Protocol].

[252] *Ibid*, Art 4(p).

[253] New Partnership for African Development (October 2001), paras 47–9 <http://www.nepad.org/2005/files/documents/inbrief.pdf>.

The Peace and Security and Democracy and Political Governance initiatives of NEPAD acknowledge that development is impossible in the 'absence of true democracy, respect for human rights, peace and good governance'.[254] Under NEPAD, African states agreed to 'respect the global standards of democracy', allowing for fair democratic elections to 'enable people to choose their leaders freely' and achieve 'basic standards of good governance and democratic behaviour'.[255]

The crises in São Tomé and Príncipe would serve as the AU's first real test of its commitment to democracy.

B. São Tomé and Príncipe

On 15 July 2003, while he was attending an African/African–American summit in Nigeria,[256] President Fradique de Menezes of São Tomé and Príncipe was dislodged in a bloodless coup d'état by a small group of junior military officials, led by Major Fernando Pereira.[257] The coup leaders captured Prime Minister Maria das Neves, Natural Resources Minister Rafael Branco, Defence Minister Fernando Danqua and Finance Minister Maria Tebús Torres.[258] The government officials were released shortly after being captured after international mediators, at the behest of Congo-Brazzaville's Foreign Minister, Rodolphe Adada, placed immense pressure on the coup plotters.[259]

The coup included elements that attempted to seize power in 1988 along with former soldiers from apartheid South Africa's infamous 32nd Buffalo Battalion.[260] The coup seems to have been precipitated by various internal and external actors vying for political power and interests

[254] *Ibid*, para 79.

[255] *Ibid*. See also para 82.

[256] 'Kudos for Obasanjo's Bullying Diplomacy' (2003) *Africa Analysis* (London), 8 August, 3 <ProQuest> (search the Ethnic Newswatch database for 'Obasanjo Bullying Diplomacy').

[257] 'Coup in Island State with Big Oil Reserves' (2003) *UN Integrated Regional Information Networks* (16 July).

[258] 'Desperados' (2003) *Africa Confidential* (London), 25 July, 8.

[259] *Ibid*.

[260] 'Troubled Waters Over Oil: Oil Curses Another African State', (2003) *The Economist* (London), 19 July, 47; see also UN Office for the Coordination of Humanitarian Affairs, 'Sao Tomé and Principe: Mercenaries, Corruption and Poverty Complicate the Road to an Oil Boom', 9 September 2006, <http://www.irinnews.org/print.asp?ReportID=47129>; Gerhard Seibert, 'Coup d'etat in Sao Tome e Principe: Domestic Causes, the Role of Oil and Former "Buffalo" Battalion Soldiers', Institute for Security Studies Paper no 81 (November 2003) <www.iss.co.za/pubs/papers/81/paper81.pdf>; Johann Smith, 'Memorandum on S Tome e Principe', *Institute for Security Studies* (Pretoria, 17 July 2003) 5, n 1 <http://www.iss.co.za/AF/current/saotomejul03.pdf>. The FDC was founded in the late 1990s by former members of the National Resistance Front of São Tomé and Príncipe (FRNSTP). The group was in opposition to the socialist policies of São Tomé President Manuel Pinto da Costa and was exiled to Liberville, Gabon. President Omar Bongo of Gabon supported the group

in the country's oil reserves.[261] However, coup leaders stated that they chose to take action in response to the country's poor standard of living and chronic political instability.[262] There has been some speculation that disgruntled members of Christian Democratic Front (FDC) helped to organise the coup, given allegations of corruption in the way that Menezes awarded oil contracts for reserves located in a zone that is being jointly developed with Nigeria.[263] The waters separating Nigeria and São Tomé and Príncipe contain an estimated 6 billion barrels of oil.[264]

In particular, the International Monetary Fund determined that deals with Exxon Mobil and Nigerian-based Chrome were unfair.[265] The President's attempts to renegotiate the contracts led to his public admonishment by senior members of the political class,[266] who likely had interests in the original contracts. In January 2003, the President dissolved Parliament, partly because of disagreements over the right of the

because he wanted to prevent São Tomé and Príncipe from being integrated into the alliance of Algiers, Conakry, Brazzaville and Luanda. Once São Tomé and Príncipe began to liberalise, Bongo reconciled with the ruling party and expelled the FRNSTP. The group sought refuge in Kribi, Cameroon, in 1986. After cleavages emergd in the group, most members of the FRNSTP left Cameroon and sought asylum in the South African-controlled area of Walvis Bay in Namibia. The majority of those who relocated to Namibia were descendants of Cape Verdian contract workers. They were detained as illegal immigrants by South Africa and forced to either fight with the 32nd Buffalo Battalion or remain in prison. Fifty-three members of the FRNSTP fought for the apartheid regime of South Africa and gained South African citizenship. The 32nd Buffalo Battalion was based in northern Namibia and its soldiers were used as special forces for operations inside Angola. After Namibia achieved independence in 1990, many of the soldiers began working for the South African security/mercenary company Executive Outcomes. Those members of the FRNSTP who remained in Gabon led an invasion of 44 mostly unarmed men to overthrow São Tomé's President in 1988. São Tomé security forces quickly detained the group, who had travelled to the country by canoe. Most of the conspirators were tried by a local court in 1989. However, President da Costa pardoned all of them in April 1990. Later that year the FRNSTP members, including 2003 coup leader Sabino dos Santos, formed the FDC. After Executive Outcomes was disbanded in 1998, former FRNSTP members, including the co-leader of the 2003 coup, Alèrcio Costa, joined their old comrades in the FDC.

[261] Michael Peel, 'Middle East and Africa: Leader of Sao Tome Coup Calls for Fresh Elections' (2003) *Financial Times* (London), 18 July, 6.

[262] Gethin Chamberlain, 'Sao Tome Coup Linked to Oil Reserves,' (2003) *The Scotsman* (Edinburgh), 17 July 2003, 12.

[263] 'Sao Tomé and Principe: Mercenaries, Corruption and Poverty Complicate the Road to an Oil Boom', n 260 above, at 3.

[264] Peel, n 261 above, at 2.

[265] 'Troubled Waters Over Oil: Oil Curses Another African State', n 260 above; see also Daphne Eviatar, 'Sao Tome Residents Hope For Oil Riches Corruption Fears Temper Hopes' (2003) *Boston Globe*, 30 November, A8 (explaining that, in 1997, a small Houston-based oil company, Environmental Remediation Holding Corp. (ERHC), guaranteed $5 million for drilling rights in São Tomé. When Menezes was elected in 2001, he renegotiated the unfair contract after Exxon Mobil was brought in by ERHC. However, it was later revealed that Menezes received $100,000 from the chairman of ERHC. Menezes said the money was a campaign contribution).

[266] 'Troubled Waters Over Oil: Oil Curses Another African State', n 260 above.

executive to negotiate oil deals.[267] Soon after, Parliament was reinstated, but tensions remained over a payment the President received from an oil firm and allegedly used for campaign purposes.[268] In addition, in October 2002, Menezes dismissed Gabriel Costa as Prime Minister and replaced him with Maria das Neves.[269] The President made the change following complaints from the army that Costa improperly promoted two high-ranking officers.[270] The new Prime Minister appointed 14 new government ministers.[271]

The coup was short-lived because of opposition to it by Nigeria, the AU and other stakeholders.[272] On the day of the coup, Menezes appealed to the international community and specifically to the governments of Angola and Nigeria to restore him to power.[273] The coup met with a

> storm of international protest … as neighboring countries, the Africa Union, as well as the United States and the United Nations strongly condemned the one day-old coup. The common position has been that the events in STP [São Tomé and Príncipe] amount to an unconstitutional change of government and that STP's constitutional legality must be restored as soon as possible.[274]

The Nigerian government condemned the coup as 'a gross violation' of the African Union Constitution.[275] President Joaquim Chissano of Mozambique, former chairman of the AU, likewise condemned the coup[276] and stated that the 'sole purpose of any negotiation was to restore constitutional order to São Tomé.'[277] UN Secretary-General Annan also condemned the coup and called for the 'unconditional restoration of constitutional order'.[278]

International pressure and hard diplomacy by Angola, Nigeria, the Economic Community of Central African States, the Community of Portuguese-Speaking Countries, the United States and Portugal provided little room to manoeuvre for the junta.[279] President Obasanjo's

[267] Chamberlain, n 262 above, at 2.
[268] *Ibid*.
[269] 'New Cabinet: Maria das Neves is the Archipelago's First Woman Prime Minister', (2002) 39 *Africa Research Bulletin*: *Political, Social, and Cultural Series* 15036 (Oxford).
[270] *Ibid*.
[271] *Ibid*.
[272] 'Seven-day Junta: Announced as an "'International SOS", Oil Interests and the Chances of Future Gain Are Likely to Have Been the Underlying Motive' (2003) 40 *Africa Research Bulletin: Political, Social, and Cultural Series* 15385 (Oxford).
[273] Smith, n 260 above, at 2–3; see also Seibert, n 260 above, at 5.
[274] Smith, n 260 above, at 2.
[275] Chamberlain, n 262 above.
[276] 'Coup in Island State with Big Oil Reserves', n 257 above.
[277] 'No Military Intervention Yet,' *Agencia de Informacao de Macabique* (Brighton, UK, 21 July 2003) <2003 WLNR 478118>.
[278] Press Release, Secretary-General, 'Secretary-General "Strongly Condemns" Coup D'Etat in Sao Tome and Principe' (16 July 2003) UN Doc SG/SM/8781 AFR/666.
[279] Seibert, n 260 above, at 6; see also 'Seven-day Junta', n 270 above, at 15385–6.

stern diplomacy produced a peace accord and led to the restoration of Menezes to power.[280] The UN praised the restoration of constitutional order; Annan stated that the

> positive outcome of the crisis in Sao Tome and Principe reflects not only the will of African States to work together towards the settlement of crises affecting countries on the continent, but also their determination to promote and safeguard democracy.[281]

The coup in São Tomé and Príncipe provided the first test for the AU's new peace and security framework. While no intervention was necessary, the AU's use of coercive diplomacy including the threat of force to enforce its rules on unconstitutional changes of government amounted to PDI. It demonstrated that African states are no longer willing to accept as faits accomplis unconstitutional seizures of power and that, at the very least, in Africa there has been a normative legal shift in the *jus ad bellum* towards the recognition of democracy as an enforceable right.[282]

In 2003, building on its conflict mitigation experiences and in the wake of its involvement in resolving the conflict in São Tomé and Príncipe, the AU adopted a peace and security protocol to evolve further its peacemaking and collective security capability.

C. AU Peace and Security Protocol

The Protocol establishing the Peace and Security Council of the African Union (AUPSC) came into force on 26 December 2003 and serves as the first continent-wide regional collective security system.[283] The AUPSC is empowered to carry out several important functions that complement and evolve Africa's collective security mechanisms.[284] Its key function is to promote peace, security and stability in Africa through early warning,

[280] 'Kudos for Obasanjo's Bullying Diplomacy', n 256 above.

[281] Press Release, Secretary-General, 'Secretary-General Welcomes Restoration of Constitutional Order, Commends Mediation Efforts, in Sao Tome and Principe' (25 July 2003) UN Doc SG/SM/8791 AFR/676.

[282] As discussed in preceding sections, the AU's commitment to democracy and the rule of law would be tested two years later in Togo. See generally nn 153 and 185 above and the accompanying discussion on Togo.

[283] African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002) <http://www.africa-union.org/root/au/organs/psc/Protocol_peace%20and%20security.pdf> [hereinafter African Union, Peace and Security Council Protocol], reprinted in *Africa: Selected Documents*, n 59 above, at 163; see also Jeremy Levitt, 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur Sudan' in NM Blokker and NJ Schrijver (eds), *The Security Council and the Use of Force* (Lieden, Brill Publishers, 2005) 213–51; Jeremy Levitt, 'The Peace and Security Council of the African Union: The Known Unknowns' (2003) 13 *Journal of Transnational Law and Contemporary Problems* 109, 118.

[284] See generally Levitt, 'The Peace and Security Council', n 283 above.

preventive diplomacy, mediation and, most importantly, peace support operations, intervention, humanitarian action, disaster management, peace-building, post-conflict reconstruction and any other function as may be decided on by the AU.[285] The AUPSC may authorise the use of force in multiple contexts, including to safeguard democracy, thwart conflict or protect human rights, ensure access to humanitarian agencies and deliver humanitarian relief during natural disasters.[286]

The AUPSC Protocol empowers the AU to engage in numerous activities, from policy oversight to fully fledged military intervention.[287] Furthermore, the AUPSC is charged with instituting 'sanctions whenever an unconstitutional change of Government takes place',[288] employing force to protect against a serious threat to legitimate order,[289] implementing 'common defense policy'[290] and co-coordinating and co-operating with sub-regional and regional mechanisms (and the UN), particularly on peace and security issues.[291] AU member states are bound by AUPSC decisions and actions and 'shall extend full cooperation to, and facilitate action by, the Peace and Security Council for the prevention, management and resolution of crises and conflicts'.[292]

The AUPSC Protocol confers on the AU more explicit legal authority to engage in peace enforcement than the UN Charter does on the Security Council. The AU Constitutive Act and AUPSC Protocol clearly delineate the circumstances under which PDI may take place: when regimes come to power extra-constitutionally, to protect against a serious threat to legitimate order,[293] and during any other breakdown of law and order as determined by the organisation. Against this background, it is more than evident that the AUPSC framework was a response to Africa's fragile security environment and reflects African leaders' recognition that an apparatus was needed to deal with governance-related security issues, especially grave threats to lawful order, and illegal seizures of power.[294]

[285] African Union, Peace and Security Council Protocol, n 283 above, Art 6, paras (a)–(f), reprinted in *Africa: Selected Documents*, n 59 above, at 163, 168.

[286] *Ibid*, Art 7, para 1(a)–(m), reprinted in *Africa: Selected Documents*, n 59 above, at 163, 169.

[287] *Ibid*.

[288] *Ibid*, Art 7 para 1(g), reprinted in *Africa: Selected Documents*, n 59 above, at 163, 169.

[289] African Union, Amendments to the Constitutive Act Protocol, n 251 above, Art 4(h).

[290] African Union, Peace and Security Council Protocol, n 283 above, Art 7 para 1(h), reprinted in *Africa: Selected Documents*, n 59 above, at 163, 169.

[291] *Ibid*, Art 7 para 1(i), reprinted in *Africa: Selected Documents*, n 59 above, at 163, 169.

[292] *Ibid*, Art 7 para 4, reprinted in *Africa: Selected Documents*, n 59 above, at 163, 170.

[293] It appears that the expansion of Art 4(h) under the Protocol amending the AU Constitutive Act to protect against a serious threat to legitimate authority lowers the threshold for intervention from instances where constitutionally valid regimes have been overthrown to cases where there are grave threats against them: African Union, Amendments to the Constitutive Act Protocol, n 251 above, Art 4(h).

[294] The AU's PDI regime has become even stronger with the emergence of the Draft African Charter on Democracy, Elections and Governance, which not only confirms that democracy

D. Africa's Daring Example

The willingness of African states and institutions to codify a right to PDI and to openly condemn in the continent's foremost political body undemocratic seizures of power is a remarkable achievement and advancement in the *jus ad bellum*. Even more surprising is the willingness of African nations to contract away sovereignty and authority and to endow an organisation with the political and legal clout to intervene in their internal affairs to safeguard democracy and human rights.

VI. CONCLUSIONS

The birth of this seemingly new African liberalism on the regional security and democracy fronts has resulted in a whittling away of the absolutist/positivist mantle of state sovereignty and non-intervention, and an acceptance of the logic of sovereignty as responsibility.[295] Africa's new paradigm of interventionism is not only taking seriously its responsibility to protect human rights and democracy[296] but also helping to destroy the 'tragic myth that the interests of the people are one with those of their national governments' (eg, AU and ECOWAS action in Togo).[297] Here, the nexus between democracy and responsible governance is unmistakable. While it is true that political elites often have mixed motives for supporting particular policy prescriptions, democrats and autocrats alike recognise that peace, security and stability are precursors to accessing the foreign capital needed to create enabling environments for authentic political and economic development. Both reformers and thieves acknowledge that it is necessary to have some measure of stability to effectuate positive change in, or pilfer,

is a basic and enforceable right, but also permits intervention when 'illegal means of accessing power constitute an unconstitutional change of government' such as a 'military coup d'etat against a democratically elected government'; 'intervention by mercenaries to replace a democratically elected government'; 'replacement of democratically elected government by armed dissidents and rebels'; 'refusal of an incumbent government to relinquish power to the winning party after free, fair and regular elections'; and/or 'manipulation of constitutions and legal instrument for prolongation of tenure of office by a incumbent regime': Draft African Charter on Democracy, Elections and Governance (2006), Art 27 (unpublished document, on file with author).

[295] See Francis Deng, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC, Brookings, 1996) xvii.

[296] See generally Jeremy Levitt, 'The Responsibility to Protect: A Beaver without a Dam?' (2003) 25 *Michigan Journal of International Law* 153 (reviewing International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) and Thomas G Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (Supp Vol to *The Responsibility to Protect*) (2001)).

[297] Ibrahim Gassama, 'Safeguarding the Democratic Entitlement: A Proposal for United Nations Involvement in National Politics' (1997) 30 *Cornell University Law Journal* 287, 333.

the state; hence, there are incentives for both democrats and autocrats to operate in stable, conflict-free environments. This fact may explain the general consensus amongst political elites in Africa to bestow regional bodies with the authority to employ force to safeguard DCGs.

African states and their organisations have created the world's most advanced and legally coherent frameworks to combat conflict and regional insecurity and protect democracy.[298] No other nations or regions have offered comparable structures or demonstrated a similar willingness to sacrifice human and tangible resources and sovereignty for peace and democracy. While not every African intervention discussed in this chapter qualifies as PDI, the continuity in state practice and treaty-law developments confirms the existence of, and strengthens, the PDI norm. The pro-democratic intervention norm has been spurred not only by state practice and treaty-law developments in Africa but by universal international law and practice and several interconnected occurrences, including the popular intervention by the UN and OAS in Haiti in 1994; UNSC resolutions supporting several of the interventions discussed in this chapter; recent decisions of the UN Credentials Committee not to accredit regimes that come to power by overthrowing democratic governments; and stern UN statements and declarations on the sanctity of democracy and the unlawfulness of unconstitutional seizures of power. For example, Secretary-General Annan stated that the 'success of Africa's third wave depends equally on respect for fundamental human rights' and democratic rule.[299] As noted, he has made the case that African states can no longer tolerate coups against elected governments or illegal seizures of power by military cliques and that the international community and African states must be dedicated to a new doctrine of African politics: 'Where democracy has been usurped, let us do whatever is in our power to restore it to its rightful owners, the people.'[300] Elsewhere I have argued that:

> Annan's comments arguably marked the beginning of a pendulum shift away from the UN's practice of silence and inaction on issues it traditionally

[298] However, the OAS adoption of the Inter-American Democratic Charter (2001) and Resolution 1080 (XXI-O/91) on representative democracy seem to indicate the Organisation's willingness to eventually build a viable conflict maintenance system.

[299] Press Release, Secretary-General, 'Secretary-General Calls for Efforts to Unleash African "Third Wave" Based on Democracy, Human Rights, and Sustainable Development' (2 June 1997) UN Doc SG/SM/6245/Rev.1 AFR/9/Rev.1.

[300] *Ibid*. Annan has also appealed to the international community to 'ostracize and isolate putschists' and avoid mere passive verbal condemnations of coups against DCGs. He has even encouraged ECOWAS to 'deal' with elected governments that 'violate constitutional norms and flout basic principles of good governance'. See also Press Release, Secretary-General, 'Good Governance Essential for Political Stability, Economic Growth Says Secretary-General in Message to West African Summit' (19 December. 2003) UN Doc SG/SM/9090 AFR/799 (delivered by Mr. Ahmedou Ould-Abdallah, Special Representative of the Secretary-General and Chief of UN Office for West Africa).

> considered internal or within the exclusive jurisdiction of states—and to a new doctrine that overrides state sovereignty to protect human rights and democracy.[301]

Similarly, African states were the first to substantially force the pendulum to swing and hence are largely responsible for the normative shift that is taking place.

Africa's new interventionism (backed by hard law), taken together with the international community's new attitude against unconstitutional seizures of power, has not only influenced state behaviour inside and outside Africa; it has also added significant weight and shape to the development of the corpus of international law, particularly the law of *jus ad bellum*, including the emerging norm of PDI and the doctrine of humanitarian intervention. Although it may be too early to claim that a right of PDI exists under customary international law, its recognition as a treaty-based right and one firmly established in customary regional law in Africa and arguably Latin America is both timely and futuristic.

[301] Levitt, n 56 above, at 568.

5

Humanitarian Warfare: Towards an African Appreciation

DINO KRITSIOTIS

I. INTRODUCTION

While it is an increasing feature of international law literature to remark upon the 'contributions' of African states to the international legal regulation of force (*jus ad bellum*), the same cannot be said of the rules that govern the conduct of hostilities—the so-called laws of warfare, also known by their Latin antonym of the *jus in bello*.[1] We might find this insufficiency of focus surprising given that African states have had their fair share of armed conflicts during and since decolonisation, but they have also taken something of a humanitarian lead in terms of their restructuring of the laws concerning the application of force (or the *jus ad bellum*).[2] This approach has not only been forged over a significant period of time, but has been the result of experience and sustained diplomatic imagination, as any reading of the 2000 Constitutive Act of the African Union will show.[3] At the same time, professions of the 'multicultural'

[1] To this we would enjoin the rare exceptions of Emmanuel Bello, *African Customary Humanitarian Law* (Geneva, ICRC, 1980) and LJ van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (The Hague, Martinus Nijhoff, 2005).

[2] See Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal* 333, and Lee Berger, 'State Practice Evidence of the Humanitarian Intervention: The ECOWAS Intervention in Sierra Leone' (2001) 11 *Indiana International and Comparative Law Review* 605. The focus of this chapter is international humanitarian law in its modern form; its previous entanglements are fully deserving of their own independent and extended treatment and, as such, will not be described here. See further Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (Cambridge, Cambridge University Press, 2006) 265.

[3] Article 4(h) of that Act, adopted in July 2000, provides for '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'. See further Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention' (2003) 85 *International Review of the Red Cross* 807. This organisation of

foundations of the *jus in bello* require a concerted appreciation of the relevant histories that lie outside the European quarter,[4] an undertaking that will draw us up against practices of a distant past as well as the passionate intensities of the present.[5]

Our effort to provide an appreciation of 'African' contributions to humanitarian warfare is in need of further elaboration, since it has not always been the case that African states have acted in unison on all aspects and angles of humanitarian warfare. At times, this lack of unison can be explained by a genuine difference of position on behalf of the African governments concerned, but we must also question whether—on each and every issue—African states can be said to share 'a special identity, a special fate'.[6] African states, it is true, might present a continental flanking on certain legislative themes or points of law, but, as we set upon the course of our enquiries, we should recall that, as states, each of these states retains its legal persona, which has been reflected in the different stances or positions African states have taken against each other.

Something should also be said of the nature of the 'contributions' to humanitarian warfare examined in this chapter, for the impression might be given that these relate only to concrete legislative initiatives that have borne fruit in either conventional or customary form. It is clear that examples of this sort—akin to, say, President Truman's proclamation on the continental shelf in September 1945 or Ambassador Pardo's articulation of the 'common heritage of mankind' in November 1967—are well within my concerns, but I have not limited them to such examples. 'Contributions' have often taken various guises, and part of my purpose here is to bear witness to this diversity, whether a particular contribution has laid the groundwork for legal intervention or change or whether it

principles has been matched by institutional initiatives, as in the creation of the Peace and Security Council of the African Union in Durban, South Africa, in July 2002. Both of these documents are contained in Jeremy Levitt (ed), *Africa: Selected Documents on Constitutive, Conflict and Security, Humanitarian and Judicial Issues* (Ardsley NY, Transnational Publishers, 2003). See also Jeremy Levitt, 'The Peace and Security Council of the African Union: The Known Unknowns' (2003) 13 *Journal of Transnational Law and Contemporary Problems* 109.

[4] As per Christopher Weeremantry's separate opinion in the *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep. 227.

[5] Indeed, as Hugo Grotius remarked in explaining the inspiration for undertaking *De Jure Belli ac Pacis* (1625):

> Fully convinced … that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write on this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of. I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.

[6] JM Coetzee, *Elizabeth Costello* (London, Secker & Warburg, 2003) 41.

has entailed the activation of existing infrastructures for the enforcement of the law.

To digest these materials, and as the framework for my analysis, I have adopted the classic structure of the humanitarian canon. In part II, I consider the question of the characterisation of armed conflicts, the necessary condition for these laws to become applicable in the first place. Then, in part III, I consider issues of participation, often considered in terms of the classification of combatants. In part IV, I move to the means and methods of combat, before discussing practices connected with prosecutions and amnesties in part V. Part VI is devoted to concluding remarks and final reflections.

II. CHARACTERISATION OF ARMED CONFLICTS

For its application, international humanitarian law depends upon the existence of an 'armed conflict'—although, crucially, the 1949 Geneva Conventions make a clear distinction between international armed conflicts ('all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties')[7] and 'armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties'.[8] Both of these terms are legal terms of art, marking the scope of application of their respective provisions, and whose significance was underscored by the advent of the First Additional Protocol of 1977 (for international armed conflicts) and the Second Additional Protocol (for non-international armed conflicts).[9] The dichotomy is important because, at least as a matter of conventional

[7] Common Art 2 to 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1950) 75 UNTS 31; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1950) 75 UNTS 85; 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (1950) 75 UNTS 135; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1950) 75 UNTS 287.

[8] Common Art 3 to 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1950) 75 UNTS 31; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1950) 75 UNTS 85; 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (1950) 75 UNTS 135; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1950) 75 UNTS 287.

[9] Although the Second Additional Protocol instituted a more exacting standard for its 'material field of application': Art 1 (1) of 1977 Second Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to Non-international Armed Conflicts (1979) 1125 UNTS 609. See further Frits Kalshoven, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–77' (1977) VII *Netherlands Yearbook of International Law* 107, 112–13.

law, the breadth and specificity of the protections, responsibilities and enforcement mechanisms itemised for non-international armed conflicts pale in comparison to those articulated for international armed conflicts.[10]

A significant adjustment to this arrangement was made in June 1977 with the adoption of the First Additional Protocol (henceforth the Protocol) for international armed conflicts. According to Article 1(4) of the Protocol, international armed conflicts would now include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.[11] In other words, such armed conflicts would no longer be treated as non-international armed conflicts for the purposes of common Article 3 of the Geneva Conventions but would instead be regarded as international armed conflicts and treated in accordance with common Article 2 to those Conventions. For this provision to take effect, however, a unilateral declaration would need to be issued by '[t]he authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4', as provided for in Article 96(3) of the First Additional Protocol.[12]

While the intended beneficiaries of this arrangement were the African National Congress (South Africa), the South West Africa People's Organization (Namibia) and the Palestinian Liberation Organization,[13] it could be said that the seeds of this idea and its procedure had been

[10] Note, however, the customary rules of warfare applicable in *both* international and non-international armed conflicts, as announced in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Vols I and II) (Cambridge, Cambridge University Press, 2005) [hereinafter *ICRC Study*]. See additionally Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554.

[11] See Christina Murray, 'Status of the ANC and SWAPO and International Humanitarian Law' (1983) 100 *South African Law Journal* 402, 406 (referring to the customary potential of this provision).

[12] Addressed to the depositary of the Protocol,

> [s]uch declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects: (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect; (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.
>
> (1977 First Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1979) 1125 UNTS 3). See further Yoram Dinstein, 'Interstate Armed Conflict and Wars of National Liberation' (1982) 31 *American University Law Review* 849.

[13] Christina Murray, 'The 1977 Geneva Protocols and Conflict in Southern Africa' (1984) 33 *International and Comparative Law Quarterly* 462, 463.

sown much earlier—during Algeria's war of independence from France (1954–62).[14] There, the factual configuration of that conflict would certainly have placed it—as things stood at that time—within the realm of an armed conflict 'occurring in the territory of one of the High Contracting Parties',[15] ripe for the application of common Article 3. However, following its establishment by the rebel forces of the Front de Libération Nationale (FLN) in September 1958, the Gouvernement Provisoire de la République Algérienne (GPRA) adopted the position that the FLN met the qualifications for lawful combatants contained in Article 4 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.[16] The premise of this argument was that an international armed conflict existed in Algeria and that the Conventions would therefore be applicable in their formidable entirety.

This argument was pursued separate to the GPRA claim that conditions for a recognition of belligerency had been satisfied by the FLN—a claim that the GPRA made with increasing vigour over the

[14] Mohammed Bedjaoui, *Law and the Algerian Revolution* (Brussels, International Association of Democratic Lawyers, 1961). To a lesser extent, we could perhaps add the contemporaneous experience of the UK in Kenya: see GIAD Draper, *The Red Cross Conventions* (London, Stevens & Sons, 1958) 15 ('The refusal of France and the United Kingdom to recognize that these conflicts [in Algeria and Kenya, respectively] fall within [common] Article 3 [of the Geneva Conventions] has, it is thought, been determined by political considerations and not by any objective assessment of the facts.') For further (and more recent) probing of British conduct, consider David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (London, Weidenfeld & Nicolson, 2005), and Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York, Henry Holt & Co, 2005).

[15] Eldon van Cleef Greenberg, 'Law and the Conduct of the Algerian Revolution' (1970) 11 *Harvard International Law Journal* 37, 39:

> beyond the ordinary political instinct to label the revolt a purely 'internal' one, below the scale of international conflict and corresponding international concern and normative regulation, it was particularly difficult psychologically for the French to view the conflict as involving anything other than purely local competence.

France had ratified the Conventions without reservations on 28 June 1951. See further van Cleef Greenberg, *ibid*, at 46:

> Recognition of FLN or GPRA belligerency would have meant acknowledging—in effect, if not under traditional legal notions—that another state, with an effective government, was the adversary; and this would have foreclosed, or at least drastically limited, the terms under which the war could have concluded.

[16] Note however that, in its White Paper on the application of the Conventions, the GPRA held to the view that, at the very least, common Art 3 was applicable to the unfolding conflict: Algerian Office–New York, White Paper on the Application of the Geneva Conventions of 1949 to the French–Algerian Conflict (1960). See further van Cleef Greenberg, n 15 above, at 47 (on the 'contradictions within the policies of each of the two parties', ie France and the GPRA (and FLN)) and 56 (noting that 'there is an apparent inconsistency in urging the application of Article 3, yet also turning to Article 4 and the rest of the Convention. While the White Paper nowhere mentions Article 2 (on international wars) specifically, it does state that the Algerians were relying on their claim that they were belligerents and thus "that the conflict in Algeria constitutes a war".')

years.[17] Each of these positions, it is true, would have had the same effect as the other in terms of the wholescale application of the Geneva Conventions to the conflict,[18] but the argument that the FLN constituted an 'organized resistance movement' within the meaning of Article 4(A)(2) of the Geneva Convention Relative to the Treatment of Prisoners of War suggested that the GPRA was of the view that, *as a matter of form*, the armed conflict in Algeria possessed an international character. It was this factor—set as it was within the colonial context and amid a narrative of self-determination—that blossomed a generation later, perhaps helped along by the fact that the GPRA had deposited instruments of ratification for accession to the Conventions with the Swiss Federal Council on 20 June 1960.[19]

This experience has been credited as the 'catalyst' for the normative change that was to come at the Geneva Diplomatic Conference of 1974 to 1977:

> By a double stroke of paradox, armed conflicts indisputably 'non-international' from one party's standpoint were represented as intrinsically international from the other's, and an armed insurrectionary movement which might seem to an established ruler to be 'aggressive' (and therefore, if one had to use the language at all, 'unjust'), was represented as a merely defensive (and certainly 'just') response to the imperial power's original aggression, understood to have been sustained by his continuing presence ever since.[20]

[17] See van Cleef Greenberg, n 15 above, at 40.

[18] Philip C Jessup, *A Modern Law of Nations: An Introduction* (New York, Macmillan, 1948) 53.

[19] See van Cleef Greenberg, n 15 above, at 64–6. Hence the reference to 'procedure' in the text accompanying n 14 above. See further Bedjaoui, n 14 above, at 217–20. The Geneva Conventions make provision for accession: 'From the date of its coming into force, it shall be open to any Power in whose name the present Convention has not been signed, to accede to this Convention.' See common Art 60/59/139/155: n 7 above. They also make provision for the procedure for accession: 'Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they have been received.' See common Art 61/60/140/156, n 7 above.

[20] Geoffrey Best, *Humanity in Warfare* (New York, Columbia University Press, 1980) 312. Together with Morocco and Tanzania—as well as the Soviet Union, Poland, Czechoslovakia, the German Democratic Republic, Hungary and Bulgaria—Algeria was behind the first amendment concerning the *ratione materiae* of the 1977 First Additional Protocol. The amendment sought to add this paragraph: 'The international armed conflicts referred to in Art 2 common to the Conventions include also conflicts where peoples fight against colonial and alien domination and against racist régimes.' Algeria also supported the second amendment—as did other African countries (Egypt, Libya, Sudan, Nigeria, Cameroon, Ivory Coast and Zaire)—which, in the end, proved to be the more influential:

> The situations referred to in the preceding paragraph include armed struggles waged by peoples in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and defined by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

See Georges Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979–IV) 165 *Hague Recueil* 353, 375.

If this experience did, in truth, contribute to the redefinition of an international armed conflict for the purpose of extending the protections of warfare, then it is to a further African experience that we should turn in order to observe a similar dynamic in motion. Here protections were extended not by affecting the scope of meaning of an armed conflict—in this situation, a non-international armed conflict—but by de-emphasising the significance of an armed conflict as a necessary condition of the protections provided for.[21] The protections in question concern the fate of children during hostilities. Whereas the First and Second Additional Protocols of 1977 enhanced such protections,[22] the Second Additional Protocol raised the threshold according to which such protections become applicable: it applies to those conflicts

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[23]

Compare this arrangement with Article 22 of the 1990 African Charter on the Rights and Welfare of the Child.[24] Although this provision does not create any new substantive obligations for states parties[25]—who 'undertake

[21] An obvious parallel for this approach exists in the conceptualisation of crimes against humanity which, in its original incarnation, required a nexus to war or armed conflict (although see Art 5 of the 1993 Statute of the International Criminal Tribunal for Former Yugoslavia (crimes against humanity are committed 'in armed conflict, whether international or internal in character') (3 May 1993) UN Doc. S/25704 36). See further William A Schabas, *An Introduction to the International Criminal Court*, 2nd edn (Cambridge, Cambridge University Press, 2004) 43.

[22] As compared with the limited protections afforded by the 1949 Geneva Convention (IV) Relative to the Protection of Civilians in Time of War, n 7 above, Arts 14, 17, 23–7, 40, 50, 51, 68, 76, 81, 82, 89, 94 and 132.

[23] 1977 Second Additional Protocol, Art 1(1), n 9 above. To be compared with common Art 3 of the 1949 Geneva Conventions, n 8 above, which provides the traditional definition of non-international armed conflicts and which does not contain such detailed specifications. See in particular Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, Cambridge University Press, 2002) 100–103.

[24] African Charter on the Rights and Welfare of the Child (entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990). See also (1991) 3 *African Journal of International and Comparative Law* 173.

[25] Note, however, Art 2's definition of a child as 'every human being below the age of 18 years' (*ibid*). According to Art 77 (2) of the First Additional Protocol, n 12 above:

> The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavor to give priority to those who are oldest.

Article 4(3)(c) of the 1977 Second Additional Protocol, n 9 above, provides that 'children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.

to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child' and adopt 'all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child'[26]—Article 22(3) of the Charter makes it clear that 'States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. *Such rules shall also apply to children in situations of internal armed conflicts, tension and strife*' (emphasis added).[27] The effect of this stipulation is clear. It 'breaks new ground' in its concentration on the protections themselves, rather than on the known jurisdictional obsessions of the law:

> The drafters of the African Charter, in contrast to those who drew up the Geneva Conventions and the [1989] Convention on the Rights of the Child, proved to be sufficiently far-sighted to recognize that the best interests of the child ought to predominate in international law and not the form and level of the conflict.[28]

All of this said, it is also the case that African states and jurisprudence have shown adherence—and, at times, strict adherence—to the jurisdictional clauses of the Geneva Conventions and their Protocols. The denial of the application of Article 1(4) of the First Additional Protocol as a matter of customary international law during the apartheid era[29] should be contrasted with the ruling of the post-apartheid Constitutional Court of South Africa in July 1996 when it concluded that the 'armed conflict' in South Africa could *not* be considered an international armed conflict for the purposes of international humanitarian law.[30] Indeed, in *Azanian*

[26] African Charter on the Rights and Welfare of the Child, n 24 above, at Art 22(1) and (2), respectively.

[27] *Ibid*, Art 22(3).

[28] Geraldine Van Bueren, 'The International Legal Protection of Children in Armed Conflicts' (1994) 43 *International and Comparative Law Quarterly* 809, 812, and Bankole Thompson, 'Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432.

[29] *S v Sagarius & Others* [1983] 1 SA 833 (SWA), and *S v Mogoerane & Others* [1983] 1 *LHR Bulletin* 11. See further Murray, n 13 above.

[30] *Case CCT 17/96*, Constitutional Court of South Africa: Judgment of 25 July 1996 (emphasising, at s 30, the distinction between 'the position of perpetrators of acts of violence in the course of war (or other conflicts between states or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign state in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state on the other'). See further Neil Boister and Richard Burchill, 'The International Legal Definition of the South African Conflict in South African Courts: War of National Liberation, Civil War or War At All?' (1998) 45 *Netherlands International Law Review* 348.

People's Organizations (AZAPO) & Others v President of the Republic of South Africa, Mohamed DP concluded that it was 'doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto *appl[ied] at all* to the situation in which this country found itself during the years of the conflict to which I have referred' (emphasis added).[31]

In the context of non-international armed conflicts, the International Criminal Tribunal for Rwanda has held to the distinction that exists *within* non-international armed conflicts—that is, the distinction which provides for a series of basic protections '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' (common Article 3 to the 1949 Geneva Conventions) and for an extended set of protections in armed conflicts

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. [32]

'Such distinction,' maintained the Tribunal, 'is inherent to the conditions of applicability specified for Common Article 3 and Additional Protocol II'.[33] For the Tribunal, the distinction was important from the perspective of substantive consequences and also the position in custom.[34] A similar appreciation of this dichotomy occurs in the Report of the International Commission of Inquiry on Darfur,[35] although the apparent developments in customary international humanitarian law in the intervening period have thrown doubt on the significance of this distinction in the longer term.[36]

[31] *Case CCT 17/96*, n 30 above (s 29); *ibid* (referring, in s 30, to the 'proper ambit and technical meaning of these Conventions and Protocols').

[32] Article 1(1) of the 1977 Second Additional Protocol. See further Sylvie Junod, 'Additional Protocol II: History and Scope' (1983) 33 *American University Law Review* 29 (noting, though, at 31, that occasional provision was made for protections beyond those of common Article 3 of the 1949 Geneva Conventions—as was the case with the Nigerian government during the 1967–70 Nigerian civil war).

[33] *Prosecution v Akayesu*, Judgment of ICTR Trial Chamber of 2 September 1998 (s 602).

[34] After concluding that 'the norms of Common Article 3 have acquired the status of customary law' (s 608), the Trial Chamber remarked that 'Additional Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law' (s 609): *ibid.*

[35] Where the Commission concluded that 'Additional Protocol II only gives a negative definition [of non-international armed conflict] which, in addition, *seems to narrow the scope of Article 3 common to the Geneva Conventions*'. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005), para 74 (emphasis added).

[36] See Henckaerts and Doswald-Beck, *ICRC Study*, n 10 above.

III. PARTICIPATION

Questions of participation in international armed conflicts have traditionally been answered by a distinction made between 'lawful' and 'unlawful' combatants on the basis of conditions set for regular and irregular forces. These conditions can be found in Articles 4(A)(1) and (2) of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, although an effort has been made to simplify these rules in the First Additional Protocol of 1977.[37] For non-international armed conflicts, no such framework was ever articulated,[38] but common Article 3 of the 1949 Geneva Conventions does make clear that its protections apply to '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause'.[39]

To the arrangement for international armed conflicts, an historical exception was fashioned for spies—or those 'acting clandestinely, or on false pretences' in obtaining or seeking to obtain 'information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party'.[40] On account of their actions, spies were therefore not entitled to prisoner-of-war status,[41] but they could 'not be punished without previous trial'.[42] In a similar vein, and at the instigation of the Government of Nigeria at the Diplomatic Conference at Geneva in 1974 to 1977,[43] mercenaries were singled out for an explicit and categorical denial of prisoner-of-war status. Article 47 of the 1977 First Additional Protocol provided that '[a] mercenary shall not have the right to be a combatant

[37] By ridding the classification scheme of the dichotomy between 'regular' and 'irregular' forces, so that now 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack'. See Art 44(3) of the 1977 First Additional Protocol (which also recognises that 'there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate'): n 12 above.

[38] Waldemar A Solf, 'The Status of Combatants in Non-international Armed Conflicts under Domestic Law and Transnational Practice' (1983) 33 *American University Law Review* 53.

[39] According to Rule 47 of the ICRC study on customary international humanitarian law, a person *hors de combat* is '(a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender provided he or she abstains from any hostile act and does not attempt to escape'. See Henckaerts and Doswald-Beck, *ICRC Study* (Vol I), n 10 above, at 164–70.

[40] Art 29 of Regulations of 1907 Hague Convention (IV) (1907) 205 CTS 277.

[41] Art 46(1) of 1977 First Additional Protocol, n 12 above.

[42] Art 30 of Regulations of 1907 Hague Convention (IV), n 40 above.

[43] CDDH/III/GT/82. See Henry W Van Deventer, 'Mercenaries at Geneva' (1976) 70 *American Journal of International Law* 811, 812.

or a prisoner of war.'[44] In other words, if combatants met the definitional elements contained in Article 47 of the Protocol, their fate would be governed by that provision and *not* by the classification system set out in Article 4(A)(1) and (2) of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War—nor, for that matter, by the revised schemata announced in Article 44(3) of the First Additional Protocol.[45]

Clearly, this approach has not come without its criticisms. It has been argued that:

> There is no more reason to deprive the foreign fighter who qualifies for combatant status of that status than there would have been so to deprive members of the Iraqi armed forces in the [1990–91 Gulf Conflict]. Indeed, there are strong reasons for not doing so. If a mercenary is treated according to the laws of war, he will be less tempted to shoot his way out of a situation in order to avoid capture. He is more likely to abide by his obligations as a combatant if he can also expect to benefit from the rights attaching to the status.[46]

Furthermore, the position taken against mercenaries might be regarded as out of kilter with the spirit of the Diplomatic Conference and, of course, with the broad embrace of combatants realised in Article 44(3) of the First Additional Protocol.[47] Nevertheless, Article 47 stands as a real testament to the political convictions of its time—convictions that sought to mark out mercenaries as fundamental and irredeemable enemies of post-colonial Africa.[48]

An assessment of their record in the period of decolonisation helps to illuminate the realisation of this position, but it also goes some way in explaining its *depth*—or the reason why feelings on this issue ran so strong at the Diplomatic Conference in Geneva. The continent had served as both 'the physical and ideological battleground' for mercenaries[49]: they emerged as 'neo-colonialism's last card … a faceless and bottomless reserve of

[44] Art 47(1) of 1977 First Additional Protocol, n 12 above.

[45] Note 37 above.

[46] Francoise J Hampson, 'Mercenaries: Diagnosis Before Proscription' (1991) 22 *Netherlands Yearbook of International Law* 3, 15–16. The United States did not 'favor the provisions of Article 47 on mercenaries, which among other things introduce political factors that do no belong in international humanitarian law': see Michael J Matheson, 'Remarks' (1987) 2 *American University Journal of International Law and Policy* 419, 426–7.

[47] Note 37 above. See also RR Baxter, 'Humanitarian Law or Humanitarian Politics—the 1974 Diplomatic Conference on Humanitarian Law' (1975) 16 *Harvard International Law Journal* 1.

[48] In the model of battlefield as market, however, the broader truth revealed that mercenaries would follow the money and not the cause of action: both the National Union for the Total Independence of Angola (UNITA) and the National Liberation Front of Angola (FNLA) were amenable to the hiring of mercenaries in Angola: 'The Mercenary Life' (1976) *Newsweek*, 9 February, 30. For a critical evaluation of this position, see Dino Kritsiotis, 'Mercenaries and the Privatization of Warfare' (1998) 22 *Fletcher Forum of World Affairs* 11.

[49] Edward Kwakwa, 'The Current Status of Mercenaries in the Law of Armed Conflict' (1990) 14 *Hastings International and Comparative Law Review* 67, 75, and Paul W Mourning, 'Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries' (1982) 22 *Virginia Journal of International Law* 589, 599.

cannon fodder, not identifiable with governments and their policies, immune to public criticism and debate'.[50] Their allegiances did not go entirely unnoticed, however, since mercenaries often fought on the wrong side of the decolonisation line,[51] and had also proved their capacities to disrupt the stable boundaries of African states once independence had been achieved.[52] That mercenaries had also acted in the interests of certain African governments—as happened during the Nigerian civil war (1967–70), for instance—was not enough to tame their reputation as 'the symbol of racism and neocolonialism within the Afro-Asia bloc'.[53]

It was the cause célèbre of the trial of 13 individuals in Angola in June 1976 that helped focus and consolidate international opposition to mercenaries, in a ruling that essentially foreshadowed Article 47 of the First Additional Protocol by denying prisoner-of-war status to the accused.[54] There it was concluded by the Revolutionary People's Court that:

> Africa feels that mercenaries are a danger to the peace for its children and to the security of its States. And since these values undoubtedly merit legal protection, the only realistic way to protect them is to regard mercenarism, war to order, as a formal crime. Hence those who commit the crime of mercenarism, in its

[50] Wilfred Burchett and Derek Roebuck, *The Whores of War: Mercenaries Today* (Harmondsworth, Penguin, 1977) 17.

[51] As in (Southern) Rhodesia on behalf of the regime of Ian Smith: Tahar Boumedra, 'International Regulation of the Use of Mercenaries in Armed Conflicts' (1981) 20 *Revue de Droit Penal Militaire et de Droit de la Guerre* 35, 39. The Council of Ministers of the Organization of African Unity adopted a resolution on 10 September 1964, in which it stated that 'the use of mercenaries has unfortunate effects … on the struggle for national liberation in Angola, Southern Rhodesia, Mozambique and the other territories in the regions which are still under colonial domination': see Doc ECM/Res 5-III. In November 1968, the General Assembly adopted Resolution 2395 (XXIII) in which it issued an urgent appeal 'to all States to take all measures to prevent the recruitment or training in their territories of any persons as mercenaries for the colonial war being waged in the Territories under Portuguese domination and for violations of the territorial integrity and sovereignty of the independent African States' (ninth operative paragraph).

[52] Note their role in the Katanga war of secession in the Congo between 1960 and 1963: Smith Hempstone, *Rebels, Mercenaries and Dividends: The Katanga Story* (New York, Praeger, 1962).

[53] James Taulbee, 'Myths, Mercenaries and Contemporary International Law' (1985) 15 *California Western International Law Journal* 339, 342 (suggesting that 'The fact that white South African have contributed large numbers to mercenary forces has given credence to this perception'). See further Montgomery Sapone, 'Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence' (1999) 30 *California Western International Law Journal* 1, 17–24.

[54] See further Mike Hoover, 'The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War' (1977) 9 *Case Western Reserve Journal of International Law* 323, 336 ('[t]his trial is a continuation of the process of developing the laws of war'), although this thinking was not unanimous: on 10 July 1976, US Secretary of State Henry Kissinger remarked that:

> there is absolutely no basis in national or international law for the action now taken by the Angolan authorities. The law [underpinning the prosecution] was nothing more than an internal ordinance of the MPLA … issued in 1966, when the MPLA was only one of many guerrilla groups operating in Angola.

See (1976) 75 *Department of State Bulletin* 163.

> consummate form, are all those who, for personal profit, enlist in a group or in forces intending, by military means, to counter the achievement of a foreign people's determination or, by the same means, to impose neo-colonial designs on them.[55]

Following the trial, the International Commission of Inquiry on Mercenaries, which had convened for the trial in Luanda, produced the Draft Convention on the Prevention and Suppression of Mercenaries.[56] Article 4 of this document provided that 'Mercenaries are not lawful combatants. If captured they are not entitled to prisoner of war status', an approach that is altogether different from that of the 1972 OAU Convention for the Elimination of Mercenaries in Africa.[57] That Convention regarded the 'offence' of the mercenary 'as crimes against the peace and security of Africa',[58] since a 'mercenary' was there defined:

> as anyone who, not a national of the group of the State against which his actions are directed, is employed, enrols or links himself willingly to a person, group or organization whose aim is: (a) to overthrow by force of arms or by any other means the government of that Member State of the Organization of African Unity; (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State; (c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity.[59]

African states have therefore produced various models to control mercenaries, but the continued existence and proliferation of mercenaries on the continent remains a sore point for some and an ugly throwback to earlier times.[60] Even if we are able to recognise the reality of mercenaries working for the good or for the better of the continent,[61] we should remain conscious of 'the dangerous attack on the principle of equality of

[55] Reproduced in Hoover, *ibid*, at 374–81. The accused were charged 'with committing crimes of mercenarism and against the peace'.

[56] Reproduced in Burchett and Roebuck, n 50 above, at 237.

[57] Convention for the Elimination of Mercenaries in Africa (1972), OAU Doc CM/433/Rev L, Annex I. The Convention has been credited for influencing 'all subsequent thinking on the international control of mercenaries'. See Burchett and Roebuck, n 50 above, at 233–4.

[58] *Ibid*, Art 2.

[59] *Ibid*—and without any reference to any component of motive: see Hampson, n 46 above, at 26.

[60] President Robert Mugabe of Zimbabwe 'seized on' a planned coup d'état in Equatorial Guinea 'as proof that western powers are bent on overthrowing splendid chaps such as himself': see 'The Fog and Dogs of War,' (2004) *The Economist* (London), 18 March, and, further, Adam Roberts, *The Wonga Coup: Guns, Thugs and a Ruthless Determination to Create Mayhem in an Oil-rich Corner of Africa* (London, Profile, 2006).

[61] Abdel Fatau Musah and Kayode Fayemi (eds), *Mercenaries: An African Security Dilemma* (London, Pluto, 2000). See also Michael Ashworth, 'Africa's New Enforcers' (1996) *Independent* (London), 16 September, 2; Herbert Howe, 'Private Security Forces and African Stability: The Case of Executive Outcomes' (1998) 36 *Journal of Modern African Studies* 307; and Peter Singer, 'Peacekeepers, Inc' (2003) 119 *Policy Review* 59, 63 (on the 'promise' of mercenaries hired by the Government of Sierra Leone in hostilities against the Revolutionary United Front).

belligerents'[62] that has occurred by virtue of the Luanda Draft Convention as well as the First Additional Protocol of 1977, and the broader objectives and purposes of the humanitarian canon should be borne in mind.[63]

If mercenaries have presented a particular challenge within humanitarian warfare for African countries, so too has the participation of children in hostilities. Child soldiers are, of course, a universal phenomenon; they are not unique or specific to the African continent. Whether we are considering the practices of the Liberation Tigers of Tamil Eelam in Sri Lanka[64] or the practices of all parties to the armed conflict in Colombia,[65] the problem of the recruitment of child soldiers in warfare is an intractable one that shows little (if any) sign of abating. We can appreciate the scale of this problem from the broad range of causation factors identified by Graça Machel in her report for the United Nations, *Impact of Armed Conflict on Children* (1996).[66] That said, the experiences of countries such as Sierra Leone, the Sudan and Angola have helped to underscore how significant this challenge actually is for African states, but there can be no more potent example of the recruitment of child soldiers than those recruited into the ranks of the Lord's Resistance Army in northern Uganda.[67]

According to Article 77 of the 1977 First Additional Protocol:

> The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.[68]

Article 4 of the Second Additional Protocol of 1977 provides that 'children who have not attained the age of fifteen years shall neither be

[62] See Hampson, n 46 above, at 32.

[63] Which might entail a certain modesty in using international humanitarian law to tackle 'mercenarism'. Consider, eg, the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries UNGA Res 44/34 (11 December 1989) 44 UN GAOR Supp No 49, at 306, UN Doc A/44/49—although this emerged after significant deliberation. See Hampson, n 46 above, at 30–31.

[64] See Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001* (London, Coalition to Stop the Use of Child Soldiers, 2001) 341.

[65] Human Rights Watch, *'You'll Learn to Cry': Child Combatants in Colombia* (New York, Human Rights Watch, 2003) 21 (reporting the child soldier population at that time as 11,000).

[66] *Impact of Armed Conflict on Children* (26 August 1996) UN Doc A/51/306.

