Africa
Mapping New Boundaries in International Law

Edited by
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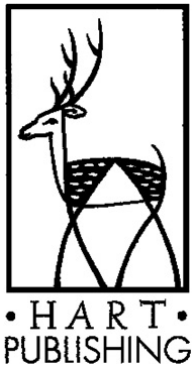

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Foreword

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 marginalized 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 maximize 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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Registrar
United Nations International Criminal Tribunal for Rwanda and
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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 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 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

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…

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.** (p. 208)

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