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## Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa

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# Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa

Richard Frimpong Oppong

## **Abstract**

This article suggests that the trend of accepting the supremacy and direct application of international law represents a rethinking of the relationship between international and national law, and that its full implications are yet to be explored. The Article seeks to build on current writings on the subject by analyzing certain regional arrangements and judicial approaches relevant to, but often ignored in the discussion. It attempts not to situate these arrangements or approaches within or outside of the monist/dualist paradigm, but to assess the practical significance of these arrangements for international law, national law, and their respective subjects.

# RE-IMAGINING INTERNATIONAL LAW: AN EXAMINATION OF RECENT TRENDS IN THE RECEPTION OF INTERNATIONAL LAW INTO NATIONAL LEGAL SYSTEMS IN AFRICA

*Richard Frimpong Oppong\**

## INTRODUCTION

Africa is becoming more “international law-friendly”;<sup>1</sup> the initial hostility or ambivalence of the post-colonial towards international law<sup>2</sup> is giving way to increased participation in international law processes, both in terms of institutional participation and in the development of norms.<sup>3</sup> Indeed, it has been suggested that an “African international law” has emerged.<sup>4</sup> More remarkable for our present purpose, and arguably a characteristic of this new African international law, is a trend in Africa to-

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1. See Tiyanjana Maluwa, *The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey*, 23 S. AFR. Y.B. INT’L L. 45, 46 (1998) (citing Gerhard Erasmus, *The Namibian Constitution and the Application of International Law*, 15 S. AFR. Y.B. INT’L L. 81, 93 (1989-1990)).

2. See Georges M. Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOW. L.J. 95, 118–19 (1962); R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT’L & COMP. L.Q. 55, 70 (1966); Abdillahi Said Osman, *The Attitude of Newly Independent States Towards International Law: The Need for Progressive Development*, 48 NORDIC J. INT’L L. 15, 15–24 (1979).

3. See generally TIYANJANA MALUWA, INTERNATIONAL LAW IN POST-COLONIAL AFRICA (1999); Tiyanjana Maluwa, *International Law-Making in the Organisation of African Unity: An Overview*, 12 AFR. J. INT’L & COMP. L. 201 (2000) [hereinafter Maluwa, *International Law-Making*]; Tiyanjana Maluwa, *International Law-Making in Post-Colonial Africa: The Role of the Organization of African Unity*, 49 NETH. INT’L. L. REV. 81 (2002) [hereinafter Maluwa, *Post-Colonial*]; Tiyanjana Maluwa, *The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?*, 98 AM. SOC’Y INT’L L. PROC. 232 (2004) [hereinafter Maluwa, *The OAU/African Union and International Law*]. But see A. Peter Mutharika, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 FORDHAM INT’L L.J. 1706, 1719 (1995) (noting that Africa has generally been a recipient of rather than a contributor to the development of international law).

4. See P.F. Gondec, *Towards a “Treatise of African International Law”*, 9 AFR. J. INT’L & COMP. L. 807, 807 (1997).

wards making international law supreme over and directly or automatically applicable within the domestic legal system.<sup>5</sup> While in theory this trend may not be radical in civil law countries, it is for common law countries, both from a theoretical and practical perspective. Common law countries, unlike their monist civilian counterparts, often adopt a dualist approach to the relationship between international law and national law, especially regarding treaties.<sup>6</sup> The trend of accepting the supremacy and direct application of international law has been complemented by judicial reliance on unincorporated treaties and decisions of international tribunals in adjudication.<sup>7</sup> This Article suggests that this trend represents a rethinking of the relationship between international and national law, and that its full implications are yet to be explored.

Traditionally, scholars posit two approaches to the reception of international law into the national legal system, characterizing countries as “monist” or “dualist.”<sup>8</sup> Monists view international and national law as part of a single legal order. Under this approach, international law is directly applicable in the national legal order. There is no need for any domestic implementing legislation; international law is immediately applicable within national legal systems.<sup>9</sup> Indeed, to monists, international law is superior to national law.<sup>10</sup> The dualists, on the other hand, view international and national law as distinct legal orders. For international law to be applicable in the national legal order, it must be received through domestic legislative measures, the effect of

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5. See MALUWA, *supra* note 3, at 48–51.

6. See Maluwa, *supra* note 1, at 51.

7. See *id.* at 61–63.

8. See Felice Morgenstern, *Judicial Practice and the Supremacy of International Law*, 27 BRIT. Y.B. INT'L L. 42, 91 (1950); J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66, 67 (1936). See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31–33 (6th ed. 2003); MALCOLM N. SHAW, *INTERNATIONAL LAW* 121–24 (5th ed. 2003).

9. See, e.g., Matt Schaefer, *Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?*, 17 NW. J. INT'L L. & BUS. 609, 628 (1997).

10. Not all monists adhere to such a conception of the relationship between national and international law. For example, although Hans Kelsen was an advocate of monism, he did not argue that international law was superior to national law. In his view, international law may be subjected to particular norms within the national legal system. In other words, to him, monism required that legal norms be part of a single system of law, but left open the question of the relationship between the norms. See HANS KELSEN, *THE PURE THEORY OF LAW* 328–47 (Max Knight trans., 1967).

which is to transform the international rule into a national one. It is only after such a transformation that individuals within the State may benefit from or rely on the international (now national) law.<sup>11</sup> To the dualist, international law cannot claim supremacy within the domestic legal system although it is supreme in the international law legal system.<sup>12</sup>

While the monist/dualist debate continues to shape academic discourse and judicial decisions, it is unsatisfactory in many respects.<sup>13</sup> The debate focuses on the source or pedigree of norms and ignores the substance of the norms at issue. By creating a dichotomy between norms on the basis of their sources, we risk being blinded from assessing the merits of the contents of the norms at issue. International and national law have traditionally addressed relatively different issues, the former concentrating on the relationships among States, and the latter on relationships among persons within its jurisdiction.<sup>14</sup> In recent times, however, there is gradual convergence of interest, and the ultimate goal of both systems is to secure the wellbeing of individuals.<sup>15</sup> This common goal manifests itself in human rights law, environmental law, and commercial law, areas where there is increasing interaction between the national and international.<sup>16</sup> Thus, international and national law have a lot in common, and an attempt to compartmentalize or isolate them will be analytically flawed and practically inapposite at present.

The theoretical problems with the monist/dualist paradigm aside, the relationship between international law and national law has important practical implications for both systems and their subjects. It determines the extent to which individuals can rely on international law for the vindication of their rights within the national legal system, and has implications for the effectiveness of international law, which generally lacks effective enforce-

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11. See, e.g., Morgenstern, *supra* note 8, at 50; SHAW, *supra* note 8, at 129.

12. A classic illustration of this rule is the rule that a State cannot rely on its domestic rules to negate its international obligation.

13. See, e.g., BROWNIE, *supra* note 8, at 53; D.W. GREIG, *INTERNATIONAL LAW* 44–45 (1970).

14. See, e.g., BROWNIE, *supra* note 8, at 32; MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 80 (5th ed. 2005).

15. See SHAW, *supra* note 8, at 44–47.

16. See *id.*

ment mechanisms.<sup>17</sup> As Professor Malcolm Shaw has noted “it is precisely because of the inadequate enforcement facilities that lie at the disposal of international law that one must consider the relationship with municipal law as of more than marginal importance.”<sup>18</sup> The relationship between the two systems may also determine the extent to which there is cross-fertilization of norms generated in both systems. The extent to which international law can compel or induce reform in national law hinges on this relationship. The respect accorded a legal system is enhanced when it is able to influence normative developments in other legal systems.<sup>19</sup>

Current writings on the subject in Africa have generally concentrated on national/constitutional provisions and judicial treatment of customary international law.<sup>20</sup> Ordinarily, these writings have not gone beyond trying to demonstrate whether the practice in the relevant countries on the continent conforms to or departs from the monist/dualist paradigm.<sup>21</sup> This Article seeks to build on these previous works by analyzing certain regional arrangements and judicial approaches relevant to but often ignored in the discussion. It attempts not to situate these arrangements or approaches within or outside of the monist/dualist paradigm, but to assess the practical significance of these arrangements for international law, national law, and their respective subjects.

### I. INTERNATIONAL LAW AND NATIONAL LAW: REGIONAL ECONOMIC ARRANGEMENTS, JUDICIAL DECISIONS, AND CONSTITUTIONAL PROVISIONS

From the perspective of the relationship between international and national law, significant developments are taking

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17. See Andre Stemmet, *The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law*, 33 INT'L LAW. 47, 47 (1999).

18. SHAW, *supra* note 8, at 161.

19. See Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 96 AM. SOC'Y INT'L L. PROC. 219, 231 (2002).

20. See, e.g., MALUWA, *supra* note 3, at 31–51; P.F. Gonidec, *The Relationship of International Law and National Law in Africa*, 10 AFR. J. INT'L & COMP. L. 244 (1998); Maluwa, *supra* note 1; Stemmet, *supra* note 17.

21. See, e.g., MALUWA, *supra* note 3, at 31–51; Gonidec, *supra* note 20; Maluwa, *supra* note 1; Stemmet, *supra* note 17.

place within some regional economic arrangements and national legal systems in Africa. Some African countries have accepted the direct and automatic application of international law within their national legal systems. Others have subjected their national legal systems to an international one in defined areas.<sup>22</sup> International law is also finding a place, hitherto unavailable, in domestic adjudication and national constitutions.<sup>23</sup> These developments have been propelled by economic, social, and political considerations. National legal systems have been responding to legal developments in other national legal systems and in international law.<sup>24</sup> There is growing evidence of vertical and horizontal interaction between and among these legal systems.<sup>25</sup> Ironically, all these developments have largely gone unnoticed in the academic world. This Section examines these developments, exposes their innovative aspects, and assesses their significance for Africa and the legal subjects affected.

#### A. *The East African Community*

The East African Community Treaty ("EAC Treaty"),<sup>26</sup> which entered into force in 2001, establishes a community consisting of Kenya, Uganda, and Tanzania. The objective of the Community is to develop policies and programs aimed at widening and deepening co-operation among the Member States in the political, economic, social, and legal fields, among others.<sup>27</sup> The EAC Treaty envisages a customs union, a common market, and ultimately, a political federation of the States involved.<sup>28</sup> The achievement of these goals demands the transfer or surrender of some level of sovereignty to the community and its institutions.<sup>29</sup> Strong institutions are a prerequisite for successful inte-

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22. See, e.g., discussion *infra* Part I(E).

23. See discussion *infra* Parts I(D–E).

24. See discussion *infra* Part II.

25. See discussion *infra* Part II.

26. See The East African Community Treaty, Nov. 30, 1999, [hereinafter EAC Treaty], <http://www.eac.int/documents/EAC%20Treaty.pdf> (last visited Nov. 20, 2006). See generally Susan Fitzke, *The Treaty for East African Co-Operation: Can East Africa Successfully Revive One of Africa's Most Infamous Economic Groupings?*, 8 MINN. J. GLOBAL TRADE 127 (1999); Wilbert Kaahwa, *The Treaty Establishing the New East African Community: An Overview*, 7 AFR. Y.B. INT'L L. 61 (1999).

27. See EAC Treaty, *supra* note 26, art. 5(1).

28. See *id.* art. 5(2).

29. Perhaps no concept defies definition more than sovereignty. In this Article the term "transfer of sovereignty" is used to refer to the transfer to international organiza-

gration. Indeed, the absence of strong independent institutions to counter-balance political inertia to integration is a major reason for the slow pace of economic integration in Africa notwithstanding multiple initiatives towards economic integration.<sup>30</sup> Accordingly, the EAC Treaty grants sovereignty to Community institutions and organs and elevates Community law above national laws.<sup>31</sup> Article 8(4) of the Treaty provides, "Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty."<sup>32</sup> The Treaty also establishes the East African Court of Justice.<sup>33</sup> The decisions of the Court "have precedence over decisions of national court on a similar matter."<sup>34</sup> The importance of these provisions partly lies in their recognition of the importance of the strong institutions for the success of economic integration and the willingness to provide for that.

Article 8(4) appears to be a reaction against two previous Kenyan judicial decisions, which rejected the subordination of national law to Community law.<sup>35</sup> In the case of *Okunda v. Republic*,<sup>36</sup> the question of the supremacy of East African Community ("EAC") law over Kenyan law was in issue. Two persons were being prosecuted under the Official Secrets Act 1968 of the EAC without the consent of the counsel for the community.<sup>37</sup> Under Section 8(1) of the Act, such consent was necessary. The question was whether the Attorney General of Kenya could institute that proceeding without such consent.<sup>38</sup> Resolving this issue in-

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tions of the power to make decisions with significant national impact and the ability of laws not generated within the State to directly affect rights and obligations within a nation's legal system. For a recent discussion of the concept, see generally John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782 (2003); Jenik Radon, *Balance of Power: Redefining Sovereignty in Contemporary International Law*, 40 STAN. J. INT'L L. 195 (2004);

30. See Nsongurua J. Udombana, *A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development*, 13 IND. INT'L & COMP. L. REV. 185, 202-06 (2002).

31. See EAC Treaty, *supra* note 26, arts. 8(4)-(5).

32. *Id.* art. 8(4). In pursuance of this provision, Article 8(5) enjoins Member States to make the necessary legal instruments to confer precedence of Community institutions and laws over similar national ones. See *id.* art. 8(5).