[67] See Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London, Palgrave Macmillan, 2006). See further Human Rights Watch, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (New York, Human Rights Watch, 1997); Cole P Dodge and Magne Raundalen (eds), *Reaching Children in War: Sudan, Uganda and Mozambique* (Bergen, Sigma Forlag, 1991), and Zachary Lomo and Lucy Hovil, *Behind the Violence: The War in Northern Uganda* (Pretoria, ISS, 2004) <www.iss.org.za/pubs/Monographs/No99/Contents.html>. Indeed, the abduction of children for fighting in Uganda became the occasion for the UN Committee on the Rights of the Child to conclude that the 'violation of the rules of international humanitarian law entail responsibility attributed to perpetrators': Concluding Observations of the Committee on the Rights of the Child: Uganda (21 October 1997) CRC/C/15/Add.80, para 34.

[68] 1977 First Additional Protocol, n 12 above, at Art 77(2).

recruited in the armed forces or groups nor allowed to take part in hostilities',[69] and the 1990 African Charter on the Rights and Welfare of the Child requires states parties to 'undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child'.[70] It does so because, in its preamble, the Charter recognises the impact on African children of 'the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger'.[71] The 2000 Optional Protocol to the Convention on the Rights of the Child has sought to 'strengthen further the implementation of rights recognised in the Convention on the Rights of the Child',[72] and the 1998 Rome Statute of the International Criminal Court (ICC) makes it a war crime in *both* international and non-international armed conflicts to conscript or enlist children under the age of 15 into national armed forces or groups 'or [to use] them to participate actively in hostilities'.[73]

Given these developments, it was only a matter of time before the first known prosecution of the conscription or enlistment of child soldiers would take place; it occurred before the Special Court of Sierra Leone in the case of *Prosecutor v Sam Hinga Norman* in February 2004.[74] This fact—together with the Court's ensuing jurisprudence—makes it an important milestone in the chapter on child soldiers, because a certain vitality was given to this law that it had not otherwise known,[75] a vitality that reverberated throughout the world.[76]

[69] Art 4(3)(c), 1977 Second Additional Protocol, n 9 above. Note the difference in the formulation of the obligation: see Van Bueren, n 28 above, at 815.

[70] African Charter on the Rights and Welfare of the Child, n 24 above, Art 22(2). Note the historical prohibition on the participation of children in warfare: see Bello, n 1 above, and Howard Mann, 'International Law and the Child Soldier' (1987) 36 *International and Comparative Law Quarterly* 32, 35.

[71] African Charter on the Rights and Welfare of the Child, n 24 above, Art 22(2) (and also manifested in *ibid*, Art 4(1), according to which the child's best interest 'shall be the primary consideration'. Cf Art 3(1) of the Convention on the Rights of the Child, where the best interest of the child 'shall be a primary consideration'). See further Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford, Hart Publishing, 2005) 139.

[72] Convention on the Rights of the Child (1989) UN Doc A/54/RES/263 (ie Art 38 of the 1989 United Nations Convention on the Rights of the Child).

[73] Rome Statute of the International Criminal Court (1998) 37 ILM 999, Art 8(2)(b)(xxvi) and (e)(vii). Although see Schabas, n 21 above, at 63 (noting that 'The term "recruiting" appeared in an earlier draft, but was replaced with "conscripting or enlisting" to suggest something more passive, such as putting the name of a person on a list').

[74] *Prosecutor v Sam Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) (31 May 2004) Case No SCSL-2004-14-AR72 (E) <www.sc-sl.org/SCSL-04-14-AR72(E)-131-7383.pdf> (Appeals Chamber).

[75] Note the observation of Justice Geoffrey Robertson, in his Dissenting Opinion in *Norman*, *ibid* at 1 (s 2), that '"child enlistment" has never been prosecuted before in an international court nor, so far as I am aware, has it been the subject of prosecution under municipal law, although many states now have legislation which would permit such a charge'.

[76] Elizabeth Blunt, 'Child Recruitment "Was War Crime"', BBC News Online (1 June 2004) <news.bbc.co.uk/2/hi/africa/3767041.stm>.

Yet the Court's decision case did not come without difficulties. While Article 4 of the Statute of the Special Court provided the Court with jurisdiction over those involved in '[c]onscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities', it was argued on behalf of the defendant that 'the crime of child recruitment was not part of customary international law at the times relevant to the Indictment'.[77] The prosecution was of the view that the language of Article 4 was drawn from the Rome Statute and that this reflected custom at the time of its adoption in July 1998.[78] After consideration of the evidence, the Court agreed with this proposition,[79] although one of its members found it fitting to issue a forthright dissent:

> [I]t would breach the *nullen crimen* rule to impute the necessity intention to create an international law crime of child enlistment to States until 122 of them signed the Rome Treaty. From that point, it seems to me it was tolerably clear to any competent lawyer that a prosecution would be 'on the cards' for anyone who enlisted children to fight for one party or another in an ongoing conflict, whether internal or international. It is not of course *necessary* that a norm should be embodied in a Treaty before it becomes a rule of international criminal law, but in the case of child enlistment the Rome Treaty provides a *sufficient* mandate—certainly no previous development will suffice. It serves as the precise point from which liability can be reckoned and charged against defendants in this court. It did, of course, take four years before the necessary number of ratification were received to bring the treaty into force. But the normative status of the rule applicable to States prior to 1998, the overwhelming acceptance by States in the Rome Treaty of its penal application to individuals and the consequent predictability of prosecution from that point onwards, persuades me that the date of the Treaty provides the right starting point.[80]

Despite these reservations, the 'historic' significance of this ruling cannot be denied when set against the 'far reaching impact' that practices of

[77] *Prosecutor v. Sam Hinga Norman*, n 74 above, at 3. Issued on 3 March 2003, Count 8 of the Indictment charged Sam Hinga Norman of '[c]onscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, and other serious violations of international humanitarian law, punishable under Art 4 (c) of the Statute': see <www.sc-sl.org/normanindictment.html>.

[78] *Prosecutor v. Sam Hinga Norman*, n 74 above, at 4.

[79] *Ibid*, at 256 (s 50):

> [D]uring a certain period the conscience of leaders and populations started to note a given problem. In the case of recruiting child soldiers this happened during the mid-1980s. One can further determine where customary law begins to develop, which in the current case began with the acceptance of key international instruments between 1990 and 1994. Finally, one can determine the period during which the majority of states criminalized the prohibited behavior, which in this case, … was the period between 1994 and 1996. It took a further six years for the recruitment of children between the ages of 15 and 18 to be included in treaty law as individually punishable behaviour.

[80] *Ibid* (Dissenting Opinion of Justice Robertson), at 34 (s 45).

conscription and enlistment had on the lives of children in Sierra Leone.[81] Indeed, in lending its support to the establishment of 'an independent special court' for Sierra Leone in Resolution 1315 (2000) of August 2000, the Security Council recognised that

> in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.[82]

That system of justice and accountability has now been brought to life in Sierra Leone, and while we might question the quality of this justice or the extent of its actual contribution to national reconciliation and peace processes, we are given real pause to stop and speculate what message the verdict in *Norman* has sent to those who conscript or enlist children—not only in other African countries but also in the wider world.

IV. MEANS (AND METHODS) OF COMBAT

The traditional distinction made between international and non-international armed conflicts is one that has permeated the *jus in bello*, including its regard for the means and methods of combat, to the point where, in October 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia remarked that

> elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.[83]

The Appeals Chamber then concluded that

> State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare … mention can be made of the prohibition of perfidy.[84]

[81] As announced by Human Rights Watch—and regarded as part of the Special Court's 'significant strides in investigating and charging defendants with gender[-]based crimes and child recruitment': See Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings, and Needed Support* (New York, Human Rights Watch, 2004), s IV.A. See also <hrw.org/reports/2004/sierraleone0904/>. Further understanding of the plight of the child soldier in Sierra Leone is provided by Ishmael Beah, *A Long Way Gone: Memoirs of A Boy Soldier* (New York, Farrar, Straus & Giroux, 2007), and Ishmael Beah, 'The Making, and Unmaking, of a Child Soldier' (2007) *New York Times Sunday Magazine*, 14 January, 36.

[82] UNSC Res 1315 (2000) (14 August 2000) UN Doc S/Res/1315 (seventh preambular para).

[83] *Prosecutor v Dusko Tadic* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) [2 October 1995] Case No IT-94-1-AR72, s 119, reprinted in (1996) 35 ILM 32.

[84] *Ibid*, at s 125.

In making this point, the Chamber cited the single authority of a decision from the Supreme Court of Nigeria to the effect that rebels in non-international armed conflicts must not feign civilian status. This was the ruling in *Pius Nwaoga v the State* (1972),[85] but the essence of that case—which involved a trial under Nigerian law for an act of murder committed during the Nigerian civil war—must make us question whether, in actual fact, 'the consideration of the significance of the defendants' disguise was peripheral to the decision'.[86] Nevertheless, this decision should be viewed alongside the other empirical validations of the rule prohibiting perfidy in non-international armed conflicts that have been made available.[87]

International law thus engages the question of *how* hostilities are waged both in international and non-international armed conflicts. It does so from the perspective of the *means* of warfare as well as the *methods* of warfare (examples would include policies of starvation and, as we have discussed, perfidy).[88] With respect to the former, international law has made its intervention since at least the 1868 St Petersburg Declaration Renouncing the Use in Time of War, of Explosive Projectiles under 400 Grammes in Weight, when states committed themselves to prohibit 'any projectile of a weight below 400 grammes, which is either explosive

[85] *Pius Nwaoga v the State* (Supreme Court of Nigeria) (1972) reproduced in (1979) 52 ILR 494.

[86] Christopher Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for Former Yugoslavia' (1998) 2 *Max Planck Yearbook UN Law* 97, 129. See further Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, Cambridge University Press, 2002) 146. Although the Supreme Court of Nigeria admitted that a state of 'civil war' existed in Nigeria at the time of the commission of the offence on 20 July 1969, it considered the actions of the defendant—a member of the Biafran Organisation of Freedom Fighters—and reasoned that 'if any of these rebel officers, as indeed the appellant did, commit an act which is an offence under the Criminal Code, he is liable for punishment, just like any civilian would be, whether or not he is acting under orders'. The Court concluded that 'deliberate and intentional killing of an unarmed person living peacefully inside the Federal Territory as in this case is a crime against humanity, and even if committed during a civil war is in violation of the domestic law of the country, and must be punished'. The conviction of Nwaoga was upheld; his appeal dismissed.

[87] See Henckaerts and Doswald-Beck, *ICRC Study* (Vol I), n 10 above, at 220–21. The Appeals Chamber decision is recited in Henckaerts and Doswald-Beck, *ICRC Study* (Vol II), n 10 above, at 1452 (s 1503). Note, though, that the case is offered in the practice section of 'national case-law' for the customary rule that 'killing, injuring or capturing an adversary by resort to perfidy is prohibited'. See further *ICRC Study* (Vol II), at 1449 (s 1489).

[88] Henri Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering—From the Declaration of St Petersburg of 1868 to Additional Protocol I of 1977' (1994) 299 *International Review of the Red Cross* 98, 103 (noting that the expression 'methods of warfare' in Article 35 (2) of the 1977 First Additional Protocol 'is to be understood as the mode of use of means of warfare in accordance with a certain military concept or tactic'). In this respect, note the practices of the Herero in South West Africa (Namibia) not to target German women and children: see Isabel Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca, NY, Cornell University Press, 2005) 10 and 14 (though, at 21, noting 'the Hereros' own practice of taking no prisoners and of killing wounded soldiers').

or charged with fulminating or inflammable substances';[89] they did so because the use of such projectiles would 'uselessly aggravate the sufferings of disabled men, or render their death inevitable' when 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'.[90]

This statement was not, of course, altogether evident from either European or African attitudes and practices of that period,[91] and one is forced to compare the development of expandable bullets in India[92] and the use of the curbash in Abyssinia[93] with the modus operandi of the Nuer warriors of the Nile as well as the 'rage and destructive propensities' of the Galla of Botswana and the Bovana of Abyssinia.[94] The principle of unnecessary suffering was nevertheless confirmed in Article 23 (e) of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (which provided that it was 'especially forbidden … [t]o employ arms, projectiles, or material calculated to cause unnecessary suffering')—although a restrictive provenance was envisaged for its application in this formulation since it was only in Article 35(2) of the 1977 First Additional Protocol that the principle was made relevant to the '*methods of warfare* of a nature to cause superfluous injury or unnecessary suffering'.[95] According to the International

[89] St Petersburg Declaration Renouncing the Use in Time of War, of Explosive Projectiles under 400 Grammes in Weight (1868–69) 138 CTS 297.

[90] *Ibid*.

[91] Spain was not among the European powers signatory to the Declaration: Best, n 20 above, at 160—important, because, as the Declaration made clear: 'This engagement is obligatory only upon the Contracting or Acceding Parties thereto, in case of war between two or more of themselves; it is not applicable with regard to Non-Contracting Parties, or Parties who shall not have acceded to it.'

[92] JM Spaight, *War Rights on Land* (London, Macmillan & Co, 1911) 79. See also Edward Spiers, 'The Use of the Dum Dum Bullet in Colonial Warfare' (1975) 4 *Journal of Imperial and Commonwealth History* 3, 4.

[93] Michela Wrong, *'I Didn't Do It for You': How the World Betrayed a Small African Nation* (New York, Harper Collins, 2005).

[94] Bello, n 1 above, at 34.

[95] Emphasis added. See further Meyrowitz, n 88 above, at 102 (concluding (at 103) that this formulation was a conventional innovation: 'the status of [the Hague Regulations, Art 23(e)] as a rule of customary law is well established [while] the use of the term "methods of warfare" in [Additional Protocol I, Art 35(2)] introduces a new element which at present has only the status of a treaty rule'), and Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, Cambridge University Press, 2004) 58. Article 35(2) was important from another perspective, according to the International Committee of the Red Cross in its *Comments on Informal Working Paper on War Crimes of Oct. 13, 1997* (1997) 3:

> The French text in 1899 and 1907 used the same wording: 'propre a causer des maux superflus'. The French text of these Hague Conventions is the only authentic text. In 1899 the terminology was correctly translated into English, that is 'to employ arms … of a nature to cause superfluous injury', but incorrectly translated in 1907 into 'calculated to cause superfluous injury'. This has been rectified in the wording of Article 35(2) of 1977

Committee of the Red Cross, this prohibition has since acquired the force of custom for both international and non-international armed conflicts,[96] although when the International Court of Justice considered the principle of unnecessary suffering in its *Nuclear Weapons Advisory Opinion* in July 1996, it emphasised the application of this principle to types of weapon used in combat.[97]

Notwithstanding continued problems with the definition of this principle and the scope of its application,[98] its value has been demonstrated

> Protocol I ('of a nature to cause'), in Article 3 of Protocol II (amended 3 May 1996) of the 1980 Convention ('designed or of a nature to cause') and recently, in the preamble to the Ottawa Convention on the prohibition of anti-personnel mines, which provides for the 'principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'.

To this restriction, I must also mention the differential proposed for the principle of unnecessary suffering at the 1899 Hague Peace Conference, where Sir John Ardagh, the British military plenipotentiary there, argued that 'Civilized man is much more susceptible to injury than savages … the savage, like the tiger, is not so impressionable, and will go on fighting even when desperately wounded': see James B Scott (ed), *The Proceedings of the Hague Peace Conference* (New York, Oxford University Press, 1920) 286–7. This position was not accepted, and the 1899 Hague Declaration (IV, 3) Concerning Expanding Bullets was adopted. It prohibited 'the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions'—and was 'inspired', or so the Declaration said, 'by the sentiments which found expression in the Declaration of St Petersburg of 29 November (11 December) 1868': see (1898–99) 187 CTS 459, and Robin Coupland and Dominique Loye, 'The 1899 Hague Declaration Concerning Expanding Bullets: A Treaty Effective for More than 100 Years Faces Complex Contemporary Issues' (2003) 849 *International Review of the Red Cross* 135.

[96] Rule 70: 'The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited': see Henckaerts and Doswald-Beck, *ICRC Study* (Vol I), n 10 above, at 237.

[97] Perhaps wholly understandable given the question before it: *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226, 257 ('it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In the application of [this] principle, States do not have unlimited freedom of choice of means in the weapons they use' (s 78)). Also, at 256, referencing 'the appearance of new means of combat' (s 76). Note that Article 8(2)(b)(xx) of the 1998 Rome Statute of the ICC criminalises the employment of

> weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123

in the context of international armed conflicts. No such criminalisation appears in the war crimes listed for non-international armed conflicts in Art 8(2)(c) and (e), although Article 8(2)(e)(ix) criminalises the 'killing or wounding treacherously a combatant adversary'. See Rome Statute of the ICC, n 73 above.

[98] Note that the ICRC study reports that 'States articulating this rule [on unnecessary suffering] do not give any examples of methods of warfare that would be prohibited by virtue of the rule': see Henckaerts and Doswald-Beck, *ICRC Study* (Vol I), n 10 above, at 242.

at the political level, where it has been pressed in to service to help secure explicit conventional prohibitions on certain weapons.[99] I would mention in particular, and because of its resonance for African states in the main,[100] the 1997 Ottawa Convention on the Prohibition, Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, since, in concluding this treaty, states based themselves

> on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants.[101]

The Convention has become the basis of a subsequent landmark initiative under the auspices of the African Union[102] for the continent to be

[99] Not only at the political level, though: note its prominence at the point of technological design: see Robert Coupland, 'The SIrUS Project: Towards a Determination of Which Weapons Cause "Superfluous Injury or Unnecessary Suffering"' in Helen Durham and Timothy LH McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague, Martinus Nijhoff, 1999) at 100.

[100] Alberto Ascherio *et al*, 'Deaths and Injuries Caused by Landmines in Mozambique' (1995) 346 *Lancet* 1509. The 2003 South African Anti-personnel Mines Prohibition Act recognised the 'destabilising effect' which anti-personnel mines have 'on civilian populations in Africa and in the region of the Southern African Development Community in particular': Act No 36, 2003. It is further reported that 17 million landmines have remained buried in Egypt since World War II: United Nations Office for the Coordination of Humanitarian Affairs, 'Laying Landmines to Rest?' <www.irinnews.org/webspecials/hma/afrinv.asp>. See further Mary Ferrer, 'Affirming Our Common Humanity: Regulating Landmines to Protect Civilians and Children in the Developing World' (1996–97) 20 *Hastings International and Comparative Law Review* 135, and Africa Action, *Landmines: Africa's Stake Global Initiatives* (Washington DC, April 1997) <www.africaaction.org/bp/lmineall.htm>.

[101] Ottawa Convention on the Prohibition, Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction (1997) 36 ILM 1507, Preamble (although the preamble opened with the expression of the determination of states parties 'to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement'). In her dissenting opinion in the *Nuclear Weapons Advisory Opinion* (1996), Judge Rosalyn Higgins observed: 'There has been, in many of the written and oral submissions made to the Court, a conflation of [the] two elements [of unnecessary suffering to enemy combatants and of harm to civilians as a means of securing victory over the enemy]', n 97 above, at 585 (s 12). See further Dinstein, n 95 above, at 59.

[102] Egypt, Libya, Morocco and Somalia are among those African states not parties to the Convention. At the First Review Conference for the Convention in Nairobi, Kenya, 28 November to 2 December 2004, Egypt announced an official moratorium on the production of anti-personnel mines, and Morocco claimed that it has implemented all of the Convention's provisions de facto: see Government of Canada Foreign Affairs and International Trade, 'Canada's Guide to the Global Ban on Landmines' <www.mines.gc.ca/convention-en.asp>.

transformed into an anti-personnel mine-free zone. Known as the African Common Position on Anti-personnel Landmines, it was adopted by African governments at Addis Ababa, Ethiopia, on 17 September 2004; only Egypt entered a reservation to this position.[103]

This continental focus and commitment informed an earlier position of African governments regarding the 1996 Treaty of Pelindaba establishing Africa as a nuclear weapon-free zone.[104] African states have not been alone in this exercise; nor have they been the first to embrace the proposition at hand: in February 1967, Latin American countries concluded the Treaty of Tlatelolco for the Prohibition of Nuclear Weapons in Latin America.[105] This was followed by the Treaty of Raratonga on the Nuclear-Weapon-free Zone of the South Pacific in August 1985,[106] and South-east Asian nations concluded the Treaty of Bangkok for a South-east Asia Nuclear-Weapon-free Zone in December 1995.[107] According to the Treaty of Pelindaba, parties undertake:

(a) [n]ot to conduct research on, develop, manufacture, stockpile or otherwise acquire, possess or have control over any nuclear explosive device by any means anywhere;
(b) [n]ot to seek or receive any assistance in the research on, development, manufacture, stockpiling or acquisition, or possession of any nuclear explosive device;
(c) [n]ot to take any action to assist or encourage the research on, development, manufacture, stockpiling or acquisition, or possession of any nuclear explosive device.[108]

[103] African Union, Common Position on Anti-personnel Landmines (17 September 2004) <www.genevacall.org/resources/testi-reference-materials/testi-official-documents/au-17sep04.pdf>.

[104] Treaty of Pelindaba (1996) 35 ILM 698.

[105] Treaty of Tlatelolco for the Prohibition of Nuclear Weapons in Latin America (1967) UNTS 9068. The deployment of nuclear weapons had already been prohibited in specific spaces: see the 1959 Antarctic Treaty and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. See further the 1971 Treaty on the Prohibition of the Employment of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof. Note, however, that in July 1964, at its first ordinary session, the Assembly of Heads of State and Government of the Organization of African Unity solemnly declared their readiness to undertake, through an international agreement to be concluded under United Nations auspices, not to manufacture or acquire control of nuclear weapons: AHG/Res 11(l).

[106] Treaty of Raratonga on the Nuclear-Weapon-Free Zone of the South Pacific (1985) 24 ILM 1442.

[107] Treaty of Bangkok for a South-east Asia Nuclear Weapon-free Zone (1996) 35 ILM 635.

[108] Treaty of Pelindaba, n 104 above, Art 3.

Although the treaty has noble aims,[109] it has thus far fallen short of the target of 28 ratifications needed for its entry into force[110]—a fact that makes one wonder about the true extent of the political commitment that exists on the continent if, as is specified in the preamble, an objective of this conventional arrangement is to 'protect African States against possible nuclear attacks on their territories'.[111] This protection, it is clear, has been devised for nuclear attacks which emanate not only from states *within* the continent, but also, as is evident from the three Protocols related to the treaty, from *outside* the continent. Here the acceptance of invitations to nuclear weapon (and other) states has some way to go before a nuclear weapon-free zone can be realised.

Protocol I invites China, France, the Russian Federation, the United Kingdom and the United States of America to become Protocol parties[112] and undertake

> not to use or threaten to use a nuclear explosive device against: (a) [a]ny Party to the Treaty; or (b) [a]ny territory within the African Nuclear-Weapon-Free Zone for which a State that has become a Party to Protocol III is internationally responsible as defined in annex I.[113]

[109] Its preamble noted the position of the General Assembly of the United Nations, which recognised in Resolution 3472 (XXX) of 11 December 1975 'that the establishment of nuclear-weapon-free zones can contribute to the security of members of such zones, to the prevention of the proliferation of nuclear weapons and to the goals of general and complete disarmament'. Further, the preamble states that parties to the treaty are:

> *Convinced* of the need to take all steps in achieving the ultimate goal of a world entirely free of nuclear weapons, as well as of the obligations of all States to contribute to this end,
>
> *Convinced* also that the African nuclear-weapon-free zone will constitute an important step towards strengthening the non-proliferation regime, promoting cooperation in the peaceful uses of nuclear energy, promoting general and complete disarmament and enhancing regional and international peace and security. *Aware* that regional disarmament measures contribute to global disarmament efforts,
>
> *Believing* that the African Nuclear-Weapon-Free Zone will protect African States against possible nuclear attacks on their territories …
>
> *Determined* to keep Africa free of environmental pollution by radioactive wastes and other radioactive matter.

[110] In accordance with Art 18 (3) of the treaty, n 104 above. Forty-nine states have signed the treaty (a figure which excludes Equatorial Guinea, Madagascar and the Sahrawi Arab Democratic Republic) and only 20 states have ratified or acceded to it. These are: Algeria, Botswana, Burkina Faso, Côte d'Ivoire, Equatorial Guinea, Gambia, Guinea, Kenya, Libya, Lesotho, Madagascar, Mali, Mauritania, Mauritius, Nigeria, South Africa, Swaziland, Tanzania, Togo and Zimbabwe. Although it did not sign the treaty, Equatorial Guinea deposited its instrument of ratification on 19 February 2003, as did Madagascar on 12 December 2003. See <www.africa-union.org>. Libya was the last state to deposit its instrument of ratification with the African Union, on 11 May 2005, and, on 6 January 2006, the General Assembly adopted Resolution 60/49, in which it called upon 'African States that have not yet done so to sign and ratify the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba) as soon as possible so that it may enter into force without delay'. See further Sola Ogumbanwo, 'Accelerate the Ratification of the Pelindaba Treaty' (2003) *Nonproliferation Review* 132.

[111] Note 104 above.

[112] Art 4 of Protocol 1, 'Parties to the Protocol', (1996) 35 ILM 717.

[113] Art 1 of Protocol I: *ibid*.

While all of these states have signed the Protocol,[114] only China (September 1996), France (July 1997) and the United Kingdom (February 2001) have ratified it.[115]

Protocol II invites China, France, the Russian Federation, the United Kingdom and the United States of America to become Protocol parties[116] and undertake 'not to test or assist or encourage the testing of any nuclear explosive device anywhere within the African Nuclear-Weapon-Free Zone'.[117] Protocol II was signed by China, France, the United Kingdom and the United States in April 1996; China (September 1996), France (July 1997) and the United Kingdom (February 2001) have ratified the treaty, whereas ratifications are still pending from the United States and the Russian Federation.[118]

According to Article 4 of Protocol III, France and Spain are invited to apply relevant provisions of the Treaty to territories 'for which [they are] de jure or de facto internationally responsible [and which are] situated within the African Nuclear-Weapon-Free Zone'.[119] France alone has ratified this Protocol.[120]

These developments have not escaped the attention of the General Assembly. In Resolution 60/49 of January 2006, the General Assembly expressed its appreciation to those nuclear-weapon states that have 'signed the Protocols that concern them', but it also called upon 'those that have not yet ratified the Protocols concerning them to do so as soon as possible'.[121] As for Protocol III, the General Assembly has

> [c]all[ed] upon the States contemplated in Protocol III to the Treaty that have not yet done so to take all necessary measures to ensure the speedy application of the Treaty to territories for which they are, de jure or de facto, internationally responsible and lie within the limits of the geographical zone established in the Treaty.[122]

We can only speculate on the reduced political capital which African governments will have in securing ratifications for these Protocols when the

[114] China, France, the UK and the US in April 1996; the Russian Federation in November 1996. Information obtained from the Center for Nonproliferation Studies, Inventory of International Nonproliferation Organizations and Regimes: <www.nti.org/e_research/official_docs/inventory/pdfs/anwfz.pdf>.

[115] In accordance with Art 5 of Protocol II: (1996) 35 ILM 717. Again, information obtained from the Center for Nonproliferation Studies, *ibid*.

[116] Art 4 of Protocol II: (1996) 35 ILM 719.

[117] Art 1 of Protocol II: *ibid*.

[118] In accordance with Art 5 of Protocol II: *ibid*. Information obtained from the Center for Nonproliferation Studies, n 114 above.

[119] Art 1 of Protocol III: (1996) 35 ILM 720.

[120] In accordance with Art 5 of the Protocol: *ibid*. Spain has neither signed nor ratified the Protocol. Information obtained from the Center for Nonproliferation Studies, n 114 above.

[121] Note 110 above (operative para 2)—the latter stipulation clearly intended for the US and the Russian Federation.

[122] *Ibid* (operative para 3)—a statement clearly intended for Spain.

Treaty of Pelindaba is itself some distance from success and when Africa's own nuclear house has yet to be put in order.

V. PROSECUTIONS AND AMNESTIES

As a general statement, it would be fair to say that states have been rather remiss in meeting their obligation under the 1949 Geneva Conventions 'to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before [their] own courts'.[123] African states are no exception to this phenomenon.[124] The Preamble to the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences recognises the fact that many African states that are parties to the 1949 Geneva Conventions 'have not ensured that their courts can exercise jurisdiction in respect of gross human rights offences on the basis of universal jurisdiction'.[125] It exhorted African states to

> adopt measures, including legislative and administrative, that will ensure that their national courts can exercise universal jurisdiction over gross human rights

[123] Common Art 49/50/129/146 of the Geneva Conventions I–IV, n 7 above. A state may also, common Art 49/50/129/146 continues, 'if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case'. Each High Contracting Party is under a further obligation—by virtue of the same provision—to 'take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article'. See further Art 85 of the First Additional Protocol, n 12 above.

[124] Although consider that, of the 63 countries whose national legislations are recorded in the ICRC study on customary international humanitarian law, 12 of them hail from the African continent: see Henckaerts and Doswald-Beck, *ICRC Study* (Vol II), n 10 above, at 3894–912: see Botswana (1970 Geneva Conventions Act, Section 3(2)); Côte d'Ivoire (1974 Code of Military Penal Procedure, Art 11(1)); Ethiopia (1957 Penal Code, Art 17(a)); Kenya (1968 Geneva Conventions Act, Art 3(2)); Malawi (1967 Geneva Conventions Act, Section 4(1) and (2)); Mauritius (1970 Geneva Conventions Act, Section 3); Niger (1961 Penal Code (as amended), Art 208.8); Nigeria (1960 Geneva Conventions Act, Section 3(1) and (2)); Rwanda (2001 Law Setting Up Gacaca Jurisdictions, Arts 1(a) and 93); Seychelles (1985 Geneva Conventions Act, Section 3(1) and (2)); Uganda (1964 Geneva Conventions Act, Section 1(1) and (2)) and Zimbabwe (1981 Geneva Conventions Act (as amended), Section 3(1) and (3)). Consider further the electronic database on national implementation established by the International Committee of the Red Cross <www.icrc.org/ihl-nat>, which includes entries for Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, Chad, the Comoros, the Congo, Democratic Republic of the Congo, Djibouti, Egypt, Gabon, the Gambia, Ghana, Guinea, Lesotho, Madagascar, Mali, Morocco, Mozambique, Namibia, Senegal, Sierra Leone, South Africa, the Sudan, Swaziland, Togo and Tunisia.

[125] The Cairo-Arusha Principles were adopted after meetings in those cities on 30–31 July 2001 (Cairo) and 18–22 October 2002 (Arusha). A provisional consideration of the electronic database on national implementation (*ibid*) make me wonder whether this is a correct diagnosis of the problem and whether its cause (or causes) lie elsewhere, eg through the lack of political will or because of infrastructural incapacitation. The possible prosecution of Hissein

> offences, including, but not limited to, those contained in the Rome Statute of the International Criminal Court,[126]

although it did not limit its exhortation to such crimes.[127]

That said, the record of practice before the ICC has been much more promising, with African states providing the first four opportunities for the Court to begin its substantive work: in December 2003, President Yoweri Museveni of Uganda referred the first situation to the Court, concerning the Lord's Resistance Army[128]; in April 2004, the prosecutor of the Court received a letter from President Kabila of the Democratic Republic of the Congo requesting an investigation into any crimes within the jurisdiction of the Court committed on the territory of his state since the entry into force of the Rome Statute of the ICC on 1 July 2002.[129] This was followed by the third referral, in January 2005, from the government of the Central African Republic for crimes within the jurisdiction of the Court committed on its territory since the same date.[130] Finally, in March 2005, the Security Council adopted Resolution 1593 (2005), in which it decided to refer the situation in Darfur, in the Sudan, to the ICC.[131] All of these

Habré, who served as President of Chad between 1982 and 1990, seems a lone example in this wilderness: 'An African Pinochet' (2000) *New York Times* 11 February, A30, and Reed Brody, 'The Prosecution of Hissein Habré—An "African Pinochet"' (2001) 35 *New England Law Review* 321. See further Dustin Sharp, 'Prosecutions, Development, and Justice: The Trial of Hissein Habré' (2003) 16 *Harvard Human Rights Journal* 147, and Todd Howland, 'Learning to Make Proactive Human Rights Interventions Effective: The Carter Center and Ethiopia's Office of the Special Prosecutor' (2000) 18 *Wisconsin International Law Journal* 407. Of the 16 countries whose national case law is recorded in the ICRC study on customary international humanitarian law, only one of these—Senegal—comes from Africa: see Henckaerts and Doswald-Beck, *ICRC Study* (Vol II), n 10 above, at 3923 (s 266). This is without prejudice to the fact that other African armed conflicts feature in this section of the study, but not with respect to African jurisdictions: see Belgium (four from Butare Case (2001): Vol II, 3913 (s 249)); France (Munyeshyaka Case (1996): Vol II, 3915 (s 253)) and Switzerland (Musema Case (1997): Vol II, 3923 (s 268) and Niyonteze Case (1999): Vol II, 3924 (s 269)).

[126] Principle 3: *ibid*.

[127] For Principle 4, *ibid*, provided:

> In addition to the crimes that are currently recognized under international law as being subject to universal jurisdiction, certain other crimes that have major adverse economic, social or cultural consequences—such as acts of plunder and gross misappropriation of public resources, trafficking in human beings and serious environmental crimes—should also be granted this status.

[128] See Press Release, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to ICC' (29 January 2004) ICC-20040129-43-En. See further Allen, n 67 above, and Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of First State Referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403.

[129] Press Release, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo' (19 April 2004) ICC-OTP-20040418-50-En.

[130] Press Release, 'Prosecutor Receives Referral Concerning African Republic' (7 January 2005) ICC-OTP-20050107-En.

[131] UNSC Res 1593 (31 March 2005) UN Doc S/Res/1593. See also Press Release, 'Security Council Refers Situation in Darfur to ICC Prosecutor' (1 April 2005) ICC-OTP-20050401-96-En, and Matthew Happold, 'Darfur, the Security Council and the International Criminal Court' (2006) 55 *International and Comparative Law Quarterly* 226.

developments came as a prelude to the first case to be heard before the ICC in November 2006. This concerned the prosecution of the Congolese warlord Thomas Lubanga Dyilo and the conscription of child soldiers into the Forces Patriotiques pour la Libération du Congo (FPLC).[132]

That these practices will be viewed as consonant with 'an end to impunity for the perpetrators of these crimes, and thus to contribute to the prevention of such crimes' is not in doubt,[133] but we might want to question further and determine what is meant by the notion of impunity in this context. What might appear to be 'impunity' to one observer might—to a different observer or, indeed, to the same observer viewing matters from a different angle or at a different point in time—in fact be the realisation of a set of deliberate political arrangements, strategies or negotiated compromises that have not put their exclusive faith in prosecution as the method for 'the prevention of such crimes' (as the statute of the ICC would appear to have it). We have in mind here the practice of amnesties, not mentioned in the Rome Statute of the ICC,[134] but one on which African states from South Africa to Sierra Leone and from Liberia to Algeria have made their controversial mark. This is not to suggest that the spread of amnesties is or has been specific to Africa—recall the experiences of Latin America in this respect[135]—but it is African practice and jurisprudence that has developed a series of

[132] The FPLC is the military wing of the Union des Patriotes Congolais, of which Dyilo was leader: see M Corder, 'Child Soldiers Test Cases Marks War Crimes Court's Debut' (2006) *The Guardian* (London), 10 November, 20. According to the warrant of arrest issued on 10 February 2006 by the Pre-Trial Chamber I of the ICC:

> there are reasonable grounds to believe that from July 2002 to December 2003 members of the FPLC carried out repeated acts of conscription into the FPLC of children under the age of fifteen who were trained in the FPLC training camps of Bule, Centrale, Mandro, Rwampara, Bogoro, Sota and Irumu ... there are reasonable grounds to believe that, during the relevant period, members of the FPLC repeatedly used children under the age of fifteen to participate actively in hostilities in Libi and Mbau in October 2002, in Largu at the beginning of 2003, in Lipri and Bogoro in February and March 2003, in Bunia in May 2003 and Djugu and Mongwalu in June 2003.

See Press Release, 'Issuance of a Warrant of Arrest Against Thomas Lubanga Dyilo' (17 March 2006) ICC-OTP-20060302-126-En, and ICC Newsletter (no 10) (November 2006).

[133] As per the Preamble of the Rome Statute of the ICC, n 73 above.

[134] John Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001.

[135] Particular mention should be made of the amnesty legislation in Argentina (1973 Amnesty Law; 1983 Self-Amnesty Law); Colombia (1991 Amnesty Decree); El Salvador (1987 Law on Amnesty to Achieve National Reconciliation; 1993 General Amnesty Law for Conciliation of Peace); Guatemala (1996 National Reconciliation Law); Peru (1996 Law on Amnesty for Retired Offices of the Armed Force and the Law on Amnesty for Military and Civil Personnel) and Uruguay (1985 Amnesty Law; 1986 Amnesty Law). See further Margaret Popkin, 'Latin American Amnesties in Comparative Perspective' (1999) 13 *Journal of Ethics and International Affairs* 99, and Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843.

high-profile justifications for permissible amnesties at a time when international emphasis had began to favour prosecution.[136]

The main authority on this question is the ruling of the Constitutional Court of South Africa in July 1996 in *Azanian Peoples Organization & Others v President of the Republic of South Africa*.[137] There a constitutional challenge was brought against section 20(7) of the 1995 Promotion of National Unity and Reconciliation Act, the provision that enabled amnesties to be granted in post-apartheid South Africa. The challenge was based in part upon a further constitutional provision (which provided that 'Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum'),[138] but it was also based upon the obligation contained in the Geneva Conventions of 1949 to prosecute war crimes.[139]

In responding to this latter aspect of the challenge,[140] the Constitutional Court doubted whether the Geneva Conventions applied at all 'to the situation in which this country found itself during the years of the conflict'.[141] In other words, it took issue with the proposition that South Africa was engaged in an 'international armed conflict' for the purpose of the Geneva Conventions,[142] as it moved to distinguish between

> the position of perpetrators of acts of violence in the course of war (or other conflicts between states or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign state in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state on the other.[143]

[136] Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime' (1991) 100 *Yale Law Journal* 2537.

[137] *Case CCT 17/96*, n 30 above.

[138] Section 22.

[139] Paragraph 25 of the ruling. See n 30 and n 123 above.

[140] Delivering the judgment of the Court, Mahomed DP expressed in no uncertain terms the proper place of international law in the balance of considerations before him:

> The issue which falls to be determined in this Court is whether s 20(7) of the Act is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorize any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.

Case CCT 17/96, n 30 above, at para 26.

[141] *Ibid* at para 29.

[142] See Boister and Burchill, n 30 above.

[143] *Case CCT 17/96*, n 30 above, at para 28. To be sure, see also the reasoning of the Constitutional Court of Colombia in Constitutional Case No C-225/95 (Judgment of 18 May 1995).

The Court pursued this route in order to invoke Article 6(5) of the Second Additional Protocol—designed for non-international armed conflicts—which provides:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[144]

For the Court, the need for (and purpose of) this distinction was 'obvious',[145] Mahomed DP wrote, as separate legal rules had evolved as was befitting of the context in which they were intended or designed to operate:

> It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatized by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. That is a difficult exercise which the nation within such a state has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity.[146]

In drawing this distinction, it is clear that the Court paid heed to the *function* of the rules before it; it did not train its focus, to the exclusion of all other considerations, on the intricate web of distinctions and definitions that emanate from common Articles 2 and 3 of the 1949 Geneva Conventions.[147]

The Court's position should not be regarded as the end of our analysis, however, but should be treated as the beginning of our understanding

[144] Note that Rule 159 of the ICRC study on customary international humanitarian law specifies that the rule that '[a]t the end of hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to those who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspect of, accused of or sentenced for war crimes' is applicable in non-international armed conflicts, see Henckaerts and Doswald-Beck, *ICRC Study* (Vol I), n 10 above, at 611.

[145] *Case CCT 17/96*, note 30 above, para 31.

[146] *Ibid*.

[147] And happened at the hands of the United States Supreme Court in *Hamdan v Rumsfeld*, 415 F. 3d 33 (2006).

of the jurisprudence on amnesties, because the Court then proceeded to address the *properties* of the amnesties in question—as if to suggest that their validity depended upon their raison d'être and their respective details. So, in this instance, the Court remarked that the 'amnesty contemplated' in South Africa was 'not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia' but one that was 'specifically authorized for the purposes of effecting a constructive transition towards a democratic order'.[148] Furthermore, the Court emphasised the democratic underpinnings of the arrangement for amnesties in South Africa, together with the fact that these amnesties had to be earned on the basis of 'a full disclosure of facts'.[149] As far as the Court was concerned, the lawfulness of amnesties was to be judged on the basis of a balance of relevant and competing considerations; it was not a matter of absolute, categorical or non-negotiable principle.

Following the lead of the Constitutional Court of South Africa, we would need to enquire into the background of a given peace of amnesty legislation and ascertain whether its political and legal validation derives from a source other than the legislation itself, in addition to the breadth or scope of its coverage. Here we might find Algeria's 1999 Law of National Reconciliation instructive, since it came to life on the back of a popular referendum initiated by President Abdelaziz Bouteflika.[150] However, in Sierra Leone, it has been demonstrated that *even with popular or political support*,[151] amnesties can encounter legal limitations not envisaged or not concretised at the time of their conclusion. Article 10 of the Statute of the Special Court of Sierra Leone provided:

> An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in Articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the 1949

[148] *Case CCT 17/96*, n 30 above, para 32.

[149] *Ibid*.

[150] See Nina HB Jorgensen, 'The Scope and Effect of the Algerian Law Relating to the Reestablishment of Civil Concord' (2000) 13 *Leiden Journal of International Law* 681. Article 3 of the Law on National Reconciliation provided immunity from prosecution for those:

> who [have] not committed or participated in the commission of one of the offences set forth in Art 87b of the Penal Code [ie acts qualifying as 'terrorist or subversive'], leading to death or permanent disability, rape, or who has not used explosives in public places or places frequented by the public and who, within six months of the date of promulgation of this law, has advised the competent authorities that he will stop any terrorist or subversive activity and has given himself up to the competent authorities.

For subsequent developments, consider 'Algerians to Free Jailed Islamists under Amnesty' (2006) *New York Times*, 6 March, A5, and Craig Smith, 'Many Algerians Are Not Reconciled by Amnesty Law' (2006) *New York Times* 28 June, A3.

[151] C Johnson, 'Sierra Leone Rebels Back Peace Accord' (1999) *Irish Times* (Dublin) 9 July, 1.

> Geneva Conventions and of the Second Additional Protocol, and of other serious violations of international humanitarian law] shall not be a bar to prosecution.[152]

We would do well to recall the words of United Nations Secretary-General Kofi Annan in his report on the establishment of the Special Court:

> While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.
>
> At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in Article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[153]

VI. CONCLUSION

Despite all of the 'silent' or 'forgotten' wars waged on the African continent, it is clear from this chapter that African states have made significant and often decisive contributions to the understanding, evolution and application of international humanitarian law. It is a record that marks an obvious break with the past.[154]

Our assessments have taken us across a broad cross-section of concerns for the law. We have considered questions relating to the classification of armed conflicts, participation, the means (and methods) of warfare, prosecutions and amnesties—and, as we have done so, it has become apparent how African states have secured their accomplishments. Not all of these contributions have been for the good of the law, however. In the context of our discussion of mercenaries, we discovered how the charged political

[152] See further *Prosecutor v Morris Kallon* (13 March 2004) Case No SCSL-2004-15-AR72 (E) and *Prosecutor v Brima Bazzy Kamara* (13 March 2004) Case No SCSL-2004-16-AR72 (E); *Prosecutor v Allieu Kondewa* (25 May 2004) Case No SCSL-2004-14-AR72 (E); and Sarah Williams, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone' (2005) 5 *Human Rights Law Review* 271.

[153] United Nations Secretary-General, Report on the Establishment of A Special Court for Sierra Leone (4 October 2000) UN Doc S/2000/915, paras 22, 23. The Security Council noted this point in its preamble to Security Council Resolution 1315 (4 August 2000). See, however, the exact stipulation of Art 10 of the Court's Statute: *ibid*.

[154] David Killingray, '"A Swift Agent of Government": Air Power in British Colonial Africa, 1916–1939' (1984) 25 *Journal of African History* 429.

environment of the Diplomatic Conference in Geneva did not provide the best of all possible legislative outcomes. African states have also proved no different and no more efficient than other states in the enforcement of this law before their national courts. Nevertheless, across the full range of topics touched upon in this chapter, a rich vein of material has been explored and its gems have been brought to light. Whether African states have acted directly or indirectly, singularly or in concert, their recent impact upon international humanitarian law cannot be in much doubt. The sheer range of the practices amalgamated here—together with the volume of practice that remains untapped and undigested—deserves the seriousness of study which it has too frequently been denied.

Part II

Governance, Sovereignty and Development

6

African Constitutionalism: Forging New Models for Multi-ethnic Governance and Self-Determination

J PETER PHAM

I. INTRODUCTION

A LITTLE MORE THAN a decade ago, the study of African constitutionalism was a thoroughly unrewarding undertaking. Before 1990, all but a handful of the continent's states were ruled by an assortment of one-party and other autocratic regimes.[1] Up to then, with the exception of the state Presidents of the apartheid governments in South Africa and those at the helm of Liberia's various oligarchic democracies,[2] only one African leader, Aden Abdulle Osman of Somalia (in 1967), had ever peacefully relinquished his office following an electoral defeat and only three—Léopold Sédar Senghor of Senegal (in 1980), Ahmadou Ahidjo of Cameroon (in 1982) and Julius Nyerere of Tanzania (in 1985)—had retired voluntarily (although Ahidjo, after apparently undergoing a change of heart, subsequently tried to shoot his way back into office). By the end of the decade, however, virtually all sub-Saharan African states—even those that had collapsed or were on the verge of collapse—opened themselves to what Jean-Germain Gros has termed the 'first phase of democratization',[3] the formal opening, however tentative, of the political system to competition. In doing so, however, the states also faced new challenges as tensions long repressed in their multi-ethnic societies were brought into the open. Similar phenomena have, of course, been observed in other areas of the world.

[1] See generally Larry Diamond, *Prospects for Democratic Development in Africa* (Stanford, CA, Hoover Institution, 1997).

[2] See Jeremy Levitt, *The Evolution of Deadly Conflict in Liberia: From 'Paternaltarianism' to State Collapse* (Durham, NC, Carolina Academic Press, 2005) 5, defining 'oligarchic democracy' as a regime that is 'arguably internally democratic but ethnically exclusive'.

[3] Jean-Germain Gros, *Democratization in Late Twentieth-Century Africa: Coping with Uncertainty* (Westport, CT, Greenwood Press, 1998) 2.

This chapter provides a concise snapshot of some of the most creative constitutional arrangements that African states have designed to meet the monumental task of democratic governance in complex and largely multi-ethnic polities. Each of the case studies selected addresses a particular challenge of governance. The chapter also briefly explores another recent trend in African constitutionalism: the role of regional and sub-regional groupings of states as guarantors of the adherence of individual member states to democratic governance and their own constitutional order. Overall, the emerging constitutional architecture may well prove to be Africa's signal contribution to twenty-first-century international law, by pointing the way to juridical solutions to often daunting national and communitarian conflicts.

II. CRISIS OF THE COLONIAL JURIDICAL STATE

One of the little (but not inconsequential) ironies of contemporary international politics is that while the continent is often portrayed as chaotic—a 'frontier of anarchy'[4] and the birthplace of 'the coming chaos',[5] to recall two of Robert Kaplan's provocative titles—Africa is actually remarkable for having retained essentially unchanged the boundaries of the 1880s, a feat that international society has repeated nowhere else, even in Latin America, where the international juridical principle of *uti possidetis* originated in the affirmation of the boundaries inherited by the newly independent states from the Spanish empire.[6] In fact, Africa's newest internationally recognised sovereign state, Eritrea, which achieved its independence from Ethiopia following the victory of the Eritrean nationalist resistance (then allied with a coalition of Ethiopian insurgents) over the former Ethiopian regime and a near-unanimous vote for an independence plebiscite in 1993, is the restoration of a colonial-era political unit that had been merged with Ethiopia in 1952, rather than an entirely new entity.[7]

The challenge for African states since independence has been how to refashion what Bertrand Badie has called '*l'état importé*'[8] into an

[4] Robert Kaplan, *The Ends of the Earth: From Togo to Turkmenistan, From Iran to Cambodia—A Journey to the Frontiers of Anarchy* (New York, Random House, 1996).

[5] Robert Kaplan, 'The Coming Anarchy: How Scarcity, Crime, Overpopulation and Disease are Rapidly Destroying the Social Fabric of Our Planet' (1994) *Atlantic Monthly* (Washington, DC), February, 44–76.

[6] See generally Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal, McGill–Queen's University Press, 2002).

[7] See generally Edmond Keller, 'Remaking the Ethiopian State' in I William Zartman (ed), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Boulder, CO, Lynne Rienner, 1995) 130–34.

[8] Bertrand Badie, *L'état importé. L'occidentalisation de l'ordre politique* (Paris, Fayard, 1992).

arrangement that is not only stable, but will also be accepted by its citizens as legitimate, as well as sufficiently performing the basic functions of statehood: control over national territory; oversight of the natural resources; effective and rational collection of revenue; maintenance of adequate national infrastructure; and capacity to govern and maintain law and order, including respect for basic human rights. A cursory glance at any major newspaper, however, reveals that in Africa today, the 'imported state' is in trouble.

At the centre of this crisis is the contrived and artificial nature of the African state, coupled with the surreal expectation that post-independence leaders should somehow fashion nations out of heterogeneous groups of peoples and cultures. A thumbnail definition of a nation has been given as a

> named human population sharing a historic territory, common myths and historical memories, a mass, public culture, a common economy and common legal rights and duties for all members.[9]

If that is the case, then there is no such chimera as the 'Congolese nation'—or any other such sub-Saharan 'nationality' for that matter. Consequently, as the jurist Makau Mutua has argued this point in moral and juridical terms:

> The post-colonial state, the uncritical successor of the colonial state, is doomed because it lacks basic moral legitimacy. Its normative and territorial construction on the African colonial state, itself a legal and moral nullity, is the fundamental reason for its failure … At independence, the West decolonized the colonial state, not the African peoples subject to it. In other words, the right of self-determination was exercised not by victims of colonization but their victimizers, the elites who control the international state system.[10]

While Africa has a rich social, cultural and political history, modern African states are not rooted in this past. The present-day borders and national compositions of African states are colonial legacies, emerging directly from the often arbitrary ways that the great powers delineated their respective spheres of influence during the late nineteenth and early twentieth centuries. That keen observer and consummate practitioner of *Realpolitik* Henry Kissinger has elaborated on the consequences of this colonial past:

> In Africa, borders not only follow the demarcations *between* the spheres of influence of the European powers, as in Asia; they also reflect the administrative subdivisions *within* each colonial area. In East and West Africa, Britain and

[9] Anthony Smith, *National Identity* (London, Penguin, 1991) 43.

[10] Makau Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 *Michigan Journal of International Law* 1113, 1116.

> France governed colonies with long coastlines. Hence it proved efficient to divide these colonies into a multiplicity of administrative units, each with its own outlet to the sea, which later became independent states. On the other hand, in Central Africa, tiny Belgium governed a region nearly as large as the British and French possessions without, however, any significant coastline. Possessing only a very short outlet to the sea at the mouth of the Congo River, this vast territory was ruled by Belgium as a single unit, which later emerged as a single state with an explosive ethnic mixture.
>
> Most importantly, the administrative borders in each colony were drawn without regard to ethnic or tribal identities; indeed, the colonial powers often found it useful to divide up ethnic or tribal groups in order to complicate the emergence of a unified opposition to imperial rule.[11]

While the struggle, whether peaceful or violent, towards independence from colonial rule united disparate groups in a common cause, this was rarely sufficient to form a cohesive unifying national identity. The challenge was even greater in some cases, such as Sierra Leone, where the country was created by amalgamating two separate colonial-era political units, the Crown Colony of Freetown and the Protectorate of Sierra Leone, each of which came to independence with a distinct colonial experience grafted upon more ancient differences.[12] The survival of these artifices has not been contingent so much upon internal legitimacy—by and large, non-existent—but due to international recognition derived from the right of self-determination granted to the colonial state and reinforced by the logic of the Cold War. Absent the Cold War or neo-colonial diplomatic, financial and military guarantees to the client regimes of African states, ethnic plurality and, in some cases, state duality (where national groups were split into separate states by the colonial cartographers) finally caught up with sub-Saharan Africa and unleashed tensions long repressed by proxy regimes reinforced by the superpowers. The consequences of the failure of post-colonial states (and their highly arbitrary borders) to forge national identities and loyalties have been devastating. Without any organic ties such as shared language, culture and history binding them to a historic nation-state,[13] many post-independence rulers pillaged national resources at will with their cronies—and, by extension, members of their ethnic group—and resorted to massive human rights abuses to prevent

[11] Henry Kissinger, *Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century* (New York, Simon & Schuster, 2001) 201–3.

[12] See especially J Peter Pham, *The Sierra Leonean Tragedy: History and Global Dimensions* (Hauppage, NY, Nova Science, 2006).

