

International and regional requirements for good governance and the rule of law

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Good governance and the rule of law are widely recognised as keys to greater prosperity and the protection of human rights. There is however, an uneasy tension between efforts of international law to legally define governance standards and the consequent limitation it places on the sovereignty of states. Has international law overstepped its own ‘constitutional’ boundary by prescribing to states how they should govern themselves, or are we entering an era where the international legal order aspires comprehensively to regulate social life at all levels of government?¹

Part of the predicament is due to the fact that international law today has expanded beyond any neat definition.² The legitimacy of universal values are rapidly increasing to such an extent that obligations are no longer firmly grounded in the specific consent of states. Today the negotiation and enforcement of rules are not confined to states as the only role players any more. Due to the forces of globalisation, international law has broadened its scope to such an extent as to regulate many specialised areas formerly confined to national legal systems. We are experiencing an evolutionary convergence and cross fertilisation of principles of private and public law, national and international law. Both international and national law is put to the test of constitutionality.

This paper will argue that the international law involvement with concepts that traditionally belonged within the scope of national law is not only in tune with current developments, but also a key to enhancing the global national practice of the rule of law and good governance. Thus moving from national accountability to international responsibility.

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¹See Fassbender ‘Sovereignty and constitutionalism in international law’ in Walker (ed) *Sovereignty in transition* (2003) 115-143.

²See Stephan ‘The new international law – legitimacy, accountability, authority and freedom in the new global order’ (1999) 70 *University of Colorado Law Review* 1555-1587.

Unlike human rights, it is debatable whether the constitutional values underlying good governance such as the rule of law, have entered the domain of universal values. Theoretically the protection of individual or human rights is problematic within the context of classical international law which does not view individuals as subjects. Nevertheless it is widely accepted today, that individuals do enjoy protection of international law although made possible through the intermediary of the state in which they live, through treaty or other international law obligations. Paradoxically, international law has always been reluctant to prescribe norms of governance to governments, who in fact represent states who are the accepted subjects of international law. These difficulties must be addressed within the current structure of international law and underlines the tension between globalisation versus sovereignty.

If absolute sovereignty prevailed, one could hardly hope to develop rules that bind all states.³ Sovereignty is indeed the cornerstone of a consent-based international order, but also a stumbling block in the way of the development of universal standards of governance.

The traditional form of sovereignty was based on absolute territorial jurisdiction, the concept of absolute sovereign immunity and non-intervention instead of international co-operation.⁴ This impermeability of a state by international law, led to an absolute separation between national and international law which culminated in the doctrine of dualism. Sovereignty, unbridled by any form of international control, allowed anarchical governmental action in the nineteenth and early twentieth century. At the time, international law was essentially bilateral, and recognised only the interests and rights of states. Closer multilateral relations following the founding of the United Nations gradually eroded the traditional notion of sovereignty.

The introduction of the term 'sovereign equality' as used in the UN Charter⁵ appeared to have tempered absolute sovereignty somewhat by recognising the equal rights of states at an international level. States were seen as role-players with equal status, negotiating rules at a horizontal level. The term of 'sovereign equality' is clarified by the Friendly Relations Declaration of the United Nations General Assembly⁶ stating that all states have equal rights and duties and are equal members of the international community notwithstanding differences of an economic, social, political or other nature. Accordingly all members of the United Nations General Assembly have one vote notwithstanding differences such as the size of its population or territory. Various elements are listed by the Declaration

³Charney 'Universal international law' (1993) 87 *AJIL* 529 at 530.

⁴Fassbender n 1 above at 118.

⁵Art 2(1).

⁶GA 2625(XXV) 1970.

aiming to assure states equality in law. In the absence of any guidance as to the nature of these 'rights' it is assumed that they refer to rights held by states under international law. Analogous to the position of the individual under a constitutional democracy, Fassbender suggests that they are rights defined by the constitutional law norms of the international community.⁷ He proceeds to argue that it is a shortcoming of the present constitution of the international community that it defines only the constitutional status of (sovereign) states but not of other role players in the international legal order.⁸ Post UN Charter history has however further expanded boundaries on matters left to the exclusive control of states in favour of the international community.⁹ Due to increased globalisation, areas of common concern have expanded the scope of international competence. This phenomenon limits the autonomy/sovereignty of states but expands the possibility of participation in the international community by both states and non-state actors and will be discussed in more details below.