33. See *id.* art. 9(1)(e).

34. See *id.* art. 33(2).

35. See *id.* art. 8(4).

36. See *Okunda v. Republic*, 9 I.L.M. 556 (1970) (Kenya).

37. See *id.* at 556.

38. See *id.*



volved examining the relationship between the community law and Section 26(8) of the Kenyan Constitution, which provided that, in the performance of his duty, the Attorney General shall not be subject to the "direction or control of any person."<sup>39</sup> Counsel for the Community submitted that the conflict between the two provisions should be resolved in favor of Community law. He argued that, under the Treaty for East African Co-operation,<sup>40</sup> the members undertook to take all steps within their power to pass legislation to give effect to the Treaty, and to confer upon Acts of the Community the force of law within their territory.<sup>41</sup> Further, under Article 4 of the Treaty, the members were enjoined "to make every effort to plan and direct their policies with a view to creating favourable conditions for the development of the Common Market and the achievement of the aims of the Community." In the view of counsel, by these provisions, Member States agreed to "surrender part of their sovereignty."<sup>42</sup>

The Court found that nothing had been done by Kenya in breach of these obligations, and that the laws of the Community are, under the Kenyan Constitution, part of the laws of Kenya; and, in the event of conflict, are void to the extent of their inconsistency with the Constitution, the Constitution being the supreme law of the land.<sup>43</sup> Although an appeal from this decision was subsequently dismissed by the Court of Appeal for East Af-

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39. CONSTITUTION, art. 26(8) (1992) (Kenya).

40. See Treaty for East African Co-operation, June 6, 1967, 6 I.L.M. 932 (1967). This Treaty is the direct predecessor of the EAC Treaty. See generally Fitzke, *supra* note 26; Neil Orloff, *Economic Integration in East Africa: The Treaty for East-African Co-Operation*, 7 COLUM. J. TRANSNAT'L L. (1968).

41. See *Okunda*, 9 I.L.M. at 557.

42. For comparative purposes, it is revealing how these arguments of counsel mimic, without making reference to, similar teleological and textual arguments used by the European Court of Justice to assert the supremacy of European Community law over the national laws of Member States. See *Flaminio Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585, 588-98. Subsequently, in *Amministrazione delle Finanze dello Stato v. Simmenthal*, it was held that not even a fundamental rule of national constitutional law can be invoked to challenge a directly applicable Community law. Case 106/77, [1978] E.C.R. 629, ¶ 29. In an article in the *East African Law Journal* some few years before the *Okunda* decision, the author made reference to the *Flaminio Costa* decision, but failed to discuss its implications, at least for comparative purposes, for the law of the East African Community. See F.X. Njenga, *Contrast between the Effect of Laws of E.E.C. and E.A.C.*, 4 E.AFR. L.J. 138, 151 (1968).

43. See *Okunda*, 9 I.L.M. at 558.

rica,<sup>44</sup> the Court, recognizing that the case raised an issue of “fundamental importance,” held *obiter* that “the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict.”<sup>45</sup> In a previous case that also involved a conflict between community and Kenyan law, the Court had affirmed the superiority of Kenyan law.<sup>46</sup>

Article 8(4) demonstrates a resolve on the part of these common law countries, inspired by the potential economic benefits of successful integration, and possibly by similar jurisprudence in European community law, to subject their national legal order to the international legal order—in this case, Community law. This is a move that is unparalleled as far as the legal frameworks for other regional economic communities and for common law Africa are concerned.<sup>47</sup> Although at common law, an incorporated treaty provision may take precedence over an

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44. See *Okunda*, 9 I.L.M. at 561 (1970).

45. *Id.* at 555–56.

46. See *In the Matter of an Application by Evan Maina (Miscell) Case no. 7/1969* cited in YASH P. GHAI, *REFLECTIONS ON LAW AND ECONOMIC INTEGRATION IN EAST AFRICA* 34–35 (1976). This case arose under the East African Customs and Transfer Management Act, a Community legislation, which defines, inter alia, a number of offenses. Section 174 provides that if the Commissioner of Customs is satisfied that any person has committed an offence against the Act in respect of which a fine is provided, he may compound such offence and summarily order him to pay a sum not exceeding 200 shillings. The Court held that Section 174 was inconsistent with Section 77(1) of the Kenyan Constitution, which says: “If any person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.” The Court rejected the contention for the Customs’ authorities that the offense under consideration was a “customs” rather than a “criminal” offense, and therefore Section 77 of the Constitution had no bearing on the case. Other sub-sections of 77 require the trial to proceed only in the presence of the accused, unless he himself agrees otherwise, or his conduct makes it difficult; has been provided with an opportunity to defend himself in person or by a legal representative of his choice. Both these provisions were contravened, nor was the Commissioner a “court” within the meaning of the Section. There was therefore a clear clash between Section 174 and the Constitution. The Court then turned to the significance of the clash. Could the Community law be upheld despite the clash? The Court held that it could not, for the Constitution provides that “if any law is inconsistent with this Constitution, this Constitution shall prevail and the other law, shall to the extent of inconsistency be void.”

47. See generally Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 *BROOK. J. INT’L L.* 341 (2006) (comparing different nations and their stances on incorporation of international laws into municipal laws).

inconsistent national law, this is only with respect to a prior national law.<sup>48</sup> It cannot claim supremacy over a subsequent inconsistent national law. Under Article 8(4) of the EAC Treaty, Community law is supreme whether it pre-dates or post-dates a contrary domestic law.<sup>49</sup> This provision ties the hands of Member State governments, for they cannot legislate, even in the future, a law contrary to Community law.<sup>50</sup> It implies a restriction on national decision-making powers.

It is difficult to anticipate how national courts will react if a similar conflict arises between Community law and national law given the new supremacy provision. Even more difficult is the question of what happens in the event of a clash between Community law and national constitutional law.<sup>51</sup> For example, in Kenya, although Article 3 of the Proposed Constitution of 2005<sup>52</sup> listed the law of the EAC as part of the laws of Kenya, it expressly provided that Community law was only law in Kenya "to the extent that it is consistent with this Constitution."<sup>53</sup> Article 2 not only proclaimed the supremacy of the Kenyan Constitution, but also provided that the validity or legality of the Constitution cannot be subject to challenge by or before any court or State organ.<sup>54</sup> Arguably, this would have prevented national courts from declaring a provision of the Constitution invalid vis-à-vis Community law, but would not have prevented the Court of Justice of the EAC from doing so.<sup>55</sup> In Tanzania, the legislation imple-

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48. See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L. L. 310, 330-37 (1992).

49. See EAC Treaty, *supra* note 26, art. 8(4).

50. For some policy arguments for and against the supremacy of international law within national legal systems, see Jackson, *supra* note 48.

51. A clash between Community law and national constitutions is likely to be rare, but it is by no means impossible, as the experience of the European Union ("EU") demonstrates. See, e.g., *Amministrazione delle Finanze dello Stato v. Simmenthal*, Case 106/77, [1978] E.C.R. 629; *Regina v. Sec'y of State for Transp.*, [1991] 1 A.C. 603 (H.L.) (appeal taken from Eng.).

52. See PROPOSED NEW CONSTITUTION OF KENYA (2005), KENYA GAZETTE SUPPLEMENT No. 63, art. 3. This Constitution was rejected in a referendum held on November 21, 2005 for reasons mainly related to its provisions on presidential powers. See Marc Lacey, *Kenya Voters Rebuff Leader on Revamping Constitution*, N.Y. TIMES, Nov. 23, 2005, at A12.

53. *Id.* art. 3.

54. See *id.* art. 2(1-2).

55. See *id.* art. 2(4-5).

menting the EAC Treaty<sup>56</sup> does not purport to impose any such restriction. It gives the Treaty “the force of law” within Tanzania and annexes the Treaty to the Act without amending the Supremacy Clause.<sup>57</sup> An Act of the Community comes into force on the date of its publication in the official *Gazette* and does not need any implementing legislation,<sup>58</sup> evidencing the direct effect of Community law. Whether this Supremacy Clause will prompt courts to hold that “[e]ven the most minor piece of technical Community legislation ranks above the most cherished national constitution norm”<sup>59</sup> remains to be seen. What is certain is that the judiciary is aware of the existence and implications of this supremacy provision.<sup>60</sup>

This initiative by the EAC represents a great leap by the States concerned towards collective exercise of sovereignty through an international institution.<sup>61</sup> It reveals an approach to regional economic governance worth emulating on the continent.<sup>62</sup> Economic integration in Africa will be strengthened under the governance of strong institutions at the community level. The EAC initiative also represents a significant advance in the status of international law.<sup>63</sup> Even within the European Union (“EU”), where the principles of supremacy of community law and direct effect are accepted doctrines, they still have “the status of unwritten principles of law.”<sup>64</sup> They neither have a

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56. See Treaty for the Establishment of East African Community Act, No. 4 of 2001 (Tanz.), <http://www.kituoachakatiba.co.ug/tzeac.htm> (last visited Nov. 20, 2006).

57. See *id.* § 8(1).

58. See *id.* § 8(2).

59. STEPHEN WEATHERILL, *LAW AND INTEGRATION IN THE EUROPEAN UNION* 106 (1995).

60. See *Shah v. Manurama Ltd*, (2002) 1 E.A.L.R. 294, 297–98 (Uganda) (citing the supremacy provision as one reason why a resident of the Community need no longer pay security for cost when litigating before national courts). For discussion of the facts and the relevant parts of the judgement in this case, see *infra* notes 226–232.

61. See, e.g., Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L ECON. L. 841, 856 (2003).

62. See generally *id.*

63. See Maurice Oduor, *Resolving Trade Disputes in Africa: Choosing Between Multilateralism and Regionalism: The Case of COMISA and the WTO*, 13 TUL. J. INT’L & COMP. L. 177, 184 (2005).

64. Bruno De White, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in *THE EVOLUTION OF EU LAW* 194 (Paul Craig & Grainne de Burca eds., 1999). Article 10(1) of the Draft EU Constitutional Treaty provided that “[t]he Constitution, and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.” See generally Per Cramer, *Does the*

place in the EEC Treaty or its revisions, nor are they reflected in the national constitutions of EU Member States. They are, however, undoubtedly part of accepted law within the EU.<sup>65</sup>

B. *The Organisation for the Harmonisation of Business Law  
in Africa*

The objective of the Treaty establishing the Organisation for the Harmonisation of Business Laws in Africa ("OHADA")<sup>66</sup> is to harmonize the business laws in the contracting States.<sup>67</sup> This is to be done through the elaboration and adoption of simple modern common rules adapted to their economies.<sup>68</sup> Currently, OHADA has a membership of sixteen States.<sup>69</sup> Most of them are francophone States, the majority in the West African sub-region.<sup>70</sup> The underdeveloped state of the commercial law regime in Africa is arguably a reflection and product of the low level of commercial activity. Consequently, the willingness of these African governments to abandon their disparate national laws and adopt a unified one is a triumph for international law and cooperation on the continent.<sup>71</sup> Unification of law ensures certainty. People transacting across national boundaries will be subject to the same substantive law, thus ensuring equality of legal treatment and a potential reduction in transaction costs. The OHADA presents an opportunity for social integration in the region. That is to say, if law is the cement of society, people

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*Codification of the Principle of Supremacy Matter?*, 7 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 57 (2004–2005).

65. See *id.* at 193–98.

66. Treaty on the Harmonisation of Business Law in Africa, Oct. 17, 1993, [hereinafter OHADA Treaty] <http://www.ohada.com/traite.php> (last visited Nov. 20, 2006). There is a dearth of English writings on this organization, but see generally BORIS MARTOR ET AL., BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS (2002); Claire Moore Dickerson, *Harmonising Business Laws in Africa: OHADA Case Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17 (2005); Xavier Forneris, *Harmonising Commercial Law in Africa: The OHADA*, JURIS PERIODIQUE 6 (July–Sept. 2001).

67. See OHADA Treaty, *supra* note 66, art. 1.

68. *Id.*

69. They are Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Congo-Brazzaville, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo. See Organization for the Harmonisation of Business Law in Africa, Member States of the OHADA, [http://www.ohada.com/etat\\_partie.php](http://www.ohada.com/etat_partie.php) (last visited Nov. 10, 2006).

70. See MARTOR ET AL., *supra* note 66, at 5.

71. See *id.* at 1–2.

living under a unified system of law will feel more connected with one another.

An examination of the Treaty provides more evidence of the preparedness of African governments to re-think the relationship between international and national law by relinquishing a measure of sovereignty to promote economic development. Under the Treaty, Member States have ceded some level of national sovereignty in order to establish a single cross-border regime of uniform business laws called "Uniform Acts."<sup>72</sup> As one writer has perceptively observed, "no one can deny that transfer of sovereignty occurs under OHADA."<sup>73</sup> Although it may be too early to assess the success of the OHADA initiative, the very existence of the initiative and the number of Uniform Acts so far agreed upon are impressive. Among those currently adopted are Uniform Acts on General Commercial Law, Commercial Companies and Economic Interest Groups, Secured Transactions, Bankruptcy, Debt Collection Procedures, and Accounting Law.<sup>74</sup>

The Uniform Acts "are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws."<sup>75</sup> These laws are automatically and immediately applicable within the national legal systems of each country. No national implementing legislation is necessary. The Common Court of Justice and Arbitration ("Common Court") established under the Treaty<sup>76</sup> has held that the Uniform Acts also abrogate contrary national laws.<sup>77</sup> The Common Court is the final author-

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72. *See id.* at 18–19.

73. *See* Forneris, *supra* note 66, at 6.

74. *See* MARTOR ET AL., *supra* note 66, at 18.

75. OHADA Treaty, *supra* note 66, art. 10.

76. This Court is established by Article 3 of the OHADA Treaty as one of the two principal institutions of the organization, the other being the Council of Ministers. *See* OHADA Treaty, *supra* note 66, art. 3. The court hears appeals on the application of the Uniform Acts. *See id.* art. 14. These appeals may be brought on referral from national court or directly by individuals. *See id.* art. 15.

77. *See* MAMADOU KONE, LE NOUVEAU DROIT COMMERCIAL DES PAYS DE LA ZONE OHADA: COMPARAISONS AVEC LE DROIT FRANCAIS 5 (2003). Mamadou Kone notes that:

The legal unification rests upon the Uniform Acts. Article 5 of the Treaty defines the Uniform Act as one that is used to adopt common laws. Article 10 of the same treaty specifies the juridical (legal) value of these Acts. It provides that they are "directly applicable and mandatory in the Contracting States despite all contrary rules of previous or subsequent internal law." The text high-

ity on the interpretation and enforcement of the Treaty, the adopted Regulations, and the Uniform Acts.<sup>78</sup> Parties to the OHADA Treaty or the Council of Ministers may seek advisory opinions from the Common Court.<sup>79</sup> The Common Court may also hear appeals on referral from national courts or directly by aggrieved individuals.<sup>80</sup> The decisions of the Court are final, conclusive, and override those of all national courts including national supreme courts.<sup>81</sup> This allows for the uniform interpretation and application of the Uniform Acts.