[13] Smith, n 9 above, at 69–70:

> It is clear that nations are indeed modern phenomena in so far as: they require a unified legal code of common rights and duties, with citizenship rights where the nation is independent; they are based on a unified economy with a single division of labor, and mobility

protests from those excluded from the spoils, which became the quasi-exclusive preserve of the new governing cliques as well as the state and corporate interests of the former colonial rulers.[14]

Despite the damning evidence of the wholesale failure of the juridical states they inherited from the former colonial patrons, African elites have persisted in their canonisation of the status quo. The precursor of the present African Union (AU), the Organization of African Unity (OAU), formally declared the received borders a 'tangible reality' and required that its member governments pledge themselves 'to respect the frontiers existing on their achievement of national independence'.[15] This preservation of arbitrary territorial divisions has, more often than not, benefited illegitimate and, often enough, incompetent rulers, while depriving the African masses of civil and political liberties that ought to have been the fruits of independence, to say nothing of the minimal condition sine qua non of a tolerable standard of living. Consequently, a number of scholars, such as Ali Mazrui, have argued that with or without the development of peaceful means for true self-determination that redresses the wrongs of colonial cartographers, the break-up of the continent's colonial-era states and the re-alignment of their frontiers will occur sooner or later; the only question is whether that process requires the spilling of more blood or whether it can be managed by statesmen with the courage and vision to face reality and defy conventions.[16]

Although little attention has been paid to the phenomenon, more recently Africa's statesmen and jurists have sought politically and legally to redress the crisis of the legitimacy and functionality of the post-colonial state. The resulting juridical artifices not only represent

> of goods and persons throughout the national territory; they need a fairly compact territory, preferably with 'natural' defensible frontiers, in a world of similar compact nations; they require a single 'political culture' and public, mass education and media system, to socialize future generations to be 'citizens' of the new nation … If the nation seems in many ways modern, it is also deep-rooted. The nationalists were guilty of telescoping history, but they were not altogether mistaken. They grasped that if a nation, however modern, is to survive in this modern world, it must do so on two levels: the socio-political and the cultural-psychological. What, after all, is the *raison d'être* of any *nation* … if it is not also the cultivation of its unique (or allegedly unique) culture values? Ethnic distinctiveness remains a *sine qua non* of the nation, and that means shared ancestry myths, common historical memories, unique cultural markers, and a sense of difference, if not election—all elements that marked off ethnic communities in pre-modern eras. In the modern nation they must be preserved, indeed cultivated, if the nation is not to become invisible.

[14] See generally Jean-François Médard, 'The Underdeveloped State in Tropical Africa: Political Clientalism or Neo-patriomonialism' in Christopher Clapham (ed), *Private Patronage and Public Power Political Clientalism in Modern States* (London, Francis Pinter, 1982).

[15] OAU, 'Resolution on Border Disputes' (17–21 September 1964), in Ian Brownlie (ed), *Basic Documents on African Affairs* (Oxford, Clarendon, 1971) 364.

[16] See Ali Mazrui, 'The Bondage of Boundaries' (1993) *The Economist* (London), 11 September, 28.

innovative alternative approaches to the colonial balkanisation of Africa into ahistorical units, but also present constitutional models that may find application in other parts of the world where the question of the multi-ethnic state and self-determination threaten the state-building enterprise, including the regions of Asia, the Middle East and Latin America, as well as parts of Europe itself.

III. BUILDING A STATE OUT OF NATIONS: THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

Depending upon how one views it, Ethiopia is either Africa's oldest or second oldest state.[17] In either case, despite its ancient roots, the country's political history and development was affected by the Western colonial enterprise, albeit in a manner different from that of other pre-colonial African polities. Faced with the pressures of the European empire-builders, the Ethiopian monarchy under Menelik II (Nagusä Nägäs, 1889–1913) systematically expanded its boundaries, incorporating previously independent communities with widely differing religious, ethnic and political backgrounds into a centralised imperial state. While the regime in power at any given moment in the country's subsequent history has varied considerably—as have the constitutional documents under which the successive governments theoretically laboured—from Haile Selassie's 'divinely sanctioned' imperial rule to the socialist-inspired 'People's Democratic Republic' of the Derg, the monolithic contours of a centralised unitary state have remained constant.

Following the flight of Mengistu Hailemariam and the collapse of the Derg in 1991 after a protracted civil war, the Eritrean People's Liberation Front (EPLF) emerged victorious in Eritrea, while the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of various groups headed by the Tigrayan People's Liberation Front (TPLF), predominated in the rest of what was then Ethiopian territory. Following a referendum on 23–25 April 1993, the EPLF led the former Italian colony—which was only awarded in federation to Ethiopia in 1952 and unilaterally annexed and integrated by the latter 10 years later—to independence. An EPRDF-led transitional government was set up in Addis Ababa for the balance of the old country and tasked, among other things, with preparing a new constitution.[18]

[17] See generally Richard Pankhurst, *The Ethiopians: A History* (Oxford, Blackwell, 2001). While Liberia, which declared its independence in 1847, is considered the first modern independent state in Africa, Ethiopia, which was never colonised, has enjoyed a continuous independent political history since biblical times.

[18] See generally Kinfe Abraham, *Ethiopia from Empire to Federation* (Addis Ababa, Ethiopian International Institute for Peace and Development, 2001) 453–92.

A 547-member constituent assembly was elected in early June 1994 and, after extensive debate and a number of amendments, approved the 'Constitution of the Federal Democratic Republic of Ethiopia' on 8 December 1994.[19]

Perhaps the most salient feature of the Constitution is its privileging of the ethnic issue from the very beginning. The document's preamble opens with 'We, the Nations, Nationalities and Peoples of Ethiopia' rather than the now conventional 'We the People.' Nor is this a mere rhetorical device, as is made clear by Chapter 2 of the charter, 'Fundamental Principles of the Constitution', which declares 'all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia' for whom the Constitution 'is an expression of their sovereignty' (Article 8). Interestingly, the definition for a distinct status under the Constitution is not that different from the sociological definition of a 'nation' cited earlier:

> A 'Nation, Nationality or People' for the purpose of this Constitution is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory. (Article 39, para 5)

The Constitution goes on to specify that the federal structure thus brought into being shall comprise of states 'delimited on the basis of settlement patterns, language, identity and consent of the people concerned' (Article 46). As a starting point (Article 47), nine ethnically based federal states (*kililoch*)—Tigray, Afar, Amhara, Oromia, Somali, Benishangul/Gumuz, 'Southern Nations, Nationalities and People', 'Gambella Peoples' and 'Harari People'—as well two self-governing administrations (*astedaderoch*)—Addis Ababa and Dire Dawa—are constituted. The right of 'any Nation, Nationality or People to form its own state' is affirmed and can be exercised following a prescribed procedure.[20] The Constitution also affirms the right of secession as an inherent part of the 'unconditional right to self-determination' enjoyed by 'every Nation, Nationality

[19] Constitution of the Federal Democratic Republic of Ethiopia (8 December 1994), in (1995) 1 *Negarit Gazeta* 55.

[20] *Ibid*, Art 48, para 3:

> When the demand for statehood has been approved by a two-thirds majority of the members of the Council of the Nation, Nationality or People concerned, and the demand is presented in writing to the State Council; when the Council that received the demand has organised a referendum within one year to be held in the Nation, Nationality or People that made the demand; when the demand for statehood is supported by a majority vote of the Nation, Nationality or People in the referendum; when the State Council will have transferred its power to the Nation, Nationality or People that made the demand; and when the new state created by the referendum, without any need for application, directly becomes a member of the Federal Democratic Republic of Ethiopia.

and People in Ethiopia' (Article 39) and provides the mechanisms for exercising that right.[21]

Short of secession, the constitution affirms that 'every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government' (Article 39). Within the 'identifiable, predominantly contiguous territory' that its individual members inhabit, this right is exercised through the establishment of local institutions of government. On the state and federal levels, the right is guaranteed through the principle of 'equitable representation'. At the federal level, for instance, the Constitution requires that of the maximum 550 members of the House of People's Representatives at least 20 seats must be reserved for 'minority Nationalities and Peoples' in accordance with particulars to be legislated by statute (Article 54). Furthermore, additional provision may be made for minority representation. The upper chamber of Parliament, the House of Federation, is composed of at least one representative from each recognised 'Nation, Nationality and People', with 'one additional representative for each one million of its population' (Article 61).

To say that the introduction of this model aroused misgivings considerably understates the reaction to this novel approach to challenges of ethnicity.[22] But it has to be conceded that, whatever the subsequent shortcomings of the government of Prime Minister Meles Zenawi, the reorganisation of the centralised Ethiopian state into a federal arrangement occurred with relatively little economic or political disruption, even as large numbers of civil servants were transferred from Addis Ababa to regional centres to staff the new state governments.[23] As is the case with the other models considered later, it is too early to declare the success (or failure) of the ethnic federal system in Ethiopia. However, it is not far-fetched to propose, as one Ethiopian scholar does, that

> recognition of the rights, obligations and respect for the language, culture and identity of nations is the first difficult but unavoidable step toward non-ethnic politicisation and a multiparty system.[24]

[21] *Ibid*, Art 39, para 4:

> The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect: (a) when a demand for secession has been approved by a two-thirds majority of the members of the legislative council of the Nation, Nationality, or People concerned; (b) when the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession; (c) when the demand for secession is supported by a majority vote in the referendum; (d) when the Federal Government will have transferred its powers to the Council of the Nation, Nationality, or People who has voted to secede; and (e) when the division of assets is effected in a manner prescribed by law.

[22] See generally Richard Joseph, 'Oldspeak vs Newspeak' (1998) 9 *Journal of Democracy* 55–61.

[23] See especially Paul B Henze, 'A Political Success Story' (1998) 9 *Journal of Democracy* 40–54.

[24] Abraham, n 18 above, at 517.

IV. REPRESENTING TRADITIONAL AUTHORITIES AND LEGITIMACIES: THE HOUSE OF ELDERS FOR THE REPUBLIC OF SOMALILAND

Although the sovereignty it reasserted has yet to be formally recognised by any other state, 15 years have passed since the Republic of Somaliland (the north-western region of the former Somalia, bordering on Ethiopia and Djibouti) proclaimed the dissolution of its voluntary 1960 union with what was once the Somali Democratic Republic. The modern political history of Somaliland begins with the establishment, in 1884, of the British Somaliland Protectorate, which, except for a brief Italian occupation during the Second World War, lasted until 26 June 1960, when the territory received its independence. Notification of the independence was duly communicated to the United Nations, and some 35 members accorded the new state diplomatic recognition. Several days later, the Italian-administered UN trust territory of Somalia received its independence. The two states then entered into a hasty union which, a number of legal scholars have argued, fell short of the minimal standards for legal validity[25] and which the Somalilanders quickly regretted.

By 1982, discontent over discrimination and repression by the dictatorial regime of General Mohamed Siyaad Barre led to the formation of a secessionist Somali National Movement (SNM) in Somaliland. The regime responded with escalating abuses, which culminated in a 1988 campaign of indiscriminate bombings—over 90 per cent of Hargeisa, the Somaliland capital, and 70 per cent of Bur'o, the second largest city, were destroyed. The Barre regime also conducted mass executions. Out of an estimated population of just under 3 million, over 50,000 people were killed and another million were displaced.[26] The brutality of the repression contributed to heightening the SNM's popular support. By early 1991, when the Barre regime was forced to flee from Mogadishu, the liberation forces were in control of the territory of Somaliland. Remarkably, following the SNM's victory, responsibility for the shape of the post-conflict settlement, as it had in the pre-colonial era, fell to traditional elders (*Guurti*). A meeting convened by the SNM in Berbera proclaimed an end to the conflict and called for a conference of elders to meet in Bur'o in two months' time. In the meantime, the elders were to hold consultations in their own communities. The result was the gathering in Bur'o in May of SNM leaders and representatives of civil society and the diaspora as well as the *Garaaddo*, *Suldaanno* and *Ugaasyo* (titled traditional leaders) of the

[25] See especially Anthony Carroll and Balakrishnan Rajagopal, 'The Case for an Independent Somaliland' (1993) 8 *American University Journal of Law and Politics* 662.

[26] *Rebuilding Somaliland: Issues and Possibilities* (Lawrenceville, War-torn Societies Project, 2005) 13.

principal Somaliland clans, who signed the 18 May 1991 declaration of Somaliland's reassumed independence within the borders inherited from the British Protectorate.

After a series of provisional arrangements, a national referendum on 31 May 2001 approved a definitive constitution[27] with an overwhelming 97 per cent majority. Under the terms of this charter, when President Mohamed Haji Ibrahim Egal died in May of the next year while on a visit to South Africa, he was succeeded by Vice-president Dahir Rayale Kahin, a member of the minority Gadabursi clan rather than of the predominant Isaaq clan. In December 2002, elections were held for 379 seats on 26 district councils, with the incumbent President's Union of Democrats (UDUB) Party winning 41 per cent of the votes, and two opposition groups, Kulmiye ('Solidarity') and the Party of Justice and Welfare (UCID) making strong showings, with 19 and 11 per cent respectively. The results of the March 2003 presidential election were much closer, with President Rayale defeating his closest challenger, the standard-bearer of Kulmiye, by a mere 80 votes out of nearly 500,000 ballots cast (the opposition peacefully conceded the race after it failed to win a court challenge). The September 2005 parliamentary election to fill the 82 seats in the House of Representatives concluded with UDUB winning 33 seats, Kulmiye 28 seats, and UCID 21 seats—resulting in the almost singular case in sub-Saharan Africa of an executive President who does not enjoy a parliamentary majority. Encouraged by positive international and African evaluation of these developments, Somaliland formally applied for admission to the African Union in December 2005.

While the arguments for Somaliland's case for sovereign independence—including those based upon the broadly accepted 'Montevideo criteria'[28] (permanent population, defined territory, government and the capacity to enter into relations with other states) and the 'declaratory school'[29] (which holds, in line with the Montevideo Convention, that 'the political existence of the state is independent of recognition by the other states'[30])—are beyond the scope of this chapter,[31] what is relevant

[27] The Constitution of the Republic of Somaliland (2001) <http://www.somalilandforum.com/somaliland/constitution/revised_constitution.htm> (accessed 1 September 2006).

[28] Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934), in Charles Bevans (ed), *Treaties and Other International Agreements of the United States of America 1776–1949*, vol 3 (Washington, DC, United States Government Printing Office, 1969) 881.

[29] See generally Richard Caplan, *Europe and the Recognition of New States in Yugoslavia* (New York, Cambridge University Press, 2005).

[30] Convention on the Rights and Duties of States, n 28 above, Art 3.

[31] See generally Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (Leiden, Martinus Nijhoff, 2004).

to the discussion of constitutional models is the role accorded within the Somaliland polity for traditional authorities and legitimacies.

After an understandably fitful start to its reclaimed sovereignty, a Somaliland national accord (*axdi qaran*) was reached at the Grand Boorame Conference, which met between January and May 1993. Composed of 150 *Guurti* along with hundreds of other delegates and observers from throughout Somaliland, the conference permitted the SNM to hand over authority to a civilian administration led by Mohamed Haji Ibrahim Egal. The institutional arrangements agreed to at the conference, which were confirmed with minor modifications by a subsequent consultative conference that met in Hargeisa in February 1997 to re-elect President Egal, included a bicameral legislature which balanced an elected legislation-initiating House of Representatives and a conflict-resolving House of Elders (*Guurti*), whose members are vested with traditional moral authority to consult, deliberate and mediate in a society where the influence of kinship on personal and communal identity is still pervasive. While the majority of Somalilanders come from the Isaq clan, there is also significant representation of the Dir (Gadabursi and 'Ise), Darod (Warsangeli and Dulbahante) and other clans. The imaginative innovation of the shape of the legislature represents a kind of compromise between clan-based social patterns and the exigencies of modern administration and democratic governance.[32]

The Constitution devotes a detailed section exclusively to the House of Elders (Articles 57–73), whose primary responsibility is to review legislation passed by the House of Representatives before it is forwarded to the President as well as having 'special responsibility for passing laws relating to religion, traditions, and security' (Article 57). All legislation regarding the latter issues must pass the House of Elders, while, with the exception of finance bills, all other legislation can be sent back to the House of Representatives only 'with written reasons of its views' (Article 61). To be eligible for election to the body, the candidate must, in addition to fulfilling the criteria of eligibility for a prospective member of the House of Representatives,[33] be at least 45 years of age and 'a person who has a

[32] See especially IM Lewis, *A Modern History of the Somali*, 4th edn (Oxford, James Currey, 2002) 282–6.

[33] The Constitution of the Republic of Somaliland, n 27 above, Art 41:

> Any person who is standing for election to the House of Representatives must fulfil the following conditions: (1) He must be a Muslim and must behave in accordance with the Islamic religion; (2) He must be a citizen who is not younger than 35 (thirty five) years; (3) He must be physically and mentally able to fulfil his duties; (4) He must be educated to, at least, secondary school level or equivalent; (5) He must not have been subject of a final sentence for a criminal offence by a court within the preceding five years; (6) He must be a responsible person with appropriate character and behaviour; (7) No employee of the state shall be eligible for candidacy unless he has tendered his resignation from office prior to a period determined by law. Such resignation shall be accepted.

good knowledge of the religion or an elder who is versed in the traditions' (Article 59). In addition to the 82 elected members, the Upper House also has a number of non-voting members, including 'five members to be selected by the President on the basis of their special significance to the nation', any person who has served as Speaker of either House of Parliament and all former Presidents and Vice Presidents of the Republic (Article 60). Members of the House of Elders serve six-year terms of office (members of the House of Representatives enjoy a five-year term) and are elected according to a manner to be determined by statute (Article 58).

Certainly the retention of the House of Elders ensures that clans that lose in the multi-party democratic electoral process due to their demographic minority status retain representation in the national legislature, giving them a long-lasting stake in the governance of the nation. While the long-term prospects of this institution remain to be seen, its existence explicitly recognises the legitimacy that can accrue to new constitutional arrangements by co-opting traditional leaders and clan-based allegiances. A number of observers have already acknowledged that the Upper House of Parliament comprising traditional elders 'has proved critical in resolving crises and legitimizing the government during difficult periods'.[34]

V. AFFIRMING THE RIGHT TO SECEDE PEACEFULLY: THE NORTH–SOUTH PEACE AGREEMENT IN SUDAN

It was previously noted that the Ethiopian Constitution of 1994 contained provisions for secession from the federal republic, and the case of Somaliland's withdrawal from its union with Somalia would actually be the reconstitution of frontiers existent at the time of the 'achievement of national independence' in accord with the 1964 Declaration of the OAU at its Cairo summit. (While Eritrea was annexed to Ethiopia before achieving its independence, its internationally recognised frontiers are those of the colonial era; similarly, Somaliland's borders are a restoration of what it possessed both as a colonial entity and as a briefly independent separate state.) However, a case may arise in the coming years that will challenge head on the state practice in Africa of sacrosanct national borders.

Amid ongoing discussions of whether the violence in the Darfur region of western Sudan constituted a genocide or not and what, if any, sanctions should be imposed upon the government of the country, it was all but forgotten that at the very moment that 'the largest humanitarian disaster

[34] International Crisis Group, 'Somaliland: Time for African Union Leadership' in *Africa Report 110* (Brussels, 23 May 2006) 7.

in the world'[35] was occurring, the officially Islamist, 'Arab'-dominated government in Khartoum signed a pact with African rebels in the south to end that conflict.[36] The 'Comprehensive Peace Agreement', a collection of agreements, including updates to previous Protocols, was signed in Naivasha, Kenya, in early 2005 after more than two years of negotiations, mediated by the United States, Norway, Italy and African Member States of the regional Inter-Governmental Authority on Development (IGAD). Together the agreements provide for sharing political power and oil revenue and, most significantly, a future referendum allowing southerners to determine whether to remain a part of Sudan or to secede. Thus, over 20 years of conflict that had resulted in almost 2 million deaths was brought to an end.

Although African peace agreements have a notoriously short shelf life and it remains to be seen whether the two sides in the Sudanese conflict will honour their commitments, the Naivasha accord has already withstood its first major test, the death in a helicopter crash on 30 July 2005 of the charismatic leader of the southern Sudan People's Liberation Movement/Army, John Garang, who had become Vice-president of Sudan through the agreement. Furthermore, the accord signals the possibility that Sudan's international borders might be altered and a new map of the continent drawn up, permitting the creation of a new state out of the current Sudan. Even the possibility of such a reconsideration is revolutionary given the 'conservative' nature of African state systems and their ruling elites who are its primary beneficiaries, as well as other interested parties, including international state and financial institutions, multi-national corporate interests and other multi-ethnic states elsewhere.

One of the agreements in the 'Comprehensive Peace Agreement', the 'Implementation Modalities of the Protocol on Power Sharing, dated 26th May 2004',[37] provides technical details for both national reconciliation and for the establishment of a largely autonomous regional 'Government of Southern Sudan', including provisions for the demarcation of the north–south border and the establishment of a Southern Sudan Constitutional Drafting Committee. Another accord, the 'Agreement on Permanent

[35] US Ambassador to the United Nations John Danforth, quoted in 'The UN's Hollow Threat' (2004) *The Economist* (London), 20 September, 20 <http://www.economist.com/agenda/displaystory.cfm?story_id=3217021> (accessed 1 September 2006).

[36] Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on the Implementation Modalities of the Protocols and Agreements (agreed 31 December 2004, signed 9 January 2005) <http://www.usip.org/library/pa/sudan/cpa01092005/implementation_coversheet.pdf> (accessed 1 September 2006).

[37] Implementation Modalities of the Protocol on Power Sharing, dated 26th May 2004 (adopted 31 December 2004) <http://www.usip.org/library/pa/sudan/cpa01092005/implementation_agreement.pdf> (accessed 1 September 2006).

Ceasefire and Security Arrangements Implementation Modalities',[38] provides security guarantees during an interim period when a negotiated 'Government of National Unity' will govern the entire country.

All of these documents appeal, in turn, to the 'Machakos Protocol', signed by the two parties under IGAD auspices on 20 July 2002.[39] That document acknowledged 'that the people of South Sudan have the right to self-determination, inter alia, through a referendum to determine their future status' (Article 1.3) and that

> at the end of the six year Interim Period there shall be an internationally monitored referendum, organised jointly by the Government of Sudan and the Sudan People's Liberation Movement/Army, for the people of South Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement; or to vote for secession. (Article 2.5)

Should this provision be honoured, and the vote result in favour of secession, the consequences may result in the re-creation not just of the Sudanese state, but also of the African continent, as it would represent the first time that the hitherto sacrosanct 'frontiers existing on their achievement of national independence'[40] had been redrawn.

VI. SUPRANATIONAL GUARANTORS: THE ECOWAS PROTOCOL ON DEMOCRACY AND GOOD GOVERNANCE, THE AU PEACE AND SECURITY PROTOCOL AND OTHER NASCENT TRANSNATIONAL INSTITUTIONS

The Economic Community of West African States (ECOWAS) was established in 1975 with the mandate of promoting co-operation between the member states[41] and facilitating the integration of their economic, social and cultural sectors in order eventually to form a monetary and economic union. This mandate was strengthened in the 1993 Treaty of Cotonou,[42] which updated the regional body's structure and operations

[38] Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities between the Government of Sudan and the Sudan People's Liberation Movement/Army during the Pre-Interim and Interim Period (adopted 31 December 2004) <http://www.usip.org/library/pa/sudan/cpa01092005/ceasefire_agreement.pdf> (accessed 1 September 2006).

[39] Agreed Text on the Preamble, Principles, and the Transition Process between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Army (signed 20 July 2002) <http://www.usip.org/library/pa/sudan/sudan_machakos_07202002.html> (accessed 1 September 2006).

[40] OAU, 'Resolution on Border Disputes', n 15 above.

[41] Currently there are 15 member states: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal, and Togo.

[42] Economic Community of West African States Treaty (signed 24 July 1993), <http://www.ecowas.int/> (accessed 1 September 2006).

in order to accelerate the process of economic integration and strengthen political ties.

The commitment to political co-ordination was preceded by the adoption of two defence-related protocols, the Protocol on Non-aggression of 1978 and the Protocol Relating to Mutual Assistance of Defence of 1981, as well as by the Declaration of Political Principles[43] by the ECOWAS Authority of Heads of State and Government in 1991. The defence protocols envisioned the organisation's member states intervening militarily, even within the borders of another member, in cases of armed conflict threatening the peace and security of the region. Alongside the right of 'humanitarian intervention', the principle of collective regional security was first invoked to justify ECOWAS's intervention from 1990 to 1997 in the Liberian civil war.[44] The Liberian intervention led to operations in Sierra Leone (1997–2000),[45] which included acting on the request of the OAU to employ force to reverse a coup against President Ahmad Tejan Kabbah—an event that 'marked the first time a regional organisation requested intervention in a member state to end human suffering and promote democracy' and 'arguably authorised another regional organisation to employ force on its behalf'.[46] In the wake of the Liberian and Sierra Leonean interventions, the decision was made through another protocol to create a permanent structure for military co-operation through the establishment of the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security in 1999.[47] Subsequently, the regional body has been involved in 'peacekeeping' operations in Guinea-Bissau (1999) and Côte d'Ivoire (ongoing since 2003).

It was with a view to addressing the root causes of the conflicts that had so vexed the region that the 25th Conference of Heads of State and Government of ECOWAS, meeting in Dakar in December 2001, adopted the Protocol on Democracy and Good Governance supplementary to the Mechanism Protocol.[48] This latest document acknowledges that, for

[43] Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States (adopted 6 June 1991) ECOWAS Doc A/DCL.1/7/91 <http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/7DecPolPrin.pdf> (accessed 1 September 2006).

[44] See generally J Peter Pham, *Liberia: Portrait of a Failed State* (New York, Reed Press, 2004).

[45] See especially J Peter Pham, 'Democracy by Force? Lessons from the Restoration of the State in Sierra Leone' (2005) 6 *Whitehead Journal of Diplomacy & International Relations* 129.

[46] Jeremy Levitt, 'Illegal Peace? An Inquiry into the Legality of Power-sharing with Warlords and Rebels in Africa' (2006) 27 *Michigan Journal of International Law* 496, 516.

[47] Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (signed 10 December 1999) <http://www.sec.ecowas.int/sitecedeao/english/ap101299.htm> (accessed 1 September 2006).

[48] Protocol A/SP1/12/01 on Democracy and Good Governance (adopted 21 December 2001) ECOWAS Doc A/SP1/12/01 <http://www.sec.ecowas.int/sitecedeao/english/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf> (accessed 1 September 2006).

all their historical diversity and differences both of colonial histories and post-independence development paths, the respective constitutions of the member states of the regional organisation have arrived at a set of 'constitutional convergence principles' shared by all, including: separation of powers; independence of the judiciary; 'every accession to power must be made through free, fair and transparent elections'; 'zero tolerance for power obtained or maintained by unconstitutional means'; 'popular participation in decision-making, strict adherence to democratic principles and decentralisation of power at all levels of governance'; freedom from ethnic, religious, regional or racial discrimination; and freedom of association and of the press (Article 1).

The Protocol also stipulates that 'all elections shall be organised on the dates or at periods fixed by the Constitution or the electoral laws' and 'no substantial modification shall be made to the electoral laws in the last six months before the election' without a broad consensus of the political actors (Article 2). The document goes on to specify the modalities for the administration of transparent elections within member states (Articles 3–10) and ECOWAS's role in assisting with and monitoring the polls (Articles 11–18). Other thematic sections of the document deal with the role of military and security forces in democracies (Articles 19–24); poverty reduction and social dialogue (Articles 25–8); education, culture and religion (Articles 29–31); the rule of law, human rights and good governance (Articles 32–39); and women, children and youth (Articles 40–43). In the event that democratic governance suffers a reversal in a member state or there is a 'massive violation of human rights' therein, 'ECOWAS may impose sanctions on the State concerned', including suspension of the offending member state from decision-making bodies and processes of the organisation (Article 45).

While the Protocol does not legally enter into force until at least nine signatories ratify it (Article 49), this did not prevent ECOWAS from putting its principles into practice in early 2005, at which time only eight countries had ratified the agreement. On 5 February 2005, President Gnassingbé Eyadema of Togo, then the African leader with the longest tenure in office, having seized power in 1967, four years after he helped lead the continent's first post-colonial coup, died unexpectedly after a heart attack. Two days later, the late President's son, Fauré Gnassingbé, was installed as head of state by the military after Togo's Constitution was hastily amended to preclude the mandated succession of the National Assembly speaker to the interim presidency. The *putschists* even amended the document further to allow the 38-year-old son to remain in office until 2008, when his late father's most recent term would have expired.

Although concerted pressure from ECOWAS forced Fauré Gnassingbé to relinquish the presidency on 25 February 2005, the regional organisation did not succeed in restoring the displaced parliamentary speaker, Ouattara Fambaré Natchaba, to his constitutionally mandated position as interim head of state. However, with the government-owned Télévision Togolaise (the country's only television station), the government-owned *Togo-Presse* (the only daily newspaper) and most of the radio stations in the hands of the ruling Rassemblement du Peuple Togolais, Fauré Gnassingbé was duly 'elected' to the presidency in the constitutionally mandated poll held on 25 April 2005. While the Togolese process was flawed and the end result the same, that ECOWAS intervened as forcibly as it did and obtained, however briefly, a respect for constitutional order constitutes remarkable progress that commends the Protocol as a model for supra-national peer review and guarantees not only of security, but also of emergent democratic politics.

A particularly interesting manifestation of this ethic of co-responsibility is contained in the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security—itself an elaborate framework encompassing the security sector and its relationship to peace in the region. In addition to the heads of state and government who, gathered together as the Mechanism's 'Authority', constitute its highest decision-making body (Article 6), and the Mediation and Security Council, comprised of nine member states, seven elected by the Authority as well as that body's current and previous chairs (Article 8), the document provides for the establishment of a novel organ, the Council of Elders (Article 20).

Each year, the regional group's executive secretary compiles a list of 'eminent personalities'—who need not be Africans—who can 'use their good offices and experience to play the role of mediators, conciliators and facilitators', including the representatives of various stakeholder groups in society such as women, traditional rulers and religious and political personalities. Once the list is approved by the Mediation and Security Council, some of these 'elders' may be called upon when needed to constitute a 'council' to undertake such missions as might be assigned to them by the ECOWAS Secretary-General. While the Council held its inaugural meeting in 2001, it has not yet been employed to prevent or manage conflicts. However, even its existence, predicated upon the use of the power of personal relationship and moral authority held by its individual members, is not only a recognition of these individuals, but also shows the promise of adapting an approach to conflict resolution that builds upon the traditional African respect for such 'elder' figures. In fact, it might well be that, rather than waiting for the crisis to occur, there might also be cases where these 'elders' could be employed in preventive

diplomatic missions where the mechanism's early-warning systems identify potential crises.

A similar mediation and peacemaking institution is found in the African Union's Peace and Security Protocol of 2002,[49] which established a Peace and Security Council as the AU's standing decision-making body for the prevention, management, and resolution of conflicts and 'a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa' (Article 2). To assist the Council in its work, especially in conflict prevention, a Panel of the Wise is constituted, made up of 'five highly respected African personalities from various segments of society who have made an outstanding contribution to the cause of peace, security and development on the continent' (Article 11). The members of this body are nominated by the chairperson of the Commission after consulting the AU member states, and their appointments, for three-year terms, are made by the Assembly of Heads of State and Government. While, once again, the Panel has yet to have the occasion to prove its mettle, its very existence represents a considerable shift from the jealous sovereignty of Africa's immediate post-independence period to a paradigm in which the promotion and maintenance of peace, security and stability are responsibilities which transcend political boundaries.

The same dynamic transnational co-responsibility found in the ECOWAS Council of Elders and the AU Panel of the Wise is also present in the New Partnership for Africa's Development (NEPAD) strategic framework which was formally adopted (originally as the New Africa Initiative) by the 37th summit of the OAU in July 2001.[50] While noting that 'the impoverishment of the African continent was accentuated primarily by the legacy of colonialism, the Cold War, [and] the workings of the international economic system', the document also acknowledged the part played by 'the inadequacies of and shortcomings in the policies pursued by many countries in the post-independence era' (para 18). Consequently, with the increased democratisation on the continent, NEPAD envisions greater African ownership of development since 'the hopes of Africa's peoples for a better life can no longer rest on the magnanimity of others' (para 44).

NEPAD is governed by a Heads of State and Government Implementation Committee (HSGIC) which meets every four months and is

[49] Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002) <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol_peace%20and%20security.pdf#search=%22african%20union%20protocol%20peace%20security%22> (accessed 1 September 2006).

[50] The New Partnership for Africa's Development (October 2001) <http://www.nepad.org/2005/files/documents/inbrief.pdf> (accessed 1 September 2006).

composed of 20 countries, to make for three representatives per AU region. The AU Chair and the Chair of the AU Commission are also *ex officio* members of the HSGIC. The HSGIC is tasked with

> identifying strategic issues that need to be researched, planned and managed at the continental level; setting up mechanisms for reviewing progress in the achievement of mutually agreed targets and compliance with mutually agreed standards; and reviewing progress in the implementation of past decisions and taking appropriate steps to address problems and delays' (para 201),

reporting annually to the AU summit, NEPAD's ultimate governing authority. It is assisted in its work by a Secretariat, based in Pretoria, South Africa (para 199).

The first HSGIC meeting in October 2001

> agreed that African leaders should set up parameters for good governance to guide their activities at both the political and economic levels. In this regard, it decided that, at its next meeting, it would consider and adopt an appropriate peer review mechanism and a code of conduct.[51]

The next meeting, in March 2002, adopted the African Peer Review Mechanism (APRM)

> as an instrument voluntarily acceded to by African members of the African Union for the purpose of self-monitoring [which] will foster the adoption of policies, standards and practices that will lead to political stability, high economic growth, sustainable development and accelerated regional integration of the African continent.[52]

The APRM is a voluntary mechanism open to all member states of the AU that deposit a memorandum of understanding with the NEPAD Secretariat pledging adherence to the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance[53] and undertaking to submit to and facilitate periodic peer reviews. As of 1 July 2006, 25 countries—almost half of the membership of the AU—had signed up to the APRM.[54] Although

[51] Communiqué Issued at the End of the Meeting of the Implementation Committee of Heads of State and Government on the New Partnership for Africa's Development (23 October 2001) <http://www.nepad.org/2005/files/documents/38.pdf> (accessed 1 September 2006).

[52] Communiqué Issued at the End of the Meeting of the Implementation Committee of Heads of State and Government on the New Partnership for Africa's Development (26 March 2002) <http://www.nepad.org/2005/files/documents/40.pdf> (accessed 1 September 2006).

[53] New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic, and Corporate Governance (adopted 18 June 2002) <http://www.nepad.org/2005/files/documents/2.pdf#search=%22nepad%20declaration%20on%20democracy%22> (accessed 1 September 2006).

[54] The 25 states are: Algeria, Angola, Benin, Burkina Faso, Cameroon, Congo (Brazzaville), Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi, Mali, Mauritius, Mozambique,

there have been a number of technical and political difficulties with fully implementing the mechanism, the APRM stipulates that 18 months after accession, a state party must submit to a 'base review' with subsequent 'periodic reviews' taking place every two to three years. States may also ask for a 'requested review' for their own reasons, as well as be subjected to a 'crisis review' if signs of impending political or economic difficulties warrant it.[55] In general, the review process begins with a 'self-assessment' covering democracy and political governance, economic governance and management, corporate governance and socio-economic development. The questions were formally adopted in February 2004 by the first meeting of the African Peer Review Forum comprised of states that are party to the APRM.[56] The entire process is consultative rather than punitive in nature.

While the committee of the heads of state is the final authority in the process, central to it is the African Peer Review Panel of seven 'eminent persons' of 'high moral stature and demonstrated commitment to the ideals of Pan Africanism' and who have 'expertise in the areas of political governance, macro-economic management, public financial management and corporate governance'. Each country to be reviewed is assigned to one of these individuals, who considers and reviews reports and, in consultation with his or her colleagues, makes recommendations to the APR Forum. The goal of this involved process is to arrive at a Programme of Action to be undertaken by the government that has been reviewed.

NEPAD/APRM and other nascent institutions, such as the Peace and Security Council of the African Union,[57] are works in progress, and their intrincate institutional structures seem rather confusing, even to their own architects.[58] However, despite these handicaps, they represent significant advances in governance on the African continent, reflective of a will to both transcend the difficulties of the colonial and independence eras and advance along a mutually supportive path to a more co-responsible future.

Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, and Zambia. Saõ Tomé and Principe has also indicated its willingness to accede, but there has not been a HSGIC meeting since that declaration to accept its memorandum of understanding.

[55] In practice, only base reviews have been conducted thus far.

[56] Communiqué Issued at the End of the First Summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism (APR Forum) (13 February 2005) <http://www.nepad.org/2005/files/documents/146.pdf>, (accessed 1 September 2006).

[57] See especially Jeremy Levitt, 'The Peace and Security Council of the African Union: The Known Unknowns' (2003) 13 *Transnational Law & Contemporary Problems* 109.

[58] See generally Ayesha Kajee, 'NEPAD's APRM: A Progress Report, Practical Limitations and Challenges', *South African Yearbook of International Affairs* (Braamfontein, South Africa, The South African Institute of International Affairs, 2003/2004) 243.

VII. CONCLUSIONS

Africa has frequently been viewed by outside observers through the almost voyeuristic optic of conflicts, many but certainly not all ethnic-based, which have sadly dashed the aspirations of the independence period and marred the subsequent history of the continent's people, many of whom were grouped together in structures inherited from the violence of Western imperialism. While some have suggested that Africa would do well to abandon the principle of *uti possidetis juris* as 'a straightjacket' that 'falsely linked the decolonization of the colonial state in Africa to the liberation of African peoples'[59]—and in certain cases this might indeed be necessary—creative constitutional arrangements may, in a great many cases, present less drastic solutions to the crisis.

However, as the precedent of ECOWAS indicates, the transcendence of the inherited colonial patterns involves not just a deconstruction of the existing states at the time of independence, but also the creation of new forms of association and governance which, on occasion, go beyond the limitations of that history, as illustrated by the new initiatives such as the NEPAD and other AU peer review mechanisms.

While it is still too early to assess the future impact of the bold constructs that Africans themselves have forwarded in recent years, there is reason to believe that at least some of these arrangements may indeed present models for statesmen as well as legal scholars and political theorists with wider application wherever in our conflicted world the inexorable march of globalisation does not permit the luxury of time scales for states and their frontiers to emerge organically as 'the visible expression of the age-long efforts of peoples to achieve political adjustment between themselves and the physical conditions in which they live'.[60]

In this respect, Africa's evolving constitutional experiments, arrived at democratically, are a most welcome departure from its colonial and authoritarian pasts. While delays, obstacles and, undoubtedly in a few cases, setbacks will be encountered, the future appears more promising as more individuals and groups, many of whom were excluded from civic and political participation up to now, find a place in the new models of constitutional government being piloted. If some of these endeavours meet with success then they—and, perhaps, even those that are less successful—will contribute immensely not only to enhancing democratic rule in African states, but also in other states ultimately transforming both the tool kit and the dynamics of international law and political theory by pointing the way to indigenous political reconstruction from the 'bottom up'.

[59] Mutua, n 10 above, at 1175.

[60] AE Moodie, 'Fragmented Europe' in W Gordon East and AE Moodie (eds), *The Changing World: Studies in Political Geography* (Yonkers-on-Hudson, NY, World Book, 1956) 54.

7

Pioneering Models for International Project Finance and Criminal Adjudication through Shared Sovereignty

EMEKA DURUIGBO

I. INTRODUCTION

Sovereignty is at the foundation of international law,[1] especially with its connection to the Peace of Westphalia of 1648, which is widely regarded as giving birth to the nation-state and modern international law.[2] One of the earliest leading authorities on sovereignty and statehood, Jean Bodin, viewed sovereignty as being within the absolute domain of the state, 'not limited either in power, or in function, or in length of time'.[3] The Swiss jurist Emmerich de Vattel did not mince words about the importance of sovereignty: 'Of all the rights that can belong to a

[1] The International Court of Justice declared in the Nicaragua case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, 1986 *ICJ Reports*, 14at 133) that 'the whole of international law' is anchored upon the 'fundamental principle of sovereignty'. See also Rosa Ehrenreich Brooks, 'Failed States, Or the State as Failure' (2005) 72 *University of Chicago Law Review* 1159, 1159 (acknowledging that the 'international legal system [is] premised on state sovereignty' but also noting that this is 'a recent and historically contingent development'). For interesting and stimulating discussions on sovereignty, see Gerard Kreijen *et al* (eds), *State, Sovereignty, and International Governance* (Oxford, Oxford University Press, 2002); Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ, Princeton University Press, 1999).

[2] See Jianming Shen, 'National Sovereignty and Human Rights in a Positive Law Context' (2000) 26 *Brooklyn Journal of International Law* 417, 419–21 (discussing the history of the sovereignty doctrine); JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, in Sir H Waldock (ed), 6th edn (Oxford, Clarendon Press, 1963) 5.

[3] Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (JH Franklin, ed & trans) (Cambridge, Cambridge University Press, 1992 (1583)) 3; Stephen M Shrewsbury, 'September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty' (2003) 68 *Journal of Air Law and Commerce* 115 (discussing the evolution of the sovereignty doctrine).

nation, sovereignty is, doubtless, the most precious and that which other nations ought most scrupulously to respect.'[4] The United Nations Charter and the Constitutive Act of the African Union provide for and protect the notion of sovereignty.[5]

The principle of sovereignty has a number of corollaries, including the sovereign equality of states and the principle of non-intervention.[6] Sovereignty and non-intervention are so intertwined that sovereignty is easily viewed as 'the power of states to regulate their internal affairs without foreign interference'.[7] The prohibition of interference and intervention provided for in Article 2(7) of the United Nations Charter is one of the most important corollaries of sovereignty.[8]

Sovereignty is a useful concept in protecting smaller nations from mightier powers. Problems, however, arise in the case of failed, weak or abusive states. Such states are unable to provide for the needs of citizens and sometimes aggressively work against the interests of citizens through harmful policies and practices. At the same time, these states seek to shield themselves under the cloak of sovereignty or its corollaries. Where this phenomenon is present, the ability of external entities to compel states to adopt humane policies is severely curtailed.

In recent times, there has been a progressive movement in Africa towards curtailing sovereignty for humanitarian intervention.[9] This change in direction is consistent with shifting global perspectives on

[4] Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (C Fenwick, trans) (Washington, DC, Carnegie Institution, 1916 (1758)).

[5] UN Charter, Art 2, para 1; Constitutive Act of the African Union, <http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm>. See also Elizabeth E Ruddick, 'The Continuing Constraint on Sovereignty: International Protection and the Internally Displaced' (1997) 77 *Boston University Law Review* 429.

[6] Shen, n 2 above, at 419–20. Vattel elaborated on and emphasised the sovereign equality of states, noting: 'A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom': Vattel, n 4 above. Moreover, although there is a traditional association of the principle of non-intervention with the Peace of Westphalia, there was no explicit articulation of the concept until 100 years later in 1758, when Vattel published his seminal work: Stephen D Krasner, 'Sharing Sovereignty: New Institutions for Collapsed and Failing States' (2004) 29 *International Security* 85. Another early articulation came from Wolff, who wrote that 'To interfere in the government of another, in whatever way indeed that may be done is opposed to the natural liberty of nations, by virtue of which one is altogether independent of the will of other nations in its action': C Wolff, *Jus Gentirum Methodo Scientifica Petractatum s 256* (JH Drake, trans) (Oxford, Carnegie Foundation for International Peace, 1934 (1764)), quoted in Stephen D Krasner, 'Pervasive Not Perverse: Semi-sovereigns as the Global Norm' (1997) 30 *Cornell International Law Journal* 651, 657.

[7] Shrewsbury, n 3 above, at 115; Richard L O'Meara, 'Applying the Critical Jurisprudence of International Law to the Case Concerning Military and Paramilitary Activities in and against Nicaragua' (1985) 71 *Virginia Law Review* 1183, 1186–7 ('Sovereign states possess complete authority within their respective national spheres').

[8] Shen, n 2 above, at 420.

[9] Constitutive Act of the African Union, Art 4(h). Member states recognise 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect

sovereignty. A report by the International Commission on Intervention and State Sovereignty (ICISS) concluded that sovereignty connotes responsibility: a 'responsibility to protect' the lives and liberty of a state's nationals, and where a particular state is unable to provide such protection, the responsibility to do so devolves to the international community.[10] Thus, the Commission essentially challenges the traditional notions of sovereignty.[11]

A similar extension or redefinition of the concept of sovereignty has been proposed in the context of international security.[12] Lee Feinstein and Anne-Marie Slaughter state that the duty has three essential features: control of the proliferation of weapons of mass destruction and the people who possess them, an emphasis on prevention, and the collective exercise of the duty through a global or regional organisation.[13]

The chances of an extension of this emerging idea of legitimate intervention to other areas where, for example, a state has been unable to provide for its citizens due to the profligacy and irresponsibility of its leaders are remote. Yet in the foreseeable future, it is not a stretch to imagine that the contours of sovereignty would experience a continuous chipping away—slowly, but steadily—where national leaders would not be able to hide behind sovereignty when oppressing their citizens. In that sense, sovereignty would once again begin to serve its proper purpose as a tool for the protection and benefit of the people.[14] Indeed, Vattel argued that

> national sovereignty belonged originally and essentially to the people collectively. Nations could subsequently cede sovereignty to a senate or to a single person, but only to the common good of all citizens.[15]

of grave circumstances, namely: war crimes, genocide and crimes against humanity'. This is a marked departure from the position under the African Union's predecessor, the Organisation of African Unity.

[10] ICISS, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).

[11] Lee Feinstein and Anne-Marie Slaughter, 'A Duty to Prevent' (Jan/Feb 2004) 83 *Foreign Affairs* 136, 140. According to ICISS, 'where a population is suffering serious harm as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of nonintervention yields to the international responsibility to protect': ICISS, n 10 above.

[12] Feinstein and Slaughter, n 11 above.

[13] *Ibid* at 137.

[14] Some scholars assert that this shift has already begun, with greater emphasis on 'sovereignty of the people' than on 'sovereignty for the benefit of the nation-state': Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46. As a matter of fact, some scholars call for the abrogation of the concept of sovereignty entirely. See Louis Henkin, *International Law: Politics and Values* (Dodrecht, Martinus Nijhoff Publishers, 1995) 10. ('We might do well to relegate the term sovereignty to the shelf of history.')

[15] Mortimer Sellers, 'Republican Principles in International Law' (1996) 11 *Connecticut Journal of International Law* 403, 410.

Further, a state can invite the participation of external actors and thereby voluntarily share its sovereignty in some given areas. Shared sovereignty exists in varied forms and contexts, such as when states share their sovereignty through common multilateral or regional organisations and institutions to which they belong.[16] The type of shared sovereignty that is discussed here, however, is one in which a state shares sovereign powers within its territory on specific issues with an external institution. This type of shared sovereignty is an uncommon phenomenon, and examples of it are rare. However, it is a subject that is experiencing a resurgence of interest. Shared sovereignty has been proposed as a panacea or part of the ultimate solution to a number of problems confronting humanity, including major conflicts, health care issues and irresponsible natural resource development.

African countries are playing a crucial role in this revival, whether it is through the Special Court for Sierra Leone that was established to prosecute the principal architects and lynchpins of a devastating war in West Africa in the 1990s or the Chad–Cameroon Oil Pipeline Project that incorporated a mechanism for effective exploration and utilisation of natural resources for national development. In fact, Africa could rightly be described as the major theatre of contemporary cases of shared sovereignty.[17] By situating itself at the forefront of this experience, Africa is making meaningful contributions to the development of international law and relations in several respects. First, shared sovereignty arrangements contribute to the development of international law by providing international law and institutions with an additional tool for strengthening state capacity.[18] Second, Africa is participating in the continuation of historical traditions in international relations. States have long utilised shared sovereignty arrangements to promote peace, foster good relations and enhance national fortunes. By embracing shared sovereignty in modern times, African countries are confirming the existence of this historical practice and contributing to its further development. They are also forging a new direction by developing unique aspects of shared sovereignty, especially with respect to the development and management of natural resources—an area relatively unknown to shared sovereignty arrangements.

[16] See eg Achilles Skordas, 'Is Europe an "Aging Power" with Global Vision? A Tale on Constitutionalism and Restoration' (2005/2006) 12 *Columbia Journal of European Law* 241, 266; Lawrence A Kogan, 'Brazil's IP Opportunism Threatens U.S. Private Property Rights' (2006) 38 *University of Miami Inter-American Law Review* 1, 60–62.

[17] See Stephen D Krasner, 'Building Democracy After Conflict: The Case for Shared Sovereignty' (2005) 16 *Journal of Democracy* 69, 77–8 (stating that the Special Court for Sierra Leone represents a 'contemporary example of shared sovereignty' and that the Chad–Cameroon Pipeline Project is a 'second and somewhat less clear contemporary case' of shared sovereignty).

[18] See text accompanying n 104 below.

This chapter is organised into five major parts. Part I is this introduction. Part II synoptically explores the notion of shared sovereignty in historical and modern contexts. Part III, an exposé on shared sovereignty in the African experience, incorporates a discussion of the Sierra Leone Special Court and the Chad–Cameroon Pipeline Project. Particular attention is paid to the pipeline project, which not only elaborates new rules on resource exploration and management, but is widely viewed as laying a foundation and serving as a model for future projects in the natural resources area. Part IV examines the future of shared sovereignty, arguing that while several bottlenecks to the adoption of shared sovereignty undoubtedly exist, there is good reason to believe that domestic and international policy-makers would have cause to resort to such arrangements to expand the tool kit for addressing pressing national and global problems. Part V is the conclusion.

II. CONCEPT OF SHARED SOVEREIGNTY

Partial or shared sovereignty limits or reduces sovereignty. In the case of partial sovereignty, national leaders may, through unilateral commitments or by treaty, limit their state's freedom of action in relation to certain policies or institutions. For example,

> [p]olitical authorities might … make a commitment to external actors that they would limit the kind of weapons that they develop, the security pacts that they would join, or the legal system that they would adopt.[19]

Shared sovereignty, however, entails the engagement and participation of external actors on an ongoing basis in the management of otherwise sovereign functions through national institutions and in the formulation and implementation of domestic policy. It is instituted through a treaty, accord, compact or some form of contractual arrangement between domestic and external actors to oversee and govern some specific issue areas. When properly constituted, the ensuing arrangement is not subject to termination without the agreement of all the parties or without the fulfilment of some clearly specified conditions.[20] According to Stephen Krasner:

> Shared sovereignty entities are created by a voluntary agreement between recognized national political authorities and an external actor such as another state or a regional or international organisation. Such arrangements can be limited to specific issue areas like monetary policy or the management of oil revenues. The legitimacy of shared-sovereignty institutions would depend

[19] Stephen D Krasner, 'Troubled Societies, Outlaw States, and Gradations of Sovereignty' (July 2002) 26, <http://www.sas.upenn.edu/brownecip/2003.04.Papers/krasner%20paper.pdf> (accessed 4 May 2007).

[20] *Ibid* at 27.

> at first on their voluntary negotiation by internationally recognized national political authorities. Shared sovereignty is not something to be imposed … Over the long term, shared sovereignty institutions would have to be self-enforcing; that is, neither the national nor the foreign signatory would have an incentive to defect from the arrangement. And this, in turn, would depend on the arrangement's effectiveness.[21]

Although examples of partial sovereignty abound in history, shared sovereignty has proven to be a much rarer phenomenon.[22] Nevertheless, history and contemporary experience provide some useful examples of shared sovereignty.