Constitutionalisation of international law

There is currently a detectable trend in international legal parlance towards the constitutionalisation of international law.¹⁰ This is evident in the increased use of the vocabulary of constitutionalism in international law.¹¹ Werner cites examples varying from in-depth critiques of existing international law, the rise of international tribunals, and the revitalisation of international organisations evident in examples such as debates on the constitutional structure of the UN, understanding European organisations in terms of constitutionalism and the development of a core of fundamental values in international law. Constitutionalism touches the foundations of the international legal order by expanding the concept beyond its traditional scope namely national sovereignty of states. In an article on the International Constitutional Order¹², De Wet states that although the term 'constitution' was traditionally reserved for domestic constitutions, there is no reason to limit the use of the term for the supreme law of a sovereign state. She argues the case for 'an emerging international constitutional order consisting of an international community, an international value system and rudimentary structures for its enforcement'.¹³ Constitutionalisation of the international legal order involves the process of (re)-organisation and allocation amongst those (subjects),

⁷Fassbender n 1 above at 132.

⁸*Id* at 138.

⁹Stephan n 2 above at 1555.

¹⁰Cottier and Hertig 'The prospects of 21st century constitutionalism' (2003) 7 *Max Planck Yearbook of United Nations Law* at 269.

¹¹Werner 'Constitutionalisation, fragmentation, politicisation, the constitutionilisation of international law as a Janus-faced phenomenon' (June 2007) 8/2, *Griffen's View* 18-22.

¹²De Wet 'The international constitutional order' (Jan 2006) 55 *ICLQ* 51-76.

¹³*Id* at 51.

which shape international law, its value system and enforcement.¹⁴ Peters argues that the old idea of an international legal community deserves reconsideration in the light of globalisation. Globalisation compels states to cooperate internationally and to find common ground to deal with common problems, putting state constitutions as supreme national authority under pressure. Governmental functions such as guaranteeing security, freedom and equality are in part transferred to a 'higher' level.¹⁵

According to Werner the vocabulary of constitutionalism moots the idea that 'international law should be regarded as a more encompassing constitutional structure that governs the relationship between a wide variety of subjects'.¹⁶ This construction views international law to be broader than a core of consent-based rules, to also include universal values and the interest of the international community as a whole where the role players are not limited to states. The establishment of the United Nations by means of what is often referred to as a constitutive treaty,¹⁷ already provides a constitutional framework for the international community, both at a structural level but also by including values and principles of the international community as a community of mankind.

While international constitutionalism will on the one hand bind the international community and legal order together, it will on the other contribute to increased fragmentation by the development of areas of functional specialisation. The scope of international law has increased dramatically over the past half-century. In its report of 2006, the International Law Commission addressed the topic under the heading: *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*.¹⁸ Modern international law is full of recent but rapidly developing areas of specialisation such as international human rights law, international environmental law, international trade law, international insolvency and nuclear law to name but a few. In fact, international law is becoming as diverse and specialised as national legal systems. Many of the traditionally demarcated areas of national law now have an international

¹⁴*Id* at 51 and 67-74.

¹⁵Peters 'Compensatory constitutionalism: The function and potential of fundamental international norms and structures' (2006) 19 *Leiden journal of National Law* 579.

¹⁶Werner n 11 above at 20.

¹⁷Dugard *International law A South African perspective* (3rd ed 2005) 28. See also Fassbender 'The United Nations Charter as constitution of the international community' (1998) 36 *Columbia Journal of Transnational Law* 573.

¹⁸Report of the International Law Commission 58th Session (1 May - 9 June and 3 July - 11 Aug 2006) General Assembly Official Records 61st Sess Supp No10 (A/61/10) 400. See, eg, at 403 par 242 'It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation'.

counterpart. Think for instance of international water law, international law of contract, or international mergers and acquisitions. The proliferation of these sub-regimes bears testimony to an increase in the occurrence of transnational problems and cooperation and do not necessarily undermine the idea of an emerging international constitutional order.