From the perspective of the constitutional arrangements in the OHADA Member States, the doctrines of direct applicability and supremacy of international law over domestic law may not be a radical departure from existing constitutional law. The majority of its members, who are former French colonies, have constitutional provisions modeled after Article 55 of the French Constitution of 1958, which provides that "treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of domestic legislation, subject, for each agreement or treaty, to application by the other party."<sup>82</sup> Although Article 55 makes treaties superior to domes-

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lights two things. First, the Uniform Acts apply directly to the internal juridical order of the states. Contracting States do not need to take a legislative act to insure the application of the Uniform Acts in internal juridical order. As soon as they are adopted and published, the Uniform Acts apply directly and equally to all Contracting States. Second, the Uniform Acts have an "above-legal" value. In this sense, in case of conflict between a Uniform Act and a national law, the former takes precedence. Consequently, a rule of a Uniform Act leads to the repeal of contrary national law. The C.C.J.A [Common Court] maintained this point in an Advisory Opinion of April 30, 2001, to the request of the Republic of Ivory Coast. In the Advisory Opinion, the judges affirmed that Article 10 of the treaty incorporates a policy of supranationality; that the article abrogates national laws, contrary or identical to those of the Uniform Acts, and precludes the Contracting States from legislating contrary to the Uniform Acts. The C.C.J.A reinforced the same position when it invalidated the application of articles 180 and 181 of the Ivorian Code of Civil Procedure because they are contrary to article 32 of the Uniform Act on Simplified Recovery Procedures and Enforcement Measures.

*Id.* (Author's translation). Thanks to Faisal Lintuuran of the University of British Columbia for helping me with this translation. See also MARTOR ET AL., *supra* note 66, at 20-22.

78. See OHADA Treaty, *supra* note 66, arts. 14, 20.

79. See *id.* art. 14.

80. See *id.* arts. 14-15.

81. See *id.* art. 20.

82. See, e.g., CONSTITUTION OF BURKINA FASO, art. 151 (1991); CONSTITUTION OF THE

tic legislation, there are conditions that must be satisfied for this to happen.<sup>83</sup> First, the agreement has to be duly ratified or approved and published. Due ratification entails ensuring legislative, and sometimes judicial, intervention or participation before the treaty is ratified.<sup>84</sup> This contrasts with the approach in common law jurisdictions, where the executive negotiates and concludes treaties that must subsequently be approved by the legislature.<sup>85</sup> The second requirement is that of reciprocity in the application of the treaty.<sup>86</sup> It is as regards this second requirement that the implementation of the Uniform Acts in Member States' legal systems departs from the constitutional model. The application of the Acts within the national legal systems of the Member States is not founded on reciprocity.<sup>87</sup>

The OHADA project represents a laudable effort at reforming the commercial laws of the States engaged. Indeed, it is a project that should be encouraged to potentially cover the whole of Africa.<sup>88</sup> From the perspective of international law, the real test for OHADA will come when common law countries, with their traditional adherence to dualism, begin to join. Currently, countries such as Nigeria and Ghana are contemplating membership.<sup>89</sup> Arguably, the supremacy and direct application clause may be one of the reasons why there is currently no common law member of OHADA.<sup>90</sup> It will demand a reworking of

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REPUBLIC OF CAMEROON, art. 45 (1996); CONSTITUTION OF THE REPUBLIC OF MALI, art. 116 (1992).

83. See, e.g., Vincent Kronenberger, *A New Approach to the Interpretation of the French Constitution in Respect of International Conventions: From Hierarchy of Norms to Conflict of Competence*, 47 NETH. INT'L L. REV. 323 (2000).

84. See *id.* at 329.

85. See, e.g., CONSTITUTION OF THE REPUBLIC OF GHANA, art. 75 (1992); CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996, art. 231.

86. For a critique of this reciprocity requirement, see Antonio Cassese, *Modern Constitutions and International Law*, 192(3) RECUEIL DES COURS 341, 405–08 (1985).

87. See MARTOR ET AL., *supra* note 66, at 6, 26.

88. Differences in national law pose great problems for economic development. Thus, countries are increasingly discussing the need to iron out differences in national laws. For example, in Europe there is discussion on the need for a uniform private law for Europe. Although this may be far from realization, the existence of the discussion is instructive. See generally JANS SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW* (Nicole Kornet trans., 2002).

89. See Dickerson, *supra* note 66, at 67 n.202.

90. Other reasons include the civil law character of the Uniform Acts and the lack of awareness about the work of OHADA. There are efforts to create awareness about the work of OHADA in common law countries. For example, in 2003 and 2004 two conferences for that purpose were held in Ghana and Nigeria, respectively. An



existing constitutional provisions on the effect of treaties in national law before these common law countries can effectively participate in the work of OHADA.<sup>91</sup>

### C. *The African Economic Community*

The Treaty Establishing the African Economic Community (“AEC Treaty”) is further evidence of the preparedness of African governments to re-examine the relationship that exists between international and national law. The Treaty envisages an economic community covering the whole of Africa, which will be achieved through defined stages including the establishment of a free market, a customs union, and a common market.<sup>92</sup> All of these entail the surrender of some level of sovereignty to the Community. Under Article 3(e) of the AEC Treaty, Member States must observe the legal system of the Community.<sup>93</sup> This provision suggests that the AEC has been constituted as a legal system distinct from those of the Member States. As positivists have demonstrated, an essential characteristic of a legal system is the presence of an ultimate authority whose norms directly bind the subjects of the system and cannot be contradicted or subordinated either by them or by any other external source.<sup>94</sup> Arguably, by constituting the AEC as a legal system, the Member States have conferred this characteristic on it. The effect of this char-

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OHADA Resource Center has also been established in Ghana. See Samuel Kofi Date-Bah, *The UNIDROIT Principles of International Commercial Contracts and the Harmonization of the Principles of Commercial Contracts in West and Central Africa*, 9 *UNIFORM L. REV.* 269, 270 (2004).

91. See *id.*

92. See Treaty Establishing the African Economic Community, art. 6 (2), June 3, 1991, 30 *I.L.M.* 1241 [hereinafter AEC Treaty].

93. See *id.* art. 3(e).

94. See generally JOHN AUSTIN, *THE PROVIDENCE OF JURISPRUDENCE DETERMINED* 193–95 (1965); H.L.A. HART, *CONCEPT OF LAW* 100–23 (1994); HANS KELSEN, *GENERAL THEORY OF NORMS* 252–65 (Michael Hartney trans., 1991). These writers captured the element of ultimate authority in a legal system differently: While Hart saw it in terms of a secondary rule of recognition, Austin discussed it in terms of the existence of a sovereign, and Kelsen saw it in terms of a basic norm or ground norm. For an analysis of economic organizations as legal systems, see F.E. Dowrick, *A Model of the European Communities' Legal System*, 3 *Y.B. EUR. L.* 169 (1983); Mark L. Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and a Legal System*, 17 *CORNELL INT'L. L.J.* 1 (1984); David Palmeter, *The WTO as a Legal System*, 24 *FORDHAM INT'L. L. J.* 444 (2000); Richard F. Oppong, *Observing the Legal System of the Community: The Relationship between Community and National Legal Systems under the African Economic Community Treaty*, 15 *TUL. J. INT'L. & COMP. L.* 41 (2006).

acteristic on the relationship between the national legal systems of the Member States and the AEC's legal system remains to be seen. Europe's experience with the doctrine of direct effect and supremacy of EC law<sup>95</sup> demonstrates that the affirmation of the AEC as a legal system has serious implications for the operation of Community law within national legal systems.<sup>96</sup> It will subject the legal systems of the Member States to the norms of the Community legal system in areas within the competence of the Community.

Under the AEC Treaty, Community law may apply automatically within national legal systems.<sup>97</sup> Article 10 provides that decisions of the Assembly are "automatically enforceable" thirty days after being signed by the Chairman of the Assembly.<sup>98</sup> Under Article 13, Regulations of the Council of Ministers, which must be approved by the Assembly, are also "automatically enforceable" thirty days after signature by the Chairman of the Council.<sup>99</sup> These provisions suggest the direct application of Assembly decisions and Council Regulations in Member States. Especially in dualist countries, these provisions will not be subject to any further national implementation measure before the courts; and private parties can rely on them in litigation.

While the automatic enforceability of Community law within the national legal system of the Member States is explicit, the same cannot be said of the supremacy of Community law.<sup>100</sup> In this regard, the approach of the AEC Treaty contrasts sharply with the other regional arrangements noted in this Article,

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95. The European experience offers invaluable lessons for the African Economic Community ("AEC") given the fact that, although not expressly stated, the AEC is modeled after it. There are no doubt differences in both communities in terms of institutional structure, membership, and historical background. Indeed, the AEC is still in its formative stages. Nonetheless, the EU, as perhaps the most advanced and successful initiative for economic integration, cannot be ignored in any attempt at economic integration. See generally Craig Jackson, *Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 139 (2003).

96. See *id.* at 159.

97. See Gino J. Naldi & Konstantinos D. Magliveras, *The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?*, 24 N.C. J. INT'L L. & COM. REG. 601, 620-21 (1999).

98. See AEC Treaty, *supra* note 92, art. 10(3).

99. See *id.* art. 13(3).

100. See *id.* art. 5; see also Naldi & Magliveras, *supra* note 97, at 620-21.

which are very explicit on the question of supremacy.<sup>101</sup> The silence of the AEC Treaty imitates a similar silence on this issue in the Treaty of the European Economic Community.<sup>102</sup> This author has argued elsewhere that the supremacy of Community law can be inferred from the text and purpose of the AEC Treaty.<sup>103</sup> This argument borrows from the jurisprudence and interpretive approach of the European Court of Justice when faced with a similar question on the supremacy of EC law within the legal systems of the Member States.<sup>104</sup> The supremacy of Community law under the AEC Treaty can be inferred from the following facts: (i) the AEC Treaty constitutes the Community as a legal system and obliges Member States to observe this legal system; (ii) Article 5 of the Treaty requires Member States to refrain from unilateral activities that will hinder the attainment of the objectives of the Community; (iii) decisions and regulations of the Community are automatically enforceable in Member States; (iv) conflicting national laws hinder the realization of the objectives of the Community; (v) the Community espouses the division of competence between itself and the Member States; and (vi) the Treaty requires the harmonization of policies.<sup>105</sup> If the Court of Justice of the African Union<sup>106</sup> ultimately

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101. See *supra* notes 49–50, 75–77 and accompanying text.

102. See Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

103. See Oppong, *supra* note 94; see also Naldi & Magliveras, *supra* note 97, at 620.

104. In *Flaminio Costa v. E.N.E.L.*, the ECJ held that the EEC Treaty, because of its special and original nature, could not be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. See Case 6/64, [1964] E.C.R. 585, 599–600.

105. See *supra* notes 92–93, 98–100 and accompanying text.

106. There is some uncertainty as to whether the Court of Justice of the African Union, established under the Protocol of the Court of Justice of the African Union will perform the work of the Court of Justice of the Community established under Article 18 of the AEC Treaty. See Protocol of the Court of Justice of the African Union, July 11, 2003, <http://www.africa-union.org> (last visited Nov. 20, 2006). Given that the AEC is an integral part of the African Union, that there is a trend towards having a single multipurpose court, as evidenced by the merger of the African Court of Human and Peoples Rights with the African Union Court, and that there is need to cut down on cost, it is unlikely that any other court will be established. Indeed, the jurisdiction of the African Union Court that covers “the interpretation, application or validity of Union treaties [of which the AEC Treaty is one] and all subsidiary legal instruments adopted within the framework of the Union” is wide enough to encompass the work of the AEC Court. See *id.* art. 19(1)(a). Unless this is the case, difficult questions of jurisdiction will arise and the potential for conflict between the two courts exists.

accepts these arguments, the AEC will become the ultimate evidence of a trend towards supranationalism in Africa. It will be evidence that Member States have surrendered part of their sovereignty for the effective operation of this continent-wide economic integration initiative.

#### D. *International Law and National Courts*

##### 1. Reliance on Unincorporated Treaties

It is a fundamental principle of the common law that a treaty does not have the force of law within the national legal system unless implemented by domestic legislation.<sup>107</sup> This principle is founded on the doctrine of the separation of executive and legislative powers.<sup>108</sup> In recent times, however, some national courts in Africa have demonstrated a willingness to rely on international human rights conventions in adjudication, even when they have not been incorporated into the national legal system. In *Unity Dow v. Attorney General*,<sup>109</sup> the Court's interpretation of the relevant legislation was "strengthened" by the fact that Botswana was a signatory to the Organization of African Unity ("OAU") Convention on Non-Discrimination, even though the judge expressly acknowledged that Botswana had not ratified it. The Court also cited the U.N. General Assembly Declaration on the Elimination of Discrimination against Women in reaching its decision.<sup>110</sup> On appeal, the Attorney General specifically took issue with the trial court's use of unincorporated treaties.<sup>111</sup> The Court of Appeal, however, affirmed the High Court's reliance on these international instruments.<sup>112</sup> With words that seem to cast doubt on the thinking that unincorporated treaties do not confer rights on individuals, Justice Austin Amisshah held that, "*even if it is accepted* that those treaties and conventions do not confer enforceable rights on individuals within the state un-

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107. See, e.g., *The Parlement Belge*, [1879] 4 P.D. 129, 154–55; *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326, 347.

108. See SHAW, *supra* note 8, at 135–36.

109. 13 Hum. Rts. Q. 614 (High Court Bots. 1991).