When the Ottoman Empire was financially incapacitated in the 1870s, and could not service its foreign debts and was in dire need of access to international capital markets, the government promulgated a decree creating the Council of the Public Debt.[23] Council members, who were selected by foreign creditors, consisted of representatives from France, Germany, Austria, Italy, Britain, Holland and the Ottoman Empire itself. The council had control over revenue from a number of principal taxes, such as the salt and tobacco monopolies, the stamp tax and the spirits tax.[24] With the consent of the government, the council could embark upon activities aimed at promoting overall economic development.[25] It grew so much in stature, relevance and influence that, at some point, it had control over approximately one-quarter of the empire's revenue and employed more people than its Finance Ministry.[26]

Beset with economic calamities arising out of an unsuccessful war with Turkey over Crete, Greece, at the end of the nineteenth century, was constrained to take the only available course of action for securing new funding: establishing an international commission of control.[27] The terms for the establishment of the commission were incorporated in the provisional peace treaty between the countries. On the commission were members representing major powers, namely Austria–Hungary, Italy, Germany, France, Russia and Britain. The commission had the authority to unilaterally assert control over such significant sources of revenue as state monopolies on salt, petroleum, matches, playing cards, cigarette paper, tobacco duties and the customs revenues of Piraeus which were essential for taking care of Greece's foreign debt and the war indemnity demanded by Turkey.[28] The commission also took other actions which struck at the

[21] Krasner, n 17 above, at 70.
[22] Krasner, n 19 above, at 31.
[23] *Ibid* at 32.
[24] *Ibid*.
[25] *Ibid* at 32–3.
[26] *Ibid* at 33.
[27] *Ibid*.
[28] *Ibid*.

heart of the country's fiscal independence, such as placing a limit on what the Greek government could borrow and controlling its capital supply.[29]

Under the North Atlantic Treaty Organisation (NATO) status-of-forces agreements in the 1950s, Germany made treaty commitments that shared sovereignty with the allied powers over security matters within its territory. Allied powers had jurisdiction over their own troops, and these troops were permitted to patrol public areas including roads, railways and restaurants.[30] Commanders of allied forces were empowered to take any measures considered necessary for maintaining good order and discipline. Moreover, the German military could fight only after securing the approval of both the German government and Washington.[31]

Shared sovereignty has some advantages that make it quite attractive where other policy instruments appear unpalatable or prove to be ineffective. Shared sovereignty arrangements are not tarred by 'delegitimating accusations of colonialism'[32] that trailed other instruments, such as the mandate system under the League of Nations or trusteeship system under the United Nations.[33] Shared sovereignty also appears more attractive than modern proposals for neo-trusteeships for failed states and contested territories,[34] since many states—developed and developing—will have different reasons to reject a neo-trusteeship or lack adequate incentives to support it, as it directly assaults sovereignty or seeks to replace it.[35] Working out the details of such trusteeships may also prove to be difficult.[36]

Relatively speaking, shared sovereignty may also be less costly to implement than other instruments that international policy-makers embrace when dealing with troubled societies, such as governance

[29] *Ibid*.
[30] Krasner, n 17 above, at 77.
[31] *Ibid*.
[32] Krasner, n 19 above, at 31.
[33] For extensive and penetrating discussions of the mandate and trusteeship systems, see Antony Anghie, 'Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations' (2006) 41 *Texas International Law Journal* 447; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations' (2002) 34 *New York University Journal of International Law and Politics* 513; Antony Anghie, '"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case' (1993) 34 *Harvard International Law Journal* 445.
[34] On various proposals for some form of modern trusteeship or the other, see Richard Caplan, A New Trusteeship? The International Administration of War-Torn Territories (London, Routledge, 2002); James D Fearon and David D Laitlin, 'Neotrusteeship and the Problem of Weak States' (2004) 28 International Security 5; Martin Indyk, 'A Trusteeship for Palestine' (May/June 2003) 82 Foreign Affairs 51; Gerald B Helman and Steven R Ratner, 'Saving Failed States' (Winter 1993) 89 Foreign Policy 3.
[35] Krasner, n 19 above, at 24–5.
[36] *Ibid* at 23.

assistance and transitional administration.[37] Governance assistance and transitional administration may be irrelevant in some situations. Where they are available, they have met with limited success if not outright failure, exposing a gap in the basket of tools available for dealing with troubled societies, a gap that shared sovereignty appears poised to readily fill.[38]

Finally, shared sovereignty can serve as a veritable tool for improving governance, democracy and accountability in weak states and those emerging out of conflicts in dire need of effective political institutions erected on a solid foundation and with well-trained, professional and objective personnel.[39] Sharing control over natural resources between national leaders and credible external actors removes some of the impediments to democratic development, including the mad rush by some to capture political power in order to enrich themselves.[40]

Nevertheless, it cannot be over-emphasised that where shared sovereignty arrangements are managed successfully, the benefits go not only to the people in the country sharing sovereignty, but also to other countries and the international community. This point is based upon the fact that the 'consequences of failed and inadequate governance have not been limited to the societies directly affected'[41] since: 'Poorly governed societies can generate conflicts that spill across international borders.'[42]

III. SHARED SOVEREIGNTY IN AFRICA

Until most recently, the general perception and description of Africa in relation to the development of international law was as a recipient, not a contributor.[43] This state of affairs was blamed on the continent's

[37] *Ibid* at 5 (defining troubled societies as 'those in which failed, weak, or abusive states have blocked economic well being, undermined the security of their populations, and violated the basic human rights of their inhabitants').

[38] *Ibid* at 12–21.

[39] See Krasner, n 17 above, at 70.

[40] *Ibid*. For the role natural resources can play in militating against democracy, see Michael L Ross, 'Does Oil Hinder Democracy' (2001) 53 *World Politics* 325, 328 (noting that 'oil and mineral wealth tends to make states less democratic'). But see Benjamin Smith, 'Oil Wealth and Regime Survival in the Developing World, 1960–1999' (2004) 48 *American Journal of Political Science* 232 (disputing the conclusion that oil wealth is more closely linked with non-viability of regimes and political instability). For a discussion of the unhealthy political contestation and corrosive corruption that are engendered by a strident pursuit of natural resource rents, see Emeka Duruigbo, 'Permanent Sovereignty and People's Ownership of Natural Resources in International Law' (2006) 38 *George Washington International Law Review* 33.

[41] Krasner, n 6 above, at 86.

[42] *Ibid*.

[43] See A Peter Mutharika, 'The Role of International Law in the Twenty-first Century: An African Perspective' (1995) *18 Fordham International Law Journal* 1706, 1719.

marginalisation.[44] A lot has changed in the past decade and half, and Africa has begun to make significant contributions to the development of norms and institutions of international law.[45]

Two contemporary cases of shared sovereignty arrangements are found in Africa, notably the Special Court for Sierra Leone established in 2002 and the Chad–Cameroon Pipeline Project whose pertinent instruments were concluded in 1998. Both arrangements confirm the historical practice of shared sovereignty but are also precedent-setting in their respective spheres.

A. Sierra Leone Special Court

Unlike some international criminal tribunals that are products of the UN Security Council (for example the International Criminal Tribunal for Rwanda), or a multi-lateral treaty (for example the Rome Statute for the International Criminal Court), the Special Court for Sierra Leone ('the Court') is the product of a treaty concluded between the government of Sierra Leone and the UN.[46] Under the treaty, concluded on 16 January 2002, the parties created a court to try leaders bearing the 'greatest responsibility' for crimes against humanity, war crimes and other serious violations of international humanitarian law committed in Sierra Leone between 30 November 1996 and 18 January 2002.[47] The Court, which is 'arguably the most important institutional development in international criminal law since the adoption and entry into force of the Rome Statute establishing a permanent [International Criminal Court] in July 1998',[48] enjoys the hallowed status as 'the first independent treaty-based hybrid or "nationalized" criminal tribunal of mixed-subject matter jurisdiction and composition'.[49]

The Court is composed of 11 judges, seven of whom are appointed by the UN Secretary-General and four by the Government of Sierra Leone.

[44] *Ibid*.

[45] See Richard Frimpong Oppong, 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) 30 *Fordham International Law Journal* 296. 'Africa is becoming more "international law-friendly," the initial hostility or ambivalence of the post-colonial state towards international law is giving way to increased participation in international law processes, both in terms of institutional participation and in the development of norms': *ibid* (citations omitted).

[46] Naomi Roht-Arriaza, 'The Complex Architecture of International Justice' (2006–2007) 10 *Gonzaga Journal of International Law* 38, 39.

[47] 'Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone' (16 January 2002) 2178 UNTS 38342 (henceforth 'Special Court Agreement').

[48] Vincent O Nmehielle and Charles C Jalloh, 'The Legacy of the Special Court for Sierra Leone' (2006) *Fletcher Forum of World Affairs* 107, 108.

[49] *Ibid*.

Six of the judges—a majority—are from Sierra Leone, while the remaining five are from different parts of the world, including North America, Asia and (other parts of) Africa.[50] The UN Secretary-General also appointed the Prosecutor, in charge of investigation and prosecution, and the Registrar, who heads the administrative organ of the Court.

Under the treaty establishing the Court, the Government of Sierra Leone is obligated to co-operate with all organs of the Court at all stages of the proceedings and 'shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation'.[51] In addition, the Government is required to

> comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to (a) identification and location of persons; (b) service of documents; (c) arrest or detention of persons; [and] (d) transfer of an indictee to the Court.[52]

The objectives of the Special Court include restoring the rule of law in Sierra Leone and developing the country's legal system, which is essential for preventing future conflict.[53]

The Court is certainly a precedent-setting institution in many respects and a key player in the elaboration and development of international law. Its unique character as a hybrid court has provided a model for other courts established in Cambodia and East Timor.[54] The Special Court is well known for contributing to the jurisprudence of international law regarding head of state immunity.[55] Some commentators have also noted that the decision of the Trial Chamber of the Court to impose a contractual obligation on Sierra Leone and its agents to co-operate with the Special Court 'could set a precedent for the scope of State cooperation for other and future criminal tribunals'.[56] The Special Court created the Office of the Principal Defender to help provide an adequate defence to accused persons in accordance with basic human rights principles. The creation of this countervailing force is 'an innovation within the structure of international criminal law'.[57]

[50] Office of Press and Public Affairs, 'Special Court for Sierra Leone: Basic Facts', <www.sc-sl.org/basicfactspamphlet.pdf> (accessed 25 June 2007).

[51] Special Court Agreement, n 47 above, Art 17.

[52] *Ibid*.

[53] See Nmehielle and Jalloh, n 48 above, at 109.

[54] Antonio Cassese, *International Criminal Law* (Oxford, Oxford University Press, 2003).

[55] John Dermody, 'Beyond Good Intentions: Can Hybrid Tribunals Work after Unilateral Intervention' (2006) 30 *Hastings International & Comparative Law Review* 77, 101.

[56] Geert-Jan Alexander Knoops and Robert R Amsterdam, 'The Duality of State Cooperation within International and National Criminal Cases' (2007) 30 *Fordham International Law Journal* 260, 279.

[57] Nmehielle and Jalloh, n 48 above, at 108.

The Special Court is considered the clearest example of shared sovereignty in the contemporary era.[58] It represents good-faith efforts on the part of a government to share its sovereignty in order to avert impunity, foster peace, enhance security and strengthen the rule of law. The work of the Court is still in progress, and a proper assessment of its effectiveness in accomplishing the set objectives can be made only years after it completes its mandate. Only then will those who have invested enormous resources and placed tremendous confidence in the Court be able to judge if their expectations were met and their investments were worthwhile.

B. Chad–Cameroon Oil Pipeline Project

i. Oil Pipeline Project

Oil was first discovered in Chad in the 1970s by a consortium of oil corporations that included Chevron, Conoco, Exxon and Royal Dutch/Shell,[59] but years of war and civil conflict prevented further exploration and development of the oil fields. Frustrated by the delay, Conoco pulled out and Chevron sold its interests to Elf Aquitaine.

Almost one and a half decades after the suspension of oil field development in 1979, a re-organised consortium re-ignited interest in Chad's oil. The consortium conducted studies on the feasibility of developing the oil and transporting it through Cameroon.[60] Two members of the consortium eventually withdrew, citing concerns about the economic viability of the project since oil was then selling at $10 per barrel. Six months after their departure, two new members—Malaysia's Petroleum Nasional Berhad (Petronas) and Chevron—joined the consortium. Exxon owned 40 per cent, Petronas 35 per cent and Chevron 25 per cent.[61]

The $4 billion pipeline project is arguably the largest private-sector investment in Africa. Approximately $1.5 billion was initially devoted to the extraction of oil from Chad's Doba Basin, while $2.2 billion was earmarked for the development of a 670-mile (1,070-km) pipeline that passes through Cameroon. Project partners formed an unincorporated joint venture known as the Upstream Consortium to own and finance the exploration component. The Chad portion of the pipeline is owned by Tchad Oil Transportation Company (TOTCO), an incorporated joint

[58] Stephen D Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law,' (2004) 25 *Michigan Journal of International Law* 1075, 1096.

[59] Benjamin C Esty, *The Chad–Cameroon Petroleum Development and Pipeline Project (A)* (Harvard Business School, Harvard Business Online 9-202-010 (Rev: 17 May 2005)), <http://harvardbusinessonline.hbsp.harvard.edu/b02/en/common/item_detail.jhtml?id=202010&referral=1043> 1.

[60] *Ibid*.

[61] *Ibid* at 1–2.

venture between the Upstream Consortium and the Government of Chad. The Cameroon portion of the pipeline is under the ownership of the Cameroon Oil Transportation Company (COTCO), an entity incorporated as a joint venture between the Governments of Chad and Cameroon and the Upstream Consortium. The project is supposed to yield up to $13.7 billion. Projections from the investment were based on the assumption that the fields would produce 883 million barrels of oil that can be sold. The average expected price was $15 per barrel.

The World Bank was invited to participate in the project. Exxon Mobil stated that it would invest only with the World Bank's involvement. This would provide the company with the needed cushion from political risk and insulation from critical non-governmental organisations (NGOs). In June 2000, the Board of Executive Directors of the World Bank voted to participate in the project due to its commercial viability and capacity to assist with the alleviation of poverty in Chad, one of the poorest countries on earth.[62] According to former World Bank President James Wolfensohn, 'the project provides the best, and perhaps only opportunity for Chad to reduce the severe poverty of most of its population'.[63] The Bank did not seem to have any illusions about the problems that it would face in support of the project. Thus, the Bank's President noted that, as has been the case in many countries, it will be a tremendous challenge to translate Chad's oil revenues into services that would be directly beneficial to the poor. But the Bank expressed the belief that challenges such as this are of the type that are incumbent upon and required of a development institution of the calibre of the World Bank.[64]

From the inception, the Chad–Cameroon Oil Pipeline Project was mired in controversy. Public interest groups, among others, complained about the Government of Chad's human rights abuses, the project's potential impact on the environment[65] and the displacement of indigenous peoples.[66] The World Bank sought to address these concerns and, as a condition for its participation, insisted on a revenue management plan which would ensure that the proceeds of oil development were used for socio-economic development, particularly the alleviation of poverty and investment in the critical sectors of health and education. The

[62] *Ibid* at 6.

[63] *Ibid* (citing letter from James D Wolfensohn to Honourable James P McGovern, The United States House of Representatives, Washington, DC 20515, 28 June 1999).

[64] *Ibid*.

[65] Environmental Defense Fund, *The Chad Cameroon Oil and Pipeline Project: Putting People and the Environment at Risk* (September 1999) <http://www.environmentaldefense.org/728_ChadCameroon_pipeline.pdf> (accessed 15 June 2007).

[66] See Norimitsu Onishi, 'Pygmies Wonder if Oil Pipeline Will Ease Their Poverty', (2000) *New York Times*, 10 July, A3 (describing the concern of the Pygmies about how the pipeline project might affect them economically).

environmental and other aspects of the project are outside the scope of this chapter,[67] which focuses on the Revenue Management Plan (RMP) and its potential to avoid the problems associated with oil exploration, production and export, and fulfilment of the designers' aspirations of meeting the social and economic needs of the people of Chad.

ii. Features of the Revenue Management Plan

According to Ian Gary and Terry Karl:

> The Chad–Cameroon Oil and Pipeline Project is the most significant and closely watched experiment designed to change the pattern of the 'oil curse' and promote poverty reduction through targeted use of oil revenues.[68]

This approach to utilising oil revenues to alleviate poverty forms a part of the RMP.

The RMP was the fruit of the World Bank's efforts at ensuring that the attendant dangers of a large influx of oil revenues—economic distortion, corruption and waste—did not manifest themselves in Chad, as has been the case in many other oil-producing countries.[69] Chad is expected to receive $1.8 billion in the form of royalties, income taxes and dividends. This is an enormous amount of money considering that Chad has been cash-strapped for years. According to Wolfenson:

> Natural resource 'booms' are difficult to manage. This is why our knowledge of other countries' experience has been crucial to designing the project. In Chad, in particular, we want to make certain that the country's new wealth will be invested for the well-being of all Chadians. With our help, the Chad Government has developed a revenue management program that targets oil revenues to key development sectors that are at the heart of its poverty alleviation strategy.[70]

The RMP contains specifications on the allocation and distribution of the expected revenue. In the course of the first 10 years of production—that is, between 2004 and 2013—income taxes will constitute 16 per cent of total revenues to Chad, and the rest will come from royalties and dividends. The government has the discretion to decide how to spend the revenues from income taxes (indirect revenues) except that they must be used for general development purposes. The government has less discretion in

[67] For useful information and discussion about the environmental implications and criticisms of the project, see 'Liability for Environmental Damage and the World Bank's Chad–Cameroon Oil and Pipeline Project', in SA Bronkhorst (ed), *Selected Papers of the NC-IUCN Symposium* (Stichtung, IUCN Ledencontact Netherlands, 2000).

[68] Ian Gary and Terry Lynn Karl, *Bottom of the Barrel: Africa's Oil Boom and the Poor* (Baltimore, MD, Catholic Relief Services, 2003) 60.

[69] See Esty, n 59 above, at 8.

[70] *Ibid*.

how it spends oil royalties and dividends (direct revenues), which are deposited in a Special Revenue Account. Ten per cent of the proceeds are held by the World Bank in a fund for future generations. Seventy-two per cent would be deposited in commercial banks and dedicated to the financing of programmes in five important sectors: education, health and social services, rural development, infrastructure, and environment and water resources. The government keeps 13.5 per cent which is not monitored or regulated and which is supposed to be spent on recurrent expenditure. The remaining 4.5 per cent is devoted to the development of the oil-producing Doba region.[71]

The RMP provides for several layers of oversight. It is incumbent upon the World Bank and the Government of Chad to approve an annual expenditure, which must be reviewed by a nine-member oversight committee, the Petroleum Revenue Oversight and Control Committee. Of the committee's nine members, five represent the government while four represent civil society (local development NGOs, trade unions, human rights groups and religious groups). The committee members are appointed for terms of three to five years. The committee is mandated to publish an annual review of those operations that are subject to external audit. Some staff members of the World Bank evinced a preference for foreign membership of the oversight committee in addition to the local members, 'but the Bank's board vetoed this shared-sovereignty initiative'.[72]

The World Bank has extensive powers and leverage in monitoring the full programme and in reviewing all expenditures. The RMP is binding because the International Bank for Reconstruction and Development (IBRD) and European Investment Bank (EIB) tied the government's performance under the RMP to future lending by the World Bank.

The World Bank has also instituted an International Advisory Group (IAG) composed of eminent persons, which is supposed to exist for 10 years.[73] Because the IAG's role is merely 'advisory', its limited functions have provided cannon fodder for the criticism that the Chad project does not make sufficient inroads into Chad's sovereignty. The contention is that what is needed is a more substantial sharing of sovereignty through a strong external body which can monitor projects and demand and effect any needed changes.[74]

[71] Edmund Sanders, 'Oil Promise Still a Dream' (2006) *Los Angeles Times*, 9 July.

[72] Krasner, n 17 above, at 78.

[73] World Bank, *The Chad–Cameroon Development and Pipeline Project, Draft Terms of Reference*—International Advisory Group on the Chad–Cameroon Oil Pipeline Project.

[74] Krasner, n 58 above, at 1095: 'Nevertheless, the level of shared sovereignty is modest. Foreign actors are only fully engaged with the International Advisory Group, and it can only give advice.'

The World Bank Inspection Panel also represents a level of oversight for the project.[75] The panel was established in 1993 by the Bank's Board of Executive Directors to serve as an independent mechanism that would ensure that the Bank's operations are in consonance with its policies and procedures.[76] The primary objective behind the Panel's creation is to have an instrument that offers groups of citizens an opportunity to present their concerns regarding Bank-financed activities that they believe have been or could be harmful to them or their interests.[77] It 'thus provides a link between the Bank's highest governing body (the Board) and the people who are likely to be affected by the project it finances'.[78] Acting upon a request for inspection, the Panel undertook an inspection of the project and issued a report in 2001, in which it urged reinforced monitoring of the project by the Bank to ensure human rights protection.[79]

The Chadian government passed a law in December 1998 incorporating the principal elements of the RMP, including procedures for audit and relating to the establishment of an oversight committee, the Oil Revenues Control and Monitoring Board (Revenue Management College).[80] Chad started selling oil in October 2003.[81] In November 2003, $6.5 million in receipts from the first sale of crude oil was deposited into the account, and in December 2003, the government approved its first budget including oil revenue and submitted it to the RMP for approval.[82]

iii. Appraising the Pipeline Project

Shared sovereignty arrangements such as the Chad–Cameroon Oil Pipeline Project include basic ingredients that make them potentially viable.[83] One of the principal benefits, as Krasner has observed, is that oil

[75] See Genoveva Hernandez Uriz, 'The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility?' (2002) 28 *Brooklyn Journal of International Law* 77, 120 (describing a report issued by the Panel).

[76] See World Bank Inspection Panel, *Investigation Report: Chad–Cameroon Petroleum and Pipeline Project (Loan No 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No 3373-CD); and Management of the Petroleum Economy (Credit No 3316-CD)*, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ChadInvestigationReporFinal.pdf> (accessed 25 June 2007), at ii.

[77] *Ibid*.

[78] *Ibid*.

[79] *Ibid*.

[80] 'Oil Revenue Management Law', translated in World Bank, *Chad–Cameroon: Petroleum Development and Pipeline Project, Project Appraisal Document* (13 April 2000).

[81] Emily Wax, 'Oil Wealth Trickles Into Chad, but Little Trickles Down Five Months after Opening of Pipeline to Cameroon, Locals Await Benefits and Crime Rate Rises' (2004) *Washington Post*, 13 March, A16 (reporting on the first few months of oil sales); United Nations Department of Public Information, 'Oil Pipeline Opens for Business' (October 2003) 17 *Africa Recovery* at 24 (describing the fiscal aspects of the oil pipeline).

[82] Wax, n 81 above, at A16.

[83] Jason Schwartz, '"Whose Woods These Are I Think I Know": How Kyoto May Change Who Controls Biodiversity' (2006) 14 *New York University Environmental Law Journal* 421,

trusts could be used to enhance domestic governance in those developing countries that are rich in petroleum so long as they involve a high level of shared sovereignty in which national governments and external actors such as the World Bank share key powers on how oil revenues are managed.[84]

A trust fund could also help in building the basic foundation of a democratic society. It establishes a link between the citizen-beneficiaries and the authority structures, giving citizens a stake in natural resources and insight into how government utilises community resources. This sense of ownership exists in developed states through a system of 'taxation with representation'. Reduction of the corrosive problem of corruption and the promotion of transparency and accountability are also some of the advantages with such funds.

In the absence of effective institutional structures and arrangements, the proposed benefits of the project are unlikely to manifest themselves. Thus, the Chad Project has been assailed on many fronts, one of the most potent criticisms being that it does not go far enough in making the government surrender significant portions of its authority over management of the country's natural resources.

According to a report authored by Luc Lampiere, the law 'represents a remarkable breakthrough in linking private investment, development and human rights,' but its chances of success are infinitesimally low unless it is accompanied by the political will of its opponents or the confidence of its citizens.[85]

Critics also think that a weakness of the Chad management plan is that there is not sufficient evidence to establish the belief that the government will follow its dictates.[86] They point to the fact that the Chadian Government spent $4 million out of $25 million from a signature bonus on arms purchases.[87] The problem with this criticism is that while it would have been preferable for the government to spend resources on the health and education sectors or follow the RMP, arms purchases are not prohibited under the governing law. Thus, the government cannot legitimately be accused of not following the law.

Another aspect of the RMP that has invited criticism is the Monitoring Committee. Although the mandate of the Committee is to 'verify',

440, fn 89 (noting that 'some notion of shared sovereignty over natural resources may … be desirable for developing nations to help maximize utility').

[84] Krasner, n 19 above, at 41.

[85] Luc Lampiere *et al*, *Managing Oil Revenues in Chad: Legal Deficiencies and Institutional Weaknesses* (Human Rights Clinical Program, Harvard Law School, 13 October 1999) 2, 5.

[86] Gary and Karl, n 68 above, at 68.

[87] *Ibid*. The Chadian Government's action embarrassed the World Bank: see Dana L Clark, 'The World Bank and Human Rights: The Need for Greater Accountability' (2002) 15 *Harvard Human Rights Journal* 205, 210, fn 17.

'authorise' and 'oversee' expenditure of revenues, the exact parameters of this mandate are unclear.[88] For instance, there is a lack of clarity as to 'whether it should monitor revenue collection, management and expenditure, or only expenditure'.[89] The Monitoring Committee is also viewed as not sufficiently strong, which could militate against the effective discharge of its duties. For instance, it has been suggested that giving the Monitoring Committee subpoena powers would strengthen it and enhance its work.[90] The process of removing Monitoring Committee members is also easy, making it possible to remove even competent members who fall out of favour with the government.[91] A truer exercise of shared sovereignty would have provided for an arrangement where the powers of appointment and removal of Committee members are shared between the government and the external institution. In a scathing criticism, one commentator predicted imminent failure of the project because of this imbalance of power, arguing that a recipe for success would be to have an international organisation appoint members of the governing or supervisory board.[92]

Another serious criticism is that the shared sovereignty components of the pipeline project do not go far enough. For example, Krasner views it as a case of shared sovereignty in 'watered down form'.[93] Similarly, Peter Rosenblum asserts that:

> At the core is a challenge to the sovereignty of undemocratic rulers … Previously, no one would have interfered in the relations between an oil company and an African state. He who ruled the state controlled its resources … There is still hope of a delicate balance, where the World Bank strengthens loan conditions that reinforce the democratic process in Chad and enable the Chadian people to better determine how their resources should be spent. That would still threaten the sovereignty of leaders, but would also empower the people.[94]

The critics were largely vindicated when in October 2005, the Government of Chad capitalised on rising oil prices and announced that it was abandoning some of its commitments under the arrangement and sought a review of the revenue management law.[95] Specifically, the government wanted to redefine priority areas to include national security in addition to health and education so that it could equip its military to contend

[88] Gary and Karl, n 68 above, at 70.
[89] *Ibid*.
[90] Lampiere *et al*, n 85 above.
[91] See Gary and Karl, n 68 above, at 72.
[92] James C Owens, 'Government Failure in Sub-Saharan Africa: The International Community's Options' (2003) 43 *Virginia Journal of International Law* 1003, 1047–9.
[93] Krasner, n 19 above, at 34.
[94] Peter Rosenblum, 'Pipeline Politics in Chad' (May 2000) *Current History* 195, 199.
[95] Lydia Polgreen, 'Chad Backs Out of Pledge to Use Oil Wealth to Reduce Poverty' (2005) *New York Times*, 3 December, A15.

with rebel uprisings in the eastern provinces bordering the violence-prone Darfur region of Sudan.[96] The government also stated that it was abolishing the future generations fund,[97] which it did in December 2005. The World Bank did not view this *volte face* favourably and warned the Government of Chad that it would view its reneging on the agreement as a breach of the loan agreement.[98]

In January 2006, because of Chad's breach of the agreement, the World Bank blocked its access to royalty payments and suspended $124 million in loans.[99] In April 2006, in order to avert threats by the Government of Chad to close oil wells if access to the accounts remained blocked, the World Bank reached an interim deal with the government in which it agreed to resume loan disbursements and release more than $100 million in overdue royalties to the Chadian government. The Bank also acceded to the government's request to double the percentage of money it can spend without constraints to 30 per cent.[100]

In July 2006, the Bank and the Government of Chad reached a one-year deal, covering only 2007 revenues, which maintained the increase in discretionary revenues to the government and allotted 70 per cent of all revenues from the project to poverty reduction. Unlike the previous arrangement under the RMP, which did not include indirect revenues (namely taxes and custom duties), the July 2007 agreement incorporated them, allowing the World Bank to exercise oversight over both direct and indirect revenues. This inclusion is significant as indirect revenues are likely to represent a substantial portion of government revenues in the years ahead.[101] The government also agreed to undertake an audit of the special petroleum revenue accounts in 2006 and co-operate with the World Bank and other stakeholders in strengthening the role of the Monitoring Committee. The Doba region will continue to receive an allocation of five per cent for local projects while revenues in excess of projections will be placed in a reserve stabilisation fund for use in the future. The agreement rejected the government's redefinition of the priority list to include

[96] Lydia Polgreen, 'World Bank Reaches Pact with Chad over Use of Oil Profits' (2006) *New York Times*, 15 July, A8.

[97] Paul Blustein, 'Chad Pipeline Project Steeped in Controversy: World Bank Reconsiders Role as Nation Looks at Altering Terms' (2005) *Houston Chronicle*, 28 December.

[98] Paul Blustein, 'Chad's Hard-line Stance Tests World Bank' (2005) *Washington Post*, 27 December. See generally Chip Cummins, 'Exxon Oil Fund Model Unravels in Chad' (2006) *Wall Street Journal*, 28 February, A4; David Vogel, *The Private Regulation of Global Corporate Conduct* (University of Toronto, Munk Centre for International Studies, Working Paper No V, 2006) 34–5.

[99] D White, 'World Bank in Deal with Chad Oil Funds' (2006) *Financial Times Europe*, 28 April.

[100] *Ibid*.

[101] Cathy Landry, 'Chad Deal to Raise World Bank Influence: New Oil Production Accord Brings Clearer Revenue Framework' (2006) *Platts Oilgram News*, 17 July.

security, but included the government's addition of 'justice' to the list. The July agreement built on the April interim deal and forms the foundation for a more permanent agreement that covers revenues in future years.[102]

It is instructive to note that none of the criticisms suggests that this kind of arrangement for the equitable distribution and proper management of resources is a bad idea. It is, however, important to devise arrangements that minimise ineffectiveness.[103]

IV. FUTURE OF SHARED SOVEREIGNTY

The future of shared sovereignty very much hinges on the willingness of rulers of troubled states to surrender some authority for the common good of their citizens and for the international community to demonstrate the political will to compel (or at least propel) them to do so. There is every indication that with the attention shared sovereignty is receiving in international law and policy discourse, it may feature more prominently in the tool kit of options for addressing serious domestic and international legal issues. Anne-Marie Slaughter and William Burke-White have observed in this connection:

> Beyond government networks, Stephen Krasner suggests that international law and institutions can strengthen state capacity by engaging in processes of shared sovereignty with national governments. Such shared sovereignty 'involves the creation of institutions for governing specific issue areas within a state—areas over which external and internal actors voluntarily share authority.' … Such shared sovereignty, Krasner claims, 'can gird new political structures with more

[102] *Ibid*.

[103] See eg Krasner, n 58 above, 1097–8:

> A shared sovereignty arrangement for natural resources, at least natural resources requiring large scale investments from multinational corporations, could work in the following way. A trust would be created through an agreement between the host country and say, the World Bank. The trust would be domiciled in an advanced industrialized country with an effective rule of law. All of the funds generated by the natural resources project would be placed in an international escrow account controlled by the trust. All disbursements from the account would have to be approved by a majority of the directors of the trust. Half of the board of directors of the trust would be appointed by the host government, the other half by the World Bank; the World Bank would have the option of appointing directors, who would not be World Bank employees, from any country. The trust agreement would stipulate that a large part of these funds would be used for social welfare programs, although specific allocations for say, health as opposed to education, would be left to the host government. The trust would refuse to dispense funds that did not conform with these commitments. The trust might even be charged with implementing programs using the resources of the escrow account if the government failed to act expeditiously. The directors of the trust would be held accountable under the laws of the advanced democracy in which the trust was incorporated. The firms' responsibility to pay revenues into the escrow account and only the escrow account would be backed by legislation enacted by the country in which the trust was domiciled, and possibly by the home countries of the companies involved in the project as well.

> expertise, better-crafted policies, and guarantees against abuses of power' onto weak or failing states.[104]

The key to successful shared sovereignty arrangements is to provide incentives for compliance and disincentives for non-compliance, with the ultimate aim of getting governments to honour their contractual obligations for the duration of the agreement. In essence, such contracts must be self-enforcing.[105] Some circumstances might provide incentives for political elites to accept shared sovereignty arrangements. One example is post-conflict situations where local leaders need to retain foreign expertise working to erect or run administrative structures in a transitional administration on a more permanent basis.[106]

It is also possible that ambitious politicians who seek to move their country out of a system that has not worked could include shared sovereignty contracts in their political platform. Cynical voters may be lured back to the electoral process and their votes secured through credible promises to improve governance by engaging the co-operation and participation of external actors in (re)building institutions and in making or implementing domestic policy in specific areas of need.[107] The possibility of employing this strategy will greatly increase if shared sovereignty arrangements become a more common practice, thus providing such candidates with a strong weapon to fend off accusations of seeking to compromise their nation's sovereignty.[108]

Another fertile ground for shared sovereignty is intrusive international investment and foreign aid. Multinational corporations may insist on such arrangements to insulate themselves from corrupt practices or constant criticisms from public interest groups.[109] Effective shared sovereignty arrangements could offer multinational corporations doing business in troubled societies some needed breathing room and temper calls for regulation of corporate activities in international law.[110] Aid donors may also condition the release of funds on the acceptance by the recipient state that non-nationals with the necessary expertise serve on the board of its central bank.

Such an arrangement, if entered into, is likely to be honoured by governments, which would not want to be cut off from international

[104] Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (Or, the European Way of Law)' (2006) 47 *Harvard International Law Journal* 327, 337–8 (citations omitted).

[105] Krasner, n 19 above, at 37.

[106] *Ibid* at 37–8.

[107] *Ibid* at 39.

[108] *Ibid*.

[109] *Ibid* at 38.

[110] For a discussion of proposals for corporate regulation in international law, see Emeka Duruigbo, *Multinational Corporations and International Law: Accountability and Compliance Issues in the Petroleum Industry* (Ardsley, NY, Transnational Publishers, 2003).

financial and investment markets.[111] If political pressure grows in donor countries about the misuse of foreign aid by some foreign leaders, political leaders in countries extending foreign assistance may insist on shared sovereignty arrangements before giving aid.

Management of natural resource revenues will be the subject of shared sovereignty arrangements in the future. The paradox of indescribable poverty in the midst of abundant natural wealth is commonplace in Africa. The mismanagement of revenues accruing from export of commodities has brought untold hardship to millions of citizens and led to many resource-rich countries significantly underperforming their resource-poor counterparts according to nearly every social, economic and political indicator. Shared sovereignty arrangements in which external actors serve as a constraining and guiding force to public officials may spur development and mitigate conflict.

Already there are indications that new entrants in the petroleum industry are using the Chad model as a blueprint. International financial institutions, such as the World Bank and the International Monetary Fund, have invested manpower and resources in assisting other countries like Timor-Leste and São Tomé and Príncipe to set up trust funds similar in some aspects to that of Chad.[112]

To be truly effective, such shared sovereignty arrangements need to be more robust than the Chad arrangement and therefore involve deeper encroachments on state sovereignty. Whether governments will more readily accept severe constraints on their sovereign powers is an open question that can hardly be answered in the affirmative. Besides, multinational corporations, despite pretensions and even protestations to the contrary, sometimes prefer weak governments over stronger ones because the latter may insist on a greater share of oil profits and impose higher taxes. It is quite doubtful that companies are interested in strengthening the capacity of weak governments in Africa to demand better treatment in connection with their natural resources.[113]

[111] Krasner, n 19 above, at 38–9.

[112] See eg International Monetary Fund (IMF), *Democratic Republic of Timor Leste: 2003 Article IV Consultation—Staff Report* (2003) 12; N Shaxson, 'Pain or Gain? Crunch Time Looms for São Tomé Oil' *Reuters* (23 December 2003). The government of São Tomé adopted an Oil Revenue Management Law in 2004 for transparent and efficient management of oil revenues. A significant feature of the law is a government trust fund.

[113] See Nicholas Shaxson, 'Bursting with Confidence' (2006) *World Today*, 1 December 62:12 at 11:

> Oil companies' public relations departments routinely assert that they like stable governments, strong institutions, and a peaceful, benign operating climate in countries where they invest. From a personal point of view, this is certainly true for almost any oil company official working in Africa. On a corporate level, however, this new-found strength of African countries, which threatens the companies and their profits, exposes their routine assertions as, at best half-truths. When governments are feeling strong, company profits,

V. CONCLUSION

Africa is gradually, but perceptibly, moving from a mere spectator to an active player in the creation or strengthening of international institutions and the development of international criminal law norms. One area in which this is evident is shared sovereignty. Some African governments, primarily those of Chad and Sierra Leone, have entered into arrangements with international institutions to play an important role in specific aspects of domestic policy. In Sierra Leone, the Special Court created pursuant to an agreement between the United Nations and the government is playing a key role in the development of norms of international criminal law and international judicial precedent and is also expected to help lay a more solid foundation for the rule of law and a global movement against impunity and for the independence of the judiciary.

The Chad–Cameroon Oil Pipeline Project presents an interesting case study in international project finance which will enrich rules and practices in international investment law and international economic law generally. The pipeline project lays a foundation for confronting mismanagement of natural resource revenues while also helping to improve democratic governance, accountability and chronic underdevelopment. It 'represents a new development paradigm',[114] which is likely to capture the attention of those with interest in international development law for years to come. The Oil Trust established in collaboration with the World Bank is precedent-setting and already serves as a model for other countries that suffer from underdevelopment and weak governance as well as a pressing need to utilise public resources for the common good.

In conclusion, African states, institutions and people have been forced to fashion new arrangements and innovative solutions to the continent's many pressing social, political, legal and economic problems. Shared sovereignty is one of several normative tools being employed to manage conflict, promote justice and foster development.

and access to new licences, come under threat. Say it softly, but oil companies sometimes feel more comfortable when their host governments feel rather weak.

(*Ibid*.)

[114] Paul M Wihbey, 'West Africa's Sustainable Development and United States Energy Security', Congressional Briefing (17 November 2005) 2, at <http://www.thesullivanfoundation.org/documents/GulfofGuineaBriefing-WihbeyPresentation.pdf> (accessed 15 June 2007).

8

*Redrawing the Map: Lessons of Post-colonial Boundary Dispute Resolution in Africa**

JOEL H SAMUELS

I. INTRODUCTION

Anyone hoping to learn about Africa's positive contributions to international law might begin by scoffing at the proposition that a chapter in such an analysis could be found in the continent's resolution of boundary disputes.[1] After all, one of the myriad legacies left by European colonisers is a continent divided along lines that often ignore tribal (or ethnic) and other historical boundaries. European leaders divided Africa by negotiating frontiers without the participation or permission of indigenous African leaders.[2] In light of this experience, when decolonisation occurred in the 1950s and 1960s, and the European powers withdrew their colonial administrations, one would have anticipated frequent struggles over boundaries.

To the contrary, since 1950, boundary disputes have been the cause of virtually no hostilities on the African sub-continent. This is not to say that the divides created by the European boundary-drawing have not been a source of African conflicts, but boundary disputes in and of themselves have been the source of only one significant war in Africa since 1950. And even that war, between Ethiopia and Eritrea (which followed Eritrea's move to independence in 1993 without clear boundaries with Ethiopia[3])

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[1] A boundary dispute is a dispute between two or more states over the possession or control of a piece of land. The dispute can involve the power over an entire territory or the demarcation of a boundary where the placement of a boundary line would shift a piece of territory from one state to another.

[2] See eg Thomas Pakenham, *The Scramble for Africa* (London, Harper Perennial, 1991) 205.

[3] Eritrea's 30-year struggle for independence from Ethiopia ended in 1993, but the two states never demarcated the boundaries between them, and many of those boundaries

ultimately ended with an agreement by the two states to settle their dispute through arbitration.[4]

In the years following independence, Africa had no shortage of armed conflicts. But these events were generally defined by disputes that did not involve boundaries. Armed conflicts in Burundi, Congo/Zaire, Côte d'Ivoire, Chad, Ethiopia, Liberia, Nigeria (the Biafran War), Rwanda, Somalia, Sudan, Sierra Leone and Uganda were primarily internal or civil wars. Several civil wars also entailed major involvement by neighbouring countries, including Congo/Zaire (Angola, Rwanda, Uganda) and Sierra Leone (Liberia). In Angola and Mozambique, colonial wars evolved into civil wars. And in Rhodesia/Zimbabwe, the conflict was really a colonial war.

In light of the number of conflicts in Africa over the last 50 years, the move to send boundary disputes to international tribunals has been all the more striking. Meanwhile, during that same period, disputes and indeed armed conflicts over boundaries have raged in Latin America, the Middle East, Europe and Asia.[5] But in Africa, where armed conflict—both internal and external—has been a fixture of the last half-century, boundary disputes have been resolved by other means.

The commitment to resolving boundary disputes through judicial decision-making rather than extra-legal armed conflict offers lessons to the protagonists of other disputes, whose protracted conflicts offer little hope for a durable cessation of hostilities. In addition, African states have turned in particular to one judicial body to resolve their disputes—the International Court of Justice (ICJ). Their faith in the ICJ (and, more often than not, willingness to abide by its decisions) has helped to legitimise the ICJ as an arbiter of disputes between states.

Focusing on the text of the decisions in leading boundary dispute cases in the ICJ, this chapter identifies a number of fundamental principles of

had been fluid during the many years of Eritrea's existence as a constituent entity of the Ethiopian state from the early 1900s until Eritrea gained independence in 1993. In May 1998, Eritrea took action to reclaim territory that it considered to be part of it, and that action ignited a war that lasted until December 2000.

[4] See Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, signed on 12 December 2000 <http://www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html>. As part of their peace treaty, the governments of Eritrea and Ethiopia agreed to settle their dispute before a boundary commission (the Ethiopia–Eritrea Boundary Commission), composed of five of the world's leading jurists: Sir Elihu Lauterpacht (President), Prince Bola Ajibola, Professor Michael Reisman, Judge Stephen Schwebel, and Sir Arthur Watts. For a copy of the decision, see Eritrea–Ethiopia Boundary Decision, <http://www.un.org/NewLinks/eebcarbitration/EEBC-Decision.pdf> (accessed 19 November 2006).

[5] Many of these disputes are not centred on a boundary dispute alone. They have also involved other factors, such as political and economic disagreements and ethnic tensions. However, in each of them, a boundary dispute has been a significant cause of conflict.

international boundary dispute law that originated in disputes between African states. First, the chapter explores the meta-contribution to boundary dispute resolution—opting for tribunals rather than armed conflict. Second, the chapter identifies and explains specific substantive contributions to boundary dispute law from Africa's cases before the ICJ. Several important developments in international boundary dispute law have been made in the context of resolving African boundary disputes. By highlighting the role of the parties in pushing the Court to develop clearer rules and norms in resolving boundary disputes, African states have contributed directly to the development of the international law of boundary dispute resolution.

II. TAKING THEIR DISPUTES TO COURT

Among the many contributions to boundary dispute law made by African states over the last 60 years, one stands out: reliance on international tribunals to resolve boundary disputes. Rather than resorting to armed conflict, African states have overwhelmingly turned to judicial institutions to resolve their boundary disputes. In particular, leading by example, the states of Africa have turned to the ICJ to settle such disputes. The resort of African states to international tribunals, and in particular the ICJ, has contributed significantly to the credibility, legitimacy and importance of the ICJ as a forum for dispute resolution between states.

Of the 109 contentious disputes brought before the ICJ since 1947,[6] 25 have involved African parties.[7] Of these African cases, more than half—13—involved boundary disputes. This number does not include the *Case Involving the Status of Western Sahara*, an advisory opinion requested by the United Nations General Assembly concerning the territorial status of Western Sahara,[8] or several advisory opinions dealing with the territorial status of the former German Southwest Africa (today, Namibia).

In contrast to the 13 contentious boundary dispute cases involving African states, the rest of the world has brought 27 boundary disputes

[6] This number is actually somewhat inflated, as a number of cases are actually related actions involving identical or similar allegations of wrongdoing. So, for example, 10 of the 109 contentious disputes filed in the ICJ were filed in 1999 by *Yugoslavia v Serbia & Montenegro* to challenge the legality of the use of force in the former Yugoslavia. Rather than a single action to determine the legality of the use of force on the territory, the case was filed as 10 separate actions (against, respectively, Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the UK and the US). Thus, taking account of this and other situations where a single legal issue is raised in multiple actions, the African boundary dispute actions represent an even larger portion of the total number of distinct contentious disputes brought before the ICJ.

[7] Of the total 109 cases, 40 have involved boundary disputes.

[8] *Western Sahara, Advisory Opinion* (16 October 1975) 1975 ICJ 12.

to the ICJ since 1947 (out of 84 total non-African cases). Interestingly, of these 27 cases, six are currently pending before the Court. As a continent, Africa has brought the most boundary dispute cases before the ICJ. In particular, African states led the movement to turn to the ICJ to resolve boundary disputes.

This commitment to rely upon international institutions rather than upon military force to resolve boundary disputes represents a fundamental step in the process of creating durable peace and security on the continent. The commitment also helped to legitimise the ICJ during the past 50 years.

When the United Nations was created in the wake of World War II, negotiators debated the merits of extending the life of the Permanent Court of International Justice (PCIJ), which had existed since the end of World War I.[9] In 1942, senior officials in the American and British governments agreed that, in light of the events that had led to World War II, an international court would be indispensable to the maintenance of future world order.[10] They agreed that, at war's end, a new international tribunal would be established, based upon the PCIJ.[11] As part of the same process that created the United Nations, the negotiating states established the ICJ.[12]

[9] The London Committee, comprised of members acting in their personal capacity and not on behalf of their governments, issued a report on 10 February 1944 in which it stated that 'the only necessary assumption was that an International Court in some form would be required in the future, either the Permanent Court with any necessary modifications to its present Statute or a new Court established by means of a new Statute': Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (Cambridge, Cambridge University Press, 1996) 48.

[10] See *A Guide to the History, Composition, Jurisdiction, Procedure and Decisions of the Court*, 5th edn (The Hague, ICJ, 2004), <http://www.icj-cij.org/icjwww/igeneralinformation/ibleubook.pdf>, 17. A State Department memorandum dated 16 November 1942 to the British Embassy in Washington stated:

> The Department of State agrees with the views of the Foreign Office that steps should be taken to examine problems connected with the [Permanent] Court [of International Justice]; that the question is one which it will be necessary to consider in connection with any peace settlement; and that there would be advantage in reaching in advance an understanding among the associated governments on desired objectives.

(State Department memorandum, quoted in Geoffrey Marston, 'The London Committee and the Statute of the International Court of Justice' in Lowe and Fitzmaurice (eds), n 9 above, at 47.

[11] See n 9 above. The negotiators agreed that:

> The statute of the court of international justice should be either (a) the Statute of the Permanent Court of International Justice, continued in force with such modifications as may be desirable or (b) a new statute in the preparation of which the Statute of the Permanent Court of International Justice should be used as a basis.

(Dumbarton Oaks Proposal, Ch VII 'An International Court of Justice', Art 3, in *The International Court of Justice: Selected Documents Relating to the Drafting of the Statute*, (US Government, 1946) 14).

[12] See United Nations Charter, Ch XIV (Arts 92–6); see also Statute of the International Court of Justice, (1945), <http://www.icj-cij.org>, Preamble, Art 1 (accessed 21 August 2007).

In its early days, the ICJ sought to establish its identity and its legitimacy. In one of the first cases it addressed, *Reparation for Injuries Suffered in the Service of the United Nations*, the Court grappled with the power of the United Nations itself.[13] The case, which held that the United Nations is an international legal person, with rights and responsibilities to, among others, its employees, breathed life into the UN as an institution.[14] But the case also gave the Court its own credibility as an arbiter of disputes over international law.

Much as the *Reparations* case made an early case for the viability of international organisations and for the power of the Court itself, the repeated commitment of African states to turn to the ICJ for resolution of contentious disputes gave legitimacy to the Court.[15] In its first 10 years, the Court was relied upon largely by the UN for the formulation of advisory opinions. Of the 24 advisory opinions sought from the Court, 10 occurred in the first decade of its existence. Only four advisory opinions have been sought since 1990.

While evidence demonstrates that African states were more willing than their counterparts from other regions to rely upon the ICJ to resolve boundary disputes, one question remains: why? One reason that African states may have turned to the ICJ more often and earlier than many other states was an early promise by African heads of state to recognise boundaries as they existed at the time of independence. Article II of the Organization of African Unity Charter, the constitutive document of the Organization of African Unity (OAU), lays out its five central purposes. Of these five purposes, three centre on the same general proposition: the importance of the unity and sovereignty of African states.[16] In Article III of

[13] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* (11 April 1949) 1949 ICJ 174. The *Reparations* case was actually an advisory opinion, issued by the Court in response to a request by the General Assembly of the United Nations. The General Assembly certified a series of questions to the Court and called on the Court to address each of those questions in turn. The Court's opinion, handed down on 11 April 1949, answered each of the questions posed by the General Assembly. The decision in this case was only the third of the Court's tenure and was the second advisory opinion it issued.

[14] See *ibid*.

[15] Contentious cases are cases brought to the Court by member states for resolution of an outstanding dispute between (or among) them. The term 'contentious dispute' is contrasted with advisory opinions, the other process by which the ICJ can be seized of a case. Advisory opinions, which may be requested by the General Assembly or by the Security Council of the United Nations (and also by any other UN organs or specialised agencies which have been designated by the General Assembly to seek advisory opinions of the Court), call on the Court to give an advisory opinion on legal questions posed by the requesting bodies. Those opinions are merely advisory and are therefore to be contrasted with the Court's judgments in contentious disputes, where the decisions are final and binding. See UN Charter, Art 96, n 12 above; ICJ Statute, n 12 above, Arts 34–6, 59–61, 65–7.

[16] OAU Charter, Article II, states:

> The Organisation shall have the following purposes:
> *(a) To promote the unity and solidarity of the African States;* (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;

the Charter, the states pledge to 'observe scrupulously' several principles, among these 'Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence'.[17]

Emerging from the colonial era, African states agreed that a primary goal of this new regional organisation would be to maintain peace and stability across the continent, in large measure to enable the newly independent states to free themselves from the colonising powers. In the midst of the decolonisation effort, intra-African battles over sovereignty and territory would only undermine the process.

This agreement was formally endorsed by the OAU member states at the first OAU session of heads of state in July 1964. In Resolution 17(I), the heads of states agreed upon a common principle for settling border disputes among African states. The operative paragraphs of that resolution read:

> The assembly of Heads of State and Government meeting in its First Ordinary Session in Cairo, UAR, from 17 to 21 July 1964:
>
> 1. SOLEMNLY REAFFIRMS the strict respect by all Member States of the Organisation for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;
> 2. SOLEMNLY DECLARES that all Member States pledge themselves to respect the borders existing on their achievement of national independence.[18]

Through this endorsement of the existing borders, African leaders hoped to avoid the instability that would come from external boundary conflicts, particularly at a time of internal turmoil as independence took root.[19] These assurances, largely respected across the continent, explain in large part the basis for African states' resort to judicial resolution of boundary disputes. In spite of the language of the July 1964 endorsement of the OAU agreement, African leaders did not ensure that boundaries would

> *(c) To defend their sovereignty, their territorial integrity and independence; (d) To eradicate all forms of colonialism from Africa;* and (e) To promote international cooperation. (Emphasis added.)

(OAU Charter, adopted 25 May 1963, <http://www.africa-union.org> (accessed 21 August 2007)). The OAU was formally replaced by the African Union (AU) in 2001. See 'The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift?' in Adrien Wing, Jeremy Levitt and Craig Jackson (eds) (2003) 13 *Transnational Law & Contemporary Problems* 1.

[17] OAU Charter, n 12 above, Art III.

[18] OAU Resolution 17(I) (July 1964).

[19] The agreement of the African heads of state also followed the dictates of a legal doctrine that had originally been applied in Spanish America but which became central to the formative years of post-independence African nations: *uti possidetis juris.* This doctrine, described further below, calls for 'the maintenance of the territorial status quo at the time of independence': *Case Concerning the Frontier Dispute (Burkina Faso v Mali)* (22 December 1986) 1986 ICJ 554, 565, para 22.

not be contested; rather, they assured one another that any challenge to boundaries would take place through judicial bodies.

In 1960, in an effort to determine the legal status of South West Africa, Ethiopia, South Africa and Liberia, all brought their disputes to the ICJ.[20] This case was the first contentious dispute among African states to be brought before the ICJ. In the years that followed, as more and more African states gained independence, the number of African disputes before the Court grew and then remained steady through the 1970s and 1980s.

Although primary recourse was made to the ICJ, African states did on occasion turn to the OAU for assistance in settling boundary disputes. In one early boundary post-colonial boundary dispute, the OAU played a significant role in moving towards a settlement. On July 1962, tensions between Morocco and Algeria sprouted into a military dispute. Morocco favoured resolution through the United Nations system, but Algeria preferred a regional solution through the OAU. Eventually Morocco agreed to seek OAU assistance first and, failing a solution through negotiation and OAU assistance, to turn to the UN mechanisms.[21] But African states turned more often to the ICJ to resolve their contentious boundary disputes. And that commitment to the ICJ gave the Court legitimacy as a mechanism for resolving disputes between states, without resort to military action.

By contrast with the declining number of advisory opinions, the number of contentious cases brought before the Court has risen dramatically in recent years. Since 1990, 50 cases have been brought to the ICJ (as compared to 59 in the preceding 40-plus years). This dramatic rise in contentious cases reflects the recognition by states that the ICJ can be a meaningful forum for resolving their disputes. This recognition, in turn, grew out of the successful resolution of disputes before the Court, a disproportionate number of which were cases involving African parties.

In short, by turning to the ICJ to resolve their boundary disputes, African states demonstrated a confidence in the international judicial mechanism, which allowed the Court to gain legitimacy.[22] And that legitimacy has led states inside and outside Africa to turn more and more frequently to the ICJ to resolve their disputes.

[20] *South-West Africa Cases (Ethiopia v South Africa; South Africa v Liberia)* (18 July 1966) 1966 ICJ 6 (holding, by an 8-to-7 vote, that Ethiopia and Liberia had no legal right solely as former members of the League of Nations to challenge South Africa's administration of its mandate over South-West Africa).