Fragmentation of course raises the danger that it may disrupt the coherence and legal certainty of existing rules. New rules may not necessarily develop in accordance with existing parameters, for example, on the creation of customary international law or the validity of treaties. One of the reasons for the development of new branches of law may in fact be that traditional structures and rules do not accommodate novel and fast developing fields of law. Think for instance of how the development of human rights law has challenged traditional thinking on sovereignty, the requirements for the development of a customary rule and the validity of reservations. Another example is the questioning of art 38 of the ICJ Statute as providing a fixed list of the sources of international law. New branches of international law do not comfortably fit the traditional requirements for treaties and custom. These new areas of specialisation are often regulated by either principles which do not qualify as custom, or by instruments of so-called soft law such as UN resolutions, which are neither treaty nor custom. New branches of specialised law place tension on existing international law, which may cause the system to develop or to collapse. When deviations of general law become general and frequent, the unity of law suffers. As stated by the report of the International Law Commission study group on the Fragmentation of International Law:

On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule systems and institutional practices. On the other hand, it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques.¹⁹

The legitimacy of old school international law embedded in state consent and sovereignty may indeed be challenged against the background of the above developments.

Internationalising constitutional law

Viewed from a national perspective there is likewise a trend towards internationalisation of constitutional law.²⁰ Literature uses the term de-constitutionalisation to refer to the ever-increasing limitations placed on states to control their governmental functions through domestic law or their own constitutions.²¹ This is clearly evidenced by the development of universal

¹⁹Report n 18 above at par 246.

²⁰See Cottier and Hertig n 10 above at 268.

²¹Werner n 11 above at 19; Peters n 15 above at 580.

norms on human rights, the rule of law and good governance. This trend can be explained against the background of the following factors: An increased drive towards regional integration at an economic, political and security level; an understanding of the need to harmonise national law within a regional or sub-regional context;²² increased activity of non-state actors, traditionally exclusively subjects of national legal systems, at the international level; submission of states to the jurisdiction of international courts, tribunals and arbitration of disputes. These controls from outside have put domestic constitutions under strain.²³ Likewise the legitimacy of international law may be put to the test in domestic legal systems in the name of democracy and constitutional supremacy.²⁴ This opening-up of international law ultimately brings collective international wisdom to individuals, regardless of state affiliation through a blurring of borders, a fusion of jurisdictional rules, and a mutation of existing role-players into new patterns of self-organisation. Globalisation has underlined the limitations of the national state empowering non-state actors, such as individuals to enter the domain of traditional state functions.²⁵ This leads, according to Peters, to governance beyond the state's constitutional confines. Since national constitutions can no longer regulate governance in its entirety, one has to resort to 'compensatory constitutionalisation on the international plane'.²⁶

The process of constitutionalisation of international law and deconstitutionalisation of national law is an evolutionary one as illustrated by world-wide processes of increased regional integration. It involves a shift of economic and political power from the exclusive constitutional powers of states to a supra-national body. Regional organisations such as the European Union and the African Union necessarily undergo a process of constitutionalisation of their own. The process in the EU is marked by the debate surrounding the Treaty Establishing a Constitution for Europe.²⁷ The European process has shown that integration is an incremental process.²⁸ Although the process of African integration is still in its initial phase and far less comprehensive in terms of reallocation of powers to regional institutions, it is likewise based on shared

²²See, eg, the harmonisation of private law within the context of SADC.

²³Currently literature rightly raises questions of the way in which legislation of policy at the international level impacts on the practice of democracy in different states and the impact it will have on domestic stability. See Van Damme and Reestman (Ed) *Ambiguity in the rule of law, the Hoogendorp Papers (I)* (2001).

²⁴Kumm 'The legitimacy of international law: A constitutionalist framework for analyses' (2004) 15/5 *EJIL* 907.

²⁵Cottier and Hertig n 10 above at 269 on challenging states as exclusive subjects of international law.