110. See *id.* At 624–26.

111. See *Dow v. Attorney General*, 103 I.L.R. 128, 159 (C.A. Bots. 1992).

112. See *id.* at 159–62, 175–79. In this case the applicant challenged the constitutionality of provisions of the Citizenship Act of 1984 as being discriminatory and an infringement on her constitutional rights and freedoms. These provisions, in essence, denied citizenship to children born to female citizens of Botswana who were married to foreign men.

til parliament has legislated its provisions of the law,"<sup>113</sup> they could be used as aids to construction. Similarly, in the Ghanaian case of *New Patriotic Party v. Inspector General of Police*,<sup>114</sup> Chief Justice Philip Archer held that the fact that Ghana had not passed specific legislation to give effect to the African Charter on Human and Peoples' Rights did not mean it could not be relied upon.<sup>115</sup> In the Nigerian case of *Abacha v. Fawehinmi*,<sup>116</sup> the Supreme Court accepted that an unincorporated treaty might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the Treaty.<sup>117</sup> The jurisprudence on the doctrine of legitimate expectation significantly relaxes the rule that an unincorporated treaty cannot confer rights or impose duties in domestic law.<sup>118</sup>

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113. *Id.* at 161 (emphasis added).

114. [1993-94] 2 G.L.R. 459, 466. In this case, the applicant challenged the constitutionality of various provisions of the Public Order Decree of 1972 (NRCD 68) as constituting an infringement on the right to assembly and association. In essence, these provisions required consent of the police before a public procession or meeting could be held. It granted the Minister of Interior and the Police the power to withhold such permission. In comparison, in *Chihana v. Republic*, M.S.C.A. Criminal Appeal No. 9 of 1992 (unreported), the Malawi Supreme Court held that the U.N. Universal Declaration of Human Rights is part of the law of Malawi, but the African Charter on Human and People's Rights is not, and added:

Malawi may well be a signatory to the Charter and as such is expected to respect the provisions of the Charter but until Malawi takes legislative measures to adopt it, the Charter is not part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provision the Charter would be enforceable in our Courts.

115. See Neville Botha & Michele Olivier, *Ten Years of International Law in South African Courts: Reviewing the Past and Assessing the Future*, 29 S. AFR. Y.B. INT'L L. 42 (2004) for other cases in South Africa where courts have relied on various unincorporated treaties in adjudication. In these cases, unlike the Ghana and Botswana cases, the reliance had a constitutional foundation, because South African courts are constitutionally mandated to consider international law in adjudication.

116. See *Abacha v. Fawehinmi*, [2001] AHRLR 172 (S.C. Nig. 2000). In *Abacha*, the respondent sought a declaration that his arrest and detention without charge contravened provisions of the 1979 Constitution of Nigeria and the African Charter of Human and Peoples' Rights (Ratification and Enforcement) Act of 1983. See *id.* at 172-73.

117. See *id.* Delivering the lead judgment, Justice Michael Ekundayo Ogundare cited with approval the Privacy Council opinion in *Higgs v. Minister of National Security*. See *id.* at 173 (discussing that the effect of an unincorporated treaty "might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty," and adding that this "represents the correct position of the law, not only in England but in Nigeria as well.") (quoting *Higgs*, [2000] Wkly. L. Rep. 1368, 1375 (2000)) (emphasis added).

118. The application of the doctrine of legitimate expectation to unincorporated treaties appears to have originated in the High Court of Australia's decision in *Minister*

These decisions are remarkable, especially coming from common law jurisdictions where treaties do not ordinarily have any effect unless incorporated into national law. They reveal preparedness on the part of courts to go beyond the traditional use of unincorporated treaties as aids to interpretation.<sup>119</sup> The courts appear to suggest that unincorporated treaties may create enforceable rights in national law. The cases thus attach national significance to the international act of ratifying treaties.

Furthermore, unlike the other African countries noted below, there are no explicit constitutional provisions allowing the courts in those countries to rely on international law in adjudication.<sup>120</sup> Thus, it can be argued that their reliance on unincorporated treaties represents an assertion by the judicial branch of autonomy from both the legislature and the executive, who are responsible for treaties and their incorporation into national law.<sup>121</sup> Indeed, the language of the courts—"strengthened," "relied upon," and give rise to "legitimate expectation"—gets stronger with each judgment.<sup>122</sup> The scope of the language is

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for *Immigration and Ethnic Affairs v. Teoh*, 183 C.L.R. 273 (1995). The doctrine has been received in England. See, e.g., *R (on the application of Lika) v. Sec'y of State for the Home Dep't*, [2002] EWCA Civ. 1855, ¶ 29; *Thomas v. Baptiste* [1999] 3 Wkly. L. Rep. 249, 260–63 (P.C. 1999) (appeal taken from Trin. & Tobago); *R v. Uxbridge Magis. Ct.*, [2000] 3 Wkly. L. Rep. 434, 455–56 (Q.B.) (2000). In South Africa, one writer has argued against the extension of the doctrine to unincorporated treaties. See George N. Barrie, *Legitimate Expectation and International Treaties*, 114 S. Afr. L.J. 474, 480 (1997). In Canada, the doctrine did not receive much attention in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice Claire L'Heureux-Dubé left open the question whether an international instrument ratified by Canada could give rise to a legitimate expectation. See *id.* at 841. In New Zealand, two models have been developed for using unincorporated treaties, especially in administrative decision-making. These are the mandatory relevant consideration model and the presumption of consistency model. While the former focuses on the decision-making process, the latter looks to the outcome of the decision. See generally Claudia Geiringer, *Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law*, 21 N.Z.U.L.R. 67 (2004). On the possibility of a legitimate expectation giving rise to a substantive and not merely a procedural benefit, see *R v. N. & E. Devon Health Auth.*, [2000] 2 Wkly. L. Rep. 622, 644–46 (1999).

119. At common law unincorporated treaties could be used as aids to interpretation but could not give rise to substantive or procedurally enforceable rights for the individual, a possibility these dicta leave open. See SHAW, *supra* note 8, at 393–408.

120. See, e.g., THE CONSTITUTION OF THE REPUBLIC OF BOTSWANA (1992); THE CONSTITUTION OF THE REPUBLIC OF GHANA (1992); CONSTITUTION (1999) (Nigeria).

121. See Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 BROOKLYN J. INT'L L. 341, 376–89 (2006).

122. See *Abacha*, [2001] AHRLR at 176 (quoting *Higgs*, [2000] Wkly L. Rep. at

broad, and pregnant with serious implications for the enforcement of international law in national courts.<sup>123</sup> For example, the extension of the doctrine of legitimate expectation to “unincorporated treaties” represents a significantly broad interpretation of the categories of “promise or practice” which define the scope of application of the doctrine.<sup>124</sup> Additionally, the doctrine of legitimate expectation has the potential to confer not only procedural but also, and more importantly, substantive benefits on litigants. Application of the doctrine limits the exercise of statutory discretion and raises difficult questions on the role of judges as law or policy makers.<sup>125</sup>

As governments become increasingly involved in international agreements in such fields as contracts, financial regulation, trade, and transportation, which are intended to regulate relationships between individuals and significantly affect their actions,<sup>126</sup> these decisions may become important for individuals. They offer some hope for individuals whose governments readily ratify international treaties, but hesitate to incorporate them into national law.<sup>127</sup> In Africa, this problem has been attributed partly to the absence of clear constitutional provisions

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1375); *New Patriotic Party v. Inspector General of Police*, 2 G.L.R. 459, 482 (1994); *Dow v. Attorney General*, 13 Hum. Rts. Q. 614, 623 (High Court Bots. 1991).

123. What is suggested here is more than the mere use of unincorporated treaties as an aid to interpretation. See generally Tiyanjana Maluwa, *International Law as an Aid to the Interpretation and Application of Law in Municipal Legal Systems of Africa*, in *THE JUDICIARY IN AFRICA* 47–63 (B. Ajibola & D.H. van Zyl eds., 1998); Stephane Beaulac, *National Application of International Law: The Statutory Interpretation Perspective*, 41 CAN. Y.B. INT’L L. 225 (2003).

124. Although treaties are promises, they are ordinarily promises among States and unlike domestic legislative measures are often not addressed to individuals as such. Additionally as Taggart has noted in his comment on the *Teoh* case, “to equate ratification of a treaty with a ‘promise’ or ‘representation’ to the people of Australia is a large leap.” See Michael Taggart, *Legitimate Expectation and Treaties in the High Court of Australia*, 112 L.Q.R. 50, 51 (1996).

125. See *id.* at 53.

126. In *Lika*, the Court, in declining to hold that the ratification of the Dublin Convention created a legitimate expectation, noted that the Convention was not intended to confer benefits on individuals, but to ascertain which State should deal with an asylum claim. See *R (on the application of Lika) v. Sec’y of State for the Home Dep’t* [2002] EWCA Civ. 1855, ¶¶ 20–21. This suggests that, had the convention been intended to confer benefits on individuals, legitimate expectation may have been founded on it even absent a domestic implementing legislation.

127. See A.O. Adede, *Africa in International Law: Key Issues of the Second Millennium and Likely Trends in the Third Millennium*, 10 TRANSNAT’L L. & CONTEMP. PROBS. 352, 367–68 (2000).

addressing the issue.<sup>128</sup> Another factor may be the domestic cost in terms of resources needed to secure compliance with obligations assumed under international treaties.<sup>129</sup> These decisions signal to the executive that the ratifications of treaties are not mere platitudinous acts, and that they may have significant national effects. It is possible that this may make the executive more circumspect in decisions to ratify treaties.

Reliance on unincorporated treaties involves an assertion of judicial autonomy that only exists to a very limited degree in the application or use of customary international law in domestic adjudication.<sup>130</sup> This is especially true in countries without constitutional provisions making customary international law part of the national legal system.<sup>131</sup> From both the transformation or incorporation approaches, customary international law is applied only when it is part of the national law, unlike an unincorporated treaty, which is never part of national law. Indeed, the fact of unincorporation may be a manifestation of parliamentary resistance to the treaty. By giving effect to it absent a national implementing measure, the judiciary may be indirectly setting itself up against the will of an elected branch of government or upsetting the balance of power between the various organs of government.<sup>132</sup> At another level, giving effect to unincorporated treaties indirectly allows the executive to change the law without any intervention from the legislature, which is the law-making body. This will unwittingly enhance the powers of the executive at the expense of the legislature by adding indirect law-making powers to its competence. As treaties become more important in domestic law, these power relation issues will become more prominent in Africa.<sup>133</sup>

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128. See A.O. Adede, *Constitutionalism, Culture and Tradition: African Experiences on the Incorporation of Treaties into Domestic Law*, 7 AFR. Y.B. INT'L L. 239, 245 (1999).

129. See generally Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003).

130. See generally Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005).

131. For examples of countries with constitutional provisions that make customary international law part of national law, see *infra* Part I.E.

132. See Ginsburg, *supra* note 130, at 633.

133. See Craig Jackson, *The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift: Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 139, 163-71 (2003).



## 2. Reference to Decisions of International Tribunals

Aside from relying on unincorporated treaties, some domestic courts have utilized the decisions of international tribunals in their domestic adjudication.<sup>134</sup> These tribunals include the International Court of Justice, the International Criminal Court for the Former Yugoslavia, the European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights.<sup>135</sup> The use to which decisions from these international tribunals are put ranges from mere reference to direct application.<sup>136</sup> The jurisprudence on which the national courts rely relates to both the existence and the interpretation of existing international norms.<sup>137</sup> As Mohammed Bedjaoui suggests, with this technique, the “rampart of State sovereignty is breached, thus enabling the norm or the judicial decision to pass from the international legal order into the municipal legal order.”<sup>138</sup> In this respect, it is significant that the international tribunal may be one to which the State in question has not consented or in whose formation the State has in any way participated.<sup>139</sup> Indeed, decisions of international tribunals are, ordinarily, binding only on the parties to the litigation.<sup>140</sup> Addi-

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134. See generally ANN-MARIE SLAUGHTER, *A NEW WORLD ORDER*, 65–103 (2004) [hereinafter SLAUGHTER, *NEW WORLD ORDER*]; Ann-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 99–100 (1994-1995) [hereinafter Slaughter, *Transjudicial Communication*].

135. See, e.g., SLAUGHTER, *NEW WORLD ORDER*, *supra* note 134, at 150 (noting the strengthening of the International Criminal Court’s evolution by the blending of international and domestic jurisprudence); Mohammed Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 21, 31 (Thomas M. Franck & Gregory H. Fox eds., 1996) (providing a discussion of national courts using the jurisprudence of the International Court of Justice in their own decisions); Slaughter, *Transjudicial Communication*, *supra* note 134, at 37, 44–45 (discussing incorporation of European Court of Justice and European Court of Human Rights decisions into national jurisprudence).

136. See Slaughter, *Transjudicial Communication*, *supra* note 134, at 118–19; see also Bedjaoui, *supra* note 135, at 29.

137. See Bedjaoui, *supra* note 135, at 29.

138. *Id.* at 23.

139. See *id.* at 28.

140. See, e.g., Statute of the International Court of Justice, 59 Stat. 1055, art. 59 (stating “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”); see also Philip V. Tisne, *The ICJ and Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in U.S. Courts*, 29 *FORDHAM INT’L L.J.* 865 (2006) (arguing that I.C.J. decisions are “binding” only as a matter of international law). But see Agreement Establishing the Caribbean Court of Justice, art. 22, Feb. 14, 2000, [http://www.caricom.org/jsp/secretariat/legal\\_instruments/agree-](http://www.caricom.org/jsp/secretariat/legal_instruments/agree-)

tionally, unlike the relationship between some international tribunals and domestic courts (for example, between the European Court of Justice or the European Court of Human Rights and domestic courts of Member States who are parties to the relevant treaty), there is no formal State-treaty-mandated relationship between these African national courts and the international courts from which they are borrowing.<sup>141</sup> Thus, this is another manifestation of independence or an “autonomous self-conception” on the part of the judiciary.<sup>142</sup> This conception may reflect a belief in a shared judicial goal of ensuring justice for all irrespective of the source from which the norm that will facilitate this goal emanates, and a desire on the part of the national courts to enhance their “legitimacy” in the eyes of the international community by acting as enforcers of international values.<sup>143</sup>

The trend of relying on decisions of international tribunals is evident from an examination of law reports in Africa.<sup>144</sup> For example, between January 2000 and August 2005 there are about fifty reported cases in which South African courts made use of decisions from various international tribunals.<sup>145</sup> This use

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ment\_ccj.pdf (last visited Nov. 27, 2006) (providing that “[j]udgments of the [Caribbean Court of Justice] shall be legally binding precedents for parties in proceedings before the Court”).