[21] The OAU did not settle the dispute through any international adjudicative mechanisms but rather helped to facilitate dialogue between Algeria and Morocco. For more on this dispute and the role of the OAU, see P Mweti Munya, 'The Organisation of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation' (Spring 1999) 19 *Boston College Third World Law Journal* 537, 556.

[22] Admittedly, African states were not the only ones bringing cases to the Court in the 1950s to 1980s (particularly during the pre-decolonisation period), but, as a continent, the African commitment to the ICJ has been steady and continuous.

III. CREATING NEW RULES FOR RESOLVING BOUNDARY DISPUTES

In addition to the broad contributions just discussed, the resort by African states to the ICJ has had important practical consequences. These consequences, in the form of contributions to the substantive law of international boundary dispute resolution, have never been thoroughly explored and therefore remain unrecognised. In this section, we identify six specific contributions to international boundary dispute law that can be traced to African cases before the ICJ.[23] These contributions have helped to shape the international law governing boundary disputes.[24] Later sections focus on the sources to be used in resolving boundary disputes and identify three special topics in boundary dispute resolution that have been advanced through the contributions of African parties.

A. Hierarchy of Sources to Resolve Boundary Disputes

One of the most important contributions to international law provided by the ICJ (or, to be precise, by the documents establishing the ICJ) has been

[23] In addition, a seventh important principle of territorial law comes from an advisory opinion issued by the court on the status of Western Sahara. The Western Sahara opinion is regarded as having set out a basic rule that a land occupied by tribes with a social and political organisation is not *terra nullius*. *Terra nullius*, literally 'no man's land,' is the concept that applied in international law to territories unclaimed by sovereign states. Where a territory did not have systems of law or property rules that allowed for the cultivation of the land, states might attempt to inhabit the land, ignoring the rights of indigenous populations who might have different conceptions of property ownership. As the Court pointed out:

> According to the State practice of that period, a territory inhabited by tribes or peoples having a social and political organisation is not regarded as *terra nullius*: in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers.

(*Western Sahara*, n 8 above, at para 80). A narrow interpretation of this rule is short-sighted. Indeed, in the context of indigenous rights, little can be more important than the proposition that tribes can create an identity for a territory. The rule here recognises that, unlike Antarctica, a territory like Western Sahara with indigenous tribal populations is not *terra nullius* but rather a settled land. As such, territorial rights in these lands can be acquired only through international agreements or other legal means. To arrive and lay claim to the territory is insufficient for purposes of establishing a viable claim of sovereignty over the disputed land.

[24] The specific rules of law that will be discussed in the sections that follow originated in contentious African dispute cases. However, many of the underlying notions predated the cases and were given doctrinal expression or formally expressed for the first time in the cases. Nonetheless, the mere codification of these rules of law is in itself a contribution to the boundary dispute arena, as the rules of the game for resolving such disputes are generally murky and subject to multiple interpretations. As such, these rules have broad application, both in the ICJ and beyond. This is true notwithstanding Art 59 of the ICJ Statute, which states that the 'decision of the Court has no binding force except between the two parties and in respect of that particular case'. As we will see, the principles of international law enunciated in a particular case are raised in subsequent cases, even though the holding of a particular case has no force in the resolution of the later dispute.

the hierarchy of sources provided as part of the Statute of the Court.[25] Article 38 of the ICJ Statute, widely considered to be the definitive statement of the sources of international law,[26] sets forth the hierarchy of sources for all cases pending before the ICJ.[27] The hierarchy of Article 38 applies in boundary dispute cases as in all other cases that come before the Court. However, as a matter of practice, over time, the judges came to recognise that the hierarchy of Article 38 was insufficiently detailed to cover many of the sources relied upon by parties to boundary dispute cases.[28]

As a result, the Court developed an additional hierarchy of sources in boundary dispute cases. This hierarchy is not codified in the Statute of the ICJ,[29] but rather in the text of the decisions of the Court. And the hierarchy of sources to be used in boundary dispute cases is the first major contribution to be found in the jurisprudence of the Court involving African states.

In a contentious case between Cameroon and Nigeria involving the maritime and land boundary between the two states, the Court first

[25] It has been aptly observed that 'Every case in the World Court involves the sources of international law in some form, because every case requires an investigation of substantive or adjective rules whose existence and legal effect ultimately depends on their having been created by one of the means recognized as apt for this purpose': *Fifty Years of the International Court of Justice*, n 10 above, at 63.

[26] See eg Restatement of the Law (Third) Foreign Relations Law of the United States, s 102, Reporter's Notes (1): 'This section draws on Article 38(1) of the Statute of the International Court of Justice, a provision commonly treated as an authoritative statement of the "sources" of international law.' See also Elihu Lauterpacht (ed), *International Law: General Works* (Cambridge, Cambridge University Press, 1970) 55.

[27] See ICJ Statute, Art 38(1), which reads in pertinent part:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[28] See *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (24 February 1982) 1982 ICJ 18, 37, para 23 (emphasising that 'While the Court is, of course, bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules applicable to the delimitation, it is also bound, in accordance with paragraph 1(a), of that Article, to apply the provisions of the Special Agreement. *ICJ Reports* 1974, p 23', and further noting that the Court 'must however take note that the law-making process in this respect has now progressed much further').

[29] The ICJ Statute was not written by the judges of the Court in any event but rather by the states that negotiated the UN Charter, led by the US and the UK. The draft of the Statute was prepared in April 1945 by a commission led by Green H Hackworth of the US (later a justice of the Court) and made up of representatives of 44 states: see *A Guide to the History, Composition, Jurisdiction, Procedure and Decisions of the Court*, n 10 above, at 19.

explicitly set up an order of authority to be used by judicial bodies in resolving boundary disputes.[30] Specifically, the order of sources to be followed to determine the proper location of a disputed boundary is: (1) treaties, (2) maps whose purpose is to find the geographic markers denoted in treaties and (3) interpretation of treaties with reference to sketch maps that show the intent of the parties.[31]

In the Cameroon–Nigeria dispute, one of the maritime boundaries involved in the case concerned a river between the two states, the Kohom. Relevant treaties failed to identify the boundary and, indeed, the course of the river. So, the Court reasoned:

> In order to locate the course of the Kohom, the Court has first examined the text of the Thomson-Marchand Declaration, which has not provided a decisive answer. Thus the Court has been unable to find, on any of the maps provided by the Parties, a single one of the villages and localities mentioned in paragraph 19 of the Declaration. Likewise, the provision in paragraph 18 of the Declaration that the boundary is to follow the course of the River Kohom from its confluence 'in the mountains' with the Keraua has not enabled the Court to identify the course of the Kohom, given in particular that neither the course proposed by Cameroon, nor that submitted by Nigeria, corresponds to such a description.
>
> The Court has therefore had to have recourse to other means of interpretation. Thus it has carefully examined the sketch-map prepared in March 1926 by the French and British officials which served as the basis for the drafting of paragraphs 18 and 19 of the Thomson-Marchand Declaration. As Nigeria pointed out in its Rejoinder, this sketch-map does indeed show what the intention of the Parties was at the time, when they referred to the River Kohom. The sketch-map is particularly helpful, since it includes very clear indications in regard to the relief of the area and the direction of the river, which the Court has been able to compare with the maps provided by the Parties. The Court is able to determine, on the basis of this comparison, that the Kohom whose course the Thomson-Marchand Declaration provides for the boundary to follow is that indicated by Cameroon. In this regard, the Court notes first that the 1926 sketch-map indicates very clearly, just before the boundary turns sharply to the south, a tributary descending from Mount Kolika and flowing into the Kohom. Such a tributary is to be found on the river identified by Cameroon as the Kohom but not on that proposed by Nigeria. The Court would further observe that the 1926 sketch-map quite clearly indicates that the boundary passes well to the north of the Matakam Mountains, as does the line claimed by Cameroon, whereas that favoured by Nigeria passes well to the south of those mountains.[32]

[30] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)* (10 October 2002) 2002 ICJ 303, 367, para 101. (Equatorial Guinea intervened in the case to protect its maritime interests.)

[31] *Ibid*.

[32] *Ibid* at para 101.

By adopting this new view of the role of sources that previously would have been ignored, the Court underlined the importance of considering all relevant sources when determining boundaries.

The hierarchy of sources established by the Court creates a clear process for resolving competing arguments over the primacy of one document over another. At the same time, as in the Nigeria–Cameroon dispute, the hierarchy allows the Court to turn to less reliable sources of authority (such as sketch maps) where better evidence—such as treaties demarcating the borders—cannot be found. The hierarchy then allows the parties to make arguments based upon other documents and to know how those documents will be considered by the Court in reaching its decision.

The power of treaties in the context of boundary disputes was reinforced in another African dispute, a dispute between Libya and Chad. In that case, the ICJ held that: 'A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy.'[33] Thus, boundaries established by a treaty continue even if the treaty ceases to be in force. African states have been instrumental in shaping the discussion of the role of maps in resolving boundary disputes as well.

B. Value of Maps in Adjudicating Boundary Disputes

Perhaps no topic is more basic—or more fundamental—to the resolution of boundary disputes than the relevance of maps. Interestingly, historically, decision makers charged with resolving boundary disputes generally disregarded maps.[34]

This point was emphasised in *Burkina Faso v Mali*, where the Court made a broad statement about the value of maps, noting that

> [s]ince relatively distant times, judicial decisions have treated maps with a considerable degree of caution: less so in more recent decisions, at least as regards the technical reliability of maps.[35]

Specifically, the Court reasoned that maps can have varying degrees of legal force, ranging from no value at all, to a finding of title, to being enough in themselves to establish a boundary when the expression of the will of the state is shown.[36]

As in most boundary dispute cases, in the case between Burkina Faso and Mali, each side produced multiple maps—maps produced by

[33] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* (3 February 1994) 1994 ICJ 6, 37, para 73.

[34] Instead, decision-makers turned to treaties and written statements about the location of boundaries.

[35] *Burkina Faso v Mali*, n 19 above, at 583, para 56.

[36] *Ibid* at paras 53–6.

different authorities and at different moments in time. In determining the value of these maps (both by reference to one another and as sources to be weighed against other sources of boundary information, such as agreements and administrative regulations), the Court stated:

> Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights.[37]

The primary question that dictates the relevance of maps is whether the maps are physical expressions of the will of the states concerned with the dispute.[38] Thus, where a map expresses 'the will of the State or States concerned', it will be weighed heavily.[39] For example, a map annexed to an official agreement and which forms an integral part of that agreement will be intrinsic evidence of the boundary. But, in *Burkina Faso v Mali*, the Court stressed that

> [e]xcept in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.[40]

Thus, maps are particularly relevant if they are attached to an official text describing an agreement.

In *Burkina Faso v Mali*, the Court laid out two additional criteria for determining the weight that maps should be given: (1) the technical

[37] *Ibid* at para 54. This principle has been relied upon regularly in subsequent boundary disputes cases across the globe. See eg *Kasikili/Sedudu Island (Namibia v Botswana)* (13 December 1999) 1999 ICJ 98; *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* (17 December 2002) 2002 ICJ 625, 667, para 88: 'In the present case, the Court observes that no map reflecting the agreed views of the parties was appended to the 1891 Convention, which would have officially expressed the will of Great Britain and the Netherlands as to the prolongation of the boundary line, as an allocation line, out to sea to the east of Sebatik Island.'

[38] *Burkina Faso v Mali*, n 19 above. The Court notes that such maps can have legal force in and of themselves but stresses that such force comes not from the maps themselves but rather from the context in which those maps are to be found:

> Maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of any auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or *juris tantum* presumption such as to effect a reversal of the onus of proof.

(*Ibid* at para 56.)

[39] *Ibid* at para 54.

[40] *Ibid*.

reliability of the maps[41] and (2) the neutrality of the sources of the maps.[42] And yet, even modern satellite images created by a neutral source should be viewed as nothing more than supplemental sources of information. Once again, the only exception to the principle that maps are supplemental sources of information is on the occasion where a map represents 'a physical expression of the will of the State'.[43]

In the most recent African boundary dispute to reach judgment in the ICJ (*Benin v Niger*), the Court referred favourably to the principles laid out in the *Burkina Faso* decision and emphasised its position. The Court held that

> except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title.[44]

The Court's statements on the role of map evidence—particularly when coupled with the hierarchy of boundary dispute sources discussed earlier—strongly suggest that international law has shifted the importance of maps in determining boundaries. One cannot say that this shift has made maps more or less important. In effect, it has accomplished a little bit of both, depending upon the situation. In the event that maps are technically reliable and produced by a neutral source, they can be more relevant than they might have been in earlier years. The converse, of course, is equally true: maps that are either technically questionable or appear to present a non-neutral view are likely to be taken less seriously than they might have been in earlier days.

The more important enquiry now to be undertaken concerns what the role of the map is intended to be. A map produced by a state for the purpose of educating its school children (previously considered useful) will now be almost wholly ignored. Such a map is likely to be biased towards the state that produced the map. More importantly, such a map is not an expression of the will of the parties to the disputed boundary. It is simply a school map. By contrast, a map produced as an annex to a treaty between

[41] *Ibid* at para 55 (noting the increased reliability of mapping technology, including satellite imagery, since the 1950s and suggesting that with increased reliability comes increased weight to be given to a map).

[42] *Ibid* at para 56. In other words, maps prepared by the governmental authorities of one of the states party to the dispute are likely to be viewed as less reliable than maps created by a third party, international organisation or neutral and private entity not involved in the boundary dispute.

[43] *Ibid*. Note, however, that in order for this principle to apply (expressing the will of the state), the likelihood is that at least one of the additional factors listed by the Court (neutrality of the source) is unlikely to be present, inasmuch as states are likely to express their will through maps they have created or commissioned.

[44] *Frontier Dispute (Benin v Niger)* (12 July 2005) 2005 ICJ 125, 31, para 44.

the two states is likely to be given far more weight after the *Burkina Faso* decision than it would have previously enjoyed as a 'mere' map. Such a map would be even more valuable, of course, if it were produced by some independent body, but the key question, the Court has established, is the purpose and actual use of the map.

Just as maps are now evaluated differently by judicial bodies charged with resolving boundary disputes, those bodies have also developed more sophisticated views on the role of external evidence in settling boundary disputes.

C. Subsequent Practice as Evidence of International Agreements

International agreements governing boundaries are not static. The Court has recognised that subsequent state practice can provide evidence of the intent of the parties with regards to their boundary agreements.[45] In resolving a dispute between Botswana and Namibia over a small island in the middle of a river that divides the two states, the Court provided guidance in determining what subsequent actions by government officials can constitute agreements.[46] In order to fully appreciate how the Court handled the use of subsequent practice as evidence of international agreements in the context of boundary disputes, a detailed account of the Kasikili/Sedudu Island dispute is necessary.[47]

The dispute concerned rights in a small island (1.5 square miles; 3.9 square kilometres) located between two branches of the Chobe River, which serves as one part of the boundary between Namibia and Botswana. In the end, the Court determined that the island forms part of the territory of Botswana.[48]

[45] The concept of subsequent practice as evidence of international agreements is a long-standing one in international law and is codified in Art 31(3)(b) of the Vienna Convention on the Law of Treaties (the so-called Treaty on Treaties, which governs treaty interpretation): Vienna Convention on the Law of Treaties (entered into force 22 May 1969) UN Doc A/Conf39/28, UNTS 58, 8 ILM 679.

[46] In addition to these broader rules that can be derived from the case, the ICJ decision in *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 13 December 1999, also establishes specific methods used to determine where the 'main channel' of a river is located. (Kasikili was the Namibian name for the island; Sedudu was its Botswanan name.)

[47] One unique feature of boundary dispute cases—another legacy of an African case—is the notion that when boundaries are in dispute before the ICJ, the Court should endeavour to resolve the entirety of the boundary dispute, even if the parties have omitted some unresolved part of the dispute over the boundary. The Kasikili/Sedudu Island dispute also provides instruction on this issue. Although the parties had not asked for a determination of each party's rights to use of the river, the Court decided to resolve outstanding questions about rights of use, even though those issues were beyond the scope of questions presented by the parties. This is a feature unique to boundary dispute cases and recognises that these disputes tend to demand a more holistic resolution.

[48] *Namibia v Botswana*, n 37 above.

The Court was asked only to determine the boundary line between Namibia and Botswana around the Kasikili/Sedudu Island and the legal status of the island. No other disputes were in issue before the Court. At the request of the parties, the Court was to reach its decision on the basis of a treaty between Great Britain and Germany, signed on 1 July 1890, which determined the line between the two countries today known as Namibia and Botswana along the River Chobe and the rules and principles of international law.[49]

The dispute centred on the question of which of two channels should be considered the 'main channel' of the Chobe, as the river divides at the island before rejoining on the other side.[50]

After deciding that the 'main channel' of the river is the northern section, the Court focused its discussion around the terms of the 1890 Treaty and subsequent actions of the parties. A proposed Article II of the 1890 Treaty (initialled by both the German and English negotiators on 17 June 1890) states:

> The frontier between the German territory and the English territory in the south-west of Africa shall follow, from the point which has been agreed upon in previous arrangements, the 22nd degree of south latitude (leaving Lake Ngami to England), to the east up to the 21st degree of longitude; from thence to the north to where that degree touches the 18th degree of south latitude. Thence, the line of demarcation shall be carried to the east along the centre of the River Tschobi, up to the point where it flows into the Zambezi.[51]

A few days later, a 'draft of the Articles of Agreement' provided:

> The boundary runs eastward along that parallel till it reaches the River Chobe, and descends the centre of that river to its junction with the Zambezi, where it terminates. It is understood that, under this arrangement, Germany shall have free access from her Protectorate to the Zambezi by the Chobe.[52]

On 25 June 1890, the British proposed that the term 'centre' of the river be changed to 'main channel' of the river.[53] The Germans accepted this proposed change.[54] According to the Court, this redefinition demonstrated that both the Germans and the British were aware that the boundary should be defined as specifically as possible.[55] However, the redefinition also shows that neither party knew how to draw the line or was willing place the line in the river in 1890. It is also apparent from the negotiating

[49] *Ibid* at para 11.
[50] *Memorial of The Republic of Namibia (Namibia v Botswana)*, 1999 ICJ Pleadings (28 February 1997) para 3.
[51] *Ibid* at para 46.
[52] *Ibid*.
[53] *Ibid*.
[54] *Ibid*.
[55] *Ibid*.

history that both parties were more concerned with the use of the river as a whole rather than agreeing upon which section would be used as the border.

Along with the 1890 Treaty, the Court applied customary international law. Specifically, both parties agreed that Article 31 of the Vienna Convention was applicable to determine what, if any, subsequent practices of the parties constituted 'an agreement by the parties'.[56] In order for a subsequent practice to bind the parties, the acts must involve an application of the 1890 Treaty. It is in that context, then, that the Court examined three sets of documents claimed by Botswana to constitute subsequent agreements.

The first group of documents began with a letter, dated 14 July 1911, from the British Secretary of State to the High Commissioner responsible for Bechuanaland. The letter indicated the British desire to determine which section of the Chobe was the 'main channel,' but was little more than a request for information. This request, however, was the driving force for Captain Eason's 'Report on the main channel of the [Chobe] river', dated 5 August 1912, which clearly indicated that the northern channel was the main channel:

> I consider that undoubtedly the North should be claimed as the main channel. At the Western end of the island the North channel at this period of the year is over one hundred feet wide and eight feet deep, the South channel about forty feet wide and four feet deep. The South channel is merely a back water, what current there is goes round the North.[57]

Botswana claimed that the Eason report constituted subsequent practice or agreement.[58] Namibia, however, pointed out that the report itself hardly amounted to subsequent practice.[59] No agreement between Germany and Great Britain was reached after the report was made. In fact, Germany never actually received this document as it was only an internal British report.[60] The Court also noted that the British placed no reliance upon the report.[61]

The second set of documents that might have constituted a subsequent practice comprised those that were created in the course of negotiating certain private business arrangements. In 1947, a businessman, one Mr Ker, operating a transport business wanted to bring timber down the Chobe using the northern channel. Ker obtained the necessary permission from the appropriate official in the Caprivi Strip (now part of Namibia),

[56] *Ibid* at para 18; Vienna Convention on the Law of Treaties, n 45 above, at Art 31.
[57] *Botswana v Namibia*, n 37 above, at para 53.
[58] *Ibid* at para 54.
[59] *Ibid*.
[60] *Ibid* at para 55.
[61] *Ibid.*

Major Trollope. Ker also requested permission from the Bechuanaland authorities. Thereafter, correspondence between Major Trollope and Mr Redman (Assistant District Commissioner for Bechuanaland) ensued.[62] Mr Redman wrote a letter to Major Trollope on 18 December 1947, which included this text:

1. I have the honor to inform you that I have received a letter from the Zambezi Transport & Trading Company stating that they wish to recommence the transport of timber by river from Serondella but they have been informed by you that the channel between Kasane and Serondella which they intend to use, is in the Caprivi Strip.
2. At low water I understand that this channel is the only water connection between Kasane and Serondella and I suggest that if this channel does happen to run into the Caprivi Strip from the Chobe river along which our boundary runs it will be in both our interests and a matter of convenience if we can come to an arbitrary agreement that half this channel is included in this Territory for the purpose of the transport of the timber by the Zambesi Transport & Trading Company.
3. If however the channel referred to is part of the Chobe river and not a branch off from it then it seems probable that the actual boundary is formed by the deep water channel in the river, which would mean that they would not be entering your Territory.[63]

In his response on 3 January 1948, Major Trollope indicated he was prepared to renew the permission originally given to Ker and wrote:

4. In regard to the larger question raised by you (ie as to whether the stretch of water in question is actually within the Eastern Caprivi Zipfel,— or whether it in fact forms the boundary), I freely admit that the matter is not without difficulty. I further agree that it is a matter affecting our two administrations and is not merely a matter between this office and Mr. Ker.
5. I suggest, in this connection, that I and your Assistant at Kasane, should hold a joint informal investigation thereafter submitting reports (joint if we are able to reach unanimity) to our respective administrations in order to resolve the matter finally and officially.[64]

On 19 January 1948, Major Trollope and Mr Redman (by now District Commissioner of Kasane, Bechuanaland) produced a joint report on the status of the boundary, written to settle the boundary dispute before any

[62] *Ibid* at para 56.
[63] *Ibid*.
[64] *Ibid*.

real problems arose. The report found that 'the "main Channel" does not follow the waterway which is usually shown on maps as the boundary between the two Territories'.[65] Moreover, the authors agreed that 'the "main Channel" lies in the waterway which would include the island in question in the Bechuanaland Protectorate'.[66] They also agreed that the island had been used by Caprivi tribesmen without objection by Bechuanaland tribesmen and that there was no evidence of use of the island by Bechuanaland tribesmen themselves.[67]

Later that month, Redman forwarded a copy of the report and a cover letter to the Government Secretary of Mafeking. This letter demonstrated that the earlier maps (which showed the southern channel as the boundary) were inaccurate and had likely been drawn by someone who had not examined the river to determine which section was the main channel.[68]

Discussions continued for a number of years, centring on two primary topics: navigation on the river and ownership of the island. To be clear, though, neither party seemed particularly interested in actual ownership. Rather, the discussion centred on the need for a demarcation of the boundary rather than its delimitation.[69]

Eventually, a 'gentleman's agreement' was proposed by Trollope in 1951, and the two sides were able to agree on a framework for treatment of the boundary.[70] Under this agreement, both sides essentially agreed to disagree about sovereignty over the island but also agreed that Caprivi tribesmen could continue to use the island, and the waterway would remain open to free use by anyone interested in navigating it.[71] These concessions of use were made explicitly without prejudice to any future claims that might be made about sovereignty over the island and waterway by either state.[72]

Botswana argued that the Joint Report and the subsequent discussions indicated that there was an agreement that the main channel was to the north of the island. Namibia, however, argued that the same documents demonstrated the island was part of the Caprivi Strip and therefore part of Namibia.[73] The Court drew eight conclusions from the Joint Report and the subsequent communications. Notably, the Court concluded

[65] *Ibid* at para 57.
[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid* at para 58.
[69] For additional discussion of this distinction, see III.D below.
[70] *Botswana v Namibia*, n 37 above, at para 60.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid* at para 61: 'According to Botswana, these documents show that the boundary around Kasikili/Sedudu Island follows the northern channel; Namibia disputes this, claiming that those same documents demonstrate that the Island forms part of the Caprivi Strip.'

that: (1) prior to 1947, there were no boundary disputes over Kasikili/Sedudu island; (2) prior to 1947, based on the maps available at the time, the boundary line had been assumed to be the southern channel of the river; (3) in 1948, local officials from both sides had agreed that the northern channel was the main channel of the island; (4) Caprivi tribesmen had been using the island since as early as 1907 without objection; (5) all of the parties who might have had claims to the island had opted to avoid confrontation over sovereignty while allowing use of the island and waterway to continue unabated.[74]

After reaching those specific conclusions, the Court determined that the events occurring between 1947 and 1951 demonstrated the absence of an agreement with regard to the location of the boundary and the ownership of the island. The Court concluded that those events did not, therefore, constitute 'subsequent practice in the application of the treaty' and did not modify the terms.[75]

The final claim of 'subsequent practice' occurred more than 75 years after the events surrounding Ker's timber extraction. After an incident between members of the Botswana Defence Force and South African soldiers in October 1984, South Africa and Botswana agreed that a joint survey was needed to determine the location of the boundary. In July 1985, this survey began.[76] The survey included an analysis of all old maps and a review of livestock grazing habits and provided details of the cross-section and depth soundings taken. The survey concluded, inter alia, that:

— The main channel of the Chobe River now passes Sidudu/Kasikili Island to the west and to the north of it.
— The evidence available seems to point to the fact that this has been the case, at least, since 1912.
— It was not possible to ascertain whether a particularly heavy flood changed the course of the river between 1890 and 1912. Floods occurred in 1899 and in June and July of 1909.
— Air photographs taken in 1925, 1943, 1972, 1977, 1981 and 1982 show no substantial change in the position of the channels.[77]

Botswana contended that this survey established the boundary line as the northern channel of the Chobe and further alleged that this survey and its results were binding on the current parties. Namibia denied that the discussion between South Africa and Botswana in 1984–85 had any bearing on the current dispute and stressed that the 1985 survey conclusions

[74] *Ibid* at para 60.
[75] *Ibid* at para 63.
[76] *Ibid* at para 64.
[77] *Ibid*.

were not self-executing and could not be legally binding. Namibia further contended that South Africa lacked any authority to bind Namibia once the United Nations General Assembly had terminated South Africa's mandate over the area almost 20 years earlier (in 1966).[78]

The Court ultimately concluded that no agreement was reached between South Africa and Botswana other than to have a joint survey performed. The 1984–85 survey, therefore, had little impact on the present dispute as it was not an agreement 'regarding the application of the 1890 Treaty'.[79]

In the examination of subsequent practices, Namibia suggested that the Court concentrate on the control and use of Kasikili/Sedudu Island by the Caprivi tribesmen. Namibia argued that those tribesmen had had a continued presence on the island at least between 1890 and the late 1940s.[80] Botswana did not dispute the use of the island by the Caprivi tribesmen for agricultural purposes, but instead contended that this use was sporadic and that the island was used for the same purposes by people living on the other side as well. Botswana also argued that there was never a permanent settlement or village on the island.[81]

In order for the Court to find that the tribal use constituted subsequent practice in the application of the 1890 Treaty, two criteria had to be satisfied. First, Namibia had to demonstrate that the use and occupation of the island by the Caprivi tribesmen was linked to a belief on the part of the Caprivi authorities that the boundary was in fact the southern channel. Second, there had to be proof the Bechuanaland authorities were aware of and accepted this interpretation of the treaty boundary.[82]

The Court determined that there was no evidence that the Caprivi tribesmen used the island as a result of a territorial claim. The Court also pointed out that it was not uncommon for tribesmen in Africa to cross borders for the purposes of agriculture and grazing without raising concern on the part of authorities on either side of the border.[83] The Court concluded that such use by tribesmen did not constitute subsequent practice in the application of the 1890 Treaty.[84] This aspect of the case is most relevant for future land disputes where native tribesmen regularly occupy land near a border. The Court placed no weight on the uncontrolled practices of the tribesmen when determining government action.

In awarding the island to Botswana, the Court ultimately concluded that no subsequent practices had modified the terms of the 1890

[78] *Ibid* at para 67.
[79] *Ibid* at paras 68–9.
[80] *Ibid* at para 71.
[81] *Ibid* at para 72.
[82] *Ibid* at para 74.
[83] *Ibid*.
[84] *Ibid* at para 75.

Treaty.[85] Nevertheless, its discussion of the role of subsequent practice provides meaningful guidance for future boundary disputes.

As in the dispute between Botswana and Namibia, consideration of subsequent practice necessarily focuses on minutiae. Many judicial bodies believe their roles call on them to consider broader questions of international law, rather than the narrow and technical questions raised in considering subsequent practice. Moreover, it can be difficult to determine what events are sufficiently important to constitute subsequent practice. But as demonstrated by the subsequent practice discussion relating to Kasikili/Sedudu Island, such evidence can truly help decision-makers as they attempt to make sense of treaties, maps and even tertiary sources, such as sketch maps. Such information can help to resolve a variety of issues that confront the judges or others who have been called on to determine the boundary. For example, what was intended by the parties when they signed an agreement on navigation of a waterway? What was the purpose of a map that was produced by the regional authorities of different states, and what role might that map have in determining the boundary? These are just two examples of the myriad questions that might be answered (or at least addressed) by resort to subsequent practice.

Having addressed the three areas where African states have contributed to the development of the use of sources in resolving boundary disputes, the chapter turns now to three special areas where African states have contributed to the international law of boundary dispute resolution.

D. Distinction between 'Definition/Delimitation' and 'Demarcation'

When they have reached a result in a boundary dispute, judicial tribunals (or other decision-makers) then set forth the boundary as it should exist between two (or more) states. This process of determining the legal boundary between states is described as *defining* or *delimiting a boundary*. These two terms are juxtaposed with the notion of *demarcating a boundary*, which is the actual physical process of laying down the boundary on the ground. Until recently, however, the three terms were often used interchangeably, leading to confusion and uncertainty about the status of boundaries.

In reaching its February 1994 decision on the territorial dispute between Libya and Chad, the Court laid out a distinction between the definition (or delimitation) of a boundary and the demarcation of a boundary. This distinction was fundamental to the resolution of the dispute, as Libya contended that the boundary between the two states had never been set

[85] *Ibid* at para 79.

and thus viewed the case as a dispute regarding attribution of territory.[86] Chad, by contrast, claimed that a boundary existed between the two states and that boundary had never been disputed until the 1970s; thus, Chad viewed the dispute as one over the location of the boundary between the two states.[87]

Questions about how the boundary was set or laid out on the ground (issues of demarcation) remain relevant to the final boundary line. But those are merely practical considerations when the boundary is actually staked out on the ground. That information is not relevant in setting the boundary line and resolving the dispute at hand, and any past mistakes based upon demarcation will not be evidence of where the boundary itself should be set.

The distinction between definition and demarcation is a simple one and is not fully explored by the Court. Instead, the Court simply concludes that demarcation 'presupposes the prior delimitation—in other words definition—of the frontier'.[88] As the Court notes, in siding with Chad on the definitional issue:

> Use of the term 'demarcation' creates a presumption that the parties considered the definition of the frontiers as already effected, to be followed if necessary by a demarcation.[89]

Chad's position in this case led the Court to create (although not as explicitly as it might have) a distinction between definition and demarcation of boundaries. Chad's argument caused the Court to focus on the actual issues regarding the boundary. In a world without this distinction between definition and demarcation, parties could muddy the waters by conflating the two concepts and the history of the parties with regard to the boundaries. Chad's successful argument means that a state contesting a boundary must demonstrate that its arguments consider the actual definition of the boundary (by resort to treaties, maps and the other sources described earlier).

In subsequent cases, the Court has repeatedly returned to the definition/demarcation distinction in the Libya/Chad case. In *Cameroon v Nigeria*, the Court referred favourably to the principle in determining the relevance of proffered sources of evidence of the boundary.[90] The Court

[86] *Memorial of the Great Socialist People's Libyan Arab Jamahiriya, Part One (Libyan Arab Jamahiriya v Chad)*, n 33 above, at 1.14: 'In the presentation to the United Nations of its position on several different occasions, Chad has maintained that there is such a boundary. In its Application to the Court filed on 3 September 1990, Chad reiterated this position. This was also France's official view. Libya denies there is any such conventional boundary.'

[87] *Ibid* at para 18.

[88] *Ibid* at para 56.

[89] *Ibid* at para 56.

[90] *Cameroon v Nigeria*, n 30 above, at para 84.

dismissed Nigeria's argument that the work of the Lake Chad Basin Commission (LCBC) compromised the clarity of the boundary definition, because the LCBC was engaged in both delimitation and demarcation.[91] The Court reasoned that:

> The records show that, although the term 'delimitation' was used from time to time, in introducing clauses or in agenda headings, it was the term 'demarcation' that was most frequently used. Moreover, the nature of the work was that of demarcation. The Court observes in this respect that the LCBC had engaged for seven years in a technical exercise of demarcation, on the basis of instruments that were agreed to be the instruments delimiting the frontier in Lake Chad. The issues of the location of the mouth of the Ebeji, and the designation of the tripoint longitude in terms other than 'approximate,' were assigned to the LCBC. There is no indication that Nigeria regarded these issues as so grave that the frontier was to be viewed as 'not delimited' by the designated instruments.[92]

Notably, in the two cases between Libya and Tunisia heard by the ICJ, the Court explicitly affirms its role as one of defining the boundary but leaves it to the parties (through experts designated by them) to demarcate the boundary in good faith in accordance with the decision of the Court.[93] As the Court emphasised in that case:

> Delimitation is the immediate concern of the Court, in respect of which the Special Agreement between the Parties requests it to lay down the applicable principles and rules of international law and the method for their application to the delimitation in the present case.[94]

The line between delimitation and demarcation allows decision-makers to distinguish their task—determining where the boundary line should be—from the task of others to actually stake out the boundary that has been determined.

Interestingly, this distinction between defining a boundary and demarcating that boundary persists. In the Eritrea/Ethiopia dispute, the decision of the Boundary Commission *defined* the boundary between the two states, but the actual *demarcation* of the boundary still has not taken place and remains a contested issue between Eritrea and Ethiopia. The demarcation process often is the most time-consuming and difficult one, as

[91] The LCBC was created by the Fort Lamy (now N'Djamena) Convention signed on 22 May 1964, by the Heads of State of the four countries which border on Lake Chad, namely Cameroon, Niger, Nigeria and Chad. In 1994, the Central African Republic was admitted as a fifth member of the LCBC.

[92] *Ibid* at para 53.

[93] See *Tunisia v Libyan Arab Jamahiriya,* n 28 above, at para 22, Special Agreement, Art 2; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (10 December 1985) 1985 ICJ 192, 228, para 65.

[94] *Ibid* at para 132.

officials on the ground are left to interpret broad mandates from judicial authorities. But their role is intended to be ministerial, in sharp contrast to the role of decision-makers charged with setting the actual boundary. For that, as Chad successfully advocated before the Court, evidence of the boundary's location is consulted by resort to the sources of boundary law and without reference to the past demarcation of the boundaries.

E. Applying Equitable Principles to the Resolution of Maritime Boundaries

In certain boundary dispute cases—cases involving maritime as opposed to land boundaries—equitable principles will on occasion trump legal principles. The reliance upon equity in maritime disputes recognises the unique status of bodies of water and the need to reach more co-operative solutions in resolving such disputes. Nonetheless, until 30 years ago, international law had not recognised an *absolute* right to equitable resolution of maritime boundaries.

In 1982, in resolving a maritime dispute between Libya and Malta, the Court stated (for the first time explicitly) that, regardless of the method used to determine a maritime boundary (in that case, the equidistance method), the method must be shown to lead to an equitable result.[95] The Court in that case noted that

> existing international law cannot be interpreted in this sense; the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, *it must be demonstrated that the equidistance method leads to an equitable result in the case in question*. To achieve this purpose, the result to which the distance criterion leads must be examined in the context of applying equitable principles to the relevant circumstances.[96]

In explaining the need to resort to equitable principles in resolving maritime disputes, the Court recognised a need for 'consistency and a degree of predictability'.[97] The Court further emphasised that 'It is … the goal—the equitable result—and not the means used to achieve it, that must be the primary element' of its inquiry into the maritime boundary.[98]

[95] See *Case Concerning the Continental Shelf (Libya v Malta)* (3 June 1985) 1985 ICJ 13, 47, para 63: 'under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question'. See also *Cameroon v Nigeria,* n 30 above, at 444–5, para 294.

[96] *Libya v Malta,* n 95 above, at 47, para 63 (emphasis added).

[97] *Ibid* at 39, para 45. The Court emphasised that equitable principles: (1) are normative; (2) are applied as part of general international law; (3) govern delimitation by adjudication and arbitration; and (4) govern 'the duty of Parties to seek first a delimitation by agreement, which is also to seek an equitable result': *ibid* at 39, para 46.

[98] *Ibid* at para 45.

Of course, as the Court noted, 'the legal concept of equity is a general principle directly applicable as law'.[99]

In laying out the relevant factors to consider when applying equitable principles to a maritime dispute, the Court emphasised that 'it is the coastal relationships in the whole geographical context that are to be taken account of and respected'.[100] A 'coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances'.[101] The weight to be accorded to the relevant circumstances is determined on a case-by-case basis.[102]

At the same time, the Court emphasised that equitable principles included some constraints. For example, tribunals should not rely upon equitable principles to refashion geography or compensate for the inequalities of nature.[103] In addition, a party cannot use equitable principles to encroach upon the natural prolongation of another state's physical boundaries.[104] The relative economic positions of the states should not influence delimitation.[105] Finally,

> the existence of equal entitlement, *ipso jure* and *ab initio*, of coastal States, does not imply an equality of extent of shelf, whatever the circumstances of the area; thus reference to the length of coasts cannot be excluded *a priori*.[106]

In a near-contemporaneous maritime case between Libya and Tunisia, the Court again applied certain equitable principles in setting the maritime boundary, albeit only after relying first upon agreements signed by the two states, not only with one another but also with third parties (private actors and states alike) that expressed recognition of the parties' territorial limits.[107]

In considering the relevance of equitable considerations, the Court noted the historical distinction between law and equity in common law systems.[108] It then pointed out that 'this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law'.[109] Ultimately, the Court concluded

[99] *Ibid*.
[100] *Ibid* at para 47.
[101] *Ibid* at para 46.
[102] *Ibid* at para 48.
[103] See eg *ibid* at para 46.
[104] See eg *ibid.*
[105] See eg *ibid* at para 50.
[106] *Ibid* at para 54.
[107] *Tunisia v Libyan Arab Jamahiriya*, n 28 above, at 60, para 72.
[108] *Ibid* at para 71: 'In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice … Application of equitable principles is to be distinguished from a decision ex aequo et bono.'
[109] *Ibid* at para 71.

that 'the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances'.[110]

In subsequent decisions, the Court has reiterated the importance of the principles expressed in the Libya/Malta decision. In the first maritime delimitation decision after Libya/Malta, a dispute between Denmark and Norway, the Court relied upon the equitable principles set forth in Libya/Malta in setting a boundary that accrued heavily to Norway's favour.[111] As Judge Bola Ajibola (the long-standing Nigerian judge on the Court, who sided with the majority in the 14-to-1 decision) emphasised in a separate opinion in the case: 'The use of equitable principles in this field is definitely on course and equity is not foundering in uncharted seas.'[112]

While not necessarily the primary force behind the move to an acknowledged doctrine of equitable principles in the delimitation of maritime boundaries, the Libya/Malta decision nonetheless played an important role in the Court's move to set forth a clear rule on the subject. Thus, while the role of the African state (here, Libya) was not as significant as it may have been in some of the other areas discussed in this chapter, Libya still helped to create a clearer rule for resolving maritime disputes, a rule that has been applied in subsequent cases and has, as Judge Ajibola noted, given the use of equity in maritime disputes some real buoyancy.

F. Adverse Possession of Land by States

If State A takes possession of territory illegally but continues to possess it, unimpeded, for an extended period of time, does that entitle State A to claim the land when State B, the original sovereign over the land, makes a claim to recover it? The answer to this question is one that is starkly different in the area of boundary dispute resolution than it would be in a private property context. In international law, where the taking of land was illegal, that taking cannot be the basis for the claim to land.

Before addressing the legal rule the Court has adopted on adverse possession of land by states, the principle of *uti possidetis juris* merits further consideration. In the context of Africa, *uti possidetis* represented the notion that colonial administrative boundaries become international boundaries when colonies achieve independence. While this doctrine existed long before decolonisation in Africa, *uti possidetis* has been invoked regularly in African cases to ensure that the territorial title is frozen at the time

[110] *Ibid* at para 133.

[111] See *Case Concerning the Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* (14 June 1993) 1993 ICJ 38.

[112] Separate Opinion of Judge Ajibola, *ibid* at 298.

of independence, so any examination of documents or maps must be a 'photograph of the territory' at that critical date.[113]

This concept of *uti possidetis* is particularly important in Africa, where decolonisation in the 1950s and 1960s left open the potential for numerous claims based upon illegal appropriation of land. As the Court has emphasised, the

> obvious purpose [of the doctrine] is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[114]

The rule on adverse possession of land by states, which relies upon but goes beyond the principle of *uti possidetis*, was laid out in *Burkina Faso v Mali*. The Court defined the core of *uti possidetis juris*: 'The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.'[115] In resolving the dispute between Burkina Faso and Mali, the Court set forth the proposition that, if a group of settlers are living in a place for a certain length of time, but they are doing so in contravention of the law, then ownership of that territory will still go to the original 'holder of title'.[116] This principle, an analogue to the private property notion of adverse possession, sets forth a basic rule of ownership in the boundary setting that is quite different from the traditional view in the context of private property.[117] As the Court explained:

> Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title.[118]

[113] See eg *Burkina Faso v Mali*, n 35 above, at 568, para 30; *Benin v Niger*, n 44 above, at 23, para 28.

[114] *Burkina Faso v Mali*, n 35 above, at 565, para 22.

[115] *Ibid* at 566–7, paras 25–6.

[116] *Ibid* at para 63: 'Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be give to the holder of the title.'

[117] The rule of adverse possession is basic to conceptions of property acquisition and ownership in most legal systems. In the US, the doctrine of adverse possession 'generally creates an absolute title to real property in fee simple, which is as good as title by patent from the state or title by deed from the record owner, although it does not amount to record title unless and until it is made so by a judicial proceeding': 3 Am Jur 2d Adverse Possession (2006), s 1. An African example of the rule on adverse possession can be found in the laws of Kenya, where the rule of adverse possession is similar to the one in the US and is codified by statute in ss 13, 27 and 38 of the Limitation of Actions Act. See Limitation of Actions Act, ch 22 (Kenya).

[118] *Burkina Faso v Mali*, n 35 above, at 586–7, para 63.

The positive side of possession also holds important weight, however. Thus, as the Court in the *Burkina Faso* decision noted: 'Pre-eminence is to be accorded to legal title over effective possession as a basis of sovereignty.'[119] So, whereas possession may be nine tenths of the law in certain private property regimes, under international law, title trumps possession when settling territorial disputes.

In the later case between Nigeria and Cameroon, Cameroon relied on the decision of the Court in *Burkina Faso v Mali* and argued that Nigeria could not claim land it had taken possession of illegally.[120] In resolving that issue, the Court sided with the Cameroonian argument, pointed favourably to the rule of law laid out in the *Burkina Faso* decision and ruled that a holder of title will have ultimate rights to territory over a state that has held a territory illegally, even for a prolonged period.[121]

In short, states do not have the same rights in territory as individuals. Illegal occupation, sustained over an extended period (even without opposition or competing claims), will not entitle a state to acquire territory. This basic concept, in sharp contrast to the laws of private property, sets forth an additional rule of international law that has been shaped by African states.

IV. CONCLUSION

Over the past 60 years, Africa has contributed to the international law of boundary disputes in numerous ways. At the meta-level, African nations have demonstrated that resort to international tribunals can lead to meaningful resolution of existing boundary disputes. The continent's commitment to the ICJ is one of the enduring legacies that African states have offered over the past half-century—not only in the area of boundary dispute adjudication but more broadly in legitimising the institution itself as an arbiter of disputes between states. And, interestingly, the contributions to international boundary dispute law have come from across the continent and not only from sub-Saharan Africa or from North Africa alone. This is, then, a rare case where the experience of Africa is truly continent-wide, not simply the experience of one region.

At a more practical level, the arguments advanced by African states—and the decisions adopted by the ICJ in cases involving them—have

[119] *Ibid* para 63; see also *Benin v Niger*, n 44 above, at 32, para 47.

[120] Pleadings of the Republic of Cameroon (4 April 2000), paras 2.48–2.52 at 61–2, in *Cameroon v Nigeria*, n 30 above.

[121] *Cameroon v Nigeria*, n 30 above, at para 70: 'The Court finds that the above events, taken together, show that there was no acquiescence by Cameroon in the abandonment of its title in the area in favour of Nigeria. Accordingly, the Court concludes that the situation was essentially one where the effectivités adduced by Nigeria did not correspond to the law, and that accordingly "preference should be given to the holder of the title".'

contributed to a variety of important developments in the procedures and the substantive law to be used in determining the outcome of boundary disputes. These contributions have enriched the law governing boundary disputes and helped to ensure that future cases will rely upon well-established principles and legal norms in resolving outstanding disputes.

African states have relied on international tribunals rather than regional mechanisms to resolve boundary disputes. Neither the Court of Justice of the African Union nor the Community Court of Justice of the Economic Community of West African States has yet been asked to resolve a boundary dispute case between or among African states.[122] Both courts are relatively new, so the question perhaps should not be retrospective but rather prospective: will African states turn to these regional tribunals to resolve boundary disputes? One reason why they might bring disputes to these courts would be to help to strengthen the underlying institutions, much as the African states have done with the ICJ (whether intentionally or not). But the advantage for the ICJ is that it now has the benefit of experience whereas these new tribunals may be less prepared to handle the complexities of boundary dispute cases. Moreover, as in the case of the dispute between Eritrea and Ethiopia, states that are not inclined to go before an established tribunal like the ICJ are more likely to opt for ad hoc arbitration, which provides additional control over the process. It is far less likely that states would simply opt to switch from one institutional tribunal to another, even less so when the second institution is new and still formulating procedures.

Sadly, the contribution of African states to the international law governing boundary disputes is likely to grow, as ongoing disputes involving the Gulf of Guinea and various other boundaries threaten security in the region and may end up leading to cases in the ICJ or elsewhere. But if the lessons of the past 60 years are any measure, the good news is that African states are likely to turn to tribunals rather than armed conflict to resolve these disputes. And, perhaps heartening only to academics, a residual benefit is that the international law of boundary dispute resolution is likely to continue to grow as African states raise new issues and arguments that advance and evolve international law in this arena.

[122] For the protocol creating the Court of Justice of the African Union, see <http://www.africa-union.org/root/AU/Documents/Treaties/Text/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf>; for a summary of the protocol of the Community Court of Justice of ECOWAS, see <http://www.court.ecowas.int/en/court_of_justice.htm>.

9

NEPAD and the Rebirth of Development Theory and Praxis

MAXWELL O CHIBUNDU

I. INTRODUCTION

THE BLACK MAN'S burden again has become the world's.[1] Not since the early part of the 1960s has the well-being of the Dark Continent attracted the level of attention that it is now generating. Spurred by a variety of motives, including humanitarianism and concerns over the potential of so-called failed states as safe harbours for transnational terrorism, the welfare of the continent has become the special concern of G8 summit meetings.[2] The United Nations Security Council now routinely adopts mandatory resolutions under Chapter VII that expressly and in fine detail regulate military, diplomatic, legal and even commercial interactions within the continent.[3] Increasingly, the continent's problems are seen

[1] Compare Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (New York, Times Books, 1992) (turning Kipling's famous cliché on its head by showing that contemporary African societies have been poorly served by reflexively adopting Western political institutions). See also William Easterly, *The White Man's Burden: Why the West's Effort to Aid the Rest Has Done So Much Ill and So Little Good* (New York, Penguin Press, 2006) (discussing shortcomings in the reliance on the top-down policies of international economic institutions to address issues of poverty and economic underperformance in poor societies such as those of tropical Africa).

[2] Africa's development has been featured prominently as an agenda item in the last five summits of G8 leaders in Italy, Canada, France, the US and the UK. Chosen African leaders have been offered the opportunity to address the G8 heads of government at these meetings; a platform offered to no other non-G8 leaders. And probably just as important have been popular and academic 'special pleadings' for treating Africa's poverty as uniquely a blight on the humanity and generosity of spirit of international society as a caring community. See eg Jeffrey Sachs, 'Developing Africa's Economy' (2004) *The Economist* (London), 20 May; Jeffrey Sachs, *The End of Poverty: Economic Possibilities for Our Time* (New York, Penguin Press, 2005) 188 *ff*, and foreword by Bono.

[3] One gauge of this phenomenon is the increasing attention African issues are garnering at the UN Security Council. Of the 52 resolutions adopted by the Security Council in 2001, 19 related exclusively to Africa. In 2002, 26 of the 68 resolutions fell into this category. In 2003, of the 64 resolutions, 36 were exclusively about events in Africa. Indeed, in the latter year,

and portrayed as meriting distinctive attention and proposals for solution at otherwise global gatherings such as those involving trade, health[4] and 'financing for development'.[5] Policy entrepreneurs, acting in quasi-official and private capacities, have thrown themselves into the struggle. Applying his trademark crusader's zeal to the issue, British Prime Minister Tony Blair created a 'commission' of eminences and experts to provide solutions for Africa's problems.[6] Rock-and-roll stars speak with authority and discernment on the poverty-prone precariousness of African lives, and software executives now contribute as much to resolving the continent's health problems as do many of its governments.

The New Partnership for African Development (NEPAD) has featured prominently in this renewed environment of interest in the welfare of African societies. For African academics and political leaders, it has become the exemplar of a re-invigorated philosophy of responsibility and accountability. For non-African politicians and entertainers, it has become a manifestation of the welcome emergence of a new and responsible African leadership with whom the 'international community' can do business. Whether at Davos, Gleneagles or Monterey, reference to NEPAD has been deployed by African leaders and foreign sympathisers alike to show the earnestness of the new commitment and to plead that this new wind of change is not forestalled prematurely. Against this backdrop, this chapter examines the extent to which NEPAD represents a dramatic shift in the fortunes of the continent. The chapter focuses on discussing the ways in which the ethos of development embodied by NEPAD fits within and contributes to the international legal order. In this regard, I explore the animating visions that underlie NEPAD and inquire into how responsive NEPAD, as an institution, is to those visions. In keeping with the overall theme of the collection of chapters in this volume, I highlight the intertwining relationship of NEPAD and the dominant neo-liberal order. In part II, I present a brief background to NEPAD and describe

events in the Democratic Republic of the Congo, Liberia, Côte d'Ivoire, and Ethiopia–Eritrea each attracted more Security Council resolutions than those relating to Iraq, 'terrorism', or the Israeli–Palestinian conflicts. And the trend continued in 2004 and 2005, with Sudan joining the list of countries subject to regulation under Chapter VII of the United Nations Charter.

[4] Africa, of course, is notorious for being the fountain of human disasters; but it is difficult to imagine any that has commanded as much doomsday prognostication as that of the HIV/AIDS 'pandemic'. See eg Chris McGreal, 'Thabo Mbeki's Catastrophe' (2002) *Prospect* (London), 21 March <http://www.prospect-magazine.co.uk/article_details.php?id=4995&issue=445> (accessed 30 January 2006).

[5] See eg 'On the Threshold: The United Nations and Global Governance in the New Millennium' (19–21 January 2000), conference held in Tokyo; and International Conference on Financing for Development (18–22 March 2002) held in Monterey, Mexico.

[6] See Commission for Africa, *Our Common Interest: Report of the Commission for Africa* (London, Penguin, 2005).

its core ideas. Part III sets NEPAD against the backdrop of prior development ideologies in Africa. Part IV examines the reciprocal interactions of NEPAD and the global neo-liberal order within which it is firmly located. I then present some concluding thoughts on the search for an appropriate path to 'development' in Africa.

II. INSTITUTIONAL FRAMEWORK

In October 2001, African leaders meeting in Abuja, Nigeria, signed an agreement for the co-ordination of economic policies across the continent. This 'New Partnership' constituted the institutionalisation of an idea that has been traced back to as early as 1997. Initially articulated by Thabo Mbeki, it came to be embraced by a diverse group of African leaders, ranging from Olusegun Obasanjo of Nigeria to Abdoulaye Wade of Senegal, Abdelaziz Bouteflika of Algeria and Hosni Mubaraq of Egypt. Aside from the obvious criss-crossing of the continent, what united these leaders was their embrace of the neo-liberal order (embodied in what had become symbolically referred to as the 'Washington Consensus') with its concomitant desire for respect in the corridors of the powerful political and economic institutions that were shaping 'globalisation'. With varying degrees of plausibility, each of these leaders laid claim to a new heritage of economic liberalism and political democratisation. NEPAD thus was intended to convey the crystallisation and confirmation of a complete break with the decay of the immediate post-independent Africa of coup d'états, economic stagnation and internecine civil wars.