²⁶Peters n 15 above at 580.

²⁷Reprinted in (2004) 47 *Official Journal of the European Union* 2004/C 310/01.

²⁸See in this regard Olivier *South Africa and the European Union self-interest, ideology and altruism* (2006) 45-56.

values and visions for the region as a whole. One can only speculate as to the extent and model of future integration that Africa will follow.

The constitutionalisation of international law, although a slow and evolutionary process, will require revolutionary changes to traditional thinking on concepts such as sovereignty and territorial jurisdiction. Contemporary critiques of international law take many forms, most pointing to a legitimacy crisis of one or other nature.²⁹ Kumm suggests that the discussion on the legitimacy of international law could be refocused by asking the following question: ‘To what extent should citizens regard themselves as morally constrained by international law, in the collective exercise of constitutional government?’³⁰ The question accurately addresses the pertinent issues under discussion in this paper namely the closer connection and partial fusion of governance and values of the national and international structures and law by focusing on its impact on all role players both state and non-state. Specifically, to what extent has the terminology of national constitutional law entered the domain of international law, and has exclusive sovereignty been depleted to the extent that the international community is permitted to prescribe governance standards to states?

Can we apply the concept of the rule of law to the international legal system?

The term constitutionalism is associated with the doctrine of the rule of law.³¹ If the term constitutionalism is applied to international law it would imply the equal application of traditional constitutional terminology such as the rule of law designed to ensure efficacy and fairness in governance. Reference to the rule of law if translated into international law, calls for an international order based on international law. This implies an international legal system based on compliance and legitimacy.³²

Matters of governance and human rights appear to present an area of overlap between the two legal orders where they are increasingly mimicking and influencing one another in their respective spheres. Such an international system will provide value-driven guidance on governance to be applied by states. States will thus be accountable both *vis-à-vis* its citizens and the international community to govern in accordance with internationally

²⁹For a sample of these critiques see Kumm n 24 above at 908.

³⁰*Id* at 908-909.

³¹Peters n 15 above at 583.

³²Broomhall *International justice and the International Criminal Court; Between sovereignty and the rule of law* (2003) 54. See also Brownlie *The rule of law in international affairs: International law at the fiftieth anniversary of the United Nations* (1998).

recognised standards. Ideally, all individuals despite their state affiliation should be able to rely on the rule of both constitutional and international law.

The relationship between 'globalisation' and 'public governance' is, however, a difficult one. The Westphalian sovereign state as a form of public governance is under siege. Ladeur argues that it is wrong to regard globalisation as the invocation of a chaotic unstructured process of the dissolution of public order. Neither does it amount to a take-over of political power by multi-national 'stateless' enterprises with the corresponding tendency towards abolishing state-based democracy.³³ He argues that globalisation introduces important transnational and supra-national elements of a new public order to the state. The state is established at a global level which should stimulate the search for forms of public governance beyond the sovereign state and its monopoly over regulating the lives of citizens. Within this context, it is suggested that certain internationalised values such as the rule of law be applied as a global standard for good governance.

Good domestic governance impacts on the maintenance of international peace and security in the same way as the maintenance of human rights does. The lessons we have learnt prompting the international human rights movement is equally applicable at the level of governance. Legitimacy and accountability of governments should not only have to be justified to its weaker subjects, but also in accordance with the rules of international law.

International standards for governance

Global and regional standards of governance manifest in the documentation and activities of the United Nations, and regional organisations.

The United Nations

The UN is involved in varied efforts to re-establish the rule of law and the administration of justice in post-conflict states. The High Commissioner for Human Rights who acts as focal point for coordinating system-wide attention on human rights, democracy and the rule of law, in 2003 began to develop rule-of-law tools to ensure sustainable, long-term institutional capacity within UN missions and transitional administrations. These tools, which are each independent, also fit into a coherent operational perspective, delineating the basic principles outlined in the document: Mapping the Justice Sector, Prosecution Initiatives, Truth Commissions, Vetting and Monitoring Legal Systems. Some of these tools have come into being, such as one on Truth Commissions³⁴ and the Justice Sector. Where appropriate, these tools refer to

³³Ladeur *Public governance in the age of globalisation* (2004) 1.

