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Internationalization of Constitutional Law and Constitutionalism in Africa†

This paper aims to examine the possible impact that the internationalization of constitutional law may have on constitutional developments and the consolidation of constitutionalism and the rule of law in Africa. As an attempt to provide universal solutions to some of the common problems we face today, the phenomena of internationalization has seen the increasing willingness of legislatures and judiciaries to look beyond the national boundaries for solutions to domestic legal problems. In spite of significant developments since the 1990s, Africa is still faced with numerous challenges.

After showing that the traditional conception of constitutional law never excluded some role for international law, the first section of the paper proceeds to examine the various ways in which the internationalization of constitutional law is influencing, reshaping and in certain instances, replacing domestic constitutional law in many African countries. It then considers some of the implications of the internationalization process on domestic constitutional law. It is shown that, in spite some criticism of this process as an infringement of sovereignty, the internationalization of constitutional law nevertheless acts as a sort of compensatory constitutionalism. The paper concludes that the reach of international law principles and standards in domestic constitutional law are likely to expand in the future and are critical to maintaining the momentum for constitutionalism in Africa at a time when ominous signs of authoritarian revival are emerging.

I. INTRODUCTION

The purpose of this paper is to examine the impact of one of the most significant developments of the last two decades, namely the progressive internationalization of domestic constitutional law, or, to put it differently, the denationalization or internationalization of con-

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stitutional law on constitutionalism in Africa. It is a phenomenon that has existed for quite a while¹ but its effects have become particularly noticeable in Africa in the post 1990s era after many states adopted constitutions that tried to promote constitutionalism, democracy and good governance.

Constitutions have evolved as a concomitant of the modern state. National constitutional law is a symbol par excellence of national independence and pride. However, since the end of the Cold War, the capacity of national constitutions to serve as the exclusive framework for self-governing practices of the national community has progressively diminished. The phenomena of globalization, liberalization and regionalism have not only underscored the need for strong linkages between states, regions and societies but also underlined the fact that most of the crises, perils, challenges and opportunities of our age require common solutions. The progressive internationalization of constitutional law appears to be an attempt to adopt universal solutions to some of the common problems we face today. This has seen the increasing willingness of legislatures and judiciaries to look beyond national boundaries for solutions to domestic legal problems. This approach has not only raised issues of democratic legitimacy but also questions about the implications of this process for sustaining the faltering transition towards sustainable constitutionalism in Africa.

Although Africa is increasingly exposed to the process of internationalization of constitutional law in all its forms, few studies have been carried out to assess what impact this phenomenon is having on the attempts to entrench constitutionalism. This is particularly important in the light of the numerous challenges faced in Africa today, and the threatening signs of democratic reversals. The opportunities given for international intervention and the imposition of international solutions to deal with the post election conflict in Côte d'Ivoire and the recent wave of violent demonstrations in North Africa raises numerous issues. Is the process of progressive internationalization of constitutional law eroding or reinforcing good constitutional standards? What are the implications of the process? Will it enhance the prospects of peace, justice and prosperity and reduce the dangers of poverty, inequality, disease, and hunger or only expose the continent to more foreign domination?

This paper will start by looking at the traditional conception of constitutional law. It will show that the domestic basis of constitu-

1. Cheryl Saunders, *How Real is the Internationalisation of Constitutional Law*, Keynote Address at the African Network of Constitutional Law (ANCL) Conference in Rabat, Morocco (Feb. 2-5, 2011), at 2, although it is a phenomena that goes back centuries through forces such as colonization, conquest and the writings of philosophers, the present excitement about it is because "internationalisation in the early part of the 21st century is distinctive in both quantitative and qualitative terms."

tional law founded on the Westphalian concept of the sovereign state had never excluded some role for international law. The next section will examine the diverse manifestations of the phenomenon of internationalization in Africa. This will be followed by an assessment of the implications of this process to constitutional development in Africa. Is this a process that will strengthen the difficult task of entrenching constitutionalism on the continent or is it just another remnant of the neo-colonial baggage? Can the process of internationalization of constitutional law act as a sort of compensatory constitutionalism at a time when the threats to constitutionalism, democracy and good governance are increasing? The paper will conclude by pointing out that the reach of international law principles and standards is likely to expand in the future and is critical to maintaining the momentum for constitutionalism in Africa at a time when ominous signs of authoritarian revival are emerging.

II. TRADITIONAL CONSTITUTIONAL LAW AND THE PHENOMENON OF INTERNATIONALIZATION

The modern concept of a constitution and constitutional law reflect an organization in which the people are at the source of power and which is established for their benefit. This finds its roots both in the very nature of a constitution and in the way international law has regarded a constitution.

Traditionally, a constitution is perceived as essentially a state-centered notion which is linked to the concept of statehood and the idea of a state exercising its sovereign power. This state-centered feature becomes particularly significant when sovereignty is defined as the supreme, undivided, absolute and exclusive power attributed to the state within a demarcated territory.² The modern concept emerged alongside social contract theories which placed the people at the center. In fact, Thomas Paine in his discussion of what he terms the four elements of a constitution, points out that a constitution "is not the act of . . . government, but of the people constituting a government."³

There is no generally accepted definition of the word "constitution." However, it has sometimes been described as a "power map,"⁴ deriving its whole authority from the governed and regulating the allocation of powers, functions and duties among the various agencies

2. See Ulrich K. Preuss, *Disconnecting Constitutions from Statehood. Is Global Constitutionalism a Viable Concept*, in *THE TWILIGHT OF CONSTITUTIONALISM?* 26-28 (Petra Dobner & Martin Loughlin eds., 2010).

3. In *Rights of Man* (1791-1792), cited by Martin Loughlin, *What is Constitutionalisation?* in *THE TWILIGHT OF CONSTITUTIONALISM?* 49, *id.*

4. Robert Elgie & Jan Zielonka, *Constitutions and Constitution-Building: A Comparative Perspective*, in *1 DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE: INSTITUTIONAL ENGINEERING* 25 (Jan Zielonka ed., 2001).

and officers of government as well as defining their relationship with the governed. In its broadest sense, a constitution consists of the collection of all rules, whether written in a formal document or not, that limits both government and the governed with respect to what may or may not be done. As K. C. Wheare rightly points out, these rules may be partly legal in the sense that courts of law will recognize and enforce them, and partly non-legal (or extra-legal), taking the form of usages, understandings, customs or conventions, which the courts may not necessarily recognize and enforce, but which are nonetheless effective in regulating government and the governed.⁵ From this definition of a constitution, it is clear that it tacitly presupposes the concentration of ruling authority within the state and the consent of the people. It is important to note that this does not *per definitionem* exclude the possibility of conceptualizing constitutional law beyond the state.

To begin with, traditional international law has always recognized the right of states to regulate themselves. This is expressed in Article 2(7) of the Charter of the UN which prohibits the organization from intervening in any matters which are "essentially within the domestic jurisdiction of any state," although it adds an important qualification: this principle "shall not prejudice the application of enforcement measures under Chapter VII of the Charter." It is not the intention of this Article to go into the issue of exclusive domestic jurisdiction that has spawned much literature. Nevertheless, a number of important points should be noted. In its advisory opinion in the case of the *Nationality Decrees in Tunis and Morocco*, the Permanent Court of International Justice described a slightly differently worded clause in the Covenant of the League of Nations, the predecessor to the UN, as "an express reservation protecting the independence of states."⁶ The Court further stated: "The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."⁷

This approach defines the scope of domestic jurisdiction as what is left over after the rules of international law have claimed their jurisdiction.⁸ A more authoritative position was stated by the International Court of Justice (ICJ) in the *Case Concerning Military and Paramilitary Activities in and Around Nicaragua (Nicaragua v. The United States) (Merits)*. The ICJ pointed out that as a direct consequence of the principle of sovereignty, each state has "the choice of a political, economic, social and cultural system and the formulation

5. K.C. WHEARE, *MODERN CONSTITUTIONS* 1-3 (1966).

6. 1923 P.C.I.J. (Ser B), No.4, 22-23 (Feb 7).

7. *Id.*

8. This has been criticized as being too broad. See, for example, Antony D'Amato, *Domestic Jurisdiction*, *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1091 (1992).

of foreign policy."⁹ A purposive interpretation of the proviso to Article 2(7) of the Charter and the practice of the UN over the decades has shown that the organization could in fact intervene in constitutional matters which are essentially within the domestic jurisdiction of any state if international peace and security were said to be threatened.¹⁰ If such interventions have not been as frequent as the circumstances have warranted, this is due more to disagreements and deadlocks within the Security Council than to the lack of a legitimate basis in international law. Thus, the fact that a matter is essentially within the domestic jurisdiction of any state does not prejudice the right of the Security Council to take any measures which it considers appropriate to preserve international peace and security.

It is also important to note that a number of international treaties and conventions also recognize the sovereign right of states to determine the form of their constitutional system. For example, Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) declare *inter alia* that all people have the right to "freely determine their political status and freely pursue their economic, social and cultural development." Still, these Covenants and other international human rights instruments contain binding obligations on states parties to conform to certain standards of behavior, and some of these treaties have actually established permanent bodies to monitor compliance with these standards. The net effect of these commitments is to limit states' sovereign right to exclusively determine the content of their domestic constitutional law.