A prolific African academic captured the euphoria felt by many over the formation of NEPAD, saying: '"It is a heroic understatement to say that Africa is poised for positive transformation or regeneration in this millennium—or, at least, this century'.[7]

Appropriately enough, the theme of a rejuvenated Africa willing to play by the rules of the neo-liberal order were first conveyed to the global community by President Thabo Mbeki of South Africa. In a speech at the World Conference (of leaders) in Davos, Switzerland, in January 2001, he unveiled the 'Millennium Africa Recovery (or Renaissance) Plan'. Africans, he told the assembled economic, political and media elites, needed and were ready to take charge of their future. They had learned

[7] See eg Nsongurua J. Udombana 'How Should We Then Live? Globalization and the New Partnership for Africa's Development' (2002) 20 *Boston University International Law Journal* 293, 294. Udombana went on to argue that the formation of NEPAD and the reconstitution of the OAU into the AU (African Union) collectively represented a singular cause for 'palpable optimism.' See also Henning Melber, Richard Cornwell, Jepthah Gathaka, and Smokin Wanjala, *The New Partnership for Africa's Development (NEPAD)—African Perspectives* (Uppsala, Nordika Afrikainstitutet, 2002) <http://130.238.24.99/webbshop/epubl/dp/dp016.pdf> accessed 30 Jan. 2006.

the lessons of misrule and mismanagement, and had come to understand that governments must be made accountable to the people and that economic well-being depended on the initiatives and institutions of market arrangements rather than those of centralised planning. With these lessons in mind, Africans desired to work collaboratively with non-Africans to rejuvenate the welfare of the continent.[8] Mbeki and President Obasanjo reiterated these views to Western leaders of the G7 at their Genoa conference later that year. African leaders were then mobilised to endorse these views at the inaugural meeting of the African Union, the successor to the widely reviled Organization of African Unity (OAU).[9]

That NEPAD represented a new way of doing business in Africa is readily conveyed in the rhetoric and style of its founding document, which lacks the usual legal formalism commonly associated with a foundational document. It is framed neither as a treaty nor a charter, but is simply referred to as a 'framework' document. It reads as a pastiche of draft ideas, occasional analysis, frequent statements of objectives and proposed courses of action.[10] And as for substance, the 'framework' document follows in the line of the neo-liberal development theory and analysis that have become conventional since a pessimistic World Bank Report on Africa that was issued in 1989.[11]

[8] See Thabo Mbeki, 'Briefing at the World Economic Forum Meeting—Millennium Africa Renaissance Program—Implementation Issues' (Davos, Switzerland, 28 January 2001) <http://www.anc.org.za/ancdocs/history/mbeki/2001/tm0128.html> (accessed 30 January 2006). Mbeki had espoused the idea at least as early as June 1997. See Tom Lodge, *Politics in South Africa: From Mandela to Mbeki*, 2nd edn (Bloomington, IN, Indiana University Press, 2003) 227. According to the *Financial Mail*, the concept can be traced even farther back, to 1994: see J Malala, 'High on Ideals, Low on Substance: African Renaissance' (1998) *Financial Mail* (South Africa), 9 October, 41.

[9] See 'The New Partnership for Africa's Development' (NEPAD) (Abuja, Nigeria, October 2001) <http://www.nepad.org/2005/files/documents/inbrief.pdf> (accessed 30 January 2006), at paras 45, 46 (hereinafter 'NEPAD Doc').

[10] Indeed, the rhetorical flourishes replete in the document might make for an interesting anthropological or literary case study. Typical is para 27:

> The *New Partnership for Africa's Development* seeks to build on and celebrate the achievements of the past, as well as reflect on the lessons learned through painful experience, so as to establish a partnership that is both credible and capable of implementation. In doing so, the challenge is for the peoples and governments of Africa to understand that development is a process of empowerment and self reliance. Accordingly, Africans must not be wards of benevolent guardians; rather they must be the architects of their own sustained upliftment.

(*Ibid*.)

[11] See Ismail Serageldin, *Poverty, Adjustment, and Growth in Africa* (Washington, DC, World Bank, 1989). Perhaps not so coincidentally, the seminal statement of the 'Washington Consensus', while addressed primarily to 'Development Economists' concerned with Latin America, was published a year later, in 1990, and addressed many of the same concerns of economic underperformance confronted in the 1989 Africa Report. See generally John Williamson, 'What Should the World Bank Think about the Washington Consensus?' *World Bank Research Observer* 15, no 2 (Washington, DC, International Bank for Reconstruction and Development, August 2000) 251–64 (reviewing the controversies over the meaning and reach of 'the Washington Consensus').

Prefaced by the assertion that '[t]he poverty and backwardness of Africa stand in stark contrast to the prosperity of the developed world',[12] catalogues of the economic infirmities and privations of Africa vis-à-vis the rest of the world are then laid bare.[13] In sector after sector, the shortfalls of the continent are identified. More than in any other continent, violent political strife and civil warfare have become routine aspects of daily existence.[14] The direct accountability of the rulers to the ruled is less likely to exist in Africa than in virtually any other region of the world. The institutions for economic management and for delivering social services are weak or non-existent. Infrastructural needs, ranging from health and education to transportation, telecommunications, water and electricity, are met, if at all, at sub-par levels. In short, there is, as succinctly framed in another report on Africa's plight, a twin deficit of 'accountability' and 'capacity'.[15]

To address these extensively documented shortcomings, NEPAD adopts two quite distinctive approaches. On one hand, it enunciates in quite general terms principles of governance and state-building. On the other, it identifies particular structural economic issues for which it prescribes quite specific curative measures. As to the former, principles of 'good governance', 'democratic accountability', the promotion of 'human rights' and the 'rule of law' are invoked and referred to,[16] but the extent to which these go beyond being ritualised incantations is far from clear. Precisely what constitutes 'good governance' or 'the rule of law' is nowhere spelled out,[17] and the definition of 'true democracy' is advanced with

[12] NEPAD Doc., n 9 above, at para 2.

[13] Thus, we are informed that:

> In Africa, 340 million people, or half the population, live on less than US $1 per day. The mortality rate of children under 5 years of age is 140 per 1000, and life expectancy at birth is only 54 years. Only 58 per cent of the population have access to safe water. The rate of illiteracy for people over 15 is 41 per cent. There are only 18 mainline telephones per 1000 people in Africa, compared with 146 for the world as a whole and 567 for high-income countries.

(*Ibid* at para 4.)

[14] At any given time over the last decade and a half, it would have taken up less space to list those African countries that are internally at peace than it would have taken to list those driven by conflict; and the countries that have experienced no significant political or economic strife throughout the last two decades can be confined to fewer than five.

[15] Commission for Africa, n 6 above, at 16 (the Commission for Africa was launched by UK Prime Minister Tony Blair).

[16] See eg NEPAD Doc, n 9 above, at paras 80, 81.

[17] In comparison, international institutions when wrestling with development issues have had little difficulty giving concrete definitions to these terms: see eg International Monetary Fund, 'Good Governance: The IMF's Role' (Washington, DC, International Monetary Fund, August 1997); World Bank, 'Ghana Poverty Reduction Strategy: An Agenda for growth and Prosperity, 2003–2005' (Washington, DC, World Bank, 19 February 2003) 119–43. The institutionalisation of 'democracy', respect for human rights and the rule of law may be markers of 'good governance', as may be the efficient delivery of public services, but so also are such criteria as transparency of policy-making, the decentralisation and debureaucratisation of policy implementation, and, of course, the combating of bribery and corruption.

only slightly more specificity.[18] Strikingly, 'corruption', that bête noire of African governance, is referred to only in passing,[19] and receives no attention in the otherwise finely tuned dissections of Africa's ills and proposed remedies. The commitment of the leaders to a new mode of association with their citizens is one of the more dramatic features of NEPAD.[20] This commitment is framed in the neo-liberal syntax of the necessity for 'good governance', 'true democracy', 'peace', 'stability' and 'respect for human rights' as elements of 'development'.[21] The one potentially transformative innovation offered up by NEPAD is the institutionalisation of the periodic monitoring and assessment of the 'progress made by African countries in meeting their commitment towards achieving good governance and social reforms'.[22] This so-called peer review commitment, although voluntary, has proven to be one of the more interesting features of NEPAD. But even this feature does not transform an essentially top-down institution into a populist one.

In contrast to the lack of specificity in the articulation of the place and role of the African people in the 'new partnership', NEPAD extensively discusses the roles of African governments and of foreign government donors, international financiers and investors in the restructuring and rejuvenation of the moribund African economies. Notably, the document reiterates the classic approach by post-independence African leaders to the integration of the continent into the world order; that is, depending upon who is telling the story, the superficial or the sophisticated attempt at creating a workable cultural and economic hybrid from a melange of competing (and not infrequently conflicting) traditional values and modern interests.[23] Since Africa won its political independence, much of the continent's energy has been devoted to governmental planning for the economy, and particularly to the identification and adoption of policies that ostensibly would implement the goals allotted to foreign investment

[18] See NEPAD Doc, n 9 above, at para 79.

[19] See *ibid* at paras 52 and 83.

[20] The provisions of NEPAD said to constitute 'an appeal' to the people from their leaders (paras 51–8), are remarkable for their vacuousness. They lack substantive demands for or programmes of action. Illustrative are paras 56–7:

> 56. We are, therefore, asking the African peoples to take up the challenge of mobilising in support of the implementation of this initiative by setting up, at all levels, structures for organisation, mobilisation and action.
> 57. The leaders of the continent are aware of the fact that the true genius of a people is measured by its capacity for bold and imaginative thinking, and its determination in support of its own development.

[21] See generally *ibid* at paras 79–84.

[22] See *ibid* at para 85.

[23] I explored this approach to policy-making in Maxwell O Chibundu, 'Law in Development: On Tapping, Gourding, and Serving Palm-Wine' (1997) 29 *Case Western Reserve Journal of International Law* 167.

within the economy.[24] Almost always, the proposed answer is closer interaction among African governments, their foreign counterparts, multilateral financial institutions and foreign private investors. This answer has not always worked out, but NEPAD's contribution is to suggest explanations for the past failures and explain why, unlike the past, these new efforts will yield desirable results.

III. PAST AS PROLOGUE

NEPAD's obvious objective is to promote African development. Just as obvious is that this is no new project.[25] While acknowledging the failures of prior development programmes, NEPAD glosses over that past as if it were irrelevant to the new undertaking.[26] The appropriate focus, as NEPAD's framers see it, is the complete integration of contemporary African economies and values into a global system that marches resolutely forward to the drumbeat of neo-liberalism and which would do so with or without Africa:

> [T]here is today a new set of circumstances, which lend themselves to integrated practical implementation. The new phase of globalisation coincided with the reshaping of international relations in the aftermath of the Cold War. This is associated with the emergence of new concepts of security and self-interest, which encompass the right to development and the eradication of poverty. Democracy and state legitimacy have been redefined to include accountable government, a culture of human rights and popular participation as central elements.[27]

The core ideologies of NEPAD thus may be summarised in this way:

1. Africa's development metrics lag well behind those of much of the globe.
2. Correcting the disparities requires Africa to be more actively engaged in the globalisation process.

[24] For an insider's account of the early practices involved in government planning in a post-independent African economy, see WF Stolper, in Clive S Gray (ed), *Inside Independent Nigeria: Diaries of Wolfgang Stolper 1960–1962* (Aldershot, Ashgate, 2003).

[25] See eg Gino J. Naldi and Konstantinos D. Magliveras, 'The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?' (1999) 24 *North Carolina Journal of International Law and Commercial Regulation* 601; Chibundu, n 24 above; Oladele Q. Akinla II, 'Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment' (1987) 7 *Boston College Third World Law Journal* 19.

[26] Past programmes are cursorily dismissed as follows: 'For a variety of reasons, both internal and external, including questionable leadership and ownership by Africans themselves, these [previous efforts] have been less than successful': NEPAD Doc, n 9 above, at para 42.

[27] *Ibid* at paras 42–3.

3. Such active engagement demands both internal and external reforms.
4. African leaders must spearhead these reforms by adopting and promoting, internally, liberal political institutions, and, externally, liberal economic practices.
5. African leaders should co-operate with each other, and they should mobilise the citizenry in the process.
6. Reforms must embrace democratic principles, respect for human rights, good governance and the rule of law.
7. Reform requires promoting the participation of foreign donors, multilateral financial institutions and foreign investors in the economic development of the continent.
8. African governments must also adopt flexible economic policies with regard to trade and investment, including participation in World Bank-prescribed poverty reduction strategies, and adoption of 'public–private partnerships'.
9. The affluent members of the international society have an obligation to assist Africa in its development objectives, and African leaders appeal to them to meet this obligation.
10. Progress in the implementation of these NEPAD objectives should be reviewed periodically by ad hoc gatherings of technocrats and heads of state.

These ideologies argue for a pragmatic approach to development; that is, a process that accepts and reflects contemporary thinking and power distribution. The framers of NEPAD eschewed interminable philosophical debates as to what constitutes 'development' in favour of practices that are dictated by what is doable. Arguably, this approach has yielded results. As indicated at the outset of this chapter, concern over and the desire to meet Africa's needs again are becoming universalised.[28] Recent data coming out of the international financial institutions tout improved gross domestic product growth, with the continent taken as a single entity.[29] Occasionally a particular business success story is vaunted as the product of NEPAD.[30]

But it remains far too early to assign success to NEPAD, even on its own terms. Expressions of desire do not necessarily translate to resource

[28] See nn 1–6 above and accompanying text.

[29] See eg Trevor A Manuel, 'Africa and the Washington Consensus: Finding the Right Path' *Finance and Development* (Washington, DC, September 2003) 18 (asserting that average 'economic growth' in Africa over the last year was 3.1% and projecting 4.2% growth in the subsequent year).

[30] See eg Carlos Tejada, 'Textile Giant Learns Downside of Globalisation' (2003) *Wall Street Journal* (New York), 14 August, A1; KJ Kelley, 'Trade Tensions emerge as AGOA Praised in New York' (2003) *The Nation* (Nairobi), 10 December.

transfers. Recent data on foreign investments in Africa, for example, indicate continued relative underperformance.[31] Indeed, if one excludes from foreign investment flows those directed to the extraction of primary products, the shortfall is glaring. Nor is there any demonstrable correlation between the list of foreign investment recipients and that of countries which ostensibly promote 'democratic practices', 'human rights' or 'good governance'. Indeed, the most obvious correlation one can establish for foreign investment inflows is their inexorable direction to the economies and countries that are dominated by the extraction of primary resources, especially crude oil.[32] Further, for every story of an alleged business success due to NEPAD, there is also a story blaming NEPAD for failure.[33] And it is surely not irrelevant to point out that Latin American countries, after 20 years of putting their faith in the neo-liberal miracles of globalisation and foreign investment, have begun to question the creed.[34]

This is not, however, a chapter on the physical or material results that NEPAD has produced. As previously noted, the dominant focus of this chapter is to discuss the ways in which the ethos of development exemplified by NEPAD fits within and contributes to the international legal order. Meaningfully discharging this task demands some elucidation of the structure of the flow of ideas (and their institutionalisation) between the centres and peripheries of the global society. In the standard division of knowledge that has come to be characteristic of the framework that shapes intellectual discussion, so-called peripheral societies such as those in Africa are viewed primarily as generating the intellectual puzzle to be solved. They do so by posing the existential practical problem of poverty and survival. The provision of solutions is generally seen as the function of scholars who are steeped in the rational discourse of post-scientific

[31] See eg United Nations Conference on Trade and Development, *World Investment Report, 2003—FDI Policies for Development: National and International Perspectives* (New York and Geneva, United Nations, 2003) 34; United Nations Conference on Trade and Development, *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment* (New York and Geneva, United Nations, 2005) Table 1 (Africa now accounts for 2%–3% of global flows of foreign direct investment, as compared with 6% in the mid-1970s, and 9% of 'developing' countries flows, as compared with 28% in 1976) (hereinafter 'UNCTAD, *Rethinking FDI*').

[32] See UNCTAD, *Rethinking FDI*, n 31 above, at 2–3. The 24 countries classified by the World Bank as 'oil and mineral dependent' over the last two decades have accounted for three-quarters of inflows of foreign capital into Africa. In its 2003 annual report to the Congress, the Office of the US Trade Representative explained that a 5.8% increase in US foreign investment in Africa in 2001 was driven largely by investments in the petroleum sector. See Office of the US Trade Representative, *2003 Comprehensive Report on US Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act* (2003).

[33] See eg S Ojo, '83,000 Jobs Lost on Account of WTO Membership' (2003) *Daily Trust* (Abuja), 5 September.

[34] This is generally taken to be the lesson of sweeping 'left-wing' victories in post-2000 national elections in such varied Latin American countries as Argentina, Bolivia, Chile, Peru, Uruguay and Venezuela.

liberal thought; that is, those trained in the 'open-minded' and 'rigorous' habits of inquiry: theorising, modelling validation or falsification through close interrogation of evidence. Much of the process of abstraction and distillation of theories and models on which efficacious solutions are seen to depend occurs within a well-worn framework of essentialised 'objective scientific' methodology that presumes as universal those relationships of cause and effect that have been observed and replicated within discrete societies, notably those that have been most minutely studied: the industrial societies of the West.[35] My task here, then, is to apply this methodology to evaluate the causal relationship of Africa's new-found partnership for development and the embrace of African leaders and their project under international law.

NEPAD's most significant contribution to the international order may well be the challenge that it poses to the standard text of the 'colonialisation of knowledge' that has just been described. African leaders, ignoring structural and post-structural critiques of the neo-liberal world order, fully embraced that order and sought to make it work for their societies. NEPAD was bred and nurtured in the bosoms of African academics and leaders. Admittedly borrowing exhaustively from the dominant language of neo-liberalism, it nonetheless seeks to address 'African conditions' as seen through African eyes. Moreover, as envisaged in the transcendent thesis that seeks to hold together the chapters in this volume, NEPAD may represent a reverse of the traditional North–South flow of knowledge. Certainly, international politicians and other friends of Africa have invoked this attribute of NEPAD in selling it to others. Typically, NEPAD has been portrayed as indicative of the emergence of a new responsible and accountable African leadership. As empowering as the claim may be—indeed, precisely because it constitutes a radical departure from long-standing global experience—it demands close contextual examination. In articulating and making sense of the embrace of NEPAD, it is worth asking and evaluating the extent to which it is part of the continuity of development ideology and the extent to which it breaks from that ideology. With regard to the latter, it is equally important to explore the foundations of the break and, therefore, the extent to which NEPAD offers new frameworks for those seeking alternative avenues to development. More directly put, does the simultaneous teleological and practical embrace of the dominant global ideology represent a more fruitful course for development than the dialectical approach of concurrent ideological criticism but practical acceptance of the seemingly inevitable? Is a 'third way' possible?

[35] For an elucidation and critique of this worldview as applied to economic development issues, see eg Frederique Apffel-Marglin and Stephen A Marglin (eds), *Decolonizing Knowledge: From Development to Dialogue* (London, Oxford University Press, 1996).

A. Accounting for Development

NEPAD is a 'development' project. As such, it falls within a genealogy of government-inspired and government-promoted undertakings that date back at least to the birth of the post-colonial African state and, in many instances, farther back.[36] Although NEPAD resolutely avoids engaging with that history, the plan of action that it proposes cannot be that readily de-linked from the continent's past experience.

NEPAD takes a catholic approach to the concept of development. Although it never attempts to define the term, it is apparent that its proponents seek to cover as many aspects of 'society' as they can conceive. Their analyses and proposals thus run the gamut from the need to engage in the social and political mobilisation of the population, to issues related to culture, agriculture, education, health, trade, investment and economics generally. This approach undoubtedly is intended as a response to a quite common criticism of development theory that was dominant prior to the 1990s: namely, that it focused too exclusively on economic issues.[37]

A second contribution of NEPAD, then, is to demonstrate that, contrary to popular belief, African leaders are neither oblivious nor insensitive to academic or intellectual criticism. If NEPAD represents anything, it is the transparent responsiveness of those leaders to the changed intellectual and political climates of the last two decades from reflexive nationalism to accommodative neo-liberalism. But it may be asked whether the pendulum has not swung from one extreme to another, and particularly so when the idea is expressed in terms of governmental involvement.

To be sure, 'development' is not a fixed or static concept. Yet putting the term in service of all aspects of human existence vitiates its force as an explanatory or mobilising tool. In the particular context of the immediate aftermath of decolonisation, it is abundantly clear that the issues, the improvement of which governments were primarily concerned with, related to the material well-being of the population. These concerns were readily framed in economic terms. First and foremost, societies were confronted with a paucity of fungible resources. Such resources might consist of tangible assets or readily tradable intangibles, such as intellectual know-how; they might be available for immediate disposal, or might simply be available on call. What is important is that a society's needs and desires for consumables can be met either by direct consumption or by transfer. Liberal economics is founded on the quantification of this form of wealth; its most hallowed indicator is a society's per capita income. So defined, development for post-colonial African societies has

[36] See eg 'Editor's Introduction' in Stolper, n 25 above, pointing out the existence of a 'Federal Ministry of Economic Development' in Nigeria prior to its independence.

[37] See eg Chibundu, n 24 above .

hued closely to policies that are intended to increase aggregate material wealth. Foreign aid and foreign investment—the risking of capital by foreigners—have always appeared to be sources of a free lunch in furtherance of this objective. In emphasising the accumulation of wealth through foreign participation in African economies, NEPAD has added its voice and blessing to the strong neo-liberal creed in the efficacy of foreign direct investment and trade flows as promoters of the development process. Of course, NEPAD adds wrinkles that at first blush might appear novel: it expresses a strong preference for 'public–private partnerships' and for a strong role for the market. But even these novelties, on closer inspection, may not be quite as fresh as they seem.[38]

It is now equally well settled that 'development', even when viewed solely in economic terms, embraces more than wealth accumulation. Although there may be disagreements about what more may be called for, three additional elements have come to influence conceptions of development: (1) fairness in distribution; (2) diversification of sources of wealth and (3) sustainable growth. While these elements of development, in varying degrees, are to be found in NEPAD, they do not receive the same sort of sustained attention that wealth accumulation does. In this sense, NEPAD is a remarkably orthodox—if not neolithic—project.

The recognition that integral to the evaluation of the success of economic development policies is an assessment of the fairness of wealth distribution within a society dates back to at least the 1970s. At about that time, liberal economists, relying primarily upon evidence from East Asia, began to argue and to demonstrate that there existed a positive correlation between the relative equality of wealth distribution within a society and the economic performance of that society.[39] Given the ubiquity of the ideological conflict between the communist and capitalist camps, this observation could not be readily translated into a prescription for egalitarian policies. Economists in Western-dominated financial institutions such as the World Bank did the next best thing. They argued for social policies that were aimed at improving the lot of the most vulnerable members of society. Out of this prescription emerged such concepts as the obligation of a developing society to provide its population with a 'minimum caloric intake' or the satisfaction of 'basic needs'.[40] These policies, far from threatening the stability of the capitalist order, were readily reconcilable

[38] See n 56 below and accompanying text (discussing the 'marketing board' as an early case of the 'public–private partnership' concept).

[39] For a succinct summary of the debate, see Gustav Ranis, 'The Evolution of Development Thinking: Theory and Policy', Yale Economic Growth Center Working Paper no 886 (prepared for the World Bank Annual Conference on Development Economics, May 2004) 12–15 <http://ssrn.com/abstract=551645> (accessed 30 January 2006).

[40] *Ibid*.

with the liberal welfare state that had become the dominant organising philosophy in the industrialised West. In more recent years, this groping for the appropriate linkage between fair distribution and wealth maximisation has been manifested in the popularity of 'micro-credit lending'.[41]

Despite this rich history, an institution that is ostensibly committed to a 'partnership' between African rulers and the African population pays remarkably little attention to issues of economic distribution. There is very little discussion in NEPAD's wide-ranging document of issues of income or wealth distribution, or of a special place for the concerns of the especially vulnerable. Women, for example, are identified as a vulnerable group, but less so in economic than in socio-political terms.[42] Rural populations, more than any group in African societies, represent the most vulnerable segment of the population. Yet, to the extent that NEPAD explicitly addresses the particular needs of this group, it is in its generalised treatment of agriculture.[43] Women and the rural population might be expected to benefit, of course, from any general improvement in the accumulation of wealth within African societies, but the contention of proponents of the fairer distribution of wealth is that particularised policies intended to bring about this outcome should be adopted because they promote economic growth. But NEPAD's omission is hardly surprising. As I shall show later, de-emphasising this aspect of economic growth is consistent with prior African practice. Thus it helps to show that, whatever its merits may be, NEPAD remains mired in a particular conception of development, a conception that may be traced all the way back to the early years of post-independence, African government–led development planning.[44]

A distinctive feature of virtually all African economies is their overwhelming dependence upon one or two primary products. For a handful of countries, national wealth is generated almost entirely by the extraction and export of such raw materials as crude oil, copper, gold and diamonds. For a few others, natural wealth is derived from the cultivation and export of 'cash crops' such as cotton, cocoa, coffee, groundnuts and tea. In all cases, the well-being of the national economy is determined by the caprice

[41] For one of the few efforts to link micro-credit financing with structural issues in development economics, see Katherine Spengler, 'Expansion of Third World Women's Empowerment: The Emergence of Sustainable Development and the Evolution of International Economic Strategy' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 303. On micro-credit financing as a strategy of development, see eg Isobel Coleman, 'Defending Microfinance' (2005) 29 *Fletcher Forum of World Affairs* 181; Kenneth Anderson, 'Microcredit: Fulfilling or Belying the Universalist Morality of Globalising Markets?' (2002) 5 *Yale Human Rights and Development Journal* 85.

[42] See eg NEPAD Doc, n 9 above , at paras 49, 118, 157.

[43] See *ibid* at paras 135, 136, 157.

[44] See III.B below.

and cyclicality of foreign demand. In such a context, 'development' mandates did not simply increase production but, more importantly, diversification. The focus of that diversification has been away from raw materials and towards industrialisation. NEPAD endorses and seeks to perpetuate this policy orientation. Among other things, NEPAD wholeheartedly embraces international agreements such as those between the European Union (EU) and the Afro-Caribbean and Pacific (ACP) countries[45] and the US–sponsored African Growth and Opportunities Act.[46] These arrangements enshrine trade as being fundamental to development. Within this framework, assisting African countries to diversify their economies by moving from reliance upon extractive to industrial production is seen as an advancement over prior policies.[47] Moreover, to a greater extent than in previous phases of African development,[48] NEPAD seeks to integrate the acquisition of knowledge, scientific know-how and managerial skills as elements of the development process.[49] This latter emphasis reflects in large measure the emergence—and, indeed, convergence—of technology and of globalisation as driving forces in the development arena.

A less well-developed content of the idea of development is the presence of what might be referred to as internally generated self-sustaining growth. The idea is allied to that of diversification, and originates from the observation that certain economies, regardless of their aggregate wealth, are better equipped to deal with temporary shocks than are others. What makes Australia, one might ask, better able to adjust to changing patterns of trade and investment flows than Argentina? The openness or integration of the economy within the international system, its mix of products, the entrepreneurial bent of the population, the availability of reserves and the confidence in the economy are all doubtless factors, but none of them, singly or in combination with others, sufficiently explains the observed disparity between the capacity of some economies to bounce back easily from temporary shocks and the tendency of others to linger for prolonged periods in a funk. Whatever may be the explanation, it is the case that a gauge of development is the extent to which an economy's resilience assures that temporary shocks remain precisely that, and that government policies will operate effectively to limit the duration of such shocks.

[45] This agreement, popularly referred to as 'the Lomé agreement', is now in its fifth iteration and serves as a framework for facilitating 'aid' from the EU as well as trade between it and the ACP countries. See generally Nsongurua J. Udombana, 'Back to Basics: The ACP–EU Cotonou Trade Agreement and Challenges for the African Union' (2004) 40 *Texas International Law Journal* 59.

[46] See African Growth and Opportunity Act of 2000, Pub L No 106-200, 114 Stat 252 (18 May 2000) (codified at 19 USCA s 3701 *et seq*).

[47] See NEPAD Doc, above n 9, at paras 19, 20, 156.

[48] See III.B below.

[49] See NEPAD Doc, n 9 above, at para 124.

The ability confidently to rely upon the responsiveness of the economy to policy prescriptions is a measure of development. NEPAD does not explicitly address this component of the development project, but some of its prescriptions may well promote this objective. The repeated emphasis on 'state capacity' building, for example, may be understood in this light.[50] Similarly, confidence in the actual practice of the 'rule of law' as a controlling principle of governance is likely to help embed this component of development.

Beyond these classical gauges, our post-industrial age has focused on yet another measure of development: sustainable growth. This criterion should be distinguished from the previous factor because its focus is on the conservation of resources. Promoted primarily by the 'environmental movement', the thrust of the philosophy of sustainable growth is that development, as traditionally conceived, privileges consumption over conservation. In the quest for the short-term accumulation of material wealth, societies in development ignore the destructive effects of unconstrained growth. Although initially articulated in the 1970s, the criterion of sustainable growth as an element of development gained prominence in the 1990s. Specifically, it has been endorsed by, and has become a central platform of, the international environmental movement.

In keeping with NEPAD's overall emphasis on Africa's complete integration into the global community, sustainable growth is readily embraced.[51] Less obviously explained, however, are the means for implementing this objective. Nor is this omission, upon closer reflection, surprising. Conservation is a good that, in the abstract, surely is desired by all. By insisting upon the optimal allocation of resources to their most productive uses, 'efficiency', that ubiquitous locomotive of economics, already embraces conservation. What is distinctive about sustainable growth, therefore, is not its embrace of conservation, but that it encourages forgoing consumption in the here and now in order to preserve the resources for the future. This approach is, at a minimum, in tension with the self-regarding rational choice model that is at the heart of traditional economic growth theory. To the extent that orthodox development theory is built upon the current consumption of resources—surely an unavoidable conclusion in industrialisation-led projects—proponents of development, in the African world, are in fact arguing for increased consumption. For conventional development theory, then, conservation is an element of the efficient utilisation of limited resources, while for sustainable growth theorists, it is an end, in and of itself. NEPAD does nothing to reconcile these different pulls of the protagonist positions that it takes both with

[50] See *ibid* at paras 86–7.
[51] *Ibid* at paras 138, 139, 140, 141, 142.

regard to orthodox development theory and to sustainable growth. In view of the more substantial specificity that there is in its articulation of the means for realising the former, one can only conclude that its invocation of sustainable growth, like those of 'good governance', 'human rights' and the 'rule of law,' should be viewed more in terms of their rhetorical and mobilising force than as a clearly laid path to a particular prescriptive policy objective.

The conclusion that seems inescapable is that while NEPAD has sought to update African leaders' conception of development to include, among other ideas, the relevance of social institutions and longer-term perspectives, prescribed policies continue to be centred around the need for capital accumulation. This approach, which might be termed the accumulation-plus syndrome, would seem to distinguish NEPAD from prior development approaches that were centred almost exclusively on capital accumulation alone. By focusing upon the elements of the 'plus', Africa's current elites, whether civil service bureaucrats, presidential advisers, international institutions' technocrats and/or university professors, have sought to portray NEPAD as an approach to development that is distinct from previous futile efforts.[52] This new approach, we are assured, is more likely to succeed because Africans have agreed to be enfolded in the protective cocoon of globalisation. To appreciate the strengths and flaws of this argument, it is worth exploring the prior approaches that post-independent African societies adopted towards their development, with the object of seeking to understand why those efforts have proven to be ineffective. Against the backdrop of this understanding, it becomes possible to explore with nuance and realism the extent to which NEPAD, which symbolises the full embrace of neoliberalism by African stakeholders, is contributing meaningfully to our contemporary international order.

B. Prior Development Practices

By my count, in the four decades of political independence that preceded NEPAD, at least four distinct phases (or strategies) of development can be identified. Each phase was an experiment in integrating Africa into the global order. Each subsequent phase was an acknowledgement of the failure of the preceding experiment and optimistically promised a different and better outcome.

[52] See Udombana, n 7 above. Compare Committee on International Relations, 'A New Partnership for Africa's Development: An African Initiative', Hearing Before the Subcommittee on Africa, US House of Representatives (18 September 2002) 107 Cong, 2d Sess (statements of several participants).

i. Development by Central Planning

As a prelude to, and in the immediate aftermath of, independence, emerging post-colonial African governments viewed as central to their identity the transformation of their societies from predominantly rural and agrarian to urban and industrial. This desire simply reflected the received wisdom that wealth was to be found in modern cities and industrial plants, a belief that doubtless grew out in part from the seemingly obvious comparison of the powerful metropolitan country to the weak and impoverished colony. Development, often framed as a move from the latter to the former,[53] consisted therefore in co-ordinated planning, usually of the indicative type,[54] which would facilitate the realisation of these objectives.

Two aspects of the planning process were especially noteworthy. First, the government sought to 'mobilise' domestic resources by bringing under its control the extractive industries that generated the surpluses on which development plans were grounded. Where the products were subsoil or offshore (for example, coal, copper, crude oil, diamonds or gold), the government could exercise, under the inherited laws of the departing European colonisers, direct ownership and control of the surplus. Where the surplus was generated by the production of cash crops, however, governmental control could be exercised only indirectly. Here, again, the departing colonial state left behind a very serviceable edifice, the 'marketing board'.[55]

The marketing board can be viewed as a prototype of the now highly popular concept of a 'public–private partnership', the embrace of which by NEPAD is unequivocal. A statutory entity, the marketing board mediated the interaction of the domestic producer with the ultimate foreign consumer by purchasing produce at a more or less predetermined price and selling the product at the market-determined price. In its benign form, it smoothed out for the producer the inevitable large cyclical swings in price to which agricultural products are especially prone. When properly used, therefore, the resulting stability of price could serve the ends of

[53] The classic statement is Walt Whitman Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (New York, Cambridge University Press, 1960).

[54] Compare Stolper, n 25 above (discussing the putting together of Nigeria's first five-year development plan. Nigeria was to have four more of these before the practice went out of fashion. 'Indicative planning', popularised by France, should be distinguished from Soviet-style centralised planning. While both sought to take inventory of available resources, the former flexibly assigned or projected the uses of those resources over a specified period, while the latter sought to allocate those resources within a much more rigid formula. Furthermore, indicative planning did not attempt the level of centralised command control over resources that was attempted under Soviet-style planning).

[55] See generally PT Bauer, *Reality and Rhetoric: Studies in the Economics of Development* (Cambridge, MA, Harvard University Press, 1984).

development by removing a potential bottleneck to production, namely the disincentive of price uncertainty. But its use was rarely limited to its end. A less benign end was its use as a means of appropriating for the government as much of the surplus generated by cash crops as the government could get away with. The marketing board did this by consistently paying producers at a predetermined rate that had little or no relation whatever to market prices, and that was sometimes quite arbitrarily fixed on the spot, without prior notice. Because this form of taxation was often easier to administer, and its results for government coffers more predictable than income or excise taxes, the use of the marketing board as a revenue source for development became quite popular. And it was also a favourite source for corruption.

Consequently, the resources appropriated by the government, whether through direct ownership or via the marketing board, ostensibly were to be ploughed back into the economy through 'development corporations'. These were entities that controlled vast national resources, prioritised national needs and had direct responsibility for co-ordinating available resources and needs.[56] In time, these institutions became the embryos for 'parastatals', which were to dominate the next phase of Africa's development strategy.

The second element of development planning in the first phase essentially was regulatory. The thrust here was on promoting industrialisation by facilitating foreign investment in the economy. Subscribing to the then-popular theory of economic growth through import substitution-led industrialisation,[57] African governments followed their Asian and Latin American counterparts in adopting a variety of incentive-based policies that were aimed at attracting foreign investment into the manufacturing sectors of their economies. Among such policies were the use of tax holidays in the so-called pioneer sectors[58] and the building of industrial parks and of 'processing zones'. Finally, it was not uncommon for these governments to use ad hoc regulatory measures, such as temporary increases in tariffs, and outright quantitative restrictions on imports as means to achieving specific trade goals.

ii. Indigenisation as Development

By the close of the 1960s, the worldwide economic boom for which the decade has become famous was beginning to fray.[59] The relative

[56] See eg Stolper, n 25 above. I use the word 'national' here in quite a loose sense. In federal societies, regional or state bodies may substitute for national ones.

[57] See eg Ranis, n 40 above.

[58] *Ibid*.

[59] Compare Robert Brenner, *The Boom and the Bubble: The U.S. and the World Economy* (New York, Verso, 2002) (presenting an economic history of international economic developments in the post–World War II period).

prosperity of the early years of independence had generated hopes that, by the end of the decade, were souring into disappointment. A regime of unimpeded industrialisation was becoming a mirage. Political stability proved to be elusive as civil wars and military coups d'état were becoming the rule rather than the exception. Even outside of Africa, much of the world seemed in ferment. The West was swept by a 'counterculture' revolution, and in the communist world, political dissent was becoming increasingly visible.

This was the setting for a phenomenal rise in the price of commodities, a phenomenon that had quite contradictory consequences for Africa's development policies. For those few countries whose products were in high demand—notably the producers of crude oil, copper, bauxite, tin and gold—there was the unparalleled inflow of capital, which, in the long run, was to make their economies entirely dependent upon that single commodity. But for the vast majority of countries, the cost of meeting the import bills became significant drains upon national resources, leading ultimately to the incurring of substantial debts that have continued to influence the structural performance of these economies, even 30 years later. For all countries alike, and indeed for much of the world, the strains of price inflation brought to the forefront the power and influence of multinational corporations as essential intermediaries in the global flow of goods and services. Taking on the multinational corporation became a release valve for all. In African countries, responding to the 'challenge' of the multinational corporation became an integral and defining component of 'development'.

The response took the form of what might be referred to as 'indigenisation'. The commodity-rich countries sought to exercise greater influence over—and, incidentally, to appropriate more of the surplus value—of their resources by insisting upon greater ownership and control of the entities responsible for the extraction, transportation and distribution of their national patrimony. These countries employed the renegotiation of 'concession agreements' as leverage for forcing multinational companies to take them on as joint venturers in the exploitation of their national resources. Parastatals proliferated as the government rapidly was transformed from an incentive-giving regulator into a co-venturer and active market participant.

A similar nationalist impulse led African governments to insist that nationals be given a broader role even in those sectors of the economy in which the government itself did not desire active participation. A typical approach involved dividing up the economy into segments and insisting that certain segments be completely or partially under the control of nationals.[60] Thus, foreigners might be forbidden from owning small retail

[60] See eg Thomas J Biersteker, *Distortion or Development? Contending Perspectives on the Multinational Corporation* (Cambridge, MA, MIT Press, 1978).

stores, allowed no more than a minority interest in small manufactures such as the production of alcoholic beverages, but permitted a controlling interest in complex manufacturing, such as that involved in the production of pharmaceuticals. The obvious underlying ideology was that development entailed the transfer of knowledge to local stakeholders and that such knowledge is best acquired through practice. But the implementation of this belief was constrained by an equally powerful reality: an innate belief in the sanctity of property rights. Whatever may have been the leftist rhetoric of African political leaders, their governments operated within the realm of, and with respect for, capitalist economic realities. Transfer of ownership required compensation, and this meant finding local capital with which to compensate foreign owners. Effectively, this meant that, as a practical matter, much of the brunt of indigenisation was borne not by large multinational companies, but by small entrepreneurs, usually from other 'third world' societies, notably the Lebanese, Indian–Pakistani and Greek diaspora.

As a first impression, the indigenisation/nationalisation phase of development might be viewed as embodying distinctively different principles from those that controlled development in the first phase. After all, while the latter had as a core objective the attraction of foreign investment, the former was less welcoming and indeed focused upon eliminating it in some sectors. But closer inspection reveals that the discord lay more in philosophies of implementation than of objectives. And, in turn, the routes of implementation were dictated, in both phases, less by strong ideological commitments to a particular mode of development than by the need to respond to external stimuli. Industrialisation remained the central pull of development, but while early development theorists suggested this could be achieved through tax incentives and import substitution, later theorists saw salvation through increased local ownership. Both perspectives were pioneered in the main by Latin American scholars and politicians, and African leaders embraced them as part of a global trend. Among these leaders and their policy advisers, the extent to which local ownership may have undercut the push for capital accumulation appears not to have generated much discussion, probably in part because its effect was to shift wealth to the urban population, a group that also had been favoured in the first phase of the development process.

Similarly, a frequently overlooked consequence of both the planning and indigenisation phases of African development policies is that they institutionalised—if they did not create—a deep-seated environment of corruption. Both concentrated not only regulatory but, even more importantly, distributive power in the central government. Participation in and control of central government became the easiest path to wealth. Prior to the 1990s, virtually all of Africa's civil wars were fought in resource-rich countries. In this sense, such wars differ from the civil

wars of the 1990s, which were essentially conflicts of desperation rather than of distribution.

iii. African Solidarity as Development

By 1980, the indigenisation phase had fizzled out. Africa, like much of the rest of the world, was being swept into the vortex of what came to be known simply as the debt crisis. The commodity price rises of the 1970s and the monetary responses to counteract them by the users had led first to inflation and then to stagnation. These, in turn, generated political consequences, none of which was more crucial than the rightward shift in political attitudes in the West, most graphically illustrated by the sweeping victories of Ronald Reagan and the Republican Party in the US and Margaret Thatcher's Conservative Party in the UK. This 'neo-conservative' climate heralded a monetarist approach to economic policies by Western governments and the international financial institutions. The thrust of these policies was to drain liquidity from the international system. Developing countries that had relied extensively on borrowing during the second half of the 1970s felt the brunt of the economic austerity. To a greater extent than most, African countries lacked the internal and institutional adjustment mechanisms for coming to grips with the changed environment.

Almost instinctively, in this environment of 'each for each', African countries sought to avoid their seemingly naturally assigned place as the 'hindmost' by seeking refuge in the notion of continent-wide solidarity. Beginning with the Lagos Plan of Action and continuing through the Abuja Declaration, African leaders aspired to a continent-wide economic policy that would restore some of the lustre that had gone out of the idea of development. The plans and programmes proposed by the various declarations, communiqués and agreements had as their core objectives the transcendence of the numerous (and not infrequently ineffectual) sub-regional economic associations (or 'communities') into a continent-wide co-operative venture. The ambitions started modestly enough, but escalated, usually in a rhetorical mimic of developments in Europe. Consultation with regard to policies, for example, metamorphosed into harmonisation, and ultimately—but only further down the road, of course—into the adoption of a single rule, such as that for a common currency.

As an abstract proposition, the yearning for continent-wide solidarity is completely understandable. More than in any other continent, African national units are less expressions of geography or of internal histories than they are of externally imposed political agreements. There simply is no escaping the reality that these borders originated from indifferent line-drawings on poorly constructed maps by distant politicians with no

knowledge of (or, for that matter, interest in) the histories or cultures of the continent. And, tragically, post-independent national borders have been and will continue to be maintained—under the doctrine of *uti possidetis*—by a desire for stability, even though the consequence has been anything but. Transnational co-ordination (or, even better, outright harmonisation) of policies is thus a means of transcending the shortcomings of the arbitrary imposition of nationalism while retaining it.

In practice, however, preaching solidarity often proves to be immeasurably easier than living it. If individuals find it difficult to subordinate self-interest and identity for group welfare, it is doubly difficult for national polities and their political leaders to do so. These leaders, typically, are in the business of putting out fires, or at best planning for the short run. Planning for and implementing continent-wide harmonisation policies require thinking about the long run, and this, in turn, entails possessing a good deal of information about the future—or at least relevant predictive capacities—and, of course, technical competence in planning and implementation. And, perhaps most importantly, being able to plan for the future requires a stable and predictable present environment.

Africa in the 1980s can hardly be characterised as having been stable. Aside from the usual unpredictable coups d'état, civil wars and natural disasters, extraordinarily poor management of the economy coupled with the austerities of the new monetarism of the international system created a restive population. Famine became endemic, and structural adjustment policies undermined notions of employment stability in the industrial and service sectors of the economy. These presented enough challenges to African governments, so that it is hardly surprising that the programmes of the Lagos Plan and of the African Economic Community remained essentially aspirational. Indeed, the structural adjustment prescriptions of the International Monetary Fund and the World Bank were much more significant determiners of Africa's development policies in the 1980s and early 1990s than were the solidarity proposals of the Lagos Plan.

iv. Globalisation and Contemporary Development Plans

Two watershed phenomena shaped the 1990s, and both have had significant impacts on how African leaders have come to define *development*. The first was the complete disintegration of the former Soviet Union as a competing axis of power to the US. The second was the emergence of a mass consumer market for the technologies of the silicon-based integrated circuit and the network of allied services that they made possible. The collapse of the Soviet Union meant that, for the first time since their political independence, African leaders did not have to make a conscious choice between the competing ideologies framed by communism, on one hand, and liberal capitalism, on the other, as to the role of the state

and its relationship to society. They had a pre-packaged answer in the declarations emerging out of Washington and the academic institutions of North America and Western Europe. Free markets are efficient; democracy is both a right of the people and humane; the 'rule of law' is efficient, humane and just; and all three explain the superiority and triumph of Western capitalism both over time and in the deadly struggle of the last 50 years. Emerging countries that seek to develop and be successful must therefore embrace this proven mode of development.

Even if African societies were not already prone to co-opting (at least rhetorically) the dominant ideology of the moment, two factors rendered their embrace of the new template virtually inevitable. In the first place, adoption of these principles was made an element of the conditions for the extension of economic assistance to these countries.[61] A decade and more of radically increasing impoverishment left these societies in no shape meaningfully to debate the requirement. Second, and in any event, the triarchy of 'democracy', 'the market' and the 'law' independent of any coercive measures to impose them had gained widespread general acceptance in the global marketplace of ideas. It is true that the level of their actual practice by societies was suspect, but in regions as historiographically, culturally and politically dissimilar as Latin America, Eastern Europe, the Indian subcontinent and East Asia, intellectuals and governments subscribed to these ideas and indeed presented them as normative ideals. For the first time since the principles of self-determination and the outlawry of war among nation-states swept through Europe and Asia at the turn of the twentieth century, there now seemed to be another truly unifying set of global principles.

The universalisation of these principles was facilitated by the second distinctive phenomenon of the 1990s: the mass diffusion of computer and satellite technology-based communication networks. The revolution in information exchanges brought about by the ready availability of the computer and the orbiting satellite has made it easy to transmit information at virtually any given time from virtually any spot on the globe to a tailored audience, and to have that information more or less instantaneously received and acted upon by that audience. The result is that the entire globe appears as an open book in which any and all with the desire to do so are entitled to inscribe their preferences. The more affluent we are, the more we come to see our particular preferences as

[61] See eg African Growth and Opportunity Act of 2000, n 47 above. The EU, the IMF and the World Bank were less categorical in insisting that these were essential for obtaining disbursements, but they made it equally clear that they viewed adoption of these principles as integral to the realisation of their development missions. The United Nations Development Programme sanctifies the principles in its annual *Human Development Reports*. See eg United Nations Development Programme, *Human Development Report* (New York, Oxford University Press, 2004).

universal laws that must command obedience. And so institutions and practices that in the past might have been understood for what they are, expressions of cultural experiences and predilections that are entitled at most to respectful evaluation by the outsider, are now presented as exemplary truths binding upon all. And this perspective is held not only by affluent Westerners, but also by overawed non-Westerners, who find it more redeeming to believe that their poverty is less the result of their incompetence—poor managerial skills, for example—than that the wealth of the West is the result of the latter's technological prowess. The answer to development is thus to acquire that Western technological know-how and the institutions that have made it possible.

And since 'globalisation' is 'inevitable,' all might as well join it and get the most out of it. That, clearly, is NEPAD's perspective.[62] But while NEPAD is blunt in stating the forces at work in its creation, it should by now be evident that these forces, at core, are no different than those that framed earlier development episodes in Africa. African leaders see development primarily as a tool that would make their societies more like the West. In this sense, 'development' is simply an aspect of a much-evaluated sociological phenomenon, that of modernity.[63] Industrialisation is the core of the process. The process is also universal, borrowing ideas as readily as capital from whoever produces them in surplus. It may be helpful to tailor the product to the particular needs of a society, but this is a secondary requirement; for the same basic ideas of centralised political leadership, social open-mindedness and, above all, economic efficiency drive the modernisation process. The purpose of this chapter, however, is not to weigh in on the merits of modernity or even of development as an objective, but to examine the propriety of the processes NEPAD employs to realise its objective. It is to this end that I now turn.

IV. PROCESSES OF DEVELOPMENT

From the brief survey just presented, it should be obvious that one of the cardinal teachings of NEPAD is the rejection of the core philosophy of the first two eras of post-colonial African economic development: central planning and national/indigenous ownership and control of domestic resources. At the same time, NEPAD has subscribed fully to

[62] See NEPAD Doc, n 9 above, at paras 1–2:

> The Programme is anchored on the determination of Africans to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalising world … The continued marginalisation of Africa from the globalisation process and the social exclusion of the vast majority of its peoples constitute a serious threat to global stability.

[63] See generally Chibundu, n 24 above.

the efficacy of trans-African solidarity and the neo-liberal economic and political institutions that underpinned the third and fourth phases of post-colonial development. The premium here is on collaboration. Three forms of 'partnerships' are evident. In the first place, NEPAD clearly contemplates extensive consultation and co-ordination among African leaders in the formulation of policies, institutional capacity-building and the monitoring of the implementation of the commitments undertaken under NEPAD. Second, NEPAD seeks a partnership between African governments, on one hand, and foreign governments, international financial institutions, private foreign investors and traders, on the other. Third, there is the possibility of a partnership between African leaders and their citizens. The efficacy and success of structuring economic growth on such a triarchy of relationships will be the ultimate gauge of what NEPAD has to contribute to the international legal and economic orders.

A. Development through Co-ordinated Solidarity

If NEPAD represents novelty, it is not because of its push for the transnational co-ordination of governmental policies. Ever since Kenya, Uganda and Tanzania created the East African Economic Community (EAC), African countries have sought to co-ordinate economic policies across national frontiers. Successful or not, 'economic communities' have proliferated and now dominate the African landscape, ranging from the Southern African Development Community (SADC), to the Commission for East and Central Africa (CECA), to the Economic Community of West African States (ECOWAS). Nor is NEPAD's quest for a continental reach particularly innovative. The Lagos Plan of Action and the Abuja Declaration on an African Economic Community were no less ambitious in their territorial coverage. What may be distinctive in the current experiment is NEPAD's breadth of reach into the subject matter of the content of development. NEPAD unveils development not solely as an economic process, but as one that implicates socio-political considerations as well. But even this is not entirely new. ECOWAS, for example, while styled as an economic community, has been a good deal more relevant to the lives of West Africans as a 'peacekeeping' political institution than as an economic one. Nonetheless, NEPAD's willingness to define development in broader than classical economic terms deserves some attention.

Much has been made of NEPAD's commitment to 'good governance,' 'democracy,' 'human rights' and 'the rule of law' as elements of the development process. Even though the elements and expanse of these terms are only vaguely identified, the fact that African governments are willing to commit to them in an official development programme is clearly a departure from orthodox behaviour. To be sure, these 'commitments'

have been driven more by a desire to appeal to neo-liberal governments, money lenders and civil society institutions in the West than by internally generated pressures and stimuli for accountability, but they nonetheless affirm the potency of the standard criticism of the earlier institutions of trans-African governmental co-operation, which were based on a rather absolutist view of sovereignty. NEPAD does not authorise member countries to guarantee the existence of these civic virtues within the territories of other member states, but by acknowledging a common concern for their existence, and by creating a 'peer monitoring' group, NEPAD has gone beyond the traditional indifference—if not outright hostility—that African governments typically have demonstrated towards fostering institutional constraints on their use of power.

These developments, however admirable, should not obscure the glaring reality that the existence of a causal relationship among 'good governance', 'democracy,' and 'the rule of law,' on one hand, and 'economic development,' on the other, are simply assumed, not demonstrated. Commitment to the former, even if wholehearted and forcefully implemented, does not necessarily assure realisation of the latter. Indeed, as even proponents of globalisation are beginning to accept, and contrary to the global diagnosis of the 1990s, the African sickness is less the problem of an overwhelmingly intrusive state than it is of the 'weak state'.[64] Concepts like 'democracy' and 'the rule of law' clearly have impacts on state formation, but they do not lead inexorably to one type of polity or another. Whether a state is strengthened or weakened by these processes (and it is important to emphasise that neither democracy nor the rule of law automatically leads to substantive outcomes) depends on the conjunction of a series of elements: an informed and motivated general public, an experienced and competent technocratic corps, a peaceful and stable society and, of course, a reasonably resourceful and resource-endowed population. In other words, the emergence of 'good governance', 'democracy' and 'the rule of law' may be just as dependent on 'economic development' as economic development is on these factors.