141. See Maluwa, *supra* note 1, at 56–57.

142. Slaughter, *Transjudicial Communication*, *supra* note 134, at 123.

143. See Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 556–57 (2002) (noting five reasons domestic judges give for relying on non-binding international norms: “(1) concern for the rule of law; (2) desire to promote universal values; (3) reliance on international law to help uncover values inherent within the domestic regime; (4) willingness to invoke the logic of judges in other jurisdictions; and (5) concern to avoid negative assessments from the international community”); Slaughter, *Transjudicial Communication*, *supra* note 134, at 127–28.

144. This examination was limited to the Index of the relevant reports. Although the limitations of such an approach are obvious, it serves the purpose here of revealing an awareness of the significance of the jurisprudence of these tribunals and a preparedness on the part of counsel and judges to benefit from it.

145. The relevant cases are listed at the start of each volume. See 4 S. African L. Rep. lxxvii, lxxviii–lxxix (2005); 3 S. African L. Rep. lxxviii, lxx (2005); 2 S. African L. Rep. xxxiii, xxxiv (2005); 1 S. African L. Rep. lxxv, lxxvi–lxxvii (2005); 6 S. African L. Rep. lxvi, lxvii, lxviii–lxix (2004); 5 S. African L. Rep. lxvi, lxvii (2004); 4 S. African L. Rep. lxxv, lxxvi–lxxvii (2004); 3 S. African L. Rep. lxxv, lxxviii (2004); 1 S. African L. Rep. lxxiii, lxxiv (2004); 6 S. African L. Rep. lxxxvi, lxxxix (2003); 5 S. African L. Rep. lxxxviii, lxxxix–xc (2003); 3 S. African L. Rep. lxxxix, xci–xcii (2003); 1 S. African L. Rep. lxxxvii, lxxxviii (2003); 6 S. African L. Rep. lxxxiv, lxxxv (2002); 4 S. African L. Rep. xci, xcii (2002); 2 S. African L. Rep. xcvi, xcix (2002); 1 S. African L. Rep. xciii, xciv (2002);

ranged from mere reference to direct application. One case made reference to two decisions of the African Human Rights Commission, which is not a court.<sup>146</sup> A similar trend is revealed in the African Human Rights Law Reports.<sup>147</sup>

At a time when courts in countries such as the United States have been accused of being oblivious to international law, and others questioned for their reliance on it,<sup>148</sup> this judicial attitude in Africa may be lauded as a triumph for international law. Criticism can be levied, however, on the absence of reliance on decisions of international courts in Africa, such as the Common Market for Eastern and Southern Africa ("COMESA") Court of Justice, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, or even the African Commission which, although not a court, has been providing some instructive human rights jurisprudence.<sup>149</sup> While the decided cases

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4 S. African L. Rep. xlix, lii (2001); 4 S. African L. Rep. cl, clv (2001); 3 S. African L. Rep. xxxvi (2000); 3 S. African L. Rep. lii, liv (2001); 2 S. African L. Rep. cxxxvi, cxl (2001); 1 S. African L. Rep. cxxxii, cxxxvi (2001); 4 S. African L. Rep. cxv, cxviii-cxix (2000); 3 S. African L. Rep. cxxii, cxxv (2000).

146. See 6 S. African L. Rep. xxxvi, xxxvii (2004) (referring to *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd.*, 2004 (6) SA 40 (SCA) at 44 (S. Afr.)).

147. This Report reports cases from all African countries including decisions of the African Human Rights Commission. See, e.g., *International Case Law, State Reports Etc Considered*, 2000 AFR. HUM. RTS. L. REP. lv (2000) (listing decisions of the African Commission on Human and Peoples' Rights). An examination of the "[i]nternational case law, state reports etc. considered" section of the Report reveals that between 2000 and 2002 various national courts made reference to sixty-five decisions from international tribunals and commissions such as the United Nations Human Rights Committee, the European Commission of Human Rights, and the Inter-American Commission of Human Rights. See, e.g., *id.* at lviii (citing to the European Commission of Human Rights).

148. See Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507, 507 (2006) (describing reliance on international law in domestic adjudication as "inappropriate, undemocratic, and dangerous"). See generally Symposium, *International Law and the 2003-04 Supreme Court Term: Building Bridges or Constructing Barriers Between National, Foreign, and International Law: The Supreme Court, Constitutional Courts and the Role of International Law in Constitutional Jurisprudence*, 12 TULSA J. COMP. & INT'L L. 109 (2004); Henry Burmester & Susan Reye, *The Place of Customary International Law in Australian Law: Unfinished Business*, 21 AUSTL. Y.B. INT'L L. 39 (2001); Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 SYDNEY L. REV. 423 (2003); Treasa Dunworth, *Hidden Anxieties: Customary International Law in New Zealand*, 2 N.Z. J. PUB. & INT'L L. 67 (2004); Shane S. Monks, *In Defence of the Use of International Law by Australian Courts*, 22 AUSTL. Y.B. INT'L L. 201 (2002).

149. See generally Rachel Murray, *International Human Rights: Neglect of Perspectives from African Institutions*, 55 INT'L & COMP. L.Q. 193 (2005). Some judgments of the

before these African international tribunals are relatively few, they do exist, and their contribution to jurisprudence and international law should be recognized and relied on, where appropriate, by other national courts in Africa.<sup>150</sup>

In some jurisdictions in Africa, the reference to international decisions has constitutional foundation. Article 11(2) of the Malawi Constitution allows the courts to “have regard to current norms of public international law and comparable foreign case law” in interpreting the Constitution.<sup>151</sup> Under Article 39(1) of the South Africa Constitution, in interpreting the Bill of Rights, courts must consider international law and may consider foreign law.<sup>152</sup> Article 233 of the South Africa Constitution also enjoins the courts to prefer interpretations that are consistent with international law.<sup>153</sup> However, not all countries have showed a willingness to accept this new judicial attitude. For example, Section 111(b) of the Zimbabwe Constitution, inserted in 1993, provides that:

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Commission are reported in the African Human Rights Law Reports and the South African Journal on Human Rights. *See, e.g., African Commission Decisions According to Communication Numbers*, 2000 AFR. HUM. RTS. L. REP. lix (2000) (listing decisions of African Commission).

150. For a sample of the jurisprudence of the COMESA Court of Justice, see *Muleya v. Common Market for Eastern and Southern Africa* (No. 3), 2003 LLR 12 (COMESA) (adjudicating on the tort of libel); *Muleya v. Common Market for Eastern and Southern Africa*, 2001 LLR 10 (COMESA) (ruling on the remedies for breach of contract of personal service); *Muleya v. Common Market for Eastern and Southern Africa*, 2001 LLR 1 (COMESA) (ruling on amendment of pleadings); *Republic of Kenya v. Coastal Aquaculture*, 2001 LLR 11 (COMESA) (adjudicating on *locus standi* and the exhaustion of local remedies); *Ogang v. Eastern and Southern African Trade and Development Bank*, [2002] LLR 9 (COMESA) (ruling on judicial bias); *Eastern and Southern African Trade and Development Bank v. Ogang*, 2000 LLR 5 (COMESA) (ruling on privileges and immunities of an international institution); *Eastern and Southern African Trade and Development Bank v. Ogang*, 2000 LLR 8 (COMESA) (adjudicating on judicial review). On the jurisprudence of the International Criminal Tribunal for Rwanda, see *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Summary of Judgment (Sept. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998) (defining rape in international law and discussing how rape can amount to genocide); *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence (Sept. 4, 1998) (ruling on official responsibility for genocide and definition of crimes against humanity); *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003) (ruling on the responsibility of journalists for genocide). *See also* Kithure Kindiki, *Contributions of the International Tribunal for Rwanda to the Development of International Humanitarian Law*, 33 ZAMBIA L.J. 35 (2001).

151. THE CONSTITUTION OF THE REPUBLIC OF MALAWI 1994, art. 11(2).

152. S. AFR. CONST. 1996, art. 39(1).

153. *Id.* art. 233.

Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations . . . shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.<sup>154</sup>

As Tiyanjana Maluwa has suggested, this provision was clearly aimed at preventing courts from invoking international law.<sup>155</sup>

### E. *International Law and National Constitutions*

There is also a trend towards the adoption of "international law-friendly" constitutions<sup>156</sup> among some African countries.<sup>157</sup> Especially in Anglophone Africa, there seems to be a gradual abandonment of the practice of "avoiding the constitutional incorporation of international law altogether."<sup>158</sup> Article 144 of Constitution 1990 of Namibia can be said to represent the first manifestation of these international law-friendly constitutions.<sup>159</sup> It states: "[U]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."<sup>160</sup> The 1992 Constitution of Cape Verde is more far reaching; Article 11 provides:

General or common international law, insofar as it is in force in the international legal order, shall be an integral part of the Capeverdean legal order . . . . [L]egal acts emanated from the relevant organs of the supranational organizations of which Cape Verde is a member, shall enter directly into

154. THE CONSTITUTION OF THE REPUBLIC OF ZIMBABWE 1993, art. 111(b).

155. See Maluwa, *supra* note 1, at 64.

156. Erasmus, *supra* note 1, at 93. For a discussion of some of these constitutions, see Maluwa, *supra* note 1.

157. See Maluwa, *supra* note 1, at 46. French colonies have traditionally had provisions incorporating international law into the domestic law. See *id.* at 55–56 (listing these countries). See generally FELIX CHUKS OKOYE, INTERNATIONAL LAW AND NEW AFRICAN STATES 21–45 (1972) (describing the relationship between international and national law in early post-independent Africa).

158. Maluwa, *supra* note 1, at 56. Examples of these countries are South Africa, Malawi, and Kenya. *Id.* However, the proposed Kenyan Constitution of 2005 was rejected. See Lacey, *supra* note 52.

159. Maluwa, *supra* note 1, at 46.

160. THE CONSTITUTION OF THE REPUBLIC OF NAMIBIA 1990, art. 144

force in the domestic legal order, provided that that is so established in the respective constitutive instruments. The rules and principles of general or common international law and of conventional international law, validly approved or ratified, shall prevail after their entry into force in the international and domestic legal orders, over all legislative and domestic normative acts of an infra-constitutional value.<sup>161</sup>

The 1993 Interim Constitution<sup>162</sup> and Articles 39(1) and 233 of the 1996 South African Constitution provide yet more evidence of these international law-friendly constitutions.<sup>163</sup> It has been noted that, if the general rules of public international law in the Namibia Constitution are interpreted narrowly to exclude customary international law, then the fact that the South African provision extends to the incorporation of customary international law makes it a first, since no similar provision in other constitutions in Africa exists.<sup>164</sup> By specifying that customary law is part of the law of the country, the provision puts to an end the debate over whether customary law is part of the domestic law by virtue of incorporation or transformation.

These provisions in the constitutions of Namibia and South Africa can be said to represent an acknowledgement of the special role international law played in the struggles for independence and against apartheid in these two countries.<sup>165</sup> International law is seen as providing a neutral foundation for development of a new legal order distinct from the old one that was marked by apartheid.<sup>166</sup> Reaching out to international law also serves as a means of becoming part of the global community after decades of isolation.

These constitutional provisions appear to be inspiring some common law countries that traditionally have avoided such provisions,<sup>167</sup> for example, Malawi and Kenya. Under Article 211(3)

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161. CONSTITUTION OF THE REPUBLIC OF CAPE VERDE 1992, art. 11. Although this provision appears to be more far reaching than that of other national constitutions, the difficulty is ascertaining the limits of its scope due to the use of concepts (e.g. common/conventional international law, supranational, infra-constitutional) without definition. *Id.*

162. S. AFR. (INTERIM) CONST. 1993, art. 35, 116(2), 226(7), 231(1), 231(4).

163. S. AFR. CONST. 1996, arts. 39(1) and 233.

164. Maluwa, *supra* note 1, at 45–46.

165. Georges Abi-Saab, *Namibia and International Law: An Overview*, 1 AFR. Y.B. OF INT'L L. 3 (1993).

166. *Id.* at 4–5.

167. See generally Brian R. Opeskin, *Constitutional Modelling: The Domestic Effect of*

of the Malawi Constitution of 1994, customary international law, unless inconsistent with this Constitution or an Act of Parliament, is acknowledged to have continued application and is accordingly part of the laws of Malawi.<sup>168</sup> In Kenya, Article 3 of the Proposed Constitution 2005 listed customary law, international agreements applicable to Kenya, as well as the laws of the East African Community as part of the laws of Kenya.<sup>169</sup> Although this proposed constitution was rejected,<sup>170</sup> its provisions on international law represented another manifestation of Africa's growing international law friendliness. It is hoped that ultimately this provision will find its way into the Kenya constitution and that of other African countries.