The increasing need by states to cooperate in order to confront common problems such as global warming, terrorism, famine, poverty and natural disasters has intensified the need for, and the scope of, more treaties and agreements, whether at the international or regional level, which has inevitably limited national sovereignty. States have often been forced to make choices and compromises, sometimes voluntarily and sometimes involuntarily. Before assessing what impact this progressive denationalization of constitutional law is having on the attempts to promote constitutionalism in Africa, it is necessary to examine the nature and scope of this phenomenon.

9. [1986] I.C.J. 14 (June 27) at 108, para. 205.

10. For some instances of intervention, see D'Amato Anthony, *op. cit.*, pp.1092-1095; D.R. Gilmour, *The Meaning of 'Intervene' within Article 2(7) of the United Nations Charter - An Historical Perspective*, 16 ICLQ 330-51 (1967), and A.A.C. Trindade, *Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations*, 25 ICLQ 715 (1976).

III. THE VARIOUS MANIFESTATIONS OF THE INTERNATIONALIZATION OF CONSTITUTIONAL LAW IN AFRICA

What is meant by the internationalization of constitutional law? Although this has become a topical issue in the last two decades or so, hardly any writer has attempted to define this phenomenon.¹¹ Internationalization of constitutional law for the purposes of this Article can be understood as the development of the adoption in national constitutional laws of many shared norms whose origins can be traced to international and regional supra-national laws. From an analytical perspective, it is possible to identify at least four main ways in which domestic constitutional law in Africa countries is being influenced, reshaped or even replaced in certain circumstances by international or supra-national laws. The internationalization process takes place, first, where it is expressly or implicitly provided for by the constitution; second, where it is based on customary or conventional international law; third, where it results from progressive interpretation or operates as an aid to constitutional interpretation, and finally, under the emerging customary international law responsibility to protect principle.

A. *Internationalization Expressly or Implicitly Provided for Under the Constitution*

The internationalization of constitutional law principles and standards can be traced to the end of the Second World War when governments' treatment of their nationals became a legitimate concern of the international community. Since 1945, numerous international instruments, both global and regional, have prescribed certain minimum standards of human rights protection with monitoring bodies to scrutinize national performance. One of the most important of these instruments is the Universal Declaration of Human Rights (UDHR). Although merely a "Declaration," and thus not binding, its provisions have over the years been so extensively incorporated in other international and regional instruments as well as national constitutions that its provisions are now considered to express principles of customary international law.¹² As a result of this

11. One notable exception is Cheryl Saunders, *Towards a Global Constitutional Gene Pool*, 4(3) NATIONAL TAIWAN UNIVERSITY LAW REVIEW 18 (2009).

12. Sir Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 11 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 15 (1965), opines that "the constant and widespread recognition of the principles of the Universal Declaration clothes it in the character of customary law." On several occasions, the judges in the International Court of Justice and even in some national courts have stated unequivocally that most of the principles contained in the UDHR are now part of customary international law. For example, Judge Ammoun in his separate opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding the Security Council Resolution 276 1971 ICJ, 12 (June 21), at 76, observed that "al-

special status, the UDHR and other instruments which contain rules considered to be customary international law are automatically applicable in most common law countries, including South Africa, as part of national law¹³ and must therefore be taken into account in any interpretation of the constitution.

In almost all modern African constitutions, many of the provisions, especially those recognising and protecting human rights, have been substantially influenced by international human rights instruments and standards. This does not necessarily make these instruments part of the constitution nor does it mean that they will have a direct role to play in its interpretation. Still, some constitutions make reference to international human rights instruments which raises the question whether this makes these instruments part of the national constitution. Whether this can have such an effect or not depends on the actual wording of the constitutional provision. A number of patterns can be discerned.

One pattern is represented by the Cameroonian Constitution where the preamble does no more than "affirm" the constitution's attachment to the fundamental freedoms enshrined in the UDHR, the UN Charter, the African Charter on Human and Peoples' Rights (ACHPR) "and all duly ratified international conventions relating thereto." This, it is submitted, does not render any of these instruments part of national law nor can they be invoked on this basis alone in the interpretation of the constitution. Far more significant in this regard is the Beninese Constitution which in its preamble refers to these international instruments and then states that their provisions "make up an integral part of this present Constitution and of Beninese law and have a value superior to the internal law." This is repeated in Article 7, and Article 40 imposes on the state a duty to teach its citizens about the Constitution, the UDHR, the ACHPR and any other "international instruments duly ratified and relative to

though the affirmations of the Declaration are not binding qua international convention . . . they can bind the states on the basis of custom . . . or because they have acquired the force of custom through a general practice accepted as law . . .". See also the dissenting opinion of Judge Guggenheim in the *Nottebohm Case* (*Liechtenstein v. Guatemala*); Second Phase 1955 ICJ 4 (Apr. 6) at 63; Judge Tanaka in his dissenting opinion in the *South West Africa Case* (*Ethiopia v. South Africa; Liberia v. South Africa*); Second Phase 1966 ICJ 6 (July 18) at 293; and the dissenting opinion of Judge Evensen in the *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal* Case 1987 ICJ 3 (May 27), at 173. At the domestic level, an important example is the decision of the United States Federal Court of Appeals in *Filartiga v. Pena-Irala*, 630 F. 2d 876(2d Cir. June 1980) and Lord Reid in the English case of *R v. Miah* [1974] 1 WLR 683 at 698.

13. See generally JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 51-54 (3d ed. 2005) and PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 67-72 (7th ed. 1997).

human rights." In fact, the ACHPR is attached as an annex to the Constitution of Benin.¹⁴

The most significant effect is given to international law in the Angolan, Kenyan and South African Constitutions. Several provisions in the Angolan Constitution underscore the importance and relevance of international instruments in interpreting and applying the Constitution.¹⁵ The two most important ones are Articles 26 and 27:

26(1) The fundamental rights established in this constitution shall not exclude others contained in the laws and applicable rules of international law.

(2) Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in keeping with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples' and other international treaties on the subject ratified by the Republic of Angola.

(3) *In the consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.* (Emphasis added.)

27 The principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of a similar nature that are established in the constitution or are enshrined in law or international conventions.

In the Kenyan Constitution, Article 2(5) provides that "the general rules of international law shall form part of the law of Kenya," and Article 2(6) states that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." To a similar effect, but perhaps less far-reaching is section 39(1) of the South African Constitution which states:

(1) When interpreting the Bill of Rights, a court, tribunal or forum

...

(b) must consider international law; and

(c) may consider foreign law.

The bills of rights in many other African constitutions also expressly incorporate some international human rights instruments.¹⁶

14. In fact, Benin is one of the few countries in Africa that has expressly incorporated the UDHR and the ACHPR into its domestic law.

15. Other provisions which make express reference to the applicability of international law are arts. 12 and 13.

16. See, for example, art. 17(3) Constitution of Cape Verde of 1999, and section 11(2) of the Malawi Constitution of 1994.

In the absence of an explicit or implicit authorization, the question arises whether it is legitimate for a court to refer to or invoke international human rights instruments. This is a fairly controversial issue on which there are strong and plausible arguments for and against.¹⁷ It can be argued that in the globalized world of today, it would be self-defeating as well as a dereliction of duty for a judge to completely ignore legal developments in the rest of the world and their actual or potential implications on national law simply because there is no express or implied authorization to do so. The fundamental values that underpin most constitutional provisions, especially the bills of rights are now universal. While there are differences, both formal and substantive in approach and implementation, it is clear that there are many similarities. Certain provisions in national constitutions, mainly those dealing with fundamental human rights, are progressively being de-nationalized in the sense that they are mainly based on international human rights instruments. The explicit references in these constitutions to international law therefore provides considerable room for the large volume of international jurisprudence to influence the nature and scope of rights provided in the constitution and the manner in which these rights are recognized and enforced by the courts.

B. Internationalization Based on Customary or Conventional International Law Being Recognized as part of National Law

Even where the constitution does not expressly mention the relevance of international law, a duly ratified international instrument which is of relevance to constitutional matters can have effect on the national constitution. The exact domestic impact will depend on how effect is given to international instruments in the particular country. Two main approaches are well established: the monist approach, which most francophone and lusophone African countries have adopted, and the dualist approach which is prevalent in anglophone Africa. In this context, two important points are worth noting.