Ultimately, in terms of the relationships under discussion, NEPAD may be less important for what it says and does than for what it symbolises. It is an integral part of the African Union, itself a rethreading of the Organisation of African Unity. Both exemplify an explicit acknowledgement by current African leaders of the irremediable

[64] See eg Sachs, n 2 above; Joseph Stiglitz, *Globalization and Its Discontents* (New York, WW Norton, 2002). Hurst Köhler, the managing director of the IMF, spoke to this evolving view in an interview with the German magazine *Die Zeit*, which the IMF apparently viewed as sufficiently newsworthy to have published on its website. See 'Globalisation—All Together or Not At All,' 25 Sept. 2003 <http://www.imf.org/external/np/vc/2003/092503.htm> accessed 1 Feb. 2006.

failure of prior transcontinental institution-building efforts. But rather than abandon these efforts, both NEPAD and the African Union indicate the belief that what is needed is a re-articulation of the grounds for collaboration. While political co-operation had been the glue of pan-Africanism in the immediate post-independent era, the integration of NEPAD and the African Union indicated the arrival of a new mind-set, one that saw economics as playing no less an important role in African integration than political and security issues. But this mind-set was neither unique to nor did it originate with African leaders. Indeed, like much else about NEPAD, it was lifted wholesale from the West. President Clinton, taking office immediately after the collapse of the Soviet Union, vigorously maintained that in the new age of globalisation, economic power was as important for national security as military power.[65] Western Europeans concurred, and spent much of the 1990s cementing European integration on the foundations of economic interdependence. Of course, more recently, this position has lost some of its lustre.[66] In the Balkans, the Middle East, southern and Central Asia and, indeed, in West and Central Africa, military force is re-asserting itself as the measure of authority and influence. This re-assessment no doubt will in time also be undertaken in Africa, depending upon how successfully NEPAD works out over the next few years. But in the interim, gauging NEPAD's possibilities requires closer inspection of the other affiliating partnerships.

B. Partnership with the Developed World as Development

NEPAD's view of the contemporary development scene as essentially a contractual arrangement in which African governments give up their autocratic tendencies in exchange for capital inflows from the West is perhaps most graphically illustrated in the way that it addresses the relationship of the continent to the developed world. That this relationship is central to, and in fact forms the backbone of, NEPAD is clear right from the outset.[67] Many of the policies articulated by NEPAD are justified substantially on this basis.[68] But it is not until the closing paragraphs of NEPAD's framework document that the full nature of the terms of the bargain are brazenly spelled out. For their part, African leaders undertake

[65] See Andrew J Bacevich, *American Empire: The Realities and Consequences of U.S. Diplomacy* (Cambridge, MA, Harvard University Press, 2002).

[66] See eg Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York, Random House, 2003).

[67] Compare NEPAD Doc, n 9 above, at paras 1–2.

[68] See nn 27–8 above and accompanying text.

to expand 'democratic frontiers' and to deepen the 'culture of human rights'.[69] The result, they assure the world, will be that:

> A democratic Africa will become one of the pillars of world democracy, human rights and tolerance. The resources of the world currently dedicated to resolving civil and interstate conflict could therefore be freed for more rewarding endeavours.[70]

Further, African governments will assure the continued participation in the web of conditionality-driven multilateral programmes sponsored by international financial institutions and developed country governments, thereby lending their imprimatur of respectability and legitimacy to these programmes.[71]

In exchange, NEPAD asks that developed country governments and international financial institutions support peacekeeping initiatives, accelerate debt reduction, increase official development assistance to at least 0.7 per cent of the gross domestic product of developed countries, make available on less stringent terms access to pharmaceuticals, negotiate 'more equitable' terms of trade within the World Trade Organization framework and encourage greater private investment in Africa.[72]

The form of the 'partnership' is presented as one of mutuality. But is it? Is the promise of a peaceful and stable Africa, or the 'expansion of democratic institutions' and 'deepening of a culture of human rights', any more of a benefit to the West than it is to Africa? That African leaders apparently believe so, at least sufficiently to think that this promise can provide the quid for the various quos they subsequently demand, is a testimony to how much traditional thinking remains in this new partnership. And yet, that Africans are willing to go out of their way to see encouraging private investment by Westerners in African economies as an obligation of the West is certainly a shift from the tendencies African leaders displayed in the 1970s and 1980s.

But the ultimate test of NEPAD's capacity to foresee and prepare for the future—and, in doing so, to contribute to the international order—may well lie in what role it plays in structuring relationships between African states and the new emerging economic colossus, China (and to a lesser extent, India). NEPAD is a statement of the depth of neo-liberal influence on African states, an influence which, during the 'indigenisation' phase of the 1970s, had emphasised (and in some instances actually forged) strong economic ties with the People's Republic of China and other governmentally centralised economies. Today, NEPAD, presents the relevant

[69] See NEPAD Doc., n 9 above, at para 180.
[70] *Ibid*.
[71] See *ibid* at para 184.
[72] See *ibid* at para 185.

partnerships as those framed by and within the sponsored collaborations of the Bretton Wood institutions and foreign private investors. Apparently unanticipated among the framers of NEPAD in 2001 was the state-guided path to frenetic economic growth that has been the 'miracle' of China. Yet in many ways China's relentless emphasis on the building of basic infrastructures, experiments in the regulation of population flows from rural to urban centres, reliance upon co-operation between local governments and foreign investors, tinkering with the adaptation of foreign and international legal standards to local conditions and rules and, perhaps above all else, flexibility in the moulding of weak political institutions to meet the demands of strong economic forces without simultaneously creating social chaos may offer more lessons for African societies than the repetition of yet another phase of the 'stages of economic growth'. Thus, whether over the long term NEPAD looks East (in addition to its obvious facing to the West) may well be essential in determining its place within the international order.

C. Foreign Investment and Development

Craving for capital, since the beginnings of the Industrial Revolution, has been the primary driving force in the shaping of development policies. Moments of retrenchment and even outright reaction can be identified, but the dominant ethos of proponents of economic growth is to encourage capital inflows into the industrial sector. As already explained, the first development phase in Africa forcefully embraced this conception of development.[73] But even in the second and third phases, attracting and allocating foreign capital continued to shape development policies. It is hardly surprising, then, that NEPAD continues the trend. But it does so more emphatically and explicitly.[74]

Crucially, the role of the African government remains central in the capital accumulation process, as articulated under NEPAD. There is, of course, the obeisance to markets, but there is remarkably little about encouraging internal capital formation. Rather, the focus is on attracting external capital from a variety of sources. Government-to-government aid remains important, and there is a call for the reduction—preferably outright elimination—of prior official indebtedness.[75] Multilateral institutions, notably the World Bank and the Africa Development Bank, are also seen as partners for development. But by far the most emphasis is placed

[73] See n 58 above and accompanying text.
[74] See n 63 above and accompanying text.
[75] See eg NEPAD Doc., n 9 above, at paras 147, 149, 150, 155.

upon attracting private foreign investment. To this end, NEPAD makes it clear that gone are the days of sentimental nationalism and that foreign investors need not fear the nationalisation of their assets. To the contrary, state parastatals would be privatised, and foreign investors would be free to acquire privatised property. And beyond that, African governments would enter into 'public–private partnerships' in which those aspects of the national economy that cannot be fully privatised may nonetheless benefit from the expert management and incentives orientation of the private sector. The use of credit guarantees and acceptance of investment insurance schemes such as those sponsored by the World Bank-affiliated Multilateral Investment Guarantee Agency and the US government-backed Overseas Private Investment Corporation will provide additional incentives for foreign investors.

But NEPAD's most significant contribution to both the theory and the praxis of development is its ratification of the neo-liberal consensus that governments have an obligation to create and nurture an aggressively hospitable environment for foreign investment. NEPAD declares:

> A basic principle of the Capital Flows Initiative is that improved governance is a necessary requirement for increased capital flows.[76] ... The first priority is to address investors' perception of Africa as a 'high-risk' continent, especially with regard to security of property rights, regulatory frameworks and markets.[77]

Transparency in regulation, functioning and reasonably efficient administrative and judicial systems, an attentive bureaucracy and, ultimately, an accountable government are obvious elements of the bargain, and affording and securing these elements to the foreign investor are objectives to be aimed for. Further, as already indicated, NEPAD explicitly requests that developed country governments implement policies that would encourage their nationals to invest in Africa. Here, for example, the use of insurance schemes that guarantee against losses flowing from currency devaluations, political instability or property expropriations, despite the obvious constraints such schemes place on 'sovereignty', are actually favoured under NEPAD.[78]

In recognising that the macro-environment may well be more important than any specific policy in influencing capital inflows, NEPAD falls into step with current received wisdom. And there is little doubt that 'good governance' contributes significantly in shaping the perception of the foreign investor. But even if one accepts the primacy of foreign investment in the development equation, one might nonetheless query whether

[76] *Ibid* at para 144.
[77] *Ibid* at para 151.
[78] See *ibid* at para 185.

NEPAD has in fact identified the right mix of macro-policies. To be sure, the emphasis on good governance fits within the conception of development as a 'holistic' project, but the omission from NEPAD's apparent concerns of such factors as budgetary, fiscal, monetary and interest rate policies clearly point to the limits of this holism. These elements presumably are not emphasised because of their recent pedigree as components of the much-derided 'structural adjustment programmes'. In keeping with temporal sentiments, the opprobrium of these programmes made the inclusion of their elements anathema to NEPAD's creators. And yet consideration of these elements is highly relevant to any sustained effort at attracting foreign investment. A transcontinental harmonisation of such policies may be just as vital to avoid a 'beggar thy neighbour' competitive environment as 'good governance' may be in promoting the entire continent to foreign investors.

But all of this assumes that attracting foreign investment depends upon government policies. While such policies may operate at the margins in particular cases, it is not clear that they are instrumental in the vast majority of situations. As already indicated, external investments in African economies have been driven predominantly by micro-economic considerations, particularly the demand for, and availability for extraction of, raw materials. Investments in oil, diamonds, gold, copper and the like have waxed and waned with little relationship to specific government policies. Of primary importance has been the external demand for these resources and, secondarily, some level of minimum internal security. Internal security is worth striving for not only for the purpose of encouraging foreign investments, but even more so for the welfare of the domestic population. And here NEPAD is worth examining less for what it says about foreign investment and more for the mind-set it exhibits with regard to the appropriate relationship between African leaders and the people they are supposed to lead.

D. Development and the Mobilisation of the People

NEPAD, as already shown, is presented unapologetically as a programme of 'African leaders'.[79] The involvement of 'the people' comes in the form of an 'appeal', which conceivably they may either accept or ignore. To the extent that governments do in fact hold themselves subject to the democratic principle and the principles of accountability embodied in the concept of 'good governance' and 'the rule of law,' the relationship with 'the people' will go beyond 'an appeal'. Similarly, if the government

[79] See n 20 above.

genuinely implements the various capacity-training initiatives referred to in NEPAD, there may emerge a genuine partnership between the bureaucracy and the governed.

But the more intriguing partnership with the people suggested by NEPAD is based less upon the post-modern conceptions of a 'third way' indicated by the examples presented than it is upon a strictly commonplace industrial policy in which the government undertakes to spend resources on socio-economic goals. A brief examination of four of these areas will illuminate, constructively, the potentials and pitfalls of the new partnership with the people. In what follows, I summarise and explore the implications—both theoretical and practical—of NEPAD's explicit adoption of agriculture, culture, health and education as tenets of the development process.

i. Development as the Promotion of Agriculture and Culture

For most of Africa, agriculture, especially subsistence farming, remains the dominant economic activity. While the proportion of the population in industrialised societies of those who till the land or husband animals typically can be measured in single-digit percentages, for most African countries that figure typically exceeds 70 per cent. And this is so notwithstanding 40 years of aggressive industrialisation policies that have ploughed inordinate resources into the mining and manufacturing sectors of the economy. Among the steps recommended by NEPAD are improvements in agricultural water management, especially the adoption of small-scale irrigation, land and tenure reforms, and improvements in the cultivation, production, transportation, storage and distribution of crops, livestock and fisheries.[80] Of note, NEPAD admonishes that:

> Particular attention must also be given to the needs of the poor, as well as the establishment of early warning systems to monitor droughts and crop production;—Enhance agricultural credit and financing schemes, and improve access to credit by small-scale and women farmers;—Reduce the heavy urban bias of public spending in Africa by transferring resources from urban to rural activities.[81]

NEPAD also calls on the developed world and the international financial institutions—especially the World Bank—to increase support for the agricultural sector.[82]

But none of these steps is framed as an obligation of the state; and, however much one welcomes the explicit recognition of their necessity,

[80] See NEPAD Doc, n 9 above, at para 155.
[81] *Ibid*.
[82] *Ibid*. See also *ibid* at paras 134, 155.

the vagueness of their formulation compares rather poorly with the elaborate prescriptions of how to develop the digital technology infrastructure or the building up of competences in the administrative and regulatory spheres. NEPAD thus fails to impose binding commitments on African governments with regard to the rehabilitation of perhaps the most defunct sector of their national economies. This shortcoming is particularly noteworthy in the context of those aspects of agriculture the improvement of which is dependent almost entirely on the regulatory framework. There is little doubt, for example, that land ownership and tenure rules account for much of the difficulty African agriculture has experienced. Yet nothing in NEPAD indicates what the thinking of African governments ought to be in this most crucial arena of interaction between the majority of the ordinary population and their government. Moreover, there is little evidence since the adoption of NEPAD that this statement of objectives is receiving anywhere near the level of attention it deserves, or which has been given to other aspects of NEPAD. Agricultural improvements notwithstanding, NEPAD's rhetoric may again end up as the orphan sector of the development process.

The approach to the development of agriculture also presents an interesting contrast to the rhetoric and bombast on culture. We are told that:

> Culture is an integral part of development efforts on the continent, [and that] it is essential to protect and effectively utilise indigenous knowledge that represents a major dimension of the continent's culture, and to share this knowledge for the benefit of humankind.[83]

Those traditionalists who might view culture in artistic or humanistic terms, or who might be heartened at the idea that African governments intend to promote traditional dances or herbal healing are promptly disabused of such misperceptions. Indigenous knowledge, NEPAD declares, includes:

> [t]radition-based literacy, artistic and scientific works, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. The term also includes genetic resources and associated knowledge.[84]

In short, the Geneva-based expert of the World Trade Organization or World Intellectual Property Organisation, rather than the practices of the rural peasant along the banks of the Niger, gets to define what constitutes 'African culture', at least that element of it entitled to attention from African governments. Whatever else may be said about the wisdom of

[83] See *ibid*, at para 140.
[84] *Ibid*.

these policies, it is clear they fall short of the claim that they are intended to 'mobilise' the African people. NEPAD is at best a limited, but by no means an unfamiliar, type of partnership between the leaders and the ruled. It is, indeed, all too familiar.

ii. Development of the Health and Education Infrastructures

I have argued elsewhere that no two elements of the development process are more central and more ignored than health and education.[85] Both aspects of development are addressed within NEPAD's kaleidoscopic approach. With regard to health, NEPAD quite rightly highlights the abysmal data, both relative and absolute.[86] In recent years, much attention has focused on the ravages of HIV/AIDS; but while Africa may share—however disproportionately—the burdens of this illness with the industrialised world, the more astonishing and typically overlooked phenomenon is the continuing endemic persistence of illnesses long eradicated in much of the rest of the world. Here malaria and tuberculosis typify a much broader phenomenon. As the focus on HIV/AIDS has rekindled a self-evident but all too easily overlooked reality, the concern about health is not simply to relieve the sufferings of the individual (although this is surely a laudable objective), but just as importantly to address a substantial social and economic barrier to the development of a community. As is well known about the building of the Panama Canal and about the development of agriculture in the South and West of the United States, eradicating endemic diseases such as those carried by mosquitoes and tsetse flies can provide the gateway to improved economic activities and social interactions. And it is generally recognised that issues of health go well beyond addressing particular illnesses. Providing for health is much like providing basic infrastructure. The necessary attention extends well beyond building hospitals, training medical personnel or filling up drugstores, as important as these are. Just as important is mass education: getting individual citizens to recognise the significance of personal and communal hygiene and to take responsibility for such seemingly simple tasks as the maintenance of local sanitation.

NEPAD's overall approach to health, unfortunately, is framed less by an introspective look at the daily health needs of the societies whose interests

[85] See Maxwell O Chibundu, 'Africa's Economic Recovery: On Linkages, Leapfrogging and the Law' (2000–2003) *Third World Legal Studies* 17–36.

[86] See NEPAD Doc., n 9 above, at para 126. According to NEPAD: 'In 1997, child and juvenile death rates were 105 and 169 per 1000, as against 6 and 7 per 1000 respectively in developed countries. Life expectancy is 48.9 years, as against 77.7 years in developed countries. Only 16 doctors are available per 100,000 inhabitants, as against 253 in industrialised countries' para 126.

it purports to address than by taking advantage of current international health headlines. The response is framed either in very vague terms or by relying on contributions from the international sector. Without disparaging the usefulness of the latter, it is surely worth considering whether the health needs of the continent cannot be satisfied by change of habits and practices rather than huge capital expenditures. Put another way, NEPAD fails to address a well-known distinction in issues of health: the appropriate balance between preventive and curative measures. Clearly, NEPAD recognises the importance of addressing issues of health, but far from forming a partnership with the people to do so, African governments would rather look outwards for financial and technical expertise. Yet among the various activities that constitute development, personal and communal responsibility for health may be more manageable than in any other areas, such as industrialisation. This may, indeed, be one area where a government can genuinely harness 'indigenous' assets for collective welfare.

Education—or, more accurately, formal (ie systematically organised and structured) education—is, of course, the *sine qua non* of modernity. If there is a function that post-colonial African governments have always embraced without equivocation, it is education. And yet the paradox persists that the educational situation in Africa at the turn of the twenty-first century is uniformly dismal. The availability of 'universal primary education' has been one of those gauges of educational advancement. For many African countries, this objective was to be realised no later than the end of the 1970s. None achieved this. NEPAD takes up this challenge, and in keeping with the United Nations Millennium Development Goals,[87] it encourages African countries to assure universal primary education to their citizens by 2015.[88] But, as recent reports by the World Bank suggest, the current rate of progress indicates this is an objective that is likely to be unrealised.

Unsurprisingly, much of the attention on education focuses on issues of interest to technical and tertiary institutions and their beneficiaries.[89] A disproportionate amount of African resources has always gone into these institutions of formal education; and yet the results have been uncertain. On one hand, the absorptive capacities of the economies effectively to make use of the 'graduates' so produced has always been underwhelming, so that the spectacle of the postgraduate humanities scholar driving a taxi cab is as much a feature of African folklore as is the non-commissioned army sergeant-major who becomes a head of state.

[87] These were adopted following a summit meeting of the heads of states of United Nations member countries.

[88] See NEPAD Doc, n 9 above, at para 117.

[89] This bias has been taken up in Tony Blair's Commission for Africa Report, n 6 above.

On the other hand, there is no doubting the shortage in Africa of engineers and medical doctors, even though a surplus of Africans—many trained by or at the expense of Chinese, Cuban and Russian experts—are successfully plying their trade in the West. NEPAD's core responses to these complex contradictions are to suggest ploughing more resources into research[90] and to:

> Create the necessary political, social and economic conditions in Africa that would serve as incentives to curb the brain drain and attract much-needed investment.[91]

Clearly, there is merit in both suggestions, but they are at best tangential to the basic issues that confront educational systems on the continent. Neither addresses the need to connect the quest for universal primary education with the rationalising of institutions and resources of post-primary education. Similarly, the second most obvious failing in African education policies today—next only to the persistent inability of the continent to provide minimal literacy education to the bulk of its population—is how best to rehabilitate moribund educational institutions. It is evident that the educational problem—whether in the context of providing universal primary education or of training the right professionals—has not been the failure to pour resources into the undertaking. Rather, it has been how to direct and manage those resources. Both at the primary and post-secondary levels, the basic problem has not been the shortage of bricks and mortar, but how to maintain the bricks and mortar; and this is so not only in the context of hard assets, but of soft ones as well. NEPAD's recommendations, even if followed up by specific implementing policies, are unlikely to address these shortcomings effectively.

V. CONCLUSION

The educational dilemma squarely brings to the forefront a recurring theme of Africa's development policies. As should be evident from what has been said throughout this chapter, the development process has been hampered neither by the lack of ideas nor by the devotion of resources to realising those ideas. Rather, it is the absence of steadiness and persistence in seeing through the implementation of the ideas that is most characteristic of the failures of the process. In part, the lack of patience reflects ambiguities among Africans as to what constitutes development. Should it be measured in terms of social welfare within the community or in terms of the relative privation of the community vis-à-vis the rest of

[90] See NEPAD Doc, n 9 above, at para 118.
[91] *Ibid* at para 122.

the world? The uncertainty is itself a measure of the lack of self-assurance that is embedded in the political development of most African nation-states. These polities, for the most part, are the product not of internally generated forces but of external administrative convenience. The result is a culture of development that is dominated by a desire and tendency of looking outwards for approval rather than of sensing and responding to internal needs. African leaders therefore embrace and discard development policies in tune with dominant external trends. In focusing on 'globalisation' as the driving theme of contemporary development policies, NEPAD is simply travelling down a well-trodden path. Import substitution, indigenisation and regionalism previously provided anchors for development policies. Globalisation is the latest of this line. It may fairly be asked whether it and NEPAD are any more likely to succeed where others have failed.

And yet one need not be in total despair. NEPAD manifests two related important sensibilities that were absent in prior approaches to development. First, although it continues to take a 'top-down' orientation, it does so self-consciously. In 'appealing' to the ordinary people of the continent and in 'mobilising' them in the development process, NEPAD introduces a theme conspicuous by its absence in prior development policies. African leaders appear to recognise that the role of 'the people' is integral to development itself. One hopes they will take the next step and see that 'development' in fact is the function of the people, not of technocratic plans and bureaucratic implementation, however enlightened these may appear or be intended. The second element in NEPAD worth special notice is the approach that it terms 'holistic'. The crafters of NEPAD clearly have bought in to the post-modern ethos. Development must be addressed in all of its multifariousness. Doing so requires incorporating into the process not simply basic economic needs, but socio-political and cultural ones as well. This insight may be driven by the belief in globalisation and the desire to attract foreign investment, but it is no less a valuable insight. One can only hope that this recognition survives the disappointments and roadblocks that are bound to emerge when it becomes evident that Africa's development cannot be underwritten primarily by foreign investment, or as an industrialisation offshoot of the globalisation phenomenon.

There is, however, a significant element of the development process that is completely overlooked by NEPAD, but which may be weakly foreshadowed in its linkage to the African Union. The decades of the 1980s and 1990s were highly destructive ones for the continent, but they may also have been essential to the process of creating durable states there. Just as much of African colonisation boiled down to barely more than the superficial organisation of vast swathes of territory under an administrative regime, the states that came into being following decolonisation often

had no greater claim of relevance to or loyalty from the inhabitants of those territories. One of the consequences of the widespread 'disintegration' of African states in the 1980s and 1990s may therefore have been to provide a mechanism by which bonds of alignment between state and society could be formed and nurtured. Struggles over limited resources, civil war conflicts and 'genocides' are clearly divisive; but they also have the potential of kindling in the survivors a shared history of interdependence and the value of coexistence. Such shared history and memory typically constitute the breeding grounds for durable nation-states. One of the striking results of these conflicts is that, contrary to what one might expect, the arbitrarily drawn colonial boundaries have in fact held. Increasingly, Africans look for solutions less in the dissolution of their admittedly fragile post-colonial states, but more and more in the forging of compromises that would strengthen the central government. The challenge is how to stir an effective middle course between the building of a strong centre without emasculating the vibrant local institutions that are essential to checking the concentration of power within one person or a limited set of central institutions. Respect for the interests of sub-national units as well as demands for accountability from the central government are more likely to emerge from these bargains struck out of the necessity to resolve conflicts than from some abstract conception of the solidarity of nationhood. Responsibly harnessing these strengthened bonds of belonging in the service of development will be one of the profound challenges that lie ahead for African societies. The answers to these challenges will be found in the compromises of daily interactions among Africans, rather than in any overarching theories of modernisation or globalisation borrowed from without.

It is perhaps no coincidence that the strongest proponent of a new development plan for the continent, Thabo Mbeki, belongs to an unusual African grouping: the politician whose self-worth has been generated and affirmed in the crucible of actual conflict. Similarly, Olusegun Obasanjo's views doubtless have been shaped in part from the tragic internal conflicts that bedevil Nigeria. These leaders may be mistaken in their apparent belief that the key to the rejuvenation of the continent's development process lies in reflexively hitching the African cart to the globalisation wagon, but they are surely right in recognising that the participation of the led is essential to the success of the process. When the inadequacy of the former becomes evident, one hopes that NEPAD can turn to the latter without having lost too much ground.

What then are NEPAD's contributions to the international legal order? Possible shortcomings notwithstanding, at least four such distinctive contributions are identifiable. First (and perhaps most significantly), NEPAD has rejuvenated (and in many ways energised) the concept of development as a collaborative rather than confrontational engagement under

law of poor and wealthy states, weak and powerful societies, rulers and the ruled. Second, it embodies the unequivocal acceptance by African states and their commitment to a rule-based accountability for the promotion of democracy, human rights and good governance as elements of the development process, thereby promoting the likely crystallization of these norms as customary international law. Third, by committing African states to active participation in the so-called public–private partnerships, in particular, and expansive use of foreign direct investments, generally, NEPAD has further legitimised concepts that barely a decade ago were roundly decried as inconsistent with the concept of national sovereignty. And finally (but by no means least significant), in couching these and several other propositions as statements of rights and responsibilities rather than simply as political aspirations or undertakings, NEPAD is fully engaged as a transcontinental participant in the process of the progressive development of international law. Collectively, these contributions represent an African-crafted holistic stance that strongly endorses the involvement of the continent's elites in the dominant contemporary conception of the international legal order as constituted by functional networks of co-operation among actors (public and private alike) rather than by commitment to any overriding normative ideology.

Bibliography

I. BOOKS

ABRAHAM, Kinfe (2001) *Ethiopia from Empire to Federation* (Addis Ababa, Ethiopian International Institute for Peace and Development).

ALLEN, Tim (2006) *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London, Palgrave Macmillan).

ANDERSON, David (2005) *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (London, Weidenfeld & Nicolson).

BACEVICH, Andrew J (2002) *American Empire: The Realities and Consequences of US Diplomacy* (Cambridge, MA, Harvard University Press).

BADIE, Bertrand (1992) *L'état importé: L'occidentalisation de l'ordre politique* (Paris, Fayard).

BANDA, Fareda (2005) *Women, Law, and Human Rights: An African Perspective* (Oxford & Portland, Hart Publishing).

BAUER, PT (1984) *Reality and Rhetoric: Studies in the Economics of Development* (Cambridge, MA, Harvard University Press).

BEAH, Ishmael (2007) *A Long Way Gone: Memoirs of A Boy Soldier* (New York, Farriar, Straus & Giroux).

BEDJAOUI, Mohammed (1961) *Law and the Algerian Revolution* (Brussels, International Association of Democratic Lawyers).

BELLO, Emmanuel (1980) *African Customary Humanitarian Law* (Geneva, ICRC).

BEST, Geoffrey (1980) *Humanity in Warfare* (New York, Columbia University Press).

BEVANS, Charles (ed) (1969) *Treaties and Other International Agreements of the United States of America 1776–1949*, vol 3 (Washington, DC, United States Government Printing Office).

BIERSTEKER, Thomas J (1978) *Distortion or Development? Contending Perspectives on the Multinational Corporation* (Cambridge, MA, MIT Press).

BODIN, Jean (1992 (1583)) *On Sovereignty: Four Chapters From the Six Books of the Commonwealth* (JH Franklin ed & trans) (Cambridge, Cambridge University Press).

BRENNER, Robert *The Boom and the Bubble: The U.S. and the World Economy* (New York, Verso, 2002).

BRIERLY, JL (1963) *The Law of Nations: An Introduction to the International Law of Peace*, 6th edn (Sir H Waldock (ed)) (Oxford, Clarendon Press).

BRONKHORST, SA (2000) *Liability for Environmental Damage and the World Bank's Chad–Cameroon Oil and Pipeline Project*, Selected Papers of the NC-IUCN Symposium (Stichtung, IUCN Ledencontact, Netherlands).

BURCHETT, Wilfred and ROEBUCK, Derek (1977) *The Whores of War: Mercenaries Today* (Harmondsworth, Penguin).

CAPLAN, Richard (2002) *A New Trusteeship? The International Administration of War-torn Territories* (London, Routledge).

—— (2005) *Europe and the Recognition of New States in Yugoslavia* (New York, Cambridge University Press).

CASSESE, Antonio (2003) *International Criminal Law* (Oxford, Oxford University Press).

COETZEE, JM (2003) *Elizabeth Costello* (London, Secker & Warburg).

COHEN, Roberta and DENG, Francis M (1998) *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, DC, The Brookings Institution Press).

DANILENKO, Gennady (1993) *Law-making in the International Community* (New York, Springer).

DAVIDSON, Basil (1992) *The Black Man's Burden: Africa and the Curse of the Nation-state* (New York, Times Books).

DENG, Francis M and LYONS, Terrence (eds) (1998) *African Reckoning: A Quest for Good* (Washington, DC, Brookings Institution Press).

DENG, Francis M and ZARTMAN, I William (eds) (1991) *Conflict Resolution in Africa* (Washington, DC, Brookings Institution Press).

—— (2002) *A Strategic Vision for Africa: The Kampala Movement* (Washington, DC, The Brookings Institution).

DENG, Francis M, KIMARO, Sadikiel, LYONS, Terrence, ROTHCHILD, Donald, and ZARTMAN, I William (eds) (1996) *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, DC, Brookings Institution Press).

DIAMOND, Larry (1997) *Prospects for Democratic Development in Africa* (Stanford, Hoover Institution).

DINSTEIN, Yoram (2004) *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, Cambridge University Press).

DODGE, Cole P and RAUNDALEN, Magne (eds) (1991) *Reaching Children in War: Sudan, Uganda and Mozambique* (Bergen, Sigma Forlag).

DRAPER, Giad (1958) *The Red Cross Conventions* (London, Stevens & Sons).

DURUIGBO, Emeka (2003) *Multinational Corporations and International Law: Accountability and Compliance Issues in the Petroleum Industry* (Ardsley, NY, Transnational Publishers).

EASTERLY, William (2006) *The White Man's Burden: Why the West's Effort to Aid the Rest Has Done So Much Ill and So Little Good* (New York, Penguin Press).

ELKINS, Caroline (2005) *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York, Henry Holt & Co).

ESTY, Benjamin C (2003) *The Chad–Cameroon Petroleum Development and Pipeline Project (A)* (Harvard Business School 9-202-010 (Rev: 16 January).

ETZIONI, Amitai (2006) *Sovereignty as Responsibility* (Elsevier on behalf of Foreign Policy Research Institute).

FOX, Gregory H and ROTH, Brad R (eds) (2000), *Democratic Governance and International Law* (Cambridge, Cambridge University Press).

FRANCK, Thomas (1995) *Fairness in International Law and Institutions* (New York, Oxford University Press).

GARY, Ian and KARL, Terry Lynn (2003) *Bottom of the Barrel: Africa's Oil Boom and the Poor* (Baltimore, MD, Catholic Relief Services).

GOERTZ, Gary (1994) *Contexts of International Politics* (Cambridge, Cambridge University Press).

GRAY, Clive S (ed) (2003) *Inside Independent Nigeria: Diaries of Wolfgang Stolper 1960–1962* (Aldershot, Ashgate).

GROS, Jean-Germain (1998) *Democratization in Late Twentieth-Century Africa: Coping with Uncertainty* (Westport, CT, Greenwood Press).

HARRIS, Peter and REILLY, Ben (eds) (1998), *Democracy and Deep Rooted Conflict: Options for Negotiators* (Stockholm, International Institute for Democracy and Electoral Assistance).

HASENCLEVER, Andreas, MAYER, Peter and RITTBERGER, Volker (1997) *Theories of International Regimes* (Cambridge, Cambridge University Press).

HEMPSTONE, Smith (1962) *Rebels, Mercenaries and Dividends: The Katanga Story* (New York, Praeger).

HENCKAERTS, Jean-Marie and DOSWALD-BECK, Louise (2005) *Customary International Humanitarian Law* (Vols I & II) (Cambridge, Cambridge University Press).

HENKIN, Louis (1979) *How Nations Behave: Law and Foreign Policy*, 2nd edn (New York, Columbia University Press).

—— (1995) *International Law: Politics and Values* (Dodrecht, Martinus Nijhoff Publishers).

van den HERIK, LJ (2005) *The Contribution of the Rwanda Tribunal to the Development of International Law* (The Hague, Martinus Nijhoff).

HULL, Isabel (2005) *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca, NY, and London, Cornell University Press).

JENNINGS, Robert and WATTS, Arthur (eds), *Oppenheim's International Law*, 9th edn (New York, Longman).

JESSUP, Philip C (1948) *A Modern Law of Nations: An Introduction* (New York, Macmillan).

KAGAN, Robert (2003) *Of Paradise and Power: America and Europe in the New World Order* (New York, Random House).

KAPLAN, Robert (1996) *The Ends of the Earth: From Togo to Turkmenistan, From Iran to Cambodia—A Journey to the Frontiers of Anarchy* (New York, Random House).

KATZENSTEIN, Peter (ed) (1996) *The Culture of National Security: Norms and Identity in World Politics* (Ithaca, NY, Cornell University Press).

KEOHANE, Robert (1984) *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ, Princeton University Press).

KISSINGER, Henry (2001) *Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century* (New York, Simon & Schuster).

KITTICHAISAREE, Kriagsak (2001) *International Criminal Law* (Oxford, Oxford University Press).

KLOTZ, Audrie (1996) *Norms in International Relations: The Struggle Against Apartheid* (Ithaca, NY, Cornell University Press).

KRASNER, Stephen D (1999) *Sovereignty: Organized Hypocrisy* (Princeton, Princeton University Press).

KREIJEN, Gerard *et al* (eds) (2002) *State, Sovereignty, and International Governance* (Oxford, Oxford University Press).

LAMPIERE, Luc *et al* (1999) *Managing Oil Revenues in Chad: Legal Deficiencies and Institutional Weaknesses* (Human Rights Clinical Program, Harvard Law School, October 13).

LALONDE, Suzanne (2002) *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal, McGill-Queen's University Press).

LAUTERPACHT, Elihu (ed) (1970) *International Law: Collected Papers* (Cambridge, Cambridge University Press).

LEVITT, Jeremy (ed) (2003) *Africa: Selected Documents on Constitutive, Conflict and Security, Humanitarian and Judicial Issues* (Ardsley, NY, Transnational Publishers).

—— (2005) *The Evolution of Deadly Conflict in Liberia: From 'Paternaltaranism' to State Collapse* (Durham, Carolina Academic Press).

LEWIS, IM (2002) *A Modern History of the Somali*, 4th edn (Oxford, James Currey).

LODGE, Tom (2003) *Politics in South Africa: From Mandela to Mbeki*, 2nd edn (Bloomington, Indiana).

LOWE, Vaughan and FITZMAURICE, Malgosia (eds) (1996) *Fifty Years of the International Court of Justice* (Cambridge, Cambridge University Press).

MALANCZUK, Peter (1997) *Akehurst's Modern Introduction to International Law*, 7th edn (London, Routledge).

APFFEL-MARGLIN, Frederique and MARGLIN, Stephen A (eds) (1996) *Decolonizing Knowledge: From Development to Dialogue* (Oxford, Oxford University Press).

MARTIN, Susan Forbes (2000) *The Handbook for Applying the Guiding Principles on Internal Displacement* (Washington, DC and Geneva, The

Brookings Project on Internal Displacement and the Office of the Coordination of Humanitarian Affairs (OCHA)).

McDOUGAL, Myres, LASSWELL, Harold and CHEN, Lung-Chu (1980) *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New York, New York Law School).

MELBER, Henning, CORNWELL, Richard, GATHAKA, Jepthah and WANJALA, Smokin (2002) *The New Partnership for Africa's Development (NEPAD)—African Perspectives* (Uppsala, Nordika Afrikainstitutet).

MOIR, Lindsay (2002) *The Law of Internal Armed Conflict* (Cambridge, Cambridge University Press).

MUBIALA, Mutoy (2005), 'Le système régional africain de protection des droits de l'homme' (Bruxelles, Bruylant).

MUSAH, Abdel Fatau and FAYEMI, Kayode (eds) (2000) *Mercenaries: An African Security Dilemma* (London, Pluto).

PANKHURST, Richard (2001) *The Ethiopians: A History* (Oxford, Blackwell).

PAKENHAM, Thomas (1991) *The Scramble for Africa* (London, Harper Perennial).

PHAM, J Peter (2004) *Liberia: Portrait of a Failed State* (New York, Reed Press).

—— (2006) *The Sierra Leonean Tragedy: History and Global Dimensions* (Hauppage, Nova Science).

ROBERTS, Adam (2006) *The Wonga Coup: Guns, Thugs and A Ruthless Determination to Create Mayhem in An Oil-Rich Corner of Africa* (London, Profile).

ROSTOW, Walt Whitman (1960) *The Stages of Economic Growth: A Non-Communist Manifesto* (New York, Cambridge University Press).

SACHS, Abbie (1973) *Justice in South Africa* (Berkeley, University of California Press).

SACHS, Jeffrey (2005) *The End of Poverty: Economic Possibilities for Our Time* (New York, Penguin Press).

SERAGELDIN, Ismail (1989) *Poverty, Adjustment, and Growth in Africa* (Washington, DC, World Bank).

SCHABAS, William A (2004) *An Introduction to the International Criminal Court*, 2nd edn (Cambridge, Cambridge University Press).

SCHACHTER, Oscar (1991) *International Law in Theory and Practice* (New York, Springer).

SCHOISWOHL, Michael (2004) *Status and (Human Rights) Obligations of Non-recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (Leiden, Martinus Nijhoff).

SCOTT, James B (ed) (1920) *The Proceedings of the Hague Peace Conference* (New York, Oxford University Press).

SHELEFF, Leon Shaskolsky (2000) *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (London, Frank Cass & Co).

SMITH, Anthony (1991) *National Identity* (London, Penguin).
SPAIGHT, JM (1911) *War Rights on Land* (London, Macmillan & Co).
STEINER, Henry and ALSTON, Phillip (2000) *International Human Rights in Context: Law, Politics, Morals*, 2nd edn (New York, Oxford University Press).
STIGLITZ, Joseph (2002) *Globalization And Its Discontents* (New York, WW Norton).
TESÓN, Fernando (2006) *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd edn (Ardsley, NY, Transnational Publishers).
THOMAS, Daniel (2001) *The Helsinki Effect: International Norms, Human Rights and the Demise of Communism* (Princeton, NJ, Princeton University Press).
de VATTEL, Emmerich (1916 (1758)) *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (C Fenwick, trans) (Washington, Carnegie Institution.
WEISS, Thomas and KORN, David (2006) *Internal Displacement: Conceptualization and its Consequences*, (London and New York, Routledge).
WOLFF, C (1934 (1764)) *Jus Gentirum Methodo Scientifica Petractatum § 256* (JH Drake, trans) (Oxford, Carnegie Foundation for International Peace).
WRONG, Michela (2005) *'I Didn't Do It for You': How The World Betrayed A Small African Nation* (New York, Harper Collins).

II. BOOK CHAPTERS

ACEVEDO, Domingo E (1993) 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy' in Lori Fisler Damrosh (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York, Council on Foreign Relations Press).
BECK, Robert (1996) 'International Law and International Relations: The Prospects for Interdisciplinary Collaboration' in Robert Beck et al (eds), *International Rules: Approaches From International Law and International Relations* (New York, Oxford University Press).
CHAYES, Abram and CHAYES, Antonia Handler (1994) 'Regime Architecture: Elements and Principles' in Janne Nolan (ed), *Global Engagement Cooperation and Security in the 21st Century* (Washington, DC, Brookings Institution Press).
COUPLAND, Robert (1999) 'The SIrUS Project: Towards A Determination of Which Weapons Cause "Superfluous Injury or Unnecessary Suffering"' in Helen Durham and Timothy LH McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague/London/Boston, Martinus Nijhoff).

DENG, Francis M (1995) 'Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action', in John Harbeson and Donald Rothchild (eds), *Africa in World Politics* (Boulder, CO, Westview Press).

—— (1996) 'Sovereignty and Humanitarian Responsibility: A Challenge for NGOs in Africa and the Sudan' in Robert Rotberg (ed), *Vigilance and Vengeance* (Washington, DC, Brookings Institution Press and The World Peace Foundation).

—— (2001) 'Ethnic Marginalization as Statelessness: Lessons from the Great Lakes Region of Africa' in Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Washington, DC, The Carnegie Endowment for International Peace).

DUFF, Antony (1992) 'Alternatives to Punishment—or Alternative Punishments?' in W Cragg (ed), *Retributivism and Its Critics* (Franz Steiner, Stuttgart).

FARER, Tom (1993) 'A Paradigm of Legitimate Intervention' in Lori Fisler Damrosh (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York, Council on Foreign Relations Press).

HURRELL, Andrew (2002) 'Norms and Ethics in International Relations' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (London, Sage Publications Ltd).

KALIN, Walter (2002) 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework' in *Recent Commentaries About the Nature and Application of the Guiding Principles on Internal Displacement* (Washington, DC, Brookings).

KELLER, Edmond (1995) 'Remaking the Ethiopian State' in I William Zartman (ed), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Boulder, CO, Lynne Rienner).

KRATOCHWIL, Friedrich (2000) 'How do Norms Matter?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (New York, Oxford University Press).

LEVITT, Jeremy (2001) 'African Interventionist States and International Law' in Oliver Furley and Roy May (eds), *African Interventionist States* (Aldershot, Ashgate Publishing).

—— (2005) 'The Peace and Security Council of the African Union and the United Nations Security Council: The Case of Darfur Sudan' in NM Blokker and NJ Schrijver (eds), *The Security Council and the Use of Force* (Lieden, Brill Publishers).

MARSTON, Geoffrey (1996) 'The London Committee and the Statute of the International Court of Justice' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (Cambridge, Cambridge University Press).

MÉDARD, Jean-François (1982) 'The Underdeveloped State in Tropical Africa: Political Clientalism or Neo-Patriomonialism' in Christopher Clapham (ed), *Private Patronage and Public Power: Political Clientelism in Modern States* (London, Francis Pinter).

MÉGRET, Frédéric (2006) 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (Cambridge, Cambridge University Press).

MOODIE, AE (1956) 'Fragmented Europe' in W Gordon East and AE Moodie (eds), *The Changing World: Studies in Political Geography* (Yonkers-on-Hudson, NY, World Book).

PRICE, Richard (1998) 'Compliance with International Norms and the Mines Taboo' in Maxwell Cameron et al (eds), *To Walk Without Fear: The Global Movement to Ban Landmines* (New York, Oxford University Press).

RAUSTIALA, Kal and SLAUGHTER, Anne-Marie (2002) 'International Law, International Relations and Compliance' in Walther Carlsnaes, Thomas Reese and Beth A Simmons (eds), *Handbook of International Relations* (London, Sage Publications Ltd).

RISSE, Thomas and SIKKINK, Kathryn (1999) 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, Cambridge University Press).

SCHEFFER, David (1991) 'Use of Force after the Cold War: Panama, Iraq, and the New World Order' in David Scheffer (ed), *Right v Might: International Law and the Use of Force* (New York, Council on Foreign Relations).

SCHMITZ, Hans Peter and SIKKINK, Kathryn (2002) 'International Human Rights, Relations' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of International Relations* (London, Sage Publications Ltd).

WAEVER, Ole (1996) 'Figures of International Thought: Introducing Persons Instead of Paradigms' in Iver Newmann and Ole Waever (eds), *The Future of International Relations: Masters in the Making* (London, Routledge).

WING, Adrien Katherine (2000) 'Introduction: Global Critical Race Feminism for the Twenty-First Century' in Adrien Katherine Wing (ed), *Global Critical Race Feminism: An International Reader* (New York, NYU Press).

WIPPMAN, David (1998) 'Practical and Legal Constraints on Internal Powersharing' in David Wippman (ed), *International Law and Ethnic Conflict* (Ithaca, NY, Cornell University Press).

III. JOURNAL ARTICLES

van AARDT, Maxi, 'The SADC Organ for Politics, Defence and Security: Challenges for Regional Community Building' (Winter 1997) *South African Journal of International Affairs* 144.

ABI-SAAB, Georges, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979–IV) 165 *Hague Recueil* 353.

ADJETEY, Fitnat Naa-Adjeley, 'Religious and Cultural Rights: Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture' (1995) 44 *American University Law Review* 1351.

AGYEI, Juliette Ayisi, 'African Women: Championing Their Own Development and Empowerment—Case Study Ghana' (2000) 21 *Women's Rights Law Report* 117.

AKA, Philip, 'The Military, Globalization, and Human Rights in Africa' (2002) 18 *New York Law School Journal of Human Rights* 361.

AKHAVAN, Payam, 'The Lord's Resistance Army Case: Uganda's Submission of First State Referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403.

AKINLA II, Oladele Q, 'Economic Reform in Sub-Saharan Africa: The Changing Business and Legal Environment' (1987) 7 *Boston College Third World Law Journal* 19.

ALKAS, Peri and SHANDERA, Wayne, 'HIV and AIDS in Africa: African Policies in Response to AIDS in Relation to Various National Legal Traditions' (1996) 17 *Journal of Legal Medicine* 527.

ANDERSON, Kenneth, 'Microcredit: Fulfilling or Belying the Universalist Morality of Globalising Markets?' (2002) 5 *Yale Human Rights and Development Journal* 85.

ANDREWS, Penny, 'Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law' (1999) 8 *Temple Political and Civil Rights Law Review* 425.

ANGHIE, Antony, '"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case' (1993) 34 *Harvard International Law Journal* 445.

——, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations' (2002) 34 *New York University Journal of International Law and Politics* 513.

——, 'Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations' (2006) 41 *Texas International Law Journal* 447.

AN-NA'IM, Abdullahi A *et al*, 'Cultural Transformations and Human Rights In Africa: A Preliminary Report' (1997) 11 *Emory International Law Review* 287.

APUULI, Kasaija Phillip, 'Amnesty and International Law: The Case of the Lord's Resistance Army insurgents in Northern Uganda' (2005) 5(2) *African Journal on Conflict Resolution* 33.

ARRIAGA, Alexandra, 'HIV/AIDS and Violence Against Women' (2002) 29 *Human. Rights* 18.

ASCHERIO, Alberto *et al*, 'Deaths and Injuries Caused by Landmines in Mozambique' (1995) 346 *Lancet* 1509.

ASIEMA, Joy K, 'Gender Equity, Gender Equality, and the Legal Process: The Kenyan Experience' (2000) 10 *Transnational Law and Contemporary Problems* 561.

ASMAL, Kader, 'Stopping Crimes through Negotiations: The Case of South Africa', *Guest Lecture Series of the Office of the Prosecutor* (14 March 2006).

BAIRNES, Erin K, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 *The International Journal of Transitional Justice* 91.

BAMGBOSE, Oluyemisi, 'Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl' (2002) 10 *University of Miami International and Comparative Law Review* 127.

BARNES, Samuel H, 'The Contribution of Democracy to Rebuilding Post Conflict Societies' (2001) 95 *American Journal of International Law* 86.

BARTSCHI, Kenneth, 'Legislative Responses to HIV/AIDS in Africa' (1995) 11 *Connecticut Journal of International Law* 169.

BAXTER, RR, 'Humanitarian Law or Humanitarian Politics—the 1974 Diplomatic Conference on Humanitarian Law' (1975) 16 *Harvard International Law Journal* 1.

BELL, Christine and O'ROURKE, Catherine, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay' (2007) 1 *The International Journal of Transitional Justice* 23.

BERGER, Lee, 'State Practice Evidence of Humanitarian Intervention: The ECOWAS Intervention in Sierra Leone' (2001) 11 *Indiana International and Comparative Law Review* 605.

BEVIS, Linda Dale, '"Political Opinions" of Refugees: Interpreting International Sources' (1988) 63 *Washington Law Review* 395.

BILYEU, Amy Small, 'Trokosi—The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs Human Rights' (1999) 9 *Indiana International and Comparative Law Review* 457.

BOISTER, Neil and BURCHILL, Richard, 'The International Legal Definition of the South African Conflict in South African Courts: War of National Liberation, Civil War or War At All?' (1998) 45 *Netherlands International Law Review* 348.

BOUMEDRA, Tahar, 'International Regulation of the Use of Mercenaries in Armed Conflicts' (1981) 20 *Revue de Droit Penal Militaire et de Droit de la Guerre* 35.

BOWMAN, Cynthia Grant, 'Theories of Domestic Violence in the African Context' (2003) 11 *American University Journal of Gender Social Policy and Law* 847.

BRAMMER, H, 'In Search of an Effective Regional Security Mechanism for Southern Africa' *Global Dialogue* 4(2) (August 1999) 21–2.

BRODY, Reed, 'The Prosecution of Hissein Habré—An "African Pinochet"' (2001) 35 *New England Law Review* 321.

BROOKS, Rosa Ehrenrich, 'Failed States, Or the State as Failure' (2005) 72 *University of Chicago Law Review* 1159.

BRYDENSHOLT, Hans Hendrick, 'Peace, Justice and the Challenge of Amnesties' (2005) 16 *Criminal Law Forum* 385 (book review of Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process*, Antwerp/Oxford: Intersentia, 2004, 442 pp).

van BUEREN, Geraldine, 'The International Legal Protection of Children in Armed Conflicts' (1994) 43 *International and Comparative Law Quarterly* 809.

CARROLL, Anthony and RAJAGOPAL, Balakrishnan, 'The Case for an Independent Somaliland' (1993) 8 *American University Journal of Law and Politics* 662.

CHAYES, Abram and CHAYES, Antonia Handler 'On Compliance' (1993) 47 *International Organizations* 175.

CHIBUNDU, Maxwell O, 'Law in Development: On Tapping, Gourding, and Serving Palm-Wine' (1997) 29 *Case Western Reserve Journal of International Law* 167.

CHINKIN, CM, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

CHOUDREE, RBG, 'Traditions of Conflict Resolution in South Africa' (1999) 1 *African Journal on Conflict Resolution* 9.

CLARK, Dana L 'The World Bank and Human Rights: The Need for Greater Accountability' (2002) 15 *Harvard Human Rights Journal* 205.

COLEMAN, Andrew and MAOGOTO, Jackson, 'Democracy's Global Quest: A Noble Crusade Wrapped in Dirty Reality?' (2005) 28 *Suffolk Transnational Law Review* 175.

COLEMAN, Isobel, 'Defending Microfinance' (2005) 29 *Fletcher Forum of World Affairs* 181.

COOMARASWAMY, Radhika, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2002) 34 *George Washington International Law Review* 483.

COUPLAND, Robin and LOYE, Dominique, 'The 1899 Hague Declaration Concerning Expanding Bullets: A Treaty Effective for More than 100 Years Faces Complex Contemporary Issues' (2003) 849 *International Review of the Red Cross* 135.

COUSINEAU, Marc, 'L'établissement de l'État de droit au Rwanda: un but irréalisable' (1996/1997) *Ottawa Law Review* 83.

DALY, Kathleen, 'Revisiting the Relationship between Retributive and Restorative Justice' Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999.

DENG, Francis M, 'Frontiers of Sovereignty: A Framework of Protection, Assistance and Development for the Internally Displaced' (1995) 2 *Leiden Journal of International Law* 8.

DERMODY, John, 'Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention' (2006) 30 *Hastings International & Comparative Law Review* 77.

DINSTEIN, Yoram, 'Interstate Armed Conflict and Wars of National Liberation' (1982) 31 *American University Law Review* 849.

DUGARD, John, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001.

DURUIGBO, Emeka, 'Permanent Sovereignty and People's Ownership of Natural Resources in International Law' (2006) 38 *George Washington International Law Review* 33.

ESSIEN, Udeme, 'The African Commission on Human and Peoples' Rights: Eleven Years After' (2000) 6 *Buffalo Human Rights Law Review* 93.

EZETAH, Reginald, 'The Right to Democracy: A Qualitative Inquiry' (1997) 22 *Brooklyn Journal of International Law* 495.

FEARON, James D and LAITLIN, David D 'Neotrusteeship and the Problem of Weak States' (2004) 28 *International Security* 5.

FEINSTEIN, Lee and SLAUGHTER, Anne-Marie, 'A Duty to Prevent' (Jan/Feb. 2004) 83 *Foreign Affairs* 136.

FERRER, Mary, 'Affirming Our Common Humanity: Regulating Landmines to Protect Civilians and Children in the Developing World' (1996–1997) 20 *Hastings International and Comparative Law Review* 135.

FIELDING, Louis E, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy' (1995) 5 *Duke Journal of Comparative and International Law* 329.

FINNEMORE, Martha and SIKKINK, Kathryn, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

FOX, Gregory H, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539.

FOX, Gregory H and NOLTE, George, 'Intolerant Democracies' (Winter 1995) 36 *Harvard International Law Journal* 1.

FRANCK, Thomas, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46.

GASSAMA, Ibrahim, 'Safeguarding the Democratic Entitlement: A Proposal for United Nations Involvement in National Politics' (1997) 30 *Cornell University Law Journal* 287.

GERSON, Chad, 'Toward an International Standard of Abortion Rights: Two Obstacles' (2005) 5 *Chicago Journal of International Law* 753.

van CLEEF GREENBERG, Eldon, 'Law and the Conduct of the Algerian Revolution' (1970) 11 *Harvard International Law Journal* 37.

GREENWOOD, Christopher, 'The Development of International Humanitarian Law by the International Criminal Tribunal for Former Yugoslavia' (1998) 2 *Max Planck Yearbook UN Law* 97.

GRIFFIN, Matthew, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through Its Accreditation Process, and Should It?' (2000) 32 *New York University Journal of International Law & Policy* 725.

GRUCHALLA-WESIERSKI, Tadeusz, 'A Framework for Understanding Soft Law' (1984) 30 *Revue de Droit de McGill* 37.

HAMPSON, Françoise, 'Mercenaries: Diagnosis Before Proscription' (1991) XXII *Netherlands Yearbook of International Law* 3.

HANSUNGULE, Michelo, 'The African Charter on Human and Peoples' Rights: A Critical Review' (2001) *African Yearbook of International Law* 265.

HAPPOLD, Matthew, 'Darfur, the Security Council and the International Criminal Court' (2006) 55 *International and Comparative Law Quarterly* 226.

HAROZ, Audrey, 'South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International Human Rights to Black South African Women' (1997) 30 *Vanderbilt Journal of Transnational Law* 863.

HEAD, John, 'Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of International Law' (1994) 42 *Kansas Law Review* 605.

HELMAN, Gerald B and RATNER, Stephen R, 'Saving Failed States' (Winter 1993) 89 *Foreign Policy* 3.

HENZE, Paul B, 'A Political Success Story' (1998) 9 *Journal of Democracy* 40.

HOOVER, Mike, 'The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War' (1977) 9 *Case Western Reserve Journal of International Law* 323.

HOWE, Herbert, 'Private Security Forces and African Stability: The Case of Executive Outcomes' (1998) 36 *Journal of Modern African Studies* 307.

HOWLAND, Todd, 'Learning to Make Proactive Human Rights Interventions Effective: The Carter Center and Ethiopia's Office of the Special Prosecutor' (2000) 18 *Wisconsin International Law Journal* 407.

INDYK, Martin, 'A Trusteeship for Palestine' (May/June 2003) 82 *Foreign Affairs* 51.

IYAKAREMEYE, Jean Bosco, 'Les Juridictions Gacaca ou un pis-aller à l'insoluble problématique de la répression du génocide au Rwanda' (2003) 1(3) *Le courrier juridique* 1.

JOHNSON, Paula C, 'Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa' (1998) 1 *Journal of Gender, Race and Justice* 472.

JOHNSON, Paula C and OBIORA, Leslye Amede, 'How Does the Universal Declaration of Human Rights Protect African Women?' (1999) 26 *Syracuse Journal of International Law and Commerce* 195.

JOK, Jok Madut, 'Health Consequences of War and Health Relief: Challenges of Assessment' (1993) 21 *UFAHAMU* 50.

JORGENSEN, Nina HB, 'The Scope and Effect of the Algerian Law Relating to the Reestablishment of Civil Concord' (2000) 13 *Leiden Journal of International Law* 681.

JOSEPH, Richard, 'Oldspeak vs Newspeak' (1998) 9 *Journal of Democracy* 55.

JUNOD, Sylvie, 'Additional Protocol II: History and Scope' (1983) 33 *American University Law Review* 29.

KALSHOVEN, Frits, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–77' (1977) VII *Netherlands Yearbook of International Law* 107.

KILLINGRAY, David, '"A Swift Agent of Government": Air Power in British Colonial Africa, 1916–1939' (1984) 25 *Journal of African History* 429.

KIOKO, Ben, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-intervention' (2003) 85 *International Review of the Red Cross* 807.

KOGAN, Lawrence A, 'Brazil's IP Opportunism Threatens US Private Property Rights' (2006) 38 *University of Miami Inter-American Law Review* 1.

KOH, Harold Hogju, 'Why do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

KNOOPS, Geert-Jan Alexander and AMSTERDAM, Robert R, (2007) 'The Duality of State Cooperation within International and National Criminal Cases' (2007) 30 *Fordham International Law Journal* 260.

KRASNER, Stephen D, 'Pervasive Not Perverse: Semi-Sovereigns as the Global Norm' (1997) 30 *Cornell International Law Journal* 651.

——, 'Troubled Societies, Outlaw States, and Gradations of Sovereignty' (July 2002) 26, <http://www.sas.upenn.edu/brownecip/2003.04.Papers/krasner%20paper.pdf> (accessed 4 May 2007).

——, 'Sharing Sovereignty: New Institutions for Collapsed and Failing States' (2004) 29 *International Security* 85.

——, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) 25 *Michigan Journal of International Law* 1075.

——, 'Building Democracy After Conflict: The Case for Shared Sovereignty' (2005) 16 *Journal of Democracy* 69.

KRITSIOTIS, Dino, 'Mercenaries and the Privatization of Warfare' (1998) 22 *Fletcher Forum of World Affairs* 11.

KWAKWA, Edward, 'The Current Status of Mercenaries in the Law of Armed Conflict' (1990) 14 *Hastings International and Comparative Law Review* 67.

LAVOYER, Philippe, 'Guiding Principles on Internal Displacement: A Few Concerns on the Contribution of International Law' (1998) 324 *International Review of the Red Cross* 30 September 467.

LEVITT, Jeremy, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 *Temple International and Comparative Law Journal* 333.

——, 'The Peace and Security Council of the African Union: The Known Unknowns' (2003) 13 *Journal of Transnational Law and Contemporary Problems* 109.

——, 'The Responsibility to Protect: A Beaver without a Dam?' (2003) 25 *Michigan Journal of International Law* 153.

——, 'Illegal Peace?: Examining the Legality of Power-sharing with Warlords and Rebels in Africa' (2006) 27 *Michigan Journal of International Law* 495.

——, 'The Law on Intervention: Africa's Pathbreaking Model' (Winter/Spring 2005) 7 *Global Dialogue* 50.

M'BAYE, Keba, 'Le Concept Africain des Droits de l'homme' (1996) 6 (3) *Bulletin Africain des Droits de l'homme* 1.

MANN, Howard, 'International Law and the Child Soldier' (1987) 36 *International and Comparative Law Quarterly* 32.

MATHESON, Michael, 'Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2 *American University Journal of International Law and Policy* 419.

MERON, Theodor, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554.

MERTUS, Julie, 'Shouting from the Bottom of a Well: The Impact of International Trials for Wartime Rape on Women's Agency' (2004) 6 *International Feminist Journal of Politics* 110.

MEYROWITZ, Henri, 'The Principle of Superfluous Injury or Unnecessary Suffering—From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977' (1994) 299 *International Review of the Red Cross* 98.

MIKELL, Gwendolyn, 'African Women's Rights in the Context of Systemic Conflict' (1995) 89 *American Society of International Law Proceeding* 484.

MORAVCSIK, Andrew, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *International Organizations* 513.

MOURNING, Paul W, 'Leashing the Dogs or War: Outlawing the Recruitment and Use of Mercenaries' (1982) 22 *Virginia Journal of International Law* 589.

MUNYA, P Mweti, 'The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation' (Spring 1999) 19 *Boston College Third World Law Journal* 537.

MURITHI, Tim, 'African Approaches to Building Peace and Social Solidarity' (2006) 6(2) *African Journal on Conflict Resolution* 9.

MURRAY, Christina, 'The 1977 Geneva Protocols and Conflict in Southern Africa' (1984) 33 *International and Comparative Law Quarterly* 462.

——, 'Status of the ANC and SWAPO and International Humanitarian Law' (1983) 100 *South African Law Journal* 402.

MUTHARIKA, A Peter, 'The Role of International Law in the Twenty-first Century: An African Perspective' (1995) 18 *Fordham International Law Journal* 1706.

MUTUA, Makua, 'The African Human Rights System in a Comparative Perspective' (1993) 3 *Review of African Commission on Human and Peoples' Rights* 5.

——, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 *Michigan Journal of International Law* 1113.

NALDI, Gino J and MAGLIVERAS, Konstantinos D, 'The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?' (1999) 24 *North Carolina—Journal of International Law and Commercial Regulation* 601.

NMEHIELLE, VO and JALLOH, CC, 'The Legacy of the Special Court for Sierra Leone' (2006) *Fletcher Forum of World Affairs* 107.

NYAMU, Celestine, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal* 381.

NYAMUYA MAOGOTO, Jackson, 'The International Criminal Tribunal for Rwanda: A distorting Mirror; Casting Doubt on its Actor-oriented Approach in Addressing the Rwandan Genocide' (2003) 3(1) *African Journal on Conflict Resolution* 55.

NYIKULI, Peter *et al*, 'Economic Development and Investment in Sub-Saharan Africa' (1999) 30 *Law and Policy in International Business* 686.

——, 'Unlocking Africa's Potential: Some Factors Affecting Economic Development and Investment in Sub-Saharan Africa' (1999) 30 *Law and Policy in International Business* 623.

OBIORA, L Amede, 'New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations' (1995) 28 *Indiana Law Review* 575.

ODINKALU, Chidi Anselm, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359.

OGUMBANWO, Sola, 'Accelerate the Ratification of the Pelindaba Treaty' (2003) *Nonproliferation Review* 132.

O'MEARA, Richard L, 'Applying the Critical Jurisprudence of International Law to the Case Concerning Military and Paramilitary Activities in and against Nicaragua' (1985) *71 Virginia Law Review* 1183.

OLOKA-ONYANGO, J, 'The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa' (1996) 24 *Denver Journal of International Law and Policy* 349.

OPPONG, Richard Frimpong, 'Re-imagining International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa' (2007) 30 *Fordham International Law Journal* 296.

ORENTLICHER, Diane, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime' (1991) 100 *Yale Law Journal* 2537.

——, '"Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (2007) 1 *The International Journal of Transitional Justice* 10.

OWENS, James C, 'Government Failure in Sub-Saharan Africa: The International Community's Options' (2003) 43 *Virginia Journal of International Law* 1003.

PHAM, J Peter, 'Democracy by Force? Lessons from the Restoration of the State in Sierra Leone' (2005) 6 *Whitehead Journal of Diplomacy & International Relations* 129.

POPKIN, Margaret, 'Latin American Amnesties in Comparative Perspective' (1999) 13 *Journal of Ethics and International Affairs* 99.

RASSAM, A Yasmine, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law' (1999) 39 *Virginia Journal of International Law* 303.

REYNTJENS, Felip, 'Le gacaca ou la justice du gazon au Rwanda' (1990) 40 *Revue politique Africaine* 31.

ROBERTS, Anthea, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757.

ROHT-ARRIAZA, Naomi, 'The Complex Architecture of International Justice' (2006–2007) 10 *Gonzaga Journal of International Law* 38.

ROHT-ARRIAZA, Naomi and GIBSON, Lauren, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843.

ROSENBLUM, Peter, 'Pipeline Politics in Chad' (May 2000) *Current History* 195.

ROSS, Michael L, 'Does Oil Hinder Democracy' (2001) 53 *World Politics* 325.

RUDDICK, Elizabeth E, 'The Continuing Constraint on Sovereignty: International Protection and the Internally Displaced' (1997) 77 *Boston University Law Review* 429.

RUSAGARA, Frank K, 'Gacaca as a Reconciliation and Nation-building Strategy in Post-genocide Rwanda' (2005) 2 *Conflict Trends Magazine* 20.

SAPONE, Montgomery, 'Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence' (1999) 30 *California Western International Law Journal* 1.

SAWAYA, Janet M, 'Rights Education as a Means of Economic Empowerment for Women in Sub-Saharan Africa' (1995) 2 *Georgetown Journal on Fighting Poverty* 329.

SCHACHTER, Oscar, 'International Law: The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620.

——, 'The Legality of Pro-democratic Invasion' (1984) 78 *American Journal of International Law* 645.

SCHARF, Michael P, 'The Case for a Permanent International Truth Commission' (1997) 7 *Duke Journal of Comparative & International Law* 375.

SCHWARTZ, Jason, '"Whose Woods These Are I Think I Know": How Kyoto May Change Who Controls Biodiversity' (2006) 14 *New York University Environmental Law Journal* 421.

SELLERS, Mortimer, 'Republican Principles in International Law' (1996) 11 *Connecticut Journal of International Law* 403.

SHARP, Dustin, 'Prosecutions, Development, and Justice: The Trial of Hissein Habré' (2003) 16 *Harvard Human Rights Journal* 147.

SHEN, Jianming, 'National Sovereignty and Human Rights in a Positive Law Context' (2000) 26 *Brooklyn Journal of International Law* 417.

SHREWSBURY, Stephen M, 'September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty' (2003) 68 *Journal of Air Law and Commerce* 115.

SINGER, Peter, 'Peacekeepers, Inc' (2003) *Policy Review* 59.

SKORDAS, Achilles, 'Is Europe an "Aging Power" with Global Vision? A Tale on Constitutionalism and Restoration' (2005/2006) 12 *Columbia Journal of European Law* 241.

SLAUGHTER, Anne-Marie and BURKE-WHITE, William, 'The Future of International Law is Domestic (Or, the European Way of Law)' (2006) 47 *Harvard International Law Journal* 327.

SMITH, Benjamin, 'Oil Wealth and Regime Survival in the Developing World, 1960–1999' (2004) 48 *American Journal of Political Science* 232.

SNYDER, Jack and VINJAMURI, Leslie, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 *International Security* 3.

SOLF, Waldemar A, 'The Status of Combatants in Non-international Armed Conflicts under Domestic Law and Transnational Practice' (1983) 33 *American University Law Review* 53.

SOUTHWICK, Katherine, 'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court' (Summer/Fall 2005) *Yale Journal of International Affairs* 113.

SPENGLER, Katherine, 'Expansion of Third World Women's Empowerment: The Emergence of Sustainable Development and the Evolution of International Economic Strategy' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 303.

SPIERS, Edward, 'The Use of the Dum Dum Bullet in Colonial Warfare' (1975) 4 *Journal of Imperial and Commonwealth History* 3.

SRIRAM, Chandra Lekha, 'Universal Jurisdiction: Problems and Prospects of Externalizing Justice' (2001) 12 *Finnish Yearbook of International Law* 47.

STROHMEYER, Hansjörg, 'Collapse and reconstruction of a judicial system: The United Nations Mission in Kosovo and East Timor' (2001) 95 *American Journal of International Law* 1.

SUNDER, Madhavi, 'Piercing the Veil' (2003) 112 *Yale Law Journal* 1399.

TAULBEE, James, 'Myths, Mercenaries and Contemporary International Law' (1985) 15 *California Western International Law Journal* 339.

TESÓN, Fernando, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53.

——, 'Collective Humanitarian Intervention' (1996) 17 *Michigan Journal of International Law* 335.

THAKUR, Ramesj, 'Global Norms and International Humanitarian Law: An Asian Perspective' (2001) 841 *International Review of the Red Cross*, 31 March, 19–44.

THOMPSON, Bankole, 'Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432.

TRIMBLE, Philip R, 'A Revisionist View of Customary International Law' (1985) 33 *UCLA Law Review* 665.

TSIE, B, 'Regional Security in Southern Africa' (1998) 3(3) *Global Dialogue* 8–10.

TUOMALA, Jeffrey C, 'Just Cause: The Thread that Runs So True' (1994) 15 *Dickson Journal of International Law* 1.

TUTU, Desmond M, 'Reflections on Moral Accountability' (2007) 1 *The International Journal of Transitional Justice* 6.

UDOMBANA, Nsongurua J, 'How Should We Then Live? Globalization and the New Partnership for Africa's Development' (2002) 20 *Boston University International Law Journal* 293.

——, 'Back to Basics: The ACP–EU Cotonou Trade Agreement and Challenges for the African Union' (2004) 40 *Texas International Law Journal* 59.

URIZ, Genoveva Hernandez, 'The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility?' (2002) 28 *Brooklyn Journal of International Law* 77.

VAN DEVENTER, Henry W, 'Mercenaries at Geneva' (1976) 70 *American Journal of International Law* 811.

VAN ZYL, Paul, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52 *Journal of International Affairs* 647.

WEISS, Edith Brown, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' (1999) 32 *University of Richmond Law Review* 1555.

WELCH, Claude Jr, 'Human Rights and African Women: A Comparison of Protection Under Two Major Treaties' (1993) 15 *Human Rights Quarterly* 549.

WELLS, Sarah L, 'Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda' (2005) 14 *Southern California Review of Law and Women's Studies* 167.

WILLIAMS, Patricia, 'Spirit-Murdering the Messenger: The Discourse of Finger pointing as the Law's Response to Racism' (1987) 42 *University of Miami Law Review* 127.

WILLIAMS, Sarah, 'Amnesties in International Law: The Experience of the Special Court for Sierra Leone' (2005) 5 *Human Rights Law Review* 271.

WING, Adrien Katherine, 'Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century' (2001) 11 *Journal of Contemporary Legal Issues* 811.

WING, Adrien Katherine and DE CARVALHO, Eunice P, 'Black South African Women: Toward Equal Rights' (1995) 8 *Harvard Human Rights Journal* 57.

WING, Adrien, LEVITT, Jeremy and JACKSON, Craig, 'The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift? (Spring 2003) 13 *Transnational Law & Contemporary Problems* 1.

WING, Adrien Katherine and JOHNSON, Mark Richard, 'The Promise of a Post-genocide Constitution: Healing Rwandan Spirit Injuries' (2002) 7 *Michigan Journal of Race and Law* 247.

WING, Adrien Katherine and SMITH, Tyler Murray, 'The New African Union and Women's Rights' (2003) 13 *Transnational Law and Contemporary Problems* 33.

WIPPMAN, David, 'Treaty-based Intervention: Who Can Say No?' (1995) 62 *University of Chicago Law Review* 607.

WOJCIK, Mark and LORD, Melinda, 'Human Rights Law' (Summer 2004) 38 *International Lawyer* 499.

IV. REPORTS

Africa Action, *Landmines: Africa's Stake Global Initiatives* (Washington, DC, April 1997).

Amnesty International, *Gacaca: A Question of Justice* (London, November 2002) AFR 47/007/02.

Commission for Africa, '*Pakistan—The tribal justice system*' (London, August 2002) ASA 33/024/02.

——, *Our Common Interest: Report of the Commission for Africa* (London, Penguin, 2005).

Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001* (London, 2001).

Environmental Defense Fund, *The Chad–Cameroon Oil and Pipeline Project: Putting People and the Environment at Risk* (September 1999), <http://www.environmentaldefense.org/728_ChadCameroon_pipeline.pdf>.

Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath*, (Washington, DC, Human Rights Watch, 1996).

——, *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (New York, Human Rights Watch, 1997).

——, '*You'll Learn to Cry': Child Combatants in Colombia* (New York, Human Rights Watch, 2003).

——, *Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings, and Needed Support* (New York, Human Rights Watch, 2004).

International Crisis Group, 'Somaliland: Time for African Union Leadership' in *Africa Report 110* (Brussels, 23 May 2006).

International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (Ottawa, International Development Research Centre, 2001).

International Committee of the Red Cross, *Comments on Informal Working Paper on War Crimes of October 13, 1997* (1997).

International Court of Justice, *A Guide to the History, Composition, Jurisdiction, Procedure and Decisions of the Court*, 5th edn (The Hague, 2004).

'An International Court of Justice' in *The International Court of Justice: Selected Documents Relating to the Drafting of the Statute* (Washington, DC: US GPO, 1946).

International Monetary Fund (IMF), *Good Governance: The IMF's Role* (Washington, DC, International Monetary Fund, August 1997).

——, *Democratic Republic of Timor Leste: 2003 Article IV Consultation—Staff Report* (2003).

Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: The ICTR and National Trials* (July 1997).

Letter addressed by President Samuel K Doe to the chairman and members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee (14 July 1990), reprinted in M Weller (ed), *Regional Peacekeeping and International Enforcement: The Liberian Crisis* (Cambridge, Cambridge University Press, 1994).

Ligue rwandaise pour la promotion et la défense des droits de l'homme (LIPRODHOR), *Problématique de la preuve dans les procès de génocide: l'institution imminente des juridictions Gacaca constitue-elle une panacée?* (Kigali, Centre de Documentation et d'Information sur les Procès de Génocide (CDIPG), June 2000).

Office for the Coordination of Humanitarian Affairs (OCHA), *Manuel on Field Practice in Internal Displacement*, Inter-Agency Standing Committee Policy Paper Series No 1 (Geneva, OCHA, 1999).

Office of the United States Trade Representative, *2003 Comprehensive Report on US Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act* (2003).

'Oil Revenue Management Law', trs in World Bank, *Chad-Cameroon: Petroleum Development and Pipeline Project*, Project Appraisal Document (13 April 2000).

Penal Reform International, *Monitoring and Research Report on the Gacaca Community Service (TIG)—Areas of reflection* (London, March 2007).

Rebuilding Somaliland: Issues and Possibilities (War-torn Societies Project, Lawrenceville, 2005).

Report of the International Colloquy on the Guiding Principles on Internal Displacement (Washington, DC, Brookings Project on Internal Displacement, 2000).

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005).

South African Law Commission, *The harmonisation of the common law and indigenous law: Traditional courts and the judicial function of traditional leaders*, Project 90, (May 1999).

United Nations Conference on Trade and Development, *World Investment Report, 2003—FDI Policies for Development: National and International Perspectives* (New York and Geneva, United Nations, 2003).

—— *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment* (New York and Geneva, United Nations, 2005).

United Nations Development Programme, *Human Development Report* (New York, Oxford University Press, 2004).

World Bank, The Chad–Cameroon Development and Pipeline Project, Draft Terms of Reference—International Advisory Group on the Chad–Cameroon Oil Pipeline Project.

—— *Ghana Poverty Reduction Strategy: An Agenda for Growth and Prosperity, 2003–2005* (Washington, DC, The World Bank, 19 February 2003).

World Bank, *Gender, Justice and Truth Commissions* (Washington, DC, World Bank, 2006).

World Bank Inspection Panel, *Investigation Report: Chad–Cameroon Petroleum and Pipeline Project (Loan No 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No 3373-CD)*.

World Health Organization, 'Internally Displaced Persons: Health and WHO', Paper presented at the humanitarian affairs segment of the substantive session of the ECOSOC (New York, 5 April 2000).

BAGSHAW, Simon, *Developing the Guiding Principles on Internal Displacement: The Role of a Global Public Policy Network* (Geneva, Global Public Policy, 1999).

BECCARIA, C, *Des délits et des peines* (Geneva, Droz 1965), Ch XXIX.

DENG, Francis M, 'Report of the Representative of the Secretary-General on Internally Displaced Persons' (21 January 2003) Submitted Pursuant to Commission on Human Rights Resolution 2002/56, E/CN.4/2003/86.

JACOBSON, Jodi, *Worldwatch Institute, Gender Bias: Roadblock to Sustainable Development*, Worldwatch Institute Paper No 110 (Washington, DC, 1992).

LACHAPELLE, The Hon J and SCHABAS, WA, *Pour un système de justice au Rwanda*, Revised report of an exploratory mission in Rwanda (Montreal, 27 November–6 December 1994).

KÄLIN, Walter, *Guiding Principles on Internal Displacement: Annotations* (Washington, DC, American Society of International Law and the Brookings Project on Internal Displacement, 2000).

LOMO, Zachary and HOVIL, Lucy, *Behind the Violence: The War in Northern Uganda* (Pretoria, ISS, 2004).

MBEKI, Thabo, 'Briefing at the World Economic Forum Meeting—Millennium Africa Renaissance Program—Implementation Issues' (Davos, Switzerland, 28 January 2001).

MANUH, Takyiwaa, 'Women in Africa's Development: Overcoming Obstacles, Pushing for Progress', *Africa Recovery Online*, Briefing Paper No 11 (New York, UN Department of Public Information, 1998) 12.

OLONISAKIN, Funmi, 'Conflict Management in Africa: The Role of the OAU and Sub-regional Organizations' in *Building Stability in Africa: Challenge for the New Millenium*, ISS Monograph 46 (Pretoria, Institute for Security Studies, 2000).

RANIS, Gustav, *The Evolution of Development Thinking: Theory and Policy*, Yale Economic Growth Center working paper no 886 (prepared for the World Bank Annual Conference on Development Economics, May 2004).

SEIBERT, Gerhard, 'Coup d'état in São Tomé e Príncipe: Domestic Causes, the Role of Oil and Former "Buffalo" Battalion Soldiers' *Institute for Security Studies no 81* (November 2003).

VOGEL, David, *The Private Regulation of Global Corporate Conduct*, Working Paper No V (University of Toronto, Munk Centre for International Studies, 2006).

WEISS, Thomas G and HUBERT, Don (2001), *The Responsibility to Protect: Research, Bibliography and Background* (supp vol to *The Responsibility to Protect*) (Ottawa: International Development Research Centre).

WIHBEY, Paul M, 'West Africa's Sustainable Development and United States Energy Security', Congressional Briefing (17 Nov. 2005); at <http://www.thesullivanfoundation.org/foundation/documents/GulfofGuineaBriefing-WihbeyPresentation.pdf>.

V. CONFERENCES, HEARINGS AND LECTURES

Committee on International Relations, 'A New Partnership For Africa's Development: An African Initiative', Hearing Before the Subcommittee on Africa, US House of Representatives (18 September 2002) 107 Cong, 2d Sess.

First Regional Conference on Internal Displacement in West Africa (Abuja, Nigeria, Economic Community of West African States (ECOWAS), Office of the United Nations High Commissioner for Refugees (UNHCR), Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons and The Brookings Institution-University of Bern Project on Internal Displacement, April 2006).

'A Hard Look at Soft Law', Proceedings of the 82nd Meeting of the American Society of International Law (20–23 April 1998) (remarks by Professor Handl).

KOSKENNIEMI, Martti, *Between Impunity and Show Trials*, Guest Lecture Series of the Office of the Prosecutor, The Hague, ICC (5 August 2004).

'On the Threshold: The United Nations and Global Governance in the New Millennium' conference held at Tokyo (19–21 January 2000); and International Conference on Financing for Development held at Monterey, Mexico (18–22 March 2002).

VI. NEWSPAPER AND PERIODICAL ARTICLES

'Acholi Leaders in The Hague to Meet ICC over LRA Probe' (2005) *IRIN News* (Kampala), 15 March.

'Algerians to Free Jailed Islamists under Amnesty' (2006) *New York Times* (New York) 6 March.

'An African Pinochet' (2000) *New York Times* (New York), 11 February.

'Angel on a Pinhead' (1996) *Africa Confidential* (London), 10 May, 3 'Annan Calls on Togolese to Respect Own Constitution in Appointing Presidential Successor' (2005) *UN News Service*, 7 February.

'CAR: French Leave' (1997) *Africa Confidential* (London), 10 October.

'Cote d'Ivoire Fighting Continues to Pose Significant Threat to Government' (2002) *War, Defense, & Foreign Affairs Daily*, 8 October.

'Cote d'Ivoire; With No Ceasefire in Ivory Coast, War Threat Looms' (2002) *Africa News*, 6 October.

'Coup in Island State with Big Oil Reserves' (2003) *UN Integrated Regional Information Networks*, 16 July.

'Desperados' (2003) *Africa Confidential* (London), 25 July.
'Echoes of Zaire' (1996) *Africa Confidential* (London), 29 November.
'ECOWAS Puts Out Plan to End Bissau Mutiny' (1998) *Panafrican News Agency* (Dakar, Senegal), 5 July.
'Faure Falters' (2005) *African Confidential* (London), 4 March.
'Fears of Armed Insurrection' (2005) *Africa Anaysis* (London), 6 May.
'The Fog and Dogs of War' (2004) *The Economist* (London), 18 March.
'Gnassignbe Eyadema Dies' (2005) 42 *Africa Research Bulletin: Political, Social, and Cultural Series* (Oxford), 1–28 February.
'Kudos for Obasanjo's Bullying Diplomacy' (2003) *Africa Analysis* (London), 8 August.
'Liberia; Celebrate in Joy and Gladness' (2005) *Africa News*, 12 December.
'Manes' Men: An Army Mutiny Has Quickly Become a Security Problem for the Neighbouring States' (1998) *Africa Confidential* (London), 26 June.
'Mayhem spreads throughout Lesotho' (1998) *Mail & Guardian Online* (Johannesburg), 24 September.
'The Melting Pot Cracks' (2002) *Economist.com* (London), 3 October.
'The Mercenary Life' (1976) *Newsweek*, 9 February.
'Military Coup' (1997) *African Research Bulletin* (Oxford), May.
'Mozambique Assembly Ratifies Protocol on Rights of Women' (2005) *Africa News*, 8 December.
'Mutineers' Mistake' (1996) *Africa Confidential* (London), 7 June.
'New Cabinet: Maria das Neves is the Archipelago's First Woman Prime Minister' (2002) 39 *Africa Research Bulletin*: *Political, Social, and Cultural Series 15036* (Oxford).
'The Nightmare Scenario: An Army Rebellion May Send the Once-Prosperous Country Down the Same Road as its Unstable Neighbors' (2002) *Africa Confidential* (London), 27 September.
'Presidential Candidates' (2005) 42 *Africa Research Bulletin*: *Political Social, and Cultural Series* (Oxford), 1–28 March.
'SA Troop Alert as Meseru Mutinies' (1998) *Mail & Guardian Online* (Johannesburg), 24 September.
'Sanctions Placed on Togo after Coup' (2005) *Observer* (London), 20 February.
'São Tomé e Príncipe: Mercenaries, Corruption and Poverty Complicate the Road to an Oil Boom' (2006) *UN Office for the Coordination of Humanitarian Affairs*, 9 September.
'Seven-day Junta: Announced as an "International SOS", Oil Interests and the Chances of Future Gain are Likely to Have Been the Underlying Motive' (2003) 40 *Africa Research Bulletin: Political, Social, and Cultural Series 15385* (Oxford).
'The Struggle Continues in Togo' (2005) *Africa Analysis* (London), 11 February.
'To a Little Kingdom'(1998) *African Confidential* (London), 9 October.

'Troubled Waters Over Oil: Oil Curses Another African State' (2003) *The Economist* (London), 19 July.
'The UN's Hollow Threat' (2004) *The Economist* (London), 20 September.
'Verbatim' (1998) *Mail & Guardian Online* (Johannesburg), 25 September.
'Women and Gender; Women's Rights Protocol Comes into Force' (2005) *Africa News*, 5 December.
ASHWORTH, Michael, 'Africa's New Enforcers' (1996) *The Independent* (London), 16 September.
BAKER OCHOLA, Bishop, 'Uganda: The Acholi Traditional Justice is Enough for Kony' (2006) *New Vision* , Opinion, 28 August.
BEAH, Ishmael, 'The Making, and Unmaking, of A Child Soldier' (2007) *New York Times* (Sunday Magazine), 14 January.
BLUNT, Elizabeth, 'Child Recruitment "Was War Crime"' BBC News Online, 1 June 2004.
BLUSTEIN, Paul, 'Chad Pipeline Project Steeped in Controversy: World Bank Reconsiders Role as Nation looks at Altering Terms' (2005) *Houston Chronicle* (Houston), 28 December.
——, 'Chad's Hard-line Stance Tests World Bank' (2005) *Washington Post* (Washington, DC), 27 December.
BUCKLEY, Stephen, 'Africa's Women Make Power Moves; Female Officials Fight Hostility to Break Grip of All-male Rule' (1995) *Washington Post* (Washington, DC), 28 February.
CHAMBERLAIN, Gethin, 'Sao Tome Coup Linked to Oil Reserves' (2003) *Scotsman* (Edinburgh), 17 July.
CLAYTON, Jonathan, 'Togo "Military Coup" Hands Leadership to President's Son' (2005) *The Times* (London), 7 February.
COLOMBANT, Nico, 'Protest Mounts Against Togo's New Leader' (2005) *Voice of America* (Washington, DC), 8 February.
CORDER, M, 'Child Soldiers Test Cases Marks War Crimes Court's Debut' (2006) *Guardian* (London), 10 November.
EAGLE, William 'AU Reiterates Support for West African Efforts to End Togo Crisis' (2005) *Voice of America*, (Washington, DC), 25 February.
EVIATAR, Daphne, 'Sao Tome Residents Hope For Oil Riches Corruption Fears Temper Hopes' (2003) *Boston Globe* (Boston), 30 November.
GODWIN, Ebow, 'President's Son Takes Power in West African Coup: New Leader of Togo Named Without Required Elections' (2005) *Chicago Sun Times* (Chicago), 7 February.
JOHNSON, C, 'Sierra Leone Rebels Back Peace Accord' (1999) *Irish Times* (Dublin), 9 July.
KAJEE, Ayesha, 'NEPAD's APRM: A Progress Report, Practical Limitations and Challenges', *South African Yearbook of International Affairs* (Braamfontein, South Africa, The South African Institute of International Affairs, 2003/2004).

KAMASHABI, Felicien, 'Avancement des procès de génocide' (1999) *Le Verdict*, 15 March.
KAPLAN, Robert, 'The Coming Anarchy: How Scarcity, Crime, Overpopulation and Disease are Rapidly Destroying the Social Fabric of Our Planet' (1994) *Atlantic Monthly* (Washington, DC) February.
KELLEY, KJ, 'Trade Tensions emerge as AGOA Praised in New York' (2003) *The Nation* (Nairobi), 10 December.
KILEY, Sam, 'Child Slaves Used by West Africans to Appease Spirits' (1996) *The Times* (London), 17 September.
LANDRY, Cathy, 'Chad Deal to Raise World Bank Influence: New Oil Production Accord Brings Clearer Revenue Framework' (2006) *Platts Oilgram News*, 17 July.
LYONS, Scott, 'The African Court on Human and Peoples' Rights' (2006) 10 *Africa Insight*, 19 September.
MALALA, J, 'High on Ideals, Low on Substance: African Renaissance' (1998) *The Financial Mail* (South Africa), 9 October.
MANUEL, Trevor A, 'Africa and the Washington Consensus: Finding the Right Path' (2003) *Finance and Development* (Washington DC), September.
MAZRUI, Ali 'The Bondage of Boundaries' (1993) *The Economist* (London), 11 September.
McGREAL, Chris, 'Thabo Mbeki's catastrophe' (2002) *Prospect* (London), 21 March.
MEALER, Bryan, 'Three Killed in Togo Coup against Military President' (2005) *Sunday Independent* (Dublin), 13 February.
OJO, S, '83,000 Jobs Lost on Account of WTO Membership' (2003) *Daily Trust* (Abuja), 5 September.
NZIRABATINYI, F, 'Poursuites des infractions: la détention préventive face à la présomption d'innocence: contradiction ou complémentarité' (1999) 2 *Le Verdict*, 15 March.
ONISHI, Norimitsu, 'Pygmies Wonder if Oil Pipeline Will Ease Their Poverty' (2000) *New York Times* (New York), 10 July.
POLGREEN, Lydia, 'Chad Backs Out of Pledge to Use Oil Wealth to Reduce Poverty' (2005) *New York Times* (New York), 3 December.
——, 'West Africa Wins Again, with a Twist' (2005) *New York Times* (New York), 27 February.
SACHS, Jeffrey, 'Developing Africa's Economy' (2004) *The Economist* (London), 20 May.
SANSONI, Silvia, 'Saving Amina' (2003) *Essence* (New York), March.
SHAXSON, N, 'Bursting with Confidence' (2006) *World Today*, 1 December.
——, 'Pain or Gain? Crunch Time Looms for Sao Tome Oil' (2003) *Reuters*, 23 December.
SMITH, Craig, 'Many Algerians Are Not Reconciled by Amnesty Law' (2006) *New York Times*, (New York), 28 June.

SMITH, Johann, 'Memorandum on S Tome e Principe' (2003) *Institute for Security Studies* (Pretoria), 17 July.
TEJADA, Carlos, 'Textile Giant Learns Downside of Globalisation' (2003) *Wall Street Journal* (New York), 14 August.
THOMSON, Alistair, 'West African Ministers Set to Talk to Ivorian rebels' (2002) *Reuters News* (London), 3 October.
TUTU-DE-MUKOSE, Tumba, 'Génocide rwandais : pourquoi Carla Del Ponte a été jetée du TPIR par l'ONU?' (2006) 195–196 *Afrique Education*.
WAX, E, 'Oil Wealth Trickles Into Chad, but Little Trickles Down Five Months After Opening of Pipeline to Cameroon, Locals Await Benefits and Crime Rate Rises' (2003) *Washington Post* (Washington, DC), 13 March.
WHITE, D, 'World Bank in Deal with Chad Oil Funds' (2006) *Financial Times Europe*, 28 April.

VII. TREATIES

A. International

1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1950) 75 UNTS 31.
1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (1950) 75 UNTS 85.
1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135.
1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, (1950) 75 UNTS 287.
1977 First Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3.
1977 Second Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to Non-international Armed Conflicts, (1979) 1125 UNTS 609.
Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002) 2178 UNTS 38342.
Ottawa Convention on the Prohibition, Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (1997) 36 ILM 1507.
Regulations of 1907 Hague Convention (IV), (1907) 205 CTS 277.
Rome Statute of the International Criminal Court (1998) 37 ILM 999.
St Petersburg Declaration Renouncing the Use in Time of War, of Explosive Projectiles under 400 Grammes in Weight (1868–69) 138 CTS 297.
Treaty of Bangkok for a Southeast Asia Nuclear Weapon-free Zone (1996) 35 ILM 635.

Treaty of Pelindaba (1996) 35 ILM 698.
Treaty of Raratonga on the Nuclear-Weapon-free Zone of the South Pacific (1985) 24 ILM 1442.
Vienna Convention on the Law of Treaties (adopted 22 May 1969) UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679.

B. Regional

African Charter on Human and Peoples' Rights, (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc CAB/LEG/67/3/rev.5 (1982) 21 ILM 58.
African Charter on the Rights and Welfare of the Child (entered into force 29 Nov.ember 1999), OAU Doc CAB/LEG/24.9/49 (1990).
African Growth and Opportunity Act of 2000, Pub L No 106-200, 114 Stat 252 (18 May 2000).
African Union (AU) Decision on the Situation of Refugees, Returnees and Displaced Persons, Executive Council Dec EX/CL/Dec 127.
African Union, Common Position on Anti-personnel Landmines (17 September 2004).
African Union, Protocol on Amendments to the Constitutive Act of the African Union (adopted 3 February 2003, entered into force 25 July 2006).
African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002).
Agreed Text on the Preamble, Principles, and the Transition Process between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Army (signed 20 July 2002).
Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on the Implementation Modalities of the Protocols and Agreements (agreed 31 December 2004, signed 9 January 2005).
Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (signed 12 December 2000).
Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities between the Government of Sudan and the Sudan People's Liberation Movement/Army during the Pre-interim and Interim Period (adopted 31 December 2004).
Charter of the Organization of African Unity (adopted 25 May 1963) 479 UNTS 39.
Communiqué Issued at the End of the Meeting of the Implementation Committee of Heads of State and Government on the New Partnership for Africa's Development (23 October 2001).
Communiqué Issued at the End of the Meeting of the Implementation Committee of Heads of State and Government on the New Partnership for Africa's Development (26 March 2002).

Communiqué Issued at the End of the First Summit of the Committee of Participating Heads of State and Government in the African Peer Review Mechanism (APR Forum) (13 February 2005).

Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc CAB/LEG/23.15.

Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934).

Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States (adopted 6 June 1991), ECOWAS Doc A/DCL.1/7/91.

Decision Establishing a Force of ECOMOG Armed Monitors along the Border Areas of Guinea and Liberia (16 December 2000) Dec 4/12/00.

Draft African Charter on Democracy, Elections and Governance (2006).

Economic Community of West African States Treaty (signed 24 July 1993).

ECOWAS Standing Mediation Committee, 'Cease-fire and Establishment of ECOWAS Cease-fire Monitoring Groups for Liberia, Banjul, Republic of Gambia' (7 August 1990) Dec A/DEC.1/8/90.

Framework Establishing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (24 July 1998).

Implementation Modalities of the Protocol on Power Sharing, dated 26 May 2004 (adopted 31 December 2004).

Inter-American Democratic Charter (11 September 2001) 40 ILM 1289.

New Partnership for African Development (October 2001).

New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic, and Corporate Governance (adopted 18 June 2002).

Organization of African Unity Resolution (July 1964).

Organization of African Unity, 'Resolution on Border Disputes' (17–21 September 1964).

'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa', African Human and Peoples' Rights Commission, Doc OS(XXX)247.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003).

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

Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security (signed 10 December 1999) ECOWAS Doc A/P10/12/99.

Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Protocol Relating to the Mechanism for Conflict

Prevention, Management, Resolution, Peacekeeping and Security (21 December 2001) ECOWAS Doc A/SP1/12/01.
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 1 January 2004).
Representative Democracy (16 July 2001) OAS Doc GT/CDI-1/01, Resolution AG/RES 1080 (XXI-O/91).
Revised Treaty of the Economic Community of West African States (July 1993), in Jeremy Levitt (ed) *Africa: Selected Documents on Constitutive, Conflict and Security, Humanitarian and Judicial Issues* (Ardsley, NY, Transnational Publishers, 2003) p 61.
SADC, Strategic Indicative Plan for the Organ on Politics, Defense and Security Cooperation (5 August 2004).
SADC, Protocol on Politics, Defense and Security Co-operation (14 August 2001).
SADC, Communiqué from the 1996 Extra-Ordinary SADC Summit to Launch the SADC Organ (1996).
Treaty of the Economic Community of West African States (28 May 1975) 1010 UNTS 17.
Treaty of the Southern African Development Community (Angola–Botswana–Lesotho–Malawi–Mozambique–Namibia–Swaziland–Tanzania–Zambia–Zimbabwe) (17 August 1992) 32 ILM 116.
Treaty of Tlatelolco for the Prohibition of Nuclear Weapons in Latin America (1967) UNTS 9068.

VIII. CASES

A. International

Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya) [10 December 1985] 1985 ICJ 192.
Case Concerning the Continental Shelf (Libya v Malta) [3 June 1985] 1985 ICJ 13.
Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya) [24 February 1982] 1982 ICJ 18.
Case Concerning the Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway) [14 June 1993] 1993 ICJ 38.
Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria) [10 October 2002] 2002 ICJ 303.
Case Concerning the Frontier Dispute (Burkina Faso v Mali) [22 December 1986] 1986 ICJ 554.
Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad) [3 February 1994] 1994 ICJ 6.

Frontier Dispute (Benin v Niger) [12 July 2005] 2005 ICJ 125.
Kasikili/Sedudu Island (Namibia v Botswana) [13 December 1999] 1999 ICJ 98.
Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (1996) ICJ Rep 226.
Memorial of The Republic of Namibia (Namibia v Botswana), 1999 ICJ Pleadings (28 February1997).
Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v US)*, Merits [27 June 1986] 1986 ICJ Rep 14.
Prosecution v Akayesu, Judgment of ICTR Trial Chamber of 2 September 1998.
Prosecutor v Allieu Kondewa (25 May 2004), Case No SCSL-2004-14-AR72 (E).
Prosecutor v Brima Bazzy Kamara (13 March 2004) Case No SCSL-2004-16-AR72 (E).
Prosecutor v Dusko Tadic (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) [2 October 1995], Case No IT-94-1-AR72.
Prosecutor v Morris Kallon (13 March 2004), Case No SCSL-2004-15-AR72 (E).
Prosecutor v. Sam Hinga Norman (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) (31 May 2004), Case No SCSL-2004-14-AR72 (E).
Prosecutor v Slobodan Milosevic (Reasons for Decision on Assignment of Defence Counsel) (22 September 2004), Case No IT-02-54-T.
Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [11 April 1949] 1949 ICJ 174.
Situation in Uganda in the Case of The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen, Affaire No ICC-02/04-01/05 (CPI, Chambre préliminaire II).
South-West Africa Cases (Ethiopia v South Africa; South Africa v. Liberia) [18 July 1966] 1966 ICJ 6.
Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia) [17 December 2002] 2002 ICJ 625.
SS 'Lotus' [7 September 1927] 1927 PCIJ (ser A) no 10.
Western Sahara, Advisory Opinion [16 October 1975] 1975 ICJ 12.

B. Regional

Case CCT 17/96, Constitutional Court of South Africa: Judgment of 25 July 1996.
Hamdan v Rumsfeld, 415 F.3d 33 (2006).
Pius Nwaoga v the State (Supreme Court of Nigeria) (1972), reproduced in (1979) 52 ILR 494.
S v Mogoerane & Others [1983] 1 *LHR Bulletin* 11.
S v Sagarius & Others [1983] 1 SA 833 (SWA).

IX. UNITED NATIONS DOCUMENTS

Commissioner on Human Rights Resolution 47 (1999), UN Doc E/CN.4/RES/1999/47.

Comprehensive study prepared by Francis M Deng, representative of the Secretary-General on the human rights issues related to internally displaced persons, pursuant to the Commission on Human Rights Resolution 1992/73 (1993) UN Doc E/CN.4/1993/35 (1993).

Concluding Observations of the Committee on the Rights of the Child: Uganda (21 October 1997) CRC/C/15/Add.80.

Fourth Report of the Secretary-General on the Situation in Sierra Leone (18 March 1998), UN Doc S/1998/249.

Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of the Work of the Commission (1998), UN Doc E/CN.4/1998/50.

Guiding Principles on Internal Displacement (11 February 1998), UN Doc. E/CN.4/1998/53/Add.2.

Impact of Armed Conflict on Children (26 August 1996), UN Doc. A/51/306.

International Conference on the Great Lakes, Protocol on the Protection and Assistance to Internally Displaced Persons (2006).

International Decade of the World's Indigenous People (1996) UN Doc. E/CN.4/1996/39.

Letter dated 4 July 1997 from Mr Ange-Félix Patasse, President of the Central African Republic, addressed to the Secretary-General, reprinted in 'Security Council, Identical Letters Dated 18 July 1997 from the Chargé d'affaires AI of the Permanent Mission of the Central African Republic to the United Nations Addressed to the Secretary-General and to the President of the Security Council' (22 July 1997), UN Doc S/1997/561.

Mandate of the Inter-African Force to Monitor the Implementation of the Bangui Agreements reprinted in 'Security Council, Identical Letters Dated 18 July 1997 from the Chargé d'affaires AI of the Permanent Mission of the Central African Republic to the United Nations Addressed to the Secretary-General and to the President of the Security Council' (22 July 1997), UN Doc S/1997/561.

Press Release, The Secretary-General, 'Good Governance [sic] Essential for Political Stability, Economic Growth Says Secretary-General in Message to West African Summit' (19 December 2003), UN Doc SG/SM/9090 AFR/799.

Press Release, Secretary-General, 'Secretary-General Calls for Efforts to Unleash African "Third Wave" Based on Democracy, Human Rights, and Sustainable Development' (2 June 1997), UN Doc SG/SM/6245/Rev.1 AFR/9/Rev.

Press Release, Secretary-General, 'Secretary-General Welcomes Restoration of Constitutional Order, Commends Mediation Efforts, in São Tomé and Príncipe' (25 July 2003), UN Doc SG/SM/8791 AFR/676.

Press Release, 'Issuance of A Warrant of Arrest Against Thomas Lubanga Dyilo' (17 March 2006), ICC-OTP-20060302-126-En and ICC Newsletter (No 10) (November 2006).

Press Release, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to ICC' (29 January 2004), ICC-20040129-43-En.

Press Release, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo' (19 April 2004), ICC-OTP-20040418-50-En.

Press Release, 'Prosecutor Receives Referral Concerning African Republic' (7 January 2005), ICC-OTP-20050107-En.

Press Release, 'Security Council Refers Situation in Darfur to ICC Prosecutor' (1 April 2005), ICC-OTP-20050401-96-En.

Principles relating to the Status and Functioning of National Institutions (1992) UN Doc E/CN.4/1992/54.

Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission on Human Rights Resolution 1995/57, 'Compilation and analysis of legal norms' (1996) UN Doc E/CN.4/1996/52/Add.2.

Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission on Human Rights Resolution 1997/39, 'Compilation and analysis of legal norms Part II: Legal Aspects Relating to the Protection Against Arbitrary Displacement' (1998), UN Doc E/CN.4/1998/53/Add.1.

Report of the Secretary-General (1991) UN Doc E/CN.4/1991/25.

Report of the Secretary-General on Conflicts in Africa, Proposals for an OAU Mechanism for Conflict Prevention and Resolution (1992).

Report of the Secretary-General Pursuant to Resolution 1136 Concerning the Situation in the Central African Republic (23 January 1998) UN Doc S/1998/61.

Report of the Secretary-General on the United Nations Mission in the Central African Republic (19 June 1998), UN Doc S/1998/540.

Report of the Secretary-General Pursuant to Security Council Resolution 1216 Relative to the Situation in Guinea-Bissau' (17 March 1999), UN Doc S/1999/294.

Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict (1999) UN Doc S/1999/957.

Report of the Secretary-General on the Establishment of A Special Court for Sierra Leone (4 October 2000) UN Doc S/2000/915.

Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* (23 August 2007), UN Doc S/2004/616.

Report on the situation of human rights in Rwanda submitted by Mr René Degni-Ségui, Special Rapporteur of the Commission on Human Rights (1996) UN Doc E/CN.4/1996/68.

Report on Refugees, Displaced Persons and Returnees (1991) UN Doc E/1991/109/Add.1.

Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr Theo van Boven pursuant to Sub-commission decision 1995/117, UN Doc E/CN.4/Sub.2/1996/17.

Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (1984), UN Doc E/CN.4/1984/4.

United Nations Department of Public Information, 'Oil Pipeline Opens for Business' (2003) 17 *Africa Recovery*, October.

——, 'The United Nations and the Situation in Liberia' (1997) UNDoc [ST/] DPI/1697/Rev.1.

UN Doc E/CN.4/1991/23 (1992).

UN Doc E/CN.4/1992/73 (1992).

United Nations Development Programme, 'Rwanda's Parliament Now Leads World in Gender Parity' (1 December 2004).

United Nations High Commissioner for Refugees, *The State of the World's Refugees* (UNHCR, 1998).

United Nations High Commissioner for Refugees, *The State of the World's Refugees* (UNHCR, 2006).

United Nations Report of the High Level Panel on Threats, Challenges, and Changes, *A More Secure World: Our Shared Responsibility* (New York, UN, 2004).

ANNAN, Kofi, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General to the United Nations General Assembly, Fifty-ninth session (21 March 2005), UN Doc A/59/2005.

ORENTLICHER, Diane 'Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity' (27 February 2004), UN Doc E/CN.4/2004/88.

——, 'Updated set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005), UN Doc E/CN.4/2005/102/Add.1.

X. UNITED NATIONS RESOLUTIONS

A. General Assembly

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (December 2005), UN Doc A/RES/60/147.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (24 Ocober 1970), UN Doc A/8082.
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985) UN Doc A/RES/40/34.
Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UNGA Res 42/22 (18 November 1987), UN Doc A/42/766.
Definition of Aggression, UNGA Res 3314 (14 December 1974), UN Doc A/9619.
International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (8 December 1988), UNGA Res 43/116.
International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, UNGA Res 44/34 (11 December 1989), 44 UN GAOR Supp No 49, UN Doc A/44/49.
Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity (1973), UNGA Res A/RES/3074.
Protection of and Assistance to Internally Displaced Persons (2000), UNGA Res A/RES/54/167.
Protection of and Assistance to Internally Displaced Persons (2001), UNGA Res A/RES/56/164.
Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations (1998), UNGA Res A/53/139-E/1998/67.
Special Court for Sierra Leone Completion Strategy (18 May 2005), UN Doc A/59/816–S/2005/350, 27 May 2005.
World Summit Outcome (15 September 2005), UNGA Res A/60/L1.

B. Security Council

UNSC Res 788 (19 November 1992), UN Doc S/RES/788.
UNSC Res 827 (25 May 1993), UN Doc S/RES/827.
UNSC Res 866 (23 September 1993), UN Doc S/RES/866.
UNSC Res 955 (8 November 1994), UN Doc S/RES/955
UNSC Res 1132 (8 October 1997), UN Doc S/RES/1132.
UNSC Res 1159 (27 March 1998), UN Doc S/RES/1159.
UNSC Res 1216 (21 December 1998), UN Doc S/RES/1216.
UNSC Res 1286 (2000), UN Doc SC/RES/1286.
UNSC Res 1315 (2000) (14 August 2000), UN Doc S/Res/1315.
UNSC Res 1527 (4 February 2004), UN Doc S/RES/1527.
UNSC Res 1528 (27 February 2004), UN Doc S/RES/1528.
UNSC Res 1593 (31 March 2005), UN Doc S/Res/1593.

XI. CONSTITUTIONS

Constitution of the Federal Democratic Republic of Ethiopia (8 December 1994).
The Constitution of the Republic of Ghana (approved 18 April 1992).
The Constitution of the Republic of Somaliland (2001).
South Africa Constitution (adopted 8 May 1996, amended 11 October 1996).

XII. SECONDARY SOURCES

Letter from James D Wolfensohn to Hon James P McGovern, The United States House of Representatives, Washington, DC, 28 June 1999).
Office of Press and Public Affairs, 'Special Court for Sierra Leone: Basic Facts', <www.sc-sl.org/basicfactspamphlet.pdf>.
The Oxford English Dictionary (Oxford, Oxford University Press, 1995).
Restatement (Third) of the Foreign Relations Law of the United States (1987).

Index