The idea of international law-friendly constitutions in Africa should not be confined to the express inclusion of international law as part of national law. International law continues to influence the structure and workings of many national constitutions.<sup>171</sup> One area where this manifests itself is the incorporation of human rights and environmental law provisions into all the emerging constitutions on the continent.<sup>172</sup> Human rights provisions inspired by various international human rights instruments, such as the Universal Declaration of Human Rights, the Covenant of Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, are now routinely incorporated into national constitutions in Africa.<sup>173</sup>

These constitutional provisions put courts on a more solid foundation when using international law in domestic adjudication, both as an interpretive device and for the creation or conferment of substantive rights. Indeed, some of the constitutions specifically enjoin the judiciary to have regard to international

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*International Law in Commonwealth Countries*, 2000 PUB. L. 607, 607–26 (2000); Brian R. Opeskin, *Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries Part II*, 2001 PUB. L. 97, 97–114 (2001), *reprinted in* 27 COMMW. L. BULL. 1242, 1242–60 [hereinafter Opeskin, *Constitutional Modelling Part II*].

168. CONST. OF MALAWI 1994, art. 11(2).

169. Proposed New Constitution of Kenya (2005), KENYA GAZETTE SUPPLEMENT NO. 63 art. 3.

170. *See supra* note 52 and accompanying text.

171. *See* Maluwa, *supra* note 1, at 47.

172. *See* CONST. MALAWI 1994, art. 30 (making provision for internationally contested right to development); Proposed New Constitution of Kenya (2005), KENYA GAZETTE SUPPLEMENT NO. 63 art. 67 (providing for various environmental rights).

173. *See* Mirna E. Adjami, *African Courts, International Law and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?* 24 MICH. J. INT'L L. 103, 110–14.

law in adjudication. Article 11(2)(c) of the Malawian Constitution of 1994 provides that, in interpreting the provisions of this Constitution, a court of law shall, where applicable, have regard to current norms of public international law and comparable foreign case law.<sup>174</sup> Arguably, foreign case law is not limited to foreign domestic cases but can be extended to international tribunals like the International Court of Justice and the Court of Justice of the African Union.<sup>175</sup> Article 39(1) of the South Africa Constitution of 1996 provides that, in interpreting the Bill of Rights, a court, tribunal, or forum must consider international law and may consider foreign law.<sup>176</sup> This provision significantly expands the reach of international law: It can be used not only by courts, but also by tribunals and other forums.<sup>177</sup> Additionally, Article 233 enjoins courts to prefer interpretations that are consistent with international law.<sup>178</sup> These provisions represent a shift, especially in common law countries, from the situation where reliance on international law as an aid to interpretation did not have a direct statutory or constitutional foundation, but was the result of common law rules.<sup>179</sup>

These constitutional provisions also reflect the extent to which African countries are becoming open to and receptive of outside normative influences. Arguably, in this era of globalization, such openness is inevitable; what is revealing here, however, is that it is being explicitly acknowledged and fostered.<sup>180</sup> Indeed, some writers have sought to find a link between democracy and the influence of international law in national legal systems.<sup>181</sup> The belief is that "respect for international law would

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174. CONST. MALAWI 1994, art. 11(2)(c).

175. President Arthur Chaskalson drew a distinction, however, between decisions of foreign countries and those of international tribunals. See *S v. Makwanyane*, 1995 (3) SA 391 (CC) at 413, ¶ 36 (S. Afr.).

176. S. AFR. CONST. 1996, art. 39(1).

177. See Raylene Keightly, *Public International Law and the Final Constitution*, 12 S. AFR. J. HUM. RTS. 405, 415 (1996).

178. See S. AFR. CONST. 1996, art. 233.

179. See Maluwa, *supra* note 1, at 55–57 (noting that, in general, constitutions in Anglophone countries do not indicate whether or not international law is superior to municipal law, and that constitutions in Francophone African States explicitly state that treaties supersede domestic legislation, but are silent on the issue of customary law's superiority).

180. See MALUWA, *supra* note 3, at 50 (arguing that constitutional incorporation of customary international law into municipal law strengthens the protection of human rights).

181. See José E. Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303, 314 (1998)



arise as a natural corollary to the spread of democracy.”<sup>182</sup> However contested this linkage may be,<sup>183</sup> it cannot be denied that international law is finding a niche, hitherto unavailable, within the national legal systems of African countries. The next part explores some of the implications of this evolving reality.

## II. RE-IMAGINING INTERNATIONAL LAW—SOME SELECTED ISSUES

The above examination provides empirical evidence of the changing attitudes towards the relationship between international and national law in Africa. International law is influencing and shaping national legal processes and decision-making in a manner hitherto unknown.<sup>184</sup> The concept of sovereignty, which suggests that national legal systems are sealed or isolated from outside interference, is being re-assessed.<sup>185</sup> The content of national legal rules also continues to be shaped by international law.<sup>186</sup> Indeed, some have had to be abolished in response to the dictates of international law.<sup>187</sup> This is occurring through the direct incorporation of international laws, such as in the area of human rights, into national constitutions,<sup>188</sup> and

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(discussing and critiquing the argument that democracies have more compliance with international agreements than non-democracies).

182. Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and Its Implications for International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 1, 21–22 (Gregory H. Fox & Brad R. Roth eds., 2000) (citing Elihu Root, *The Effect of Democracy on International Law*, 4 INT’L CONCILIATION 151, 162, 167 (1917–1918)). Elihu Root, with words that seem to resonate even in our current age, further stated:

To be safe, democracy must kill its enemy [autocracy] when it can and where it can. The world can not be half democratic and half autocratic. It must be all democratic or all Prussian. There can be no compromise. If it is all Prussian, there can be no real international law.

Root, *supra*, at 166–67.

183. Fox and Roth criticize the “naïveté” of Root’s analysis, since he simply assumed the spread of democracy would lead to respect for international law, but examined neither the reverse causal pathway (i.e. that respect for international law might promote democracy), nor how the spread of democracy would change the *content* of international law. See Fox & Roth, *supra* note 182, at 22.

184. See *supra* notes 144–147 and accompanying text.

185. See *infra* notes 195–199, 202 and accompanying text.

186. See, e.g., Maluwa, *supra* note 1, at 62–63 (discussing cases from Botswana, Zimbabwe, Namibia, and Tanzania in which national courts relied on international conventions and international court decisions in interpreting the constitutions).

187. See *infra* notes 230, 233–239 and accompanying text.

188. See *supra* note 173 and accompanying text (noting that human rights provi-

indirectly through judicial decision-making that takes account of international law.<sup>189</sup> The interaction between the two legal orders is also raising questions of domestic power relations<sup>190</sup> and the law-making processes at the international level.<sup>191</sup> This part examines some of the issues that arise from the interaction between these two legal orders.

A. *Re-examination of Traditional Understanding of Sovereignty*

The dualist conception of the domestic legal system as sealed from the outside world made international norms not directly applicable in national legal systems. Under this conception, allowing rules of international law to operate directly in municipal law unjustifiably concedes that international law is superior to, and detracts from the authority of, municipal law.<sup>192</sup> This was something a sovereign State, with its legal system, could not countenance. The above examination, however, reveals a shift in the traditional understanding of sovereignty as it relates to the relationship between the international and national legal systems. It represents a significant shift, even if only in theory, on the part of countries that were once characterized as “reluctant to incorporate international law directly into their national constitutions and thereby make it an integral part of their municipal law.”<sup>193</sup>

Indeed, this re-examination of sovereignty is going on in both the legal and political realms. The principle of non-interference in domestic affairs, which was a cardinal principle of the OAU,<sup>194</sup> has become a relic of the past upon the coming into force of the Constitutive Act of the African Union.<sup>195</sup> Under Ar-

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sions inspired by various international human rights instruments are now routinely incorporated into national constitutions in Africa).

189. See *supra* notes 109–119, 144–147 and accompanying text (noting that African courts have relied on both international human rights conventions that were not incorporated into the national legal system and decisions of international tribunals).

190. See *supra* notes 121, 130–133, and accompanying text (arguing that the courts’ reliance on unincorporated treaties is an assertion of judicial autonomy, and the executives’ giving effect to unincorporated treaties empowers the executive and the expense of the legislature).

191. See *infra* notes 257–266 and accompanying text.

192. See Monks, *supra* note 148, at 222.

193. Maluwa, *supra* note 1, at 57.

194. OAU Charter art. 3(2), May 25 1963, [http://www.africa-union.org/official\\_documents](http://www.africa-union.org/official_documents) (last visited Nov. 27, 2006).

195. Constitutive Act of the African Union, July 11, 2000, <http://www.africa-union.org>.

ticle 4(h) of the Constitutive Act, Member States recognize “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.”<sup>196</sup> Elsewhere in Africa, in August 2003, members of the Southern African Development Community (“SADC”)<sup>197</sup> unanimously endorsed a Mutual Defence Pact that gives each nation the right to intervene in armed attacks on their Member States.<sup>198</sup> Although these two instruments are riddled with textual ambiguity, and remain to be tested in practice, agreement on them represents a remarkable achievement in Africa.<sup>199</sup> Indeed, as Yusuf notes, no other regional organization in Africa has ever incorporated such a right in its constitutive instrument.<sup>200</sup> Saddled with civil con-

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org/root/au/AboutAU/Constitutive\_Act\_en.htm (last visited Nov. 27, 2006). The African Union replaces the Organization of African States (“OAS”). On the structure, characteristics, and workings of the African Union, see generally Konstantinos D. Magliveras & Gino J. Naldi, *The African Union—A New Dawn for Africa?*, 51 INT’L & COMP. L. Q. 415 (2002); Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. W. INT’L L. J. 69 (2002-2003); *Symposium: The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift?*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 1-276 (2003).

196. Constitutive Act of the African Union, *supra* note 195, art. 4(h), *amended by* Protocol on Amendments to the Constitutive Act of the African Union, July 11, 2003, *reprinted in* 13 AFR. J. INT’L & COMP. L. 37. As amended, Article 4(h) reads:

[T]he 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 to the Member State of the Union upon the recommendation of the Peace and Security Council.

*Id.* at 38.

197. This is an economic community of countries in Southern Africa. The community aims to among other goals, achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa, support the socially disadvantaged through regional integration, evolve common political values, systems and institutions, and promote and defend peace and security within the region. See Southern African Development Community, <http://www.sadc.int/home.php> (last visited Nov. 11, 2006).

198. SADC Mutual Defense Pact, Aug. 2003, art. 6, [http://www.iss.co.za/Af/RegOrg/unity\\_to\\_union/pdfs/sadc/defpact.pdf](http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/sadc/defpact.pdf) (last visited Nov. 27, 2006); see Benjamin Sirota, *Sovereignty and the Southern African Development Community*, 5 CHI. J. INT’L L. 343, 344 (2004).

199. See generally Tiyanjan Maluwa, *Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union*, 51 NETH. INT’L L. REV. 195, 215-20 (2004) (arguing for a more cautious view of the new right of intervention); Sirota, *supra* note 198, at 344; Abdulkawi A. Yusuf, *The Right of Intervention by the African Union: A New Paradigm in Regional Enforcement Action*, 11 AFR. Y.B. INT’L L. 3 (2003) (arguing for a more positive view of the right of intervention).

200. Yusuf, *supra* note 199, at 19.

flicts and human rights abuses that are often neglected by the international community, these African initiatives hold the potential of securing peace and respect for human rights on the continent.<sup>201</sup> How far these new intervention policies will assist in the reduction of conflicts and promote human rights in Africa remains to be seen.<sup>202</sup> If the recent African Union experience with the Darfur situation in Sudan is anything to go by, then it can safely be said that the challenge is monumental.<sup>203</sup> The presence of political will beyond the existence of a text mandating intervention, the receptiveness of the local population to the fact of intervention, and the availability of funding for that purpose are crucial if the positive impact of these new policies of intervention is to be realized.

The efforts at economic integration in Africa may also benefit from the integration of Community law into domestic legal systems, and the concomitant surrender of sovereignty.<sup>204</sup> As Xavier Forneris has noted:

[S]overeignty transfer is a necessary attribute of any real integration process . . . . Without its regional grouping would amount to little more than a loose association of countries—[sic] no more than a club or forum where governments might engage in discussions on matters of common interest and might issue statements and non-binding recommendations only to rush into unilateral decisions that might end up being counter to the spirit if not the letter of the joint statements.<sup>205</sup>

Arguably, such has been the case of economic integration efforts

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201. *See id.*

202. There are legal and practical difficulties with the right to intervene in a country even for humanitarian purposes. Such intervention challenges the idea of State sovereignty, may lead to protracted wars, and can be used for purposes other than humanitarian. All these counsel for caution in the invocation and exercise of this right. The literature on humanitarian intervention is vast and exciting, but a full examination of them is beyond the scope of this Article. For a recent discussion of some of the issues, especially from the perspective of unilateral humanitarian intervention, i.e., intervention without the approval of the U.N. Security Council, see Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107 (2006).

203. *See* Jonathan D. Rechner, *From the OAU to the AU: A Normative Shift with Implications for Peacekeeping and Conflict Management, or Just a Name Change?*, 39 VAND. J. TRANS-NAT'L L. 543, 570–75 (2006) (discussing the impact the African Union has had on the situation in Darfur).

204. Forneris, *supra* note 66, at 3–7 (discussing economic integration and community law integration into national law).

205. *See id.* at 6.

in Africa. Economic integration in Africa has been characterized by weak institutional frameworks, the absence of political will, and minimal national impact.<sup>206</sup> Experience in Europe indicates that as community laws become part of national law, and individuals begin to make claims founded on them, economic integration will deepen.<sup>207</sup>

Re-examining our understanding of sovereignty and how it impacts on the relationship between international and national law is important in this age of interdependency and globalization. Sovereignty should not be viewed as a zero sum game where you either retain it or lose it.<sup>208</sup> Assertion of sovereignty should not lead a nation onto the path of legal isolationism. It may sometimes be necessary to “lose” sovereignty for the general benefit of all the participants in a common undertaking like an economic integration.<sup>209</sup> The experience of the European Union demonstrates how individual States can give up a degree of sovereignty to the advantage of all in this regard.<sup>210</sup>

### B. *Respect for International Law*

Perhaps no greater problem bedevils international law than the problem of enforcement, or ensuring compliance with its norms.<sup>211</sup> It is suggested that the changing attitude towards in-

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206. See Nsongurua J. Udombana, *A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development*, 13 IND. INT'L & COMP. L. REV. 185, 202–06 (2002) (discussing the problems of economic integration in Africa).