First, in spite of the apparently divergent approaches, there is often no difference in practice in what actually happens in either anglophone or francophone Africa. This is because most African countries have no difficulties signing and ratifying treaties and conventions but often do not domesticate these instruments even where the constitution states, as most francophone and lusophone constitu-

17. See the discussion by Nsongurua Udombana, *Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies*, 5 AFRICAN HUMAN RIGHTS LAW JOURNAL 64 (2005).

tions do, that an international instrument on ratification takes immediate effect and prevails over national law.¹⁸

The second point pertains to customary international law: even anglophone African countries are monist in the sense that a well established and recognized rule of customary international law is usually considered in most countries an integral part of national law. As a result, the failure or refusal of a government to sign and ratify an international instrument does not prevent any principles contained in that instrument from forming part of the national constitutional law provided these principles have crystallized into customary international law.¹⁹ Such is the case where provisions in the international instrument either do no more than codify well established principles of customary international law or where some of the principles contained in these instruments have been so widely accepted and adopted that they have therefore crystallized into customary international law. Arguably, this approach was received as part of English law during the colonial period. The English law approach has been explained as follows by Ian Brownlie:

The dominant principle, normally characterised as the doctrine of incorporation, is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only insofar as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority. This principle is supported by a long line of authority and represents a practical rather than theoretical policy in the courts.²⁰

This has been put beyond doubt in some constitutions. For example, section 232 of the South African Constitution states that,

18. For example, art. 13(2) of the Angolan Constitution states: "Duly approved or ratified international treaties and agreements shall come into force in the Angolan legal system after they have been officially published and have entered into force in the international legal system, for as long as they are internationally binding upon the Angolan state." Article 45 of the Cameroonian Constitution states: "Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement." In both cases, a ratified treaty will take effect when it is published. For a variety of reasons, which sometimes include something as banal as lack of funds to publish the Official Gazette, at least in the case of Cameroon, many of these treaties are not published and therefore do not take effect as national law.

19. Perhaps one of the most influential instruments, the UDHR 1948, as its name suggests, is not a treaty and thus not binding, but it has come to occupy a special status amongst international human rights instruments. Over the years, as a result of the fact that its provisions have now been extensively incorporated into numerous international and regional instruments as well as national constitutions and there have been numerous affirmations of its special status in judicial decisions, there is no longer any doubt that the principles contained in the UDHR are rules of customary international human rights law.

20. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 41 (6th ed. 2003).

"[c]ustomary International law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."²¹

One of the best efforts at internationalization of constitutional law in Africa by way of international instruments has come through a number of regional agreements that the African Union (AU) and its predecessor, the Organisation of African Unity (OAU), introduced in their efforts to move the continent away from the dark past of one party dictatorship.²² In the last decade, the AU struggled to get its members to implement a series of reforms under an agenda for democracy and good governance that has serious implications for the national constitutional law of the Member States. Its predecessor, at its creation in 1963, was too preoccupied with protecting the hard earned independence of its Member States and with devising a strategy to eradicate all forms of colonialism on the African continent to bother about issues of democracy and good governance. While striving to promote unity and solidarity amongst its Member States, the Charter of the OAU strongly upheld the principle of territorial sovereignty and strictly prohibited the organization from intervening in the domestic affairs of a Member State. This turned out in retrospect to be a monumental error because it rendered the organization impotent and kept it silent regarding internal disputes and frequent incidents of gross human rights violations committed by some of the continent's bloodiest dictators like Francisco Macias Nguema of Equatorial Guinea, Jean-Bedel Bokassa of Central African Republic, and Idi Dada Amin of Uganda.

By the mid 1990s, the OAU could no longer pretend to be indifferent to the wind of democratization blowing over the continent. Although by 1981, it had adopted the ACHPR which recognized a number of fundamental human, civil and political rights, the organization itself stuck to its policy of not intervening to condemn human rights abuses in the different countries. By the early 1990s, this was beginning to change. Perhaps one of the major signs occurred during the June 1997 summit in Harare, Zimbabwe. The OAU leaders unanimously and unreservedly condemned the coup in that country as an enormous setback for democracy in Africa. During the Lome summit of July 2000, the leaders announced one of the most significant statements, the Declaration on the framework for an OAU response to unconstitutional changes of government.²³ Although it could be argued with some justification that the leaders were more interested in

21. It is not certain whether an obscurely worded provision in the Angolan Constitution could be interpreted to have the same effect. It states thus in art. 13(1), "General or common international law received under the terms of this constitution shall form an integral part of the Angolan legal system."

22. See a fuller discussion of this in Charles Manga Fombad, *The African Union, Democracy and Good Governance*, 32 CURRENT AFRICAN ISSUES 9 (2006).

23. See AHG/Decl.5 (XXXVI).

protecting themselves from military adventurers than with promoting democracy per se, this declaration contains some important principles on promoting good governance and stability. Coming as it did, on the very eve of the establishment of the AU, it is now considered one of the documents implementing the AU's democracy and good governance agenda.

The basic framework for promoting democracy and good governance amongst Member States of the AU is laid down in the Constitutive Act setting up the Union and as well as in a number of treaties, declarations and other instruments. As an international treaty, the Constitutive Act is binding on the Member States and governed by the rules of the 1969 Vienna Convention on the Law of Treaties as well as the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations.

There are four major instruments that contain the basic democratic principles of the AU democracy agenda, i.e., the Constitutive Act itself, the Declaration on the Framework for an OAU (AU) Response to Unconstitutional Changes of Government, the Declaration Governing the Democratic Elections in Africa, and the Declaration on Election Observation and Monitoring.

Unlike in the Charter of the OAU, the preamble of Constitutive Act emphasizes the important place given to democracy when it affirms the determination of Member States to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law. The basic democratic tenets of the Constitutive Act are carefully developed in the objectives and principles, which are far more elaborate and more radical than those that were contained in the Charter of the OAU.²⁴ Insofar as democracy and good governance are concerned, Article 3, dealing with the objectives of the Union states that it shall, *inter alia*:

- (g) Promote democratic principles and institutions, popular participation and good governance;
- (h) Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

These objectives define the goals and are directly linked to the principles contained in Article 4, which indicate what shall inform

24. While the purposes of the OAU were spelled out in two Articles with eleven short paragraphs in Article II, and its Article III contained only seven principles, the AU in Article 3 states that the organization has seventeen objectives while its Article 4 spells out sixteen principles. The AU initially had fourteen objectives but three more were added during the first extraordinary session of the Heads of state and heads of government on Feb. 3, 2003.

the attainment of these goals. For our purposes, the most relevant guiding principles contained in Article 4 include:

- (g) Non-interference by any member state in the internal affairs of another;
- (h) The right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity *as well as a serious threat to legitimate order to restore peace and stability in the member state of the Union upon the recommendation of the Peace and Security Council*; (emphasis added)
- (j) The right of member states to request intervention from the Union in order to restore peace and security;
- (m) Respect for democratic principles, human rights, the rule of law and good governance;
- (o) Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
- (p) Condemnation and rejection of unconstitutional changes of governments.

It is important to note that the democracy and good governance clauses in the Constitutive Act are not a novelty. Similar clauses had begun to appear in the constituent instruments of international organizations such as the Organization of the American States (OAS),²⁵ the European Union²⁶ and the Commonwealth.²⁷ Sanctions are often provided against Member States that violate this commitment.²⁸ For example, the Commonwealth democracy values are contained in the 1991 Harare Declaration. Ironically in March 2002, the Commonwealth suspended Zimbabwe's membership after a three-man team consisting of the leaders of Australia, Nigeria and South Africa reported that the presidential elections that Mugabe had won had not been free and fair and therefore in breach of the Harare Declaration.

25. See the Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas AG/RES. 1080(XXI-091) and more recently, the Inter-American Charter of 11 September 2011.

26. For a discussion of the EU use of democracy as a condition for membership and its policy in promoting democracy, see Janine Reinhard, *EU, Democracy Promotion Through Conditionality in its Neighbourhood: The Temptation of Membership Perspective or Flexible Integration* (last visited May 30, 2011), http://www.cria-online.org/12_1.html; and Victor Cuesta Lopez, *The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy* (last visited May 26, 2011), http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/cuesta_victor_3_en.pdf.

27. See the Harare Commonwealth Declaration of 1991 (last visited May 26, 2011), <http://www.thecommonwealth.org/files/36123/FileName/harare.pdf>.

28. See Konstantinos D. Magliveras & Ginos J. Naldi, *The African Union – A New Dawn for Africa?* 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 417 (2002).

A commitment to democracy by Member States of regional organizations has now become an established pattern and through this peer pressure can be brought to bear on states to democratize.

The Constitutive Act does nothing more than provide a broad framework of objectives and principles to guide more concrete action that is expected to be taken by the different organs and institutions created under it. Some action has now been taken to operationalize some of these objectives and principles through a number of declarations as well as protocols, which confer specific powers to some organs and institutions of the Union.

The second instrument, the Declaration on the Framework for an OAU (AU) Response to Unconstitutional Changes of Government, provides an interpretation for the vague wording of Article 4(p) of the Constitutive Act, which condemns and rejects unconstitutional changes of government. The presence of this provision, as well as the amendments made to Article 4(h) and the Lome declaration, underscore the concern by African leaders with the security of their hold on power at a time of momentous and sometimes violent changes. However, the declaration, although ostensibly dealing with "unconstitutional changes of government" (an obvious euphemism for coup d'etats), covers four important issues, i.e.,

- i) a set of common values and principles for democratic governance;
- ii) a definition of what constitutes an unconstitutional change of government;
- iii) measures and actions that the AU would progressively take to respond to an unconstitutional change of government; and
- iv) an implementation mechanism.

In defining the common values and principles for democratic governance, the Declaration makes it clear that the objective is to elaborate a "set of principles on democratic governance to be adhered to by all Member States." The belief is that "strict adherence to these principles and the strengthening of democratic institutions will considerably reduce the risks of unconstitutional changes on the continent." Without trying to be exhaustive, the declaration recognizes the following measures as a basis for the articulation of common values and principles for democratic governance:

- i) Adoption of a democratic constitution: its preparation, content and method of revision should be in conformity with generally acceptable principles of democracy.
- ii) Respect for the constitution and adherence to the provisions of the law and other legislative enactments adopted by Parliament.

- iii) Separation of powers and independence of the judiciary.
- iv) Promotion of political pluralism or any other form of participatory democracy and the role of the African civil society, including enhancing and ensuring gender balance in the political process.
- v) The principle of democratic change and recognition of a role for the opposition.
- vi) Organisation of free and regular elections, in conformity with existing texts.
- vii) Guarantee of freedom of expression and freedom of the press, including access to the media for all political stakeholders.
- viii) Constitutional recognition of fundamental rights and freedoms in conformity with the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981.
- ix) Guarantee and promotion of human rights.

To give practical effect to the principles enumerated, the Declaration defines an unconstitutional change of government as consisting of any of the following situations:

- i) Military coup d'etat against a democratically elected government.
- ii) Intervention by mercenaries to replace a democratically elected government.
- iii) Replacement of democratically elected governments by armed dissident groups and rebel movements.
- iv) The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

It is significant that the Declaration repeatedly refers only to action taken against a "democratically elected government," or one that refuses to relinquish power after losing elections.

The third document is the AU Declaration on the Principles Governing Democratic Elections in Africa.²⁹ This Declaration was adopted in Durban in July 2002 during the final summit of the OAU and the inaugural assembly of the AU. It is quite innovative and its main thrust consists of five points,³⁰ which can be seen as reinforc-

29. See AHG/Declarations 1-2 (XXXVIII) of 8 July 2002.

30. The five points are:

- i) An agreed set of principles of democratic elections.
- ii) A definition of the responsibilities of member states.
- iii) A definition of the rights and obligations under which democratic elections are conducted.
- iv) The role of the AU in election observation and monitoring; and
- v) The role and mandate of the AU commission.

ing the agreed common values and principles for democratic governance, some of which are actually repeated in this Declaration.

Finally, there are also the AU Guidelines on Election Observation and Monitoring. These guidelines are premised on the fact that electoral observation and monitoring has become an integral part of the democratic and electoral processes in Africa. It also recognizes that electoral observation and monitoring missions can play a role in diminishing conflicts before, during and after elections.

Mention must also be made of the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM). NEPAD is a vision and strategic framework for Africa's renewal that was developed from a mandate given by the OAU to five initiating Heads of State of Algeria, Egypt, Nigeria, Senegal and South Africa. During the July 2001 OAU Summit in Lusaka, African leaders adopted the NEPAD. It provides a comprehensive, integrated development plan that addresses key social, economic and political principles for the continent, and is designed to address the major challenges facing Africa.³¹ Amongst NEPAD's key principles is good governance as a basic requirement for peace, security and sustainable political and socio-economic development and African ownership and leadership, as well as broad and deep participation by all sectors of society. The immediate goal is to ensure that all African countries adopt and implement principles of democracy and good political economic and corporate governance and also entrench the protection of human rights.

NEPAD is now considered as a program of the AU designed to meet its development objectives. The implementing authority of NEPAD is the Heads of State and Government Implementation Committee (HSGIC) and consists of three states per region. Its Steering Committee comprises of the Personal Representative of NEPAD Heads of State and Government, and oversees the projects and programme development while its Secretariat, based in South Africa, coordinates the implementation of approved projects and programs.

In an effort to enhance the quality of governance in Africa, on March 9, 2005, the HSGIC adopted the Memorandum of Understanding of the African Peer Review Mechanism (APRM) and the Declaration on Democracy, Political, Economic and Corporate Governance.³² This latter document contains prioritized and approved codes and standards in four focus areas: democracy and good political governance, economic governance and management; socio-economic development, and corporate governance. The HSGIC also adopted

31. See generally the NEPAD website, <http://www.nepad.org/2005/files/home.php>.

32. See generally NEPAD, Country Self-Assessment for the African Peer Review Mechanism, <http://www.nepad.org/2005/files/documents/156.pdf> (last visited May 30, 2011).

documents that outline the core principles, processes and objectives of the APRM including the APRM base document, the APRM organization and processes document, the document on objectives, standards, criteria and indicators of the APRM.

Although the fifty-three African Member States of the AU³³ have ratified the Constitutive Act, not all have signed and ratified many of the treaties and protocols that have been adopted by the organization under its democracy and good governance agenda in order to implement the principles and objectives of the founding instrument. Nevertheless, the Constitutive Act on its own contains many provisions with far reaching effect on national constitutions of Member States. It is now clear that democracy, good governance and respect for human rights are no longer issues which each state can freely deal with regardless of these AU instruments. Even those important instruments which have not been ratified have an impact on the domestic constitutional law, as we shall see in the next section.

C. *Internationalization in the Process of Progressive Judicial Interpretation of the Constitution as part of a Global Judicial Dialogue*

National constitutional law is also being increasingly influenced by international law in the process of judicial interpretation of the constitution. This is occurring in numerous ways.

In most anglophone African countries, an instrument which has been signed, whether or not it has been ratified and domesticated, can still have important legal consequences domestically as an aid to constitutional interpretation. Amisshah JP in the Botswana case of *Attorney-General v. Dow*, cited with approval the following passage from the judge *a quo* in the same case:

I bear in mind that signing the Convention [the OAU Convention] does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the Convention must be preferable to a "narrow construction" which results in a finding that section 15 of the Constitution permits discrimination on the basis of sex.³⁴

The Court basically followed the well-established common law presumption in statutory construction that courts will strive to inter-

33. The only one that is not a member of the AU is Morocco who withdrew from the then OAU when the Western Sahara, which it claims to be part of its territory, was recognized as an independent state by the organization.

34. [1992] BLR 119 (Botswana) at 154.

pret legislation in a manner that will not conflict with international law. The judge went further to explain this:

Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction is quite permissible under section 24 of the Interpretation Act . . .³⁵

Such an approach must only be adopted, however, when the domestic legislation in question is obscure. This caveat was explained by Diplock L.J., an English judge, in *Saloman v. Commissioners of Custom & Excise*:

If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties, and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another and others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption.³⁶

Another way in which the internationalization of the constitutional process through judicial interpretation is taking place are instances where there are lacunae, ambiguities or uncertainties in the relevant constitutional provisions. The general approach of common law jurisdictions is to adopt the interpretive principle that the uncertainties or ambiguities should be resolved in a manner that upholds any international instruments, especially human rights

35. *Id.*

36. [1966] 3 All ER 875.

instruments which might have influenced the adoption of such provisions.³⁷ In fact, it has been argued that

where such a constitutional text makes reference to fundamental human rights, as also recognized in international law, it is highly desirable, indeed obligatory, for judges within municipal systems to familiarize themselves with the international jurisprudence pertaining to the same words in international and regional bodies devoted to expounding their meaning.³⁸

It can be argued that as a result of the Bangalore Principles on the Domestic Application of International Human Rights Norms³⁹ there is now some sort of a duty on judges to adopt this interpretative principle. But, as with legislation, this interpretative principle will certainly not apply where the constitution is clear and not inconsistent with international law.

Finally, the internationalization of constitutional law must be seen as part of a global judicial dialogue. This has entailed the gradual erosion of the strict doctrine of dualism in most common law jurisdictions as well as the recognition that there is much to be gained from looking at the pronouncements of international and regional courts and tribunals dealing with issues similar to those contained in national constitutions. This is particularly true where the constitution does nothing more than recognize and restate universal and fundamental values and principles. In common law jurisdictions, it is often regarded as an inherent part of the judicial function to be creative, and there can be no such creativity without recourse to the latest developments on the particular issue by other courts and tribunals. In fact, as Judge Kirby said: “[T]he willingness of national courts to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies represents a paradigm shift that has happened in municipal law in recent years.”⁴⁰ This is a universal trend that is bound to be copied in Africa as judges realize that they can not isolate themselves from the rapid changes in legal thinking and analysis and from the fresh approaches

37. For a detailed discussion of this, see Justice Michael Kirby, *International Law – The Impact on National Constitutions* (published Mar. 30, 2005), http://www.hcourt.gov.au/speeches/kirgyj_30mar05.html.

38. Justice Michael Kirby, *The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms* (last visited May 26, 2011), http://www.highcourt.gov.au/speeches/kirgyj_bang11.htm, at p.10.

39. See *id.*, and Lloyd G. Barnett, *International Human Rights Norms and their Domestic Application: Judicial Methods and Mechanisms* *Revista IIDH* Vol. 29 (1999), <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/29/pr/pr3.pdf> (last visited Feb. 2, 2012).

40. Justice Michael Kirby, *International Law – The Impact on National Constitutions* (published Mar. 30, 2005), http://www.hcourt.gov.au/speeches/kirgyj_30mar05.html.

and new insights generated by international jurisprudence to deal with common problems.

D. Internationalization of Constitutional Law and the Emerging Customary International Law Responsibility-to-Protect Principle

Modern constitutional design can no longer ignore certain basic principles, standards, institutions and values that are considered fundamental and essential to ensuring the rule of law, constitutional democracy and good governance. Nor can states hide any longer behind the principle of sovereignty and non-intervention when they violate their constitutions in a manner that not only puts the lives of their citizens at risk but also directly or indirectly threatens international peace and security. The adoption of a dysfunctional constitution that results in violence and political instability poses a threat not only to the state concerned but also to neighboring states and the international community as a whole. Typical instances of dysfunctional constitutional processes and practices that have threatened international peace and security include the situations in Côte d'Ivoire, Sudan, Democratic Republic of the Congo, Somalia, Kenya and Zimbabwe. More recently uprisings have toppled the leaders of Tunisia and Egypt, and have spread to Libya and other Arab countries in northern Africa and the Middle East, becoming a matter of international concern.

Over the years, there have been attempts to devise international principles to deal with or pre-empt such breakdowns of the national domestic constitutional order. As we have seen with respect to the AU and more generally, there are a growing number of regional and international frameworks designed to put pressure on constitutional designers to incorporate provisions that recognize and protect not only fundamental human rights but also certain minimum standards of constitutional behavior. In this context, the new AU policy towards intervention in the domestic affairs of Member States and its potential impact on constitutional development that deserves special attention.

While the Constitutive Act, like the OAU Charter, reaffirms the principles of sovereignty and non-intervention and also prohibits the use, or the threat of the use, of force among Member States, these precepts are now heavily qualified. As was noted earlier, the AU, unlike the OAU, can intervene under the circumstances defined in Article 4(h) of the Constitutive Act. Africa has seen the blood of its people spilled by sadists like Idi Amin, Jean-Bedel Bokassa and Macias Nguema at a time when the OAU was too weak and had no mandate to speak or act. With the present Article 4(h), there should be no excuse if the AU fails to act and even to use military force if

necessary. It has been very wary when dealing with violations by some of the more powerful states. When there was a coup d'état in Anjouan, the Organisation had no hesitation in ordering an invasion of the island under the code name "Operation Democracy in Comoros" on March 25, 2008, although there were similar coups in other countries both before and after 2008 when the Organisation did nothing more than making threats or impose ineffective sanctions against the coup plotters.

Perhaps the most significant provision in the Constitutive Act for our purposes is Article 4(h) which gives the AU the power to intervene in a state "pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity." By adopting Article 4(h), the AU became the first international organization to formally recognize the concept that the international community has a responsibility to intervene in crisis situations if the state fails to protect its population. It was only during the 2005 World Summit that Member States of the UN accepted this responsibility to protect (RTP) principle as a norm of international law.⁴¹ Although aspects of this principle have been expressed in one form or another over the years,⁴² its modern foundations appear to be the Responsibility to Protect Report submitted by the International Commission on Intervention and State Sovereignty (ICISS), set up by the Canadian Government in September 2000.⁴³ Based on the idea that sovereignty is not only a privilege but also a responsibility, it outlined the obligations of the international community to prevent and halt four kinds of crimes: genocide, war crimes, crimes against humanity and ethnic cleansing. Although critics have claimed that the RTP principle is an imposition of the West on developing countries, as Edward Luck points out, the earlier and actually more forceful endorsement of the principle by the AU suggests otherwise.⁴⁴ The principle is considered to consist of at least three elements. First, the state has a responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing (that is, mass atrocities). Second, if the state is unable to

41. See the 2005 World Summit Outcome Document adopted by the General Assembly (Sept. 15, 2005), http://www.srhhivlinkages.org/uploads/docs/articles/worldsummitoutcome_2005_en.pdf. In 2006, the Security Council in Resolution S/RES/1674 reaffirmed key paragraphs, 138 and 139, which attempt to define the scope of the responsibility to protect principle.

42. See Edward C. Luck, *The Responsible Sovereign and the Responsibility to Protect*, in ANNUAL REVIEW OF THE UNITED NATIONS AFFAIRS (Joachim W. Müller & Karl P. Sauvant eds., 2008).

43. For most of the emerging literature on this topic, see the International Crisis Group, *Responsibility to Protect*, <http://www.crisisgroup.org/en/key-issues/responsibility-to-protect.aspx> (last visited on Feb. 2, 2012).

44. Edward C. Luck, *The United Nations and the Responsibility to Protect* (published Aug. 2008), http://www.humansecuritygateway.com/documents/TSF_theUNandR2P.pdf.

protect its population on its own, the international community has a responsibility to assist the state by building capacity. This could be done in several ways, such as by developing early-warning capabilities, mediating conflicts between political parties, strengthening the security sector, and mobilizing standby forces. Finally, if the state manifestly fails to protect its citizens from mass atrocities and if peaceful measures fail, the international community has the responsibility to intervene, first diplomatically, then more coercively, and as a last resort, with military force. There is an emerging principle that intervention for humanitarian protection, including military intervention without a state's consent, is legitimate in extreme cases when major harm to civilians is occurring or imminent and the state in question is unable or unwilling to end the harm or is itself the perpetrator.⁴⁵ This RTP principle must be seen as an attempt by international law to ensure accountability and good governance, to protect human rights, to promote social and economic development and to ensure a fair distribution of resources within the state. Although the nature, scope, tools and emerging practice are still subject to debate, it is nevertheless clear that issues of good governance, respect for human rights and the rule of law are no longer merely national or local matters.

A number of concerns have been raised regarding this principle. First, it can be viewed as an infringement of state sovereignty.⁴⁶ This has been countered by the argument that the primary responsibility for protecting the population remains with the national state. The international community will only intervene without a state's consent when the state is either allowing mass atrocities to take place or is committing them itself, in which case the state is no longer fulfilling its responsibilities as a sovereign. Second, the scope of application to only four crimes, i.e., genocide, war crimes, crimes against humanity and ethnic cleansing has been criticized as being too narrow. The reality, however, is that broadening the principle's applicability could diminish its effectiveness. Third, the issue of military intervention remains controversial but such intervention is legitimate in any event only when all other peaceful means to solve the problem have failed. Fourth, it has been doubted whether the RTP adds anything to the pre-existing right to humanitarian intervention. Yet, the two are different not only in their objectives but also

45. Further legal support for this form of intervention has been found to exist in a wide variety of other legal documents including the human rights provisions and chapter VII of the UN Charter, UDHR, the Genocide Convention, the Geneva Conventions and Additional Protocols on International Humanitarian law and the statute of the International Criminal Court. See further *A New Approach: 'The Responsibility to Protect'* (last visited May 30, 2011), http://www.idrc.ca/en/ev-28738-201-1-DO_TOPIC.html.

46. See *Responsibility to Protect* (last modified May 29, 2011), http://en.wikipedia.org/wiki/Responsibility_to_protect.

their scope. RTP offers a broader range of tools to both prevent and halt mass atrocities and can only be carried out multilaterally, with the approval of the Security Council or, in the context of the AU, with the approval of the Assembly. Finally, there is the criticism that the RTP can be exercised selectively and in a biased manner that favors the economically or politically powerful states, which can easily influence the Security Council or the Assembly of the AU. This argument cannot be dismissed easily. While it is true that these institutions are essentially political bodies whose actions are often dictated by the political agendas of the rich and powerful states, this does not diminish the importance and legitimacy of the RTP as an important bulwark against repressive regimes that use constitutions merely as smokescreens to camouflage their dictatorship.

In the last decade, a number of serious crises have shown just how far the UN is prepared to go in intervening in a national constitutional crisis that threatens regional or international peace and security. There have been a good number of such political crises in Africa, in spite of the so-called third wave of democratization that was supposed to have led to more open, transparent, accountable, democratic and participatory governments. For example, in the Liberian crisis (consisting of the First Liberian Civil War 1989-1996 and the Second Liberian Civil War 1999-2003), the UN Security Council passed a number of resolutions, which intervened directly in the internal constitutional system in Liberia.⁴⁷ In order to stabilize the situation in the country and to limit the destabilizing effect it was having on neighboring Sierra Leone, the resolutions imposed an embargo on the export of Liberian rough diamonds, placed a travel ban on several senior officials, ordered the Liberian government to stop supporting armed rebel factions in Sierra Leone and froze the funds and assets controlled by some of these armed rebels.⁴⁸

The UN Security Council resolutions regarding the situation in Côte d'Ivoire have been even more far reaching. In 2005, acting under Chapter VII of the UN Charter, the Security Council ratified a decision of the African Union Peace and Security Council.⁴⁹ This decision recognized that the political situation in the country made it impossible for the elections scheduled to take place at the end of President Laurent Gbagbo's term on October 31, 2005, and authorized him to

47. See Kofi Oteng Kufuor, *Developments in the Resolution of the Liberian Crisis*, 10(1) AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 373 (1994), and IKKCHI MGBEOJI, *COLLECTIVE INSECURITY: THE LIBERIAN CRISIS, UNILATERALISM AND GLOBAL ORDER* (2004).

48. See, for example, S/RES/1521 of 22 December 2003, S/RES/1532 of 12 March 2004, S/RES/1549 of 17 June 2004, S/RES/1579 of 21 December 2004, S/RES/1607 of 21 June 2005, S/RES/1647 of 20 December 2005, S/RES/1683 of 13 June 2006, S/RES 1647 and S/RES/1689 of 20 June 2006.

49. See S/2005/1633 of 21 October 2005.

stay in power for another year.⁵⁰ The Council also requested the AU and the Economic Community of West African States (ECOWAS) to consult the parties to the various peace accords that had been signed in order to decide on who was to be appointed Prime Minister.⁵¹ The situation soon degenerated into a civil war which saw the country split into two. After years of protracted negotiations, UN organized elections were held in November 2010 under the terms of a 2007 Ouagadougou Political Agreement (OPA) aimed at reunifying the government-controlled south and the rebel-controlled north.⁵² This ended in a run-off between the incumbent president and the main opposition leader and former Prime Minister, Alasanne Ouattara, both claiming victory and each separately inaugurating himself as president. Ouattara based his victory on the UN-certified results announced by the country's Independent Electoral Commission (IEC) while his rival claimed victory on the basis of a decision by the country's Constitutional Council.⁵³ The international community (especially the UN and the AU) have broadly rejected Gbagbo's electoral victory and endorsed Ouattara as legally elected president. The standoff has resulted in political tension, violence, numerous deaths and accusations of flagrant human rights abuses on both sides. The OPA contained a number of legal reforms relating to election administration, citizenship and other matters, and the UN was designated as the independent election certifier.⁵⁴ The UN Operation in Côte d'Ivoire (ONOCI), besides providing assistance to ensure free and fair elections and related processes of citizen identification and voter registration, has also been involved in activities such as the re-establishment of state administration, law and order, and adherence to human rights laws. In other words, many aspects of the national constitutional systems have been replaced by an international system under UN and AU supervision. In response to Gbagbo's refusal to concede defeat and cede the presidency to Ouattara, the international community⁵⁵ imposed a range of sanctions such as diplomatic

50. *Id.*

51. This consisted of the Linas-Marcoussis accords signed after the Paris peace conference of Jan. 25-26, 2003, the Accra III accords of July 30, 2004 and the Pretoria accords of Apr. 6, 2005.

52. See Nicolas Cook, *Côte d'Ivoire's Post-Election Crisis: CRS Report for Congress* (last visited May 26, 2011), <http://www.fas.org/sgy/crs/row/RS21989.pdf>.

53. According to the IEC, Ouattara had won by 54.1% to his rival's 45.9% while the Constitutional Council decision gave Gbagbo victory by 51.5% to 48.6% for his rival.

54. In fact the UN Operation in Côte d'Ivoire (UNOCI) is a multifaceted mission which implements several aspects of the peace accords signed under the auspices of the UN and AU. It monitors an arms embargo and deals with issues such as the re-establishment of state administration and law and order, adherence to human rights laws, and aids efforts to conduct.

55. The AU, ECOWAS, UN, EU, the international financial institutions and several African and Western countries have imposed various sanctions and financial restrictions on Gbagbo and members of his regime.

isolation and non-recognition of his government, personal travel and financial sanctions against members of the regime, freeze on credits and access to state financial assets. Although for more than five months, Gbagbo scoffed at numerous threats by ECOWAS to intervene militarily on behalf of the international community, his forces were eventually overrun by the forces of Ouattara. The latter was sworn in as president and has promised to refer Gbagbo for possible prosecution by the ICC. Ouattara's victory saved the country from months of negotiations to broker a power-sharing agreement. As the examples of Kenya and Zimbabwe show, power-sharing agreements hardly resolve the political and economic issues that underlie any conflict, nor do they bode well for the rule of law and democratic governance in the country.

Another aspect of the expanding reach of international law into the domestic domain has been the reaction of the international community to the uprising in the Arab world which started in Tunisia, led to the departure of President Ben Ali, then spread to Egypt resulting in the end of three decades of dictatorship under Hosni Mubarak, and then ended four decades of Gaddafi dictatorship in Libya. In the latter case, the intervention by the international community contributed significantly to the fall of the regime. The political crisis in Côte d'Ivoire like that in Libya, is an example of the turmoil plaguing several African countries and illustrates the importance, as well as the limitations, of the evolving internationalization process as a means of putting Africa irrevocably on the path toward constitutional governance and democracy. This raises many questions concerning the relationship between international law and national constitutional law and its possible impact on African constitutionalism.

IV. SOME IMPLICATIONS OF THE INTERNATIONALIZATION PROCESS ON CONSTITUTIONALISM IN AFRICA

The previous chapters show that internationalization results in a multiplicity of legal and practical constraints on domestic constitutions. Can this be a good thing for African countries that are grappling with the challenges of operating under new or revised constitutions which for the first time provide some prospects of effective constitutionalism, democracy, rule of law and good governance? In analyzing this question several points should be distinguished.

To begin with, international law standards and principles often do not come in to displace domestic law. In most instances, such as in the area of human rights, they were adopted because they are more effective, or, during periods of crisis, because the domestic constitutional law rules have proven inefficient. International norms may thus replace deficient domestic laws or complement them. This is

what has been happening in countries that have almost been reduced to failed states such as Côte d'Ivoire, Liberia, Sierra Leone and Democratic Republic of the Congo. In many of these crisis situations, the adoption of international standards becomes almost inevitable and perhaps imperative where a purely domestic response will not resolve a crisis that threatens regional or international peace and stability. Hence, evolving principles of the internationalization process will have the effect of reinforcing constitutionalism by putting oppressive regimes on notice that they international community is watching and may intervene when massive atrocities are being committed.

Another important result of the internationalization phenomenon has been the progressive convergence of constitutional principles and standards. This is particularly evident when one compares the pre-and-post 1990 African constitutions. There is much similarity in form, institutional design and content of most of the post-1990 constitutions. The core elements of constitutionalism are now present in almost all of them.⁵⁶ For example, unlike in the past, these post-1990 constitutions now have *inter alia*, provisions recognizing and protecting human rights, providing for separation of powers and judicial independence as well as provisions controlling the process of constitutional amendment. However, the evidence of considerable convergence should not be taken too far. As Cheryl Saunders rightly points out, "no constitution is exactly the same in form or operation" as another.⁵⁷

The fact that many constitutions expressly or implicitly provide for references to international or foreign law combined with the growing convergence of constitutional law principles and standards necessitates a more liberal and progressive approach to constitutional adjudication. The post-1990 African constitutional rights revival has also seen the gradual emergence of more independent judiciaries with judges who are more educated, confident and increasingly more assertive in their role to creatively promote the course of constitutional justice in every facet of their judgments. Internationalization enables judges to go beyond the normal common law judicial liberalism which enables them to refer to, cite and rely on the decisions of courts in other common law jurisdictions as persuasive authorities. Because of the commonality in the provisions of many constitutions and because they have been inspired by the same philosophy, it is now not merely possible but actually imperative for

56. See generally Charles Manga Fombad, *Post 1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism*, in *THE RESOLUTION OF AFRICAN CONFLICTS* 179-99 (A.G. Nhema & P.T. Zeleza eds., 2008), and Charles Manga Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons Perspectives from Southern Africa*, 55 *AM. J. COMP. L.* 1-46 (2007).

57. In Saunders, *supra* note 11.

judges to investigate how the problems have been solved in other jurisdictions, both by national and international courts. In interpreting the constitution, judges must try to keep up with the standards and values of the times. As the former Chief Justice of Zimbabwe, Anthony Gubbay rightly observed, "a judicial decision has greater legitimacy and will command more respect if it accords with international norms that have been accepted by many jurisdictions than if it is based upon the parochial experiences or foibles of a particular judge or court."⁵⁸ Such was the approach adopted in the Botswana Court of Appeal in the *Unity Dow* case as evidenced by a *dictum* of Aguda JA:

[I]t is the primary duty of the judges . . . to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.⁵⁹

Yet, in spite of the evidence of emergence of an emboldened and more assertive judiciary in Africa, numerous challenges remain.⁶⁰ Nevertheless, because of the many areas of convergence, there is opportunity for learning and borrowing from the approach adopted by other national and international courts. In this regard, internationalization has provided considerable opportunities for cross-systemic fertilization.

In fact, the scope and benefits of cross-systemic fertilization has increased in tandem with the phenomenon of internationalization. This has been taking place at two levels. In recent years, numerous international and regional constitutional support organizations have emerged that have been helping many countries in Africa with the constitutional revision process.⁶¹ For example, the 2010 Angolan and Kenyan constitutions benefited from the expertise of some foreign consultants, but it was significant that this included experts from

58. In *Foreword*, 1 Commonwealth Human Rights Digest, at 1 (1996).

59. [1992] BLR 119(Botswana) at 166.

60. See Emmanuel K. Quansah & Charles Manga Fombad, *Judicial Activism as a Defence to Authoritarian Impulses: Lessons from India, Botswana and South Africa*, 2 SPECULUM JURIS 41-65 (2010), and Prempeh H. Kwasi, *Africa's 'Constitutionalism Revival': False Start or New Dawn?* 5 (3) I.CON 492-94 (2007).

61. One of the best although not well known in Africa is the European Commission for Democracy through the Law, better known as the Venice Commission. Although made up of essentially Member States of the Council of Europe and a few others, Morocco, Algeria and Tunisia are the only three African members while South Africa has a special co-operation status similar to that of an observer. One of the key areas of the Commission's work is constitutional assistance. In collaborating with national constitutional commissions, it prepares and provides draft opinions on whether constitutional proposals meet democratic standards and how they can be improved upon on the basis of common experience. See generally http://www.venice.coe.int/site/main/Constitutional_Assistance_E.asp.

other African countries. Foreign experts, including some from other African nations, were also invited to participate in the recent discussions on the amendment of the Ghanaian constitution.

It has been suggested that the main reason why the prospects for constitutionalism have been far better in anglophone African countries than in the francophone nations is the tendency for the latter to rely too much on the inherited constitutional system.⁶² Anglophone countries have approached constitutional reforms with more openness and have looked far beyond England for inspiration and guidance. Not only have constitutional review commissions included foreign experts from different constitutional systems, but members of these commissions have usually travelled to Europe, North America, Asia and India to learn more about modern constitutional developments. By contrast, many francophone African constitutional draftsmen have continued to rely almost slavishly on what they perceive as the most reliable and unassailable model; the Gaullist Fifth Republic and the timid amendments that have been made to it in the last fifty years.⁶³

The South African 1996 constitution is an example of cross-systemic fertilization with borrowings from the English Westminster model and the German and French civil law constitutional systems. An example of this dual influence is the mixed system of control of constitutionality of laws which is both centralized and decentralized and provides for both abstract (preventive) and concrete (repressive) judicial review. The international influence on domestic constitutional systems has also manifested itself in other ways, e.g., the appointment of foreign judges to serve on the superior courts of countries such as Gambia, Namibia, Botswana, Lesotho and Swaziland; the involvement of many international NGOs such as Amnesty International, Human Rights Watch and Survival International in domestic constitutional disputes; and in putting forward a "universalist" understanding of human rights principles.⁶⁴

62. See Filip Reyntjens, *The Winds of Change. Political and Constitutional Evolution in Francophone Africa, 1990-1991*, 25 JOURNAL OF AFRICAN LAW 51 (1991).

63. See further, Charles Manga Fombad, *Constitutional Reforms in France and their Implications for Constitutionalism in Francophone Africa* (June 2008), available at http://www.afrimap.org/english/images/paper/AfriMAP_Fombad_Eng.pdf; see also Myriam Hunter-Henin, *Constitutional Developments and Human Rights in France: One Step Forward, Two Steps Back*, 60 ICLQ 167 (2011).

64. Perhaps the best recent example of this is the Barsawa case, one of the longest and most expensive that has come before the Botswana courts cases (started in 2002 and the decision was rendered in 2006) that was taken up by Survival International, a pressure group advocating the rights of indigenous peoples. See *Basarwa Case: Moral Victory for SI*, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/SMDL-8EEHNP?OpenDocument>. Although the Basarwa won, the Government continued to interpret the decision narrowly forcing Survival International to take the matter to the Court of Appeal for an interpretation of the decision. See Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VIRGINIA J. OF INT'L LAW 985, 989 (2009), expressing reservation at those NGO interventions that take the form of "constitutional advice

Another level of cross-fertilization is the course of constitutional adjudication. As we noted earlier, many African constitutions enjoin the courts when interpreting the constitution to invoke international and comparative law.⁶⁵ The South African Constitutional Court has taken a decisive lead in the global interpretation of constitutional rights, especially when dealing with issues of fundamental human rights. Thus, in one of the first cases that came before it, *S v. Makwanyane*,⁶⁶ the court reviewed and cited more than 100 decisions from courts in the United States, Canada, Hungary, India, the European Court of Human Rights and the UN Committee on Human Rights before declaring that the death penalty was unconstitutional as a form of cruel and inhumane treatment.⁶⁷ In dealing with the issue of corporal punishment in *S v. Williams*, the Court noted a "growing consensus in the international community" that judicially imposed whipping "offends society's notion of decency and is a direct invasion of the right which every person has to human dignity."⁶⁸ Perhaps one of the best examples of the far-reaching impact of internationalization on constitutionalism is the recent Constitutional Court decision in *Glenister v. President of the Republic of South Africa*.⁶⁹ By a majority of 5 to 4, the Court declared that the amended Chapter 6A of the South African Police Service Act was inconsistent with the constitution and invalid to the extent that it failed to secure an adequate degree of independence for the anti-corruption unit that it sought to establish. Although there was no particular provision in the constitution specifying that the unit must be independent, the majority held that the constitutional obligation to set up an independent unit could be inferred from the duty imposed by section 7(2) of the constitution to "respect, protect and fulfil" the rights in the bill of rights. The Court went further to point out that section 39(1)(b) of the constitution required the Court in interpreting the bill of rights to consider international law. Since section 231 states that all international agreements approved by Parliament are binding, the establishment of an anti-corruption unit ignoring the binding international agreements which required such a unit to be independent

giving" in which the NGOs offer constitutional structures and models as model tools worth adopting. This is further discussed by Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WILLIAM AND MARY L. REV 1473 (2008).

65. *Id.*, see also art.17 (3) of the Cape Verde Constitution of 1999, and sec. 11(2) of the Malawi Constitution of 1994.

66. 1995 3 SA 391 (CC).

67. In *Minister of Health v. Treatment Action Group (TAC) (No.2)*, 2002 (5) SA 721 (CC), the Constitutional Court even went further than this when it looked at a detailed comment by the UN Committee on Economic, Social and Cultural Rights in interpreting section 27 of the constitution. Although it did not adopt all of the comments, it was certainly influenced by this.

68. 1995 7 BCLR 861 (CC)(South Africa).

69. Judgment was delivered on Mar. 17, 2011, Case No: CCT 48/10, <http://www.saflii.org/za/cases/ZACC/>.

was not a reasonable constitutional measure. In this indirect manner, the court declared legislation unconstitutional for violating international law. It became relevant not only because it was based on instruments that are binding on the South African government but also because these documents reflect the ethos of constitutionalism. It is also worthwhile citing a former judge of the South African Constitutional Court, Kate O'Regan, who in an *ex curia* opinion reviewing the first ten years of the court's work stated:

Like many South African courts before us, we find international law and comparative law most helpful in our jurisprudence. There is an emerging dialogue across continents and nations concerning democracy and human rights and we engage in this dialogue in the development of our own Constitution in our own specific context.⁷⁰

A few other African courts are also participating in this international dialogue in which they try to improve the corpus of their national constitutional law by learning from the experience of other jurisdictions.⁷¹

The enormous possibilities for enriching national constitutional law through the process of judicial dialogue are unlikely to be felt as strongly in francophone and possibly lusophone Africa. There is not much reliance on precedents and generally court judgments contain little factual and legal analysis. Besides referring to the applicable law, these judgments hardly ever articulate the factors or policies that might have influenced a particular conclusion. An example of this limited scope for judicial dialogue in francophone Africa is Benin. As was noted earlier, its fairly progressive constitution not only expressly incorporates international law but also states that their provisions have a "value superior to the internal law."⁷² Nonetheless, Anna Rotman, in a recent review of the work and jurisprudence of its Constitutional Court, observes that the judges "seldom refer to international conventions in their decisions."⁷³

70. Kate O'Regan, *Human Rights and Democracy – A New Global Debate: Reflections on the First Ten Years of South Africa's Constitutional Court*, 32 INT'L J. OF LEGAL INFORMATION 201 (2004).

71. Besides the Botswana Court of Appeal decision in the *Dow* cases referred to above, see the Namibian Constitutional Court decision in *Nwellie v. Ministry of Works* [1975] 4 LRC 184 and more generally, see Nsongurua Udombana, *Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies*, 5 AFRICAN HUMAN RIGHTS JOURNAL 47 (2005).

72. See Preamble to the Constitution.

73. In Anna Rotman, *Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights*, 17 HAR. HUM. RTS. J. 281, 310 (2004), and Bernadette Codjovi, *La Places des Conventions Internationales dans le Droit Béninois: Le Juge Béninois Devant Les Conventions Internationale*, in *Actes du Séminaire: Le Bénin et Les Conventions Internationales Relatives aux Droits de l'Homme et de la Promotion de la Démocratie*, (2002), Cotonou (unpublished).

Until a few months ago, the South African bill of rights was considered to have set the highest standard as it contained the most detailed and carefully worded listing of rights incorporating not just the classic civil and political rights, but also embracing panoply of social, economic and cultural rights.⁷⁴ It has now been overtaken by the new Angolan and Kenyan Constitutions which contain even more elaborate provisions. These two countries appear to have learned from the South African experience.

An important issue that has been raised by the increasing internationalization of constitutional law principles and standards in Africa is the lack of an intra-African constitutional dialogue. Most of the cases that many African courts, especially the South African Constitutional Court, cite and rely on hardly ever come from other African national courts or from continental tribunals. Problems of access to these decisions can hardly explain this. Increasingly, the latest and most important decisions of African national constitutional courts and regional courts are just a mouse click away.⁷⁵ As result of the rapid advances in information and communication technology in the last two decades not only judgments but also an extraordinary amount of other constitutional material from different jurisdictions is now easily available. The benefits of this will be completely lost if national legal experts and judges fail to see the benefits of learning from what is happening elsewhere on the continent. An important way of overcoming this artificial mental barrier could be to establish cross-national networks of judges. Personal contacts between judges will enable them to share their experiences and see how colleagues occupying similar positions elsewhere often confront the same kinds of problems. Although there are many fora where judges from different countries meet, with the exception of the recently established Judges' Working Group in the African Network of Constitutional

74. As Byrnes, *Hong Kong's Bill of Rights experience and its (ir)relevance to the ACT Debate over a Bill of Rights*, put it:

If one were to pursue a car analogy, perhaps one would see the South African Constitution as the Rolls Royce of Bills of Rights, the UK Human Rights Act as the finely tuned Jaguar (built with European parts), the New Zealand version as the souped-up Mini, and the Hong Kong version might come in as a Lada, under-powered and irrelevant.

(last visited Mar.3, 2011), <http://acthra.anu.edu.au/publications/>.

75. The Southern African Legal Information Institute (SAFLII) now provides free online access to the latest decisions from the superior courts in Angola, Botswana, Lesotho, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. It also provides access to the decisions of the following regional courts of justice: COMESA, the East African Court of Appeal, the East African Court of Justice and the SADC Tribunal, <http://www.saflii.org/>.

Lawyers (ANCL),⁷⁶ these have often been organized along regional lines and provided little opportunity for judges from the different legal African legal systems actually to mingle.⁷⁷ Also, as the numerous regional and continental tribunals in Africa become more active,⁷⁸ the process of internationalization through cross-jurisprudential fertilization will be intensified. This will be particularly true where national constitutional court decisions are subject to review by these tribunals. This will force national courts to take account of the jurisprudence of these tribunals in order to avoid the embarrassment of their decisions being reversed.

The internationalization phenomenon, acting as a catalyst for the convergence of national constitutional systems, has brought to the fore the need for a new era in constitutional law scholarship that must be informed and guided by knowledge in the techniques and methodological insights of comparative constitutional law. It is only when there is some familiarity or understanding by African constitutionalists and judges of the legal systems that operate in the other African countries that there can be serious intra-African dialogue. The common colonial experience, and the similarities in economic, social and cultural conditions, suggest that solutions adopted in one African country could more easily be adapted in other countries on the continent. Thus, looking to other African countries seems superior to the ongoing reliance on imported Western models for no better reasons than sentimental attachment based on previous colonial ties.

In spite of the many obvious advantages of the internationalization of domestic constitutional law principles and standards, some criticisms of this development must be taken seriously. There is, for example, the perception that the internationalization phenomenon is a new and more insidious form of colonialism. Yet, such a claim is

76. This mixed judicial forum consisting of constitutional court judges from anglophone, francophone, lusophone and hispanophone Africa was formally set up during the ANCL Annual conference that took place in Rabat, Feb. 2-5, 2011.

77. Some of these are the East African Magistrates and Judges' Association, the East African Community Forum of Chief Justice, and the Southern African Chief Justices Forum (SACJF). The only exception is the latter which includes the Chief Justices from Angola and Mozambique.

78. Africa has an impressive number of continental and regional international tribunals but there is little evidence that there is any dialogue either between the national courts and these tribunals or between these tribunals themselves, with perhaps the exception of the African Commission on Human and Peoples' Rights, which, however, is a non-judicial body that only makes recommendations. The African Court on Justice and Human Rights and the African Court of Human and Peoples' Rights are idle, the Southern African Development Community (SADC) Tribunal became too active for its own good. After delivering a number of judgments against the Zimbabwean government, its operations were suspended until further notice in 2007. The most active of these tribunals has been the Economic Community for West African States (ECOWAS) Tribunal which since its establishment in 2002 had dealt with numerous cases while others, such as the East African Court of Justice and the Common Market of Eastern and Southern Africa Court of Justice have handled just a few cases.

difficult to justify. According to one writer, even if this were a form of re-colonization, it would be a more palatable form because the world is now acting with a conscience which is quite different from the colonial period.⁷⁹ More importantly, we must not forget that it was African governments which, in the Constitutive Act of the AU, fundamentally departed from the principle of strict sovereignty with very limited rights of interference and which embraced a heavily qualified concept of sovereignty with specified instances in which the AU can interfere in the domestic affairs of Member States. This merely reflects the current trend that recognizes that absolute sovereignty has no place in a modern, increasingly globalizing and interdependent world, where problems, especially those resulting from bad governance, are bound to impact on neighboring states. It is true that the end of the Cold War diminished Africa's value as a battleground for competing political ideologies and, to that extent, the interest of the big powers to interfere in its affairs. Today, however, the war against international terrorism has refocused attention to what is happening on the continent. Bad constitutions, which provoke political turmoil provide fertile breeding ground for international terrorists and thus a plausible reason for foreign intervention. It is not an accident that Gaddafi was trying to persuade the West to see the uprising in his country not as a result of a popular revolt against an oppressive regime but rather as the work of al-Qaeda.⁸⁰

V. CONCLUSION

In an era of expanding globalization and regionalization that has seen the appearance of "de-territorialized problems and the emergence of global networks in the fields of economy, science, politics and law, a reconstruction of constitutions and a de-constitutionalisation on the domestic level has been inevitable."⁸¹ In fact, it can be argued that since the end of the Cold War, the capacity of national constitutions to serve as the sole framework for governance has been progressively eroded. As a result of the internationalization of constitutional law, the concept of complete sovereignty has virtually disappeared and state constitutions no longer regulate the totality of governance in a comprehensive sense. This reconfiguration of constitutional law can be seen as an attempt by modern constitutionalism

79. See, Yadh Ben Achour, "L'Internationalisation du Droit Constitutionnel," in Yadh Ben Achour et al, *L'Internationalisation du Droit Constitutionnel*, Recueil des Cours Vol. XVI, 22eme Session, 8-23 Juillet 2006, A.I.D.C.Tunis (2007), at 16-17.

80. See *Gaddafi blames al-Qaeda* (last update May 30, 2011), <http://news.iafrica.com/worldnews/709259.html>.

81. Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 580 (2006).

to transform itself in a manner that can address the current challenges.

While some degree of national constitutional self-government has been lost, as Anne Peters rightly argues, the internationalization phenomenon acts as a sort of "compensatory constitutionalisation" which makes up for deficiencies of domestic constitutionalism in an era of increased global interdependence.⁸² Modern constitutional draftsmen, lawyers and judges can scarcely ignore the changing attitudes, feelings and desires of the international community, especially when reflected in international and regional conventions. Most African countries radically revised their constitutions or adopted new ones in the 1990s, ushering in a new era. Many of the provisions entrenching basic principles and standards are based on, and reflect, evolving international standards on good governance and human rights protection. Yet, the entrenchment of principles and practices that promote constitutionalism and good governance at the national level has often not been a guarantee of good governance and democracy even where these elements have been influenced by international sources. New principles, such as the responsibility-to-protect principle, and international instruments, such as the AU's agenda on democracy and good governance, provide some opportunity for international intervention when the domestic constitutional system collapses. Even if these are not regularly enforced, their mere existence puts considerable pressure on states to behave themselves. Furthermore, the combined support mechanisms that international and regional organizations provide to constitutional drafting commissions and election monitoring helps to spread good global constitutional practices. The emergence of more independent judiciaries since the 1990s with more educated and increasingly confident judges, who in many jurisdictions are willing to engage in a global judicial dialogue and to adopt a progressive and global approach to interpreting constitutional rights, has led to an enrichment of national constitutional law through the use of international and comparative law.

The universality of certain constitutional law principles and standards is no longer in doubt. This phenomenon's most important effects on constitutional law is that it underscores the importance and urgent need in Africa for a serious dialogue between African judges, lawyers and constitutional law scholars about the common institutional problems that affect the different countries. At a time when some African countries, such as South Africa, and since 2010, Angola and Kenya, have made considerable strides in drafting modern constitutions that take account of the social, cultural, historical and other peculiarities of their societies, it is no longer justified to

82. *Id.*

rely almost exclusively on the imported colonial constitutional models. While internationalization and the concomitant convergence is breaking down the distinctions between many of the constitutional systems, it has also shown that much will be gained from looking at the judgments of other African courts rather than only to judgments of courts outside the continent.