³⁴2006.

clear international norms regarding appropriate structures, components, powers and minimum standards and in the case of truth commissions which may differ between countries in many respects, emphasis is placed on crystallised best practice guidelines. The underlying reason for the development of these tools is that the rule of law in its various facets is regarded as an essential instrument in building sustainable peace and stability in societies emerging from violence and protracted conflict.³⁵ It is widely accepted that the rule of law is regarded as *sine qua non* for a peaceful, democratic society. The precise components of the rule of law remain open to debate. The following are regarded as necessary building blocks that form the basis of societies functioning under a rule of law: a functioning and accountable internal police force, civilian control of the armed forces, effective and timely judicial and penal systems, a political hierarchy answerable to the people, minimum levels of corruption and a culture of respect for human rights.³⁶

Regional requirements

Africa

Are democracy and the rule of law Eurocentric remnants of colonialism, imposed on African states by the west? It appears that African leaders have embraced the concepts in theory if not in practice and now regard it as key to a better future. The quest for a rule of law is stressed by various instruments coming from Africa. Poor governance, the absence of democracy and a rule of law in Africa are widely recognised reasons for internal conflicts in Africa.

African NGOs, politically suppressed as many may be, play an important role in highlighting the quest for peace and prosperity through the rule of law and good governance. The Socialist International Africa Committee, a transregional political organisation, adopted the Continuo Declaration in September 2003, in which it was agreed that, in order to forestall African conflicts, there is a need to combat the decline of international law and the marginalisation of the United Nations.³⁷ The Declaration stipulates that in order to strengthen democracy on the continent, it is necessary to 'ensure that modern democratic constitutions are put in place in Africa, and that governments completely respect ideals of democracy, the rule of law, and the financing of political parties'.³⁸

³⁵Smith, Holt and Durch *Enhancing United Nations Capacity for Post-Conflict Police Operations* Report from the project on Rule of Law in Post-Conflicts Settings Future of Peace Operations Program Working paper 20 Dec2006 7.

³⁶*Id* at 8.

³⁷Meeting of Socialist International Africa Committee Benin Cotonou, 5-15 Sept 2003.

³⁸*Id* par 2.

The OAU and the AU

The OAU Charter³⁹ aimed at the eradication of all forms of colonialism, predictably placed a strong emphasis on the defence of sovereignty, territorial integrity and non-interference in the internal affairs of states without any reference to the respect for human rights. The OAU proved a vigorous defender of absolute sovereignty and non-interference in the domestic affairs of states. African leaders took a very strong stand that abuses by their peers was an exclusively domestic affair to which a blind eye should be turned. The celebration of sovereignty was somewhat tempered with the adoption in 1981 of the African Charter on Human and Peoples' Rights, listing a host of human rights Africans are entitled to, but not providing for effective enforcement and implementation.

The African Union, which replaced the OAU in 2000,⁴⁰ again adheres to the principle of sovereign equality and territorial integrity but sets it off against interdependence among member states. Although the non-interference of members states in the internal affairs of another is yet again recognised, AU principles enjoins AU members to observe respect for democratic principles, human rights, the rule of law and good governance. Non-intervention is however not unqualified. Exceptions are provided for in cases of war crimes, genocide and crimes against humanity. An amendment added in 2003 introduces another ground for intervention namely 'a serious threat to legitimate order'. Although a Pan African Parliament permitting democratic participation was created, the AU does not enjoy supranational powers, where state sovereignty is surrendered to an international organisation. The AU Constitutive Act introduces accountability for sovereign decisions and lays the basis for development for closer regional cooperation and peer review.

NEPAD

The New Partnership for Africa's Development was adopted in 2001 by the OAU Summit, and was endorsed by the first AU Summit in Durban in 2002 by the adoption of the Declaration on Democracy, Political, Economic and Corporate Governance⁴¹ (the Declaration). It is an amalgamation of different plans for an African renaissance through a partnership between African states and developed countries.⁴² This initiative received global legitimacy through endorsement by both the UN General Assembly and the G8.⁴³ NEPAD is more than a development

³⁹Adopted 25 May 1963.

⁴⁰With the adoption of the Constitutive Act of the African Union available at www.africa-union.org.

⁴¹Prepared by the NEPAD Heads of State and Government Implementation Committee Approved July 2002.

⁴²See Manby 'The African Union, NEPAD and human rights: The missing agenda' (2004) 26 *HRQ* 983.

⁴³UNGA adopted the Declaration on the New Partnership for Africa's Development in Sept 2002.

strategy. It links conditions for sustainable development with peace, democracy, human rights and good governance. The Declaration is very specific by describing governance standards: African states undertake to work with renewed determination to enforce a wide range of human rights but also the rule of law and free, credible and democratic political processes, the separation of powers and an independent judiciary and effective parliaments.⁴⁴

The Declaration is a clear indication that standards for national constitutional governance which a key to an African renaissance, has found its way into African Union law. It is also significant that Africa undertakes to respect global standards of democracy. The AU's commitment to the development of strong democratic institutions, observance of human rights and the rule of law was yet again endorsed by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, although it restates the principles of non-interference and sovereign equality.⁴⁵

Self-assessment under the Peer Review Mechanism

A Memorandum of Understanding on the African Peer Review Mechanism (APRM)⁴⁶, open to voluntary accession of all AU members, was adopted in July 2002. The overarching goal of the APRM is for all participating states to accelerate their progress towards adopting and implementing the priorities and programmes of NEPAD, achieving the mutually agreed objectives and compliance with identified best practice. Under the APRM, states who adopted the abovementioned Declaration on Democracy, Political, Economic and Corporate Governance undertake to submit periodic peer reviews. The review process is overseen by a Panel of Eminent Persons supported by a Permanent Secretariat. The purpose of peer review is to ensure policies, standards and practices of participating states that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration. The Declaration contains prioritised and approved codes and standards in four focus areas namely democracy and good political governance; economic governance and management; socio-economic development; and corporate governance.

The APR Panel presents a questionnaire, to provide guidance to states in preparing their peer review reports. Of specific relevance for the present discussion is the guidance provided by the questionnaire on democracy and good political governance. It defines good governance as creating well-functioning and accountable political, administrative and judicial institutions,

⁴⁴AGH/ 235 (XXXVIII) Annex 1 art 7.

⁴⁵Adopted by the Assembly of the African Union Durban 9 July 2002.

⁴⁶African Peer Review Mechanism, AHG/235(XXXVIII) Annex II, art 1.

in which citizens participate and regard as legitimate. Democracy and good political governance constitute prerequisites for socio-economic governance, respect for human rights, a government accountable to the governed, and relative political stability. A vital part of the report should address adherence and implementation of international and regional human rights standards. A constitutional democracy, including periodic political competition, the rule of law, human rights and supremacy of the constitution is identified as an objective in order to achieve democracy and good governance.

The APRM is a clear manifestation of an emerging transition from a culture of sovereign impunity to a culture of national and international accountability.⁴⁷

The European Union

The European Union is a supranational organisation where member states have transferred sovereign powers to an international organisation. It provides the best example of a constitutionalised regional/international system and national systems where certain constitutional functions associated with sovereignty has been transferred to an international decision-making body. European Community law enjoys primacy and has direct effect in its member states. The doctrine of direct effect was established by the European Court of Justice, and creates a mechanism for individuals and institutions to challenge the compatibility of national law with EC law. As a consequence, national laws deemed to run contrary to EC law, must be set aside. EC law is comprised of legislation initiated and applied by the European Commission and case law arising from rulings given by the European Court of Justice in interpreting the provisions of EC treaties and EC legislation.⁴⁸ Although the supremacy of Community law had been confirmed by numerous court decisions coming from member states, the potential for conflict between Community law and national constitutional provisions continues to be a major issue in cases before national courts.⁴⁹

⁴⁷Geldenhuis 'Brothers as keepers: Africa's new sovereignty regime' (May 2006) XXVIII/1 *Strategic Review for Southern Africa* 15. 'Rule of law in Africa' at 14 – address presented to a world conference for barristers and advocates 2004. Questions regarding the imposition of the Diceyan model of the rule of law by imperialist colonialism on Africa are asked by Gutto ('The rule of law, democracy and human rights: Whither Africa?' (1996) 3/1 *East African Journal of Peace and Human Rights* 131). Although Gutto doesn't deny the quest for the rule of law, he identifies various historical stumbling blocks in the African context including: the rule of law as mere (criterion for) legality (is devoid of social justice; inequality in society, be it between genders or classes makes equality before the law a fiction; the narrow conception of state power and the requirement of mutual checks and balances between the three branches which comprises a state; an independent but passive judiciary and a disempowered civil society unable to challenge government and mobilise the law. These realities stand in the way of not only a rule of law but also social justice.

⁴⁸See Phinnemore and McGowan *A dictionary of the European Union* (2nd ed 2004).

⁴⁹See Oppenheim (ed) *The relationship between European community law and national law: The cases* vol 2 (2003) 2-13.

It is further understood that the rule of law applies within the European Community. EC institutions are bound to act in accordance with the law. The Court of Justice must ensure that the law is observed in the interpretation and application of the EC treaty.⁵⁰ Community Acts may further be reviewed by the Court. In the *Les Verts* case the Court held that the Community is based on the rule of law, inasmuch as neither its members nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the EEC treaty.⁵¹

According to Petersmann 'European integration law offers EU citizens more individual rights for the free movement of goods, services, persons, capital and payment, as well as for democratic participation and access to courts at local, national and European levels, than European citizens ever enjoyed in earlier European history'.⁵² He further remarks that 'Individual freedom and "rule by the people" across frontiers cannot be secured solely by national constitutions and unilateral power politics without *effective international constitutional constraints* ...'.⁵³ Accordingly the EU's common foreign and security policy (CFSP) is constitutionally committed to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms in compliance with international law.⁵⁴

Conclusion

We are progressively moving into an era where the international legal order aspires to regulate all levels of governance, both national and international, state and non-state. In the words of the ICTY in the *Tadic* case 'A State-sovereignty-orientated approach has been gradually supplanted by a human-being-orientated approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well'.⁵⁵

It is suggested that the constitutionalisation of international law, and the transferring of international law values and principles to national law be used to transcend the old dichotomy between the two legal orders, and leave it open to individuals of the world to experience the benefit and protection of both. Such a construction will bring us in line with the preamble of the United Charter stating that 'We, The peoples of the United Nations reaffirm our faith

⁵⁰Art 220; see Senden *Soft law in European community law* (2004) 33.

⁵¹Case 294/83 *Les Verts* [1986] ECr 1339 par 23 as discussed by Senden at 34.

⁵²Petersmann 'From state sovereignty to the sovereignty of citizens in the international relations law of the EU?' in Walker (ed) n 1 above at 150.

⁵³*Id* at 151.

⁵⁴Art 11:1.

⁵⁵*Prosecuto v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 2 Oct 1995 at par 97. Also quoted by Werner n 11 at 22.

in the dignity, worth and equal rights of human person and to establish conditions under which both justice and respect for international law can be maintained'. Listening to these words, the bringing of individuals and states, national and international law under the same umbrella sounds less revolutionary as may appear at first glance.

There is a clear role for international law in Africa where the impact of failed or failing states on ordinary people is clear to observe. We have a history depicting a vicious circle of the rise and fall of dictatorships, the failing of already weak economies, and suffering of already impoverished peoples at the hands of corrupt political elite. 'Indeed, the recasting of international law as a system based less on state sovereignty and more on individual liberty is an aim of many contemporary international lawyers and there is no doubt that in recent years very great strides have been made in this direction.'⁵⁶ It can be said that the development of an international community with an international value system including that on governance structures, leads to the replacement of a traditional dualist system with a more integrated system. In this system both states and non-state role-players such as individuals simultaneously function both within the national and supra-national legal orders.⁵⁷

⁵⁶Dixon *International law* (5 ed 2005) 2.

⁵⁷See De Wet n 12 above at 75.