207. See *id.* at 190–91 (discussing how the EU is a model of economic integration and how the provisions for free movement of workers and goods have deepened economic integration).

208. See Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1, 16 (1993).

209. See Joel P. Trachtman, *Reflections on the Nature of the State: Sovereignty, Power and Responsibility*, 20 CAN.-U.S. L. J. 399, 400–01 (1994) (arguing that there is a cost-benefit analysis that must be done to assess what a State gains in influence once it gives up some of its autonomy).

210. See *id.*; Kanishka Jayasuriya, *Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425, 428, 443 (1999) (discussing what has emerged from the formation of the EU in terms of development of the idea of sovereignty).

211. See generally Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19 (2003) (discussing implementing international law through domestic courts); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 470, 492 (2005) (discussing the effectiveness of international law despite its apparent lack of enforcement power).

ternational law in Africa holds greater prospect for the enforcement of international law on the continent.<sup>212</sup> The fact that international law is often not integrated into national legal systems poses a strong challenge to its effectiveness.<sup>213</sup> National enforcement is an essential means of increasing respect for and effectiveness of international law.<sup>214</sup> With the increased acceptance of international law by national courts, and the direct application of international law within national legal systems, private individuals may be able to make claims founded on it.<sup>215</sup> This will enhance the effectiveness of international law.<sup>216</sup> The extension of the doctrine of legitimate expectation by the courts to unincorporated treaties may afford substantive rights to individuals in litigation before national courts. If international law is constitutionally made part of domestic law, it becomes a relevant consideration in decision-making.<sup>217</sup> This implies, for example, that the exercise of judicial and administrative discretion should take account of international law, and arguably, produce an outcome that is consistent with international law.

With the supremacy and automatic enforceability of community law, individuals may be able to challenge the validity of domestic legislation and measures that are not in conformity with the dictates of community law.<sup>218</sup> Individuals will become enforcers of community law, and international law for that matter, through litigation before national courts. This layer of en-

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212. See MALUWA, *supra* note 3, at 48–51 (finding a correlation between democracy and an increased incidence of peace and international law oriented foreign policy).

213. See Stemmet, *supra* note 17, at 47 (“In view of the inadequate enforcement facilities at the disposal of international law, the effectiveness of the implementation of international legal rules depends greatly on the enforcement of such rules by domestic courts.”).

214. See *id.* at 47 (“The status that international law enjoys in domestic legal systems is largely determined by asking whether rules of international law are automatically incorporated into municipal law and, therefore, have direct effect on citizens and the courts, or whether an act of transformation must first take place.”).

215. See Jackson, *supra* note 48, at 322 (stating that individuals can base claims on some treaty norms without the need for government intervention or an act of transformation once the treaty has been incorporated into municipal law).

216. See generally *id.* at 321–27 (arguing that individuals bringing claims to enforce treaties may be more effective than governmental enforcement due to the latter’s differing institutional imperatives).

217. See MALUWA, *supra* note 3, at 43–48 (citing CONST. MALAWI 1994, art. 11(2)(c), which provides that judicial interpretation of its provisions will, “where applicable, have regard to current norms of public international law and comparable foreign case law”).

218. See Jackson, *supra* note 48, at 322.

forcement—individual and national courts—will complement the efforts of community enforcement institutions such as in the case of the AEC, the Court of Justice of the African Union. As Justice Powell once noted, “until international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law.”<sup>219</sup> With international law as part of national law in some African countries, their national courts have become forums for the vindication of rights acquired under international law, and a channel for securing the discharge by States of obligations assumed thereunder.<sup>220</sup>

The effectiveness of international law in Africa can be greatly enhanced if individuals are allowed to rely on international law in domestic adjudication and have direct access to international tribunals in case of violation of international law.<sup>221</sup> The author has argued elsewhere that individuals can be a force behind the economic integration efforts in Africa if allowed to invoke community law before national courts, and to have direct access to community tribunals.<sup>222</sup> Indeed, some economic communities in Africa provide a right of action before their respective community courts for individuals.<sup>223</sup> Allowing for private rights of action increases the number of persons who will potentially bring cases before international tribunals, and will save States the trouble of litigating on behalf of their nationals.<sup>224</sup> It

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219. *First National City Bank v. Banco Nacional de Cuba* 406 U.S. 759, 775 (1971) (Powell, J., concurring in the judgment).

220. See Jackson, *supra* note 48, at 322; see also Stemmet, *supra* note 17, at 67.

221. See Jackson, *supra* note 48, at 322. See also Stemmet, *supra* note 17, at 67.

222. Oppong, *supra* note 94.

223. See Treaty Establishing the Common Market for Eastern and Southern Africa art. 26, Nov. 5, 1993, <http://www.comesa.int> (last visited Nov. 27, 2006). Article 26 states that:

Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty: Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State.

*Id.*; see SADC Protocol on Tribunal and Rules of Procedure Thereof art. 15(1), Aug. 7, 2000, <http://www.sadc.int> (last visited Nov. 27, 2006); EAC Treaty, *supra* note 26, art. 30.

224. See Jackson, *supra* note 48, at 322.

performs the constitutional function of limiting the power of governments to decide which community laws are worth enforcing, thus guaranteeing greater governmental compliance with community law.<sup>225</sup> Individuals will also be able to participate in the creation of community law through strategic litigation and legal submissions that will shape the jurisprudence of courts.<sup>226</sup> All these will ensure greater compliance with community law.

The reliance on decisions of international tribunals by national courts will also strengthen the former by broadening the reach of their jurisprudence. The stature of a court partly depends on the recognition accorded its jurisprudence by other courts both within and outside of its jurisdiction.<sup>227</sup> In this regard, it is hoped that national courts in Africa will begin to make use, where appropriate, of the jurisprudence of African international tribunals in adjudication. This can be facilitated by regular interaction between international tribunals in Africa and their national counterparts, and the making of their jurisprudence readily available. The selection of international judges from the national courts may be an important first step in forging this relationship.<sup>228</sup>

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225. *See id.*

226. *See id.* at 326.

227. *See* Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 269, 271–72 (stating that the effect of judicial, quasi-judicial, and arbitral institutions on individual States is to socialize them to the idea of international adjudication and proposing that the fact that leading international law practitioners and judges serve on administrative tribunals contributes to the cross-fertilization of international jurisprudence and thus to the enrichment of international law in general). *Cf.* Joseph R. Wetzel, *Improving Fundamental Rights Protection in the European Union*, 71 FORDHAM L. REV. 2823, 2832–33 (2003) (noting that the European Court of Justice's capability as a fundamental rights guardian hinges on how much the Court's decisions actually affect the European Commission Member States and determining that national courts within the Member States must consistently comply with, accept, and apply the Court's decisions for them to have any real influence within the European Union).

228. *See generally* Maria Alejandra Rodriguez Lemmo, *Study of Selected International Dispute Resolution Regimes, With an Analysis of the Decisions of the Court of Justice of the Andean Community*, 19 ARIZ. J. INT'L & COMP. L. 863, 893–95 (2002) (discussing the composition of the European Court of Justice, noting that the judges come from the Member States); Wetzel, *supra* note 227, at 2834 (opining that the European Court of Justice must derive legitimacy from the support of the Member States and their populations, even in the face of disagreement with the decisions, and contending that without compliance and legitimacy, the Court's decisions provide lip service, but no real protection to individuals).



### C. Reform of National Legal Rules

The interaction between international and national law also holds the potential for inspiring reform of aspects of national law.<sup>229</sup> This is especially so in the area of human rights law, but it also remains true for others areas of law. An awareness of, and a reliance on, international human rights law has led to reforms in many aspects of African customary law.<sup>230</sup> The patriarchal and communal tendencies of customary law are coming under attack from the egalitarian and individualist teachings of human rights.<sup>231</sup> But the impact of international law is being, and indeed must be, felt in other areas of law as well.<sup>232</sup>

The Ugandan case of *Shah v Manurama Ltd.*<sup>233</sup> provides an example of how international law commitments may affect domestic civil procedure rules. In this case, the defendant brought an application seeking an order requiring the plaintiff to pay security for costs.<sup>234</sup> The plaintiff was resident in Kenya, and thus outside the jurisdiction of the Uganda High Court. The defendant argued that the fact that the plaintiff was resident abroad was *prima facie* ground for ordering payment of costs.

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229. See Buerghenthal, *supra* note 227, at 271 (noting that international law influences the content of international conventions, domestic legislation, and national jurisprudence applicable to international transactions and international relations).

230. See, e.g., Innocent Anaba, *African Human Rights Court Judges Sworn In*, VANGUARD, July 17, 2006, <http://www.vanguardngr.com/articles/2002/world/w317072006.html> (last visited Nov. 27, 2006) (reporting that “[t]oday signposts a new beginning in the battle to enthrone a culture of respect for human rights and fundamental freedoms on the continent and we shall support the judges to ensure they keep the promise which this day represents in the life of all Africans”); African Court on Human and Peoples’ Rights, [http://www.aict-ctia.org/courts\\_conti/achpr/achpr\\_home.html](http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html) (last visited Nov. 1, 2006) (stating that before the adoption of the African Court on Human and Peoples’ Rights Protocol (“ACHPRP”), the protection of rights listed in the African Charter rested solely with the African Commission on Human and Peoples’ Rights, a quasi-judicial body, modeled on the U.N. Human Rights Committee).

231. See, e.g., Act 29 of 1960, Criminal Code § 314A, (1960) (Ghana) (outlawing the customary practice of Trokosi, i.e. sending young girls to a priest to atone for the sins of a family member by performing sexual acts); Ephraim v. Pastory, 87 I.L.R. 106, 110, 119 (Tanz. High Ct. 1992) (where reliance on human rights law influenced the abrogation of a customary rule barring women from selling land, namely clan land).

232. See *infra* notes 233–250 and accompanying text. See generally Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT’L J. CONST. L. 540, 552 (2006) (discussing the growing importance of international law in domestic adjudication, and using the law of security barriers in Israel as an example).

233. 2003 1 E. Afr. L. Rep. 294 (Uganda).

234. *Id.* at 296.

In so arguing, the defendant relied on well-established common law principles.<sup>235</sup> In reply, the plaintiff argued that given the re-establishment of the EAC, the question of residence for the purpose of ordering security for costs should be re-examined.<sup>236</sup> In denying the application, the Court held that in East Africa, “there could no longer be an automatic and inflexible presumption for the courts to order payment of security for costs with regard to a plaintiff who is resident in the East African Community.”<sup>237</sup> The Court reasoned that the fact of East African Community residence “begs for a fresh re-evaluation of our judicial thinking” as regards the implementation of the law requiring plaintiffs to pay security for costs.<sup>238</sup> Among the factors that influenced the court in declining the application were the facts that:

(2) All the three countries of Uganda, Kenya and Tanzania are partner States in the East African Community (“EAC”).

(3) The East African Community Treaty (like the European Community Treaty) seeks to establish a customs union, a common market, and a monetary union—as integral pillars of the community; and ultimately, a political union among the partner States. In particular, the East African Community Treaty makes express provision for the unification and harmonisation of the laws of the partner States, including “standardisation of the judgments of courts within the Community” (article 216); and establishment of a common bar (that is cross-border legal practice) in the partner States . . . .

(4) The underlying objective of undertaking all the initiatives described above—and many more not discussed in this ruling—are stated in article 5 of the East African Community Treaty as being the need: “to develop policies and programmes aimed at *widening* and *deepening cooperation* among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.” (emphasis added)

. . . .

(7) Article 104 of the East African Community Treaty provides for the free movement of persons, labour, services, and

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235. *Id.*

236. *Id.* at 299.

237. *Id.* at 298.

238. *Id.* at 297.

the right of establishment and residence. The partner States are under obligation to ensure the enjoyment of these rights by their citizens within the community. In this regard, the court is mindful of the fact that the East African Community Treaty has the force of law in each partner State (article 8(2)(b)); and that this treaty law has precedence over national law (article 8(5)).<sup>239</sup>

This case demonstrates a clear appreciation on the part of the Court of the importance of Community law and its impact on existing national laws. It is refreshing that individuals are beginning to enforce the benefits Community law provides for them. This can be enhanced by promoting in individuals, lawyers, and judges an awareness of the existence, implications and benefits of Community law. This is a task that should be pursued vigorously by the various economic communities in Africa. Hopefully, the engagement between community law, national courts and individuals will continue.

International law can also provide a basis for the development of the common law through legislation and judicial decisions.<sup>240</sup> In this regard, it is significant that the South Africa Constitution requires courts to develop the common law or cus-

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239. *Id.* at 297–98. This section of the decision refers to the EAC Treaty. Article 1 of the EAC treaty states that “‘Partner States’ means the Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania and any other country granted membership to the Community under Article 3 of this Treaty.” The Preamble outlines the goals of the EAC Treaty, including the establishment of a customs union, a common market, and a monetary union. Article 126 encourages the “standardisation of the judgements of courts within the Community.” Article 5 outlines the objectives of the Community. Article 104 discusses the free movement of persons and labour. Article 8 describes the responsibilities of the Partner States in undertaking implementation.

240. *See, e.g.,* *Dietrich v. The Queen* (1992) 177 C.L.R. 292 (Austl.). In *Dietrich*, the Court had to consider whether the common law recognized the right of an accused to legal representation in a criminal trial. The accused relied on Section 14(3) of the International Covenant of Civil and Political Rights and argued for the development of the common law to recognize this right. The Court accepted that where the common law is uncertain, the court may develop it by looking to international law. *See also Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) (S. Afr.). In *Carmichele*, the applicant argued for the development of the common law to recognize that a legal duty was placed on the police and prosecution to protect her from assault. In arguing for the imposition of this duty, the applicant relied on the constitutional right to life, the right to respect for and protection of dignity, the right to freedom and security, the right to privacy, and the right to freedom of movement. The Constitutional Court declined to develop the common law in this instance on the ground that it had not had the benefit of the fully considered opinion of the lower courts on the alternative courses to follow in such development. *See Carmichele*, (4) SA at 941.

tomary law so as to promote the spirit, purport, and objects of the Bill of Rights.<sup>241</sup> When interpreting the Bill of Rights, the Court must make use of international law. It is suggested that, through this route, international law may be used to develop the common law.<sup>242</sup> Where the common law is unclear or non-existent on an issue, international law could be used to clarify or develop it. As Justice Brennan has noted, “the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.”<sup>243</sup>

It is not only international human rights that can be relevant for the development of the common law in Africa. International commercial law, as reflected in, for example, the work of the United Nations Commission on International Trade Law (“UNCITRAL”) and the International Institute for the Unification of Private Law (“UNIDROIT”)<sup>244</sup> could provide rules for the development of commercial law. For example, payment systems, insolvency, and electronic commerce are areas in which the work of UNIDROIT may greatly benefit common law.<sup>245</sup> This is especially so in light of the highly underdeveloped state of these areas of the law in Africa. In recent times, a proposed Uniform

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241. S. AFR. CONST. 1996 art. 39(2); see *Carmichele*, (4) SA at 941.

242. See, e.g., Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 42–44 (1999) (discussing the importance of developing common law through provisions of the South African Constitution that encourage the consideration of international law).

243. *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 68.

244. There are currently only four African members of UNIDROIT: Egypt, Nigeria, South Africa, and Tunisia. See *International Institute for the Unification of Private Law, Membership*, <http://www.unidroit.org/english/members/main.htm> (last visited Nov. 5, 2006).

245. See generally Statute of the International Institute for the Unification of Private Law art. 1, Mar. 26, 1993, 15 U.S.T. 2504 (declaring the goals of International Institute for the Unification of Private Law (“UNIDROIT”) to be the “harmonizing and coordinating [of] the private law of States and groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law”). For an explanation of the position taken by the United Nations on payment systems, insolvency, and electronic commerce, see United Nations Convention on the Assignment of Receivables in International Trade, G.A. Res. 56/81, U.N. Doc. A/RES/56/81 (Jan. 31, 2002); Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law, G.A. Res. 59/40, U.N. Doc. A/RES/59/40 (Dec. 16, 2004); United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (Dec. 9, 2005).

Act of OHADA on contracts is being influenced by UNIDROIT principles of International Commercial Contracts.<sup>246</sup> This development is refreshing in light of the relatively underdeveloped state of the law in this area in Africa. The work of the Hague Conference on Private International Law<sup>247</sup> can also shape the development of the common law rules on private international law;<sup>248</sup> a subject whose development has been utterly neglected in Africa. Indeed, so underdeveloped is the subject in Africa that one writer has described it as "the Cinderella subject seldom studied [and] little understood."<sup>249</sup> The Hague Conventions on private international law can provide the basis for legislation in areas where the common law responses have proved inadequate, ineffective, or unduly complicated, such as in the areas of securities and child abduction.<sup>250</sup>

The extent to which the works of these international law institutions can provide the basis for the development of national law is a function of the degree of States' participation in their activities. Thus, the author suggests that there is need for increased participation of African countries in the works of these forums. It is only by their participation that the specific needs and legal traditions of a country can be taken into account as these institutions develop their law.<sup>251</sup> Participation also creates a potentially supportive domestic constituency, thus making for

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246. See, e.g., Date-Bah, *supra* note 90, at 269–72 (2004); see also Marcel Fontaine, Abstract, 9 UNIFORM L. REV. 266, 266–67 (2004).

247. The author examines the relationship between the Hague Conference and Africa in greater detail elsewhere. See Richard F. Oppong, *The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation*, 8 Y.B. PRIVATE INT'L L. (forthcoming 2007). There are currently only three African members of the Hague Conference on Private International Law: Egypt, Morocco, and South Africa. See generally *Hague Conference on Private International Law, Member States*, <http://www.hcch.net> (last visited Nov. 5, 2006).

248. See John David McClean, *The Contribution of the Hague Conference to the Development of Private International Law in Common Law Countries*, 233 RECUEIL DES COURS (Issue 2) 275 (1992); see also PETER NORTH, *Hague Conventions and the Reform of English Conflict of Laws*, in *ESSAYS IN PRIVATE INTERNATIONAL LAW* 225, 225–56 (1993).

249. C. F. FORSYTH, *PRIVATE INTERNATIONAL LAW: THE MODERN ROMAN-DUTCH LAW INCLUDING THE JURISDICTION OF THE HIGH COURTS* 43 (4th ed., 2003).

250. See, e.g., Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006, <http://www.hcch.net> (last visited Nov. 27, 2006); Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, <http://patriot.net/~crouch/haguetext.html> (last visited Nov. 27, 2006).

251. See generally Maluwa, *International Law-Making*, *supra* note 3 (discussing the role of the OAU in contributing to the development and expansion of international

increased awareness and easier implementation of laws developed in these forums.<sup>252</sup> In an era of increased interdependency and legal interaction, Africa cannot afford to be oblivious to or isolated from developments in these international forums. Africa's devotion to human rights law, as reflected in the incorporation of human rights provisions into national constitutions and the proliferation of human rights NGOs on the continent should be matched with similar attention to these equally important developments in other aspects of international law.<sup>253</sup>

#### D. *Democratic Deficit*

This examination suggests that the elected branches of government, the executive and legislature, appear to have surrendered part of State sovereignty to international institutions.<sup>254</sup> Additionally, the unelected branch of government, that is, the judiciary, has been asserting a level of autonomy as regards interpreting the role of international law in the national legal system.<sup>255</sup> Furthermore, issues of representation and accountability appear not to have been wholly accounted for in these new arrangements for receiving international law. These issues raise questions of a potential democratic deficit at two levels.

At the international level, one may query the propriety of entrusting "national law-making powers" to international institutions that are not directly accountable to the people who are often affected by the decisions. For example, treaty making

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law); Maluwa, *The OAU/African Union and International Law*, *supra* note 3 (outlining recent international law making among African States).

252. See generally Maluwa, *International Law-Making*, *supra* note 3; Maluwa, *The OAU/African Union and International Law*, *supra* note 3.

253. See, e.g., THE CONSTITUTION OF THE REPUBLIC OF MADAGASCAR 1992, pmbl., art. 40(2); THE CONSTITUTION OF THE KINGDOM OF MOROCCO 1992, pmbl (stating "[a]ware of the need of incorporating its work within the frame of the international organisations of which it has become an active and dynamic members, the Kingdom of Morocco fully adheres to the principles, rights and obligations arising from the charters of such organisations, as it reaffirms its determination to abide by the universally recognised human rights"); S. AFR. CONST. 1996, pmbl. (stating that South Africa "adopt[s] this Constitution as the supreme law of the Republic so as to [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights"). For a list of African NGOs that perform human rights work in Africa, see African NGO's, <http://billie.lib.duke.edu/pubdocs/ngo/africa.asp> (last visited Nov. 10, 2006).

254. See *supra* notes 29, 31, 42, 61, 72, 92, 93, 204, 207 and accompanying text.

255. See *supra* notes 121, 130, 142 and accompanying text.

often takes place behind closed doors with little outside input.<sup>256</sup> As Terrence Daintith put it, "international law is formed in an inherently non-democratic way . . . by conclaves of treaty negotiators collectively responsible to no representative body."<sup>257</sup> This non-democratic issue is exacerbated where the treaty regime creates supranational organizations like the EAC, AEC, and OHADA. Such supranational organizations have powers to take decisions that are directly or automatically applicable within the national legal system,<sup>258</sup> and their treaty regimes often preclude governments from taking certain decisions domestically on the pain of being in breach of their international commitments.<sup>259</sup>

Admittedly, a more open, representative, and participatory process of international lawmaking may mitigate these concerns.<sup>260</sup> The problem, however, is always who gets represented and by whom. Various interests groups such as women, inves-

256. See, e.g., *PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY* xi (Stefan A. Risenfeld & Frederick M. Abbott, eds., 1994) (explaining that treaty making powers have historically been held principally by the national executive and secondarily by the parliament because of political relations and national security).

257. Terence Daintith, *Is International Law the Enemy of National Democracy?*, in *AMBIGUITY IN THE RULE OF LAW: THE INTERFACE BETWEEN NATIONAL AND INTERNATIONAL LEGAL SYSTEMS*, 115 (Thomas A.J.A. Vandamme & Jan-Herman Reestman eds., 2001). Customary international law evolves through State practice grounded in a sense of legal obligation, a process which leaves even less scope for democratic argument.

258. See AEC Treaty, *supra* note 92, art. 8(3)(h); EAC Treaty, *supra* note 26, art. 78(2) (giving examples of such powers).

259. See EAC Treaty, *supra* note 26, arts. 3(e), 8(4), 8(5).

260. Some economic communities in Africa have appreciated this fact and have made provision for community parliaments with elected representatives. See, for example, Article 49(1) of the EAC Treaty, which makes the East African Legislative Assembly established under Article 9(1)(f) of the Treaty the legislative organ of the community. EAC Treaty, *supra* note 26, arts. 49(1), 9(1)(f). This Assembly consist of, among others, twenty-seven members elected from the various national assemblies of the member states. *Id.*, arts. 48(1)(a), 49(2)(a). The Community Assembly is to liaise with the national assemblies of the Member States on matters relating to the Community. Article 7(c) of the AEC Treaty also establishes a Pan-African Parliament with a view to ensuring that the people of Africa are fully involved in the economic development and integration of the continent. See AEC Treaty, *supra* note 92, art. 7(c). Full details on this Parliament are contained in the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament 2001, March 2, 2001, <http://www.africanreview.org/docs/civsoc/pap.pdf> (last visited Nov. 27, 2006) [hereinafter *Protocol*]. It is envisaged that the Pan-African Parliament will ultimately evolve into an institution with full legislative powers with members elected by universal adult suffrage. *Protocol*, art. 2(3). Article 6(1)(c) of the Treaty of the Economic Community of West African States also establishes a Community Parliament. Treaty of the Economic Community of West African States, art. 6(1)(c), July 24, 1993, 35 I.L.M. 660 (1996).

tors, and traders are all significantly affected by international law.<sup>261</sup> Ensuring a voice for them in the creation of international law represents a formidable challenge. The fact that these interests are often not represented, coupled with the increasing application of international law in the national legal system, suggests that legislatures in Africa must strengthen their oversight responsibility as far as international law is concerned.<sup>262</sup> Mechanisms such as question times in parliament and the use of the parliamentary committee system should be put in place to ensure legislative involvement in the processes leading to the conclusion of international agreements.<sup>263</sup> Establishing a specific parliamentary committee responsible for examining developments in international law and their domestic significance or impact will not be out of place.<sup>264</sup> The time when international law was conceived as impacting only on relationships between sovereigns is history, hence, the need for greater attention to ensure that its rules meet national needs and aspirations.<sup>265</sup>

While the democratic question is important, it can be criticized for concentrating on the sources of norms and ignoring their content.<sup>266</sup> International laws may indeed, and often do, reflect national values. Even when they do not, international law

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261. See generally NOAH RUBINS & N. STEPHAN KINSELLA, *INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE* xxiii (identifying international law as playing an important role in governing investor protection, treaties protecting foreign investment, and other matters of importance to investors); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991) (discussing international law's distinct impact on women).

262. See *supra* notes 121, 122, 130–133 and accompanying text.

263. For a comparative survey of the approach of various jurisdictions, see generally Stefan A. Riesenfeld & Frederick M. Abbot, *Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI-KENT L. REV. 293 (1991).

264. See generally Opeskin, *Constitutional Modelling Part II*, *supra* note 167, at 102–04, reprinted in 27 COMMW. L. BULL. 1270–71 (describing constitutional modeling and the broad sharing of ideas on the relationship between international law and domestic law as useful tools in adapting to developments in international law).

265. See *id.* at 102, reprinted in 27 COMMW. L. BULL. at 1247 (describing a State's potential interest in regulating the relationship between international law and domestic law because "their subject matter defines the effect of international norms on the domestic legal system."); see also Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1355 (2004); Christian N. Okeke, *International Law in the Nigerian Legal System*, 27 CAL W. INT'L L. J. 311 (1997).

266. See generally John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L. J. 244 (1997) (criticizing such concentration).



can provide rules and a basis for the development of national law. Indeed, history is replete with instances where people have turned to international law "as a source of standards of fairness and humanity to supplement local traditions which may be tainted with bias, discrimination or faction."<sup>267</sup> South Africa provides an example of this.<sup>268</sup> To merely dismiss a rule of law on account of its source would be unfortunate. Substance should overcome form in this regard. The presence of well laid out conditions for allowing international law to have direct effect within the national legal system, and an adjudication approach that takes account of the national context and values when relying on international law system, may further mitigate these concerns.<sup>269</sup> Courts may also develop rules that reduce, in appropriate circumstances, the direct application of international law. Exclusionary rules on standing, the public/private character of the treaty in question, and the directness and precision of the language in which the treaty is couched can all be relevant considerations in deciding on the direct application of international law within the national legal system.<sup>270</sup>

Our conception of democracy should go beyond elections, representation, or majoritarianism; ensuring the rule of law should be paramount. In some instances the judiciary may have to "take the lead" by using international law to protect people or reform laws that have not yet engaged the attention of the legislature. Reliance on international law brings other perspectives to bear on decision making and could be seen as an exercise in

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267. David Feldman, *Monism, Dualism and Constitutional Legitimacy*, 20 AUSTL. Y.B. INT'L L. 105, 107 (1999). This is not to suggest that international law rules are necessarily fair to all. Indeed, various groups, e.g. feminists, developing countries, or indigenous groups, often critique international law. See generally THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS, AND GLOBALISATION (Anthony Anghie et al. eds., 2003).

268. See Feldman, *supra* note 267, at 116–20.

269. See *id.* at 119–20; Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000). The fact that domestic interpretation of international law is often influenced by domestic values and considerations has been criticized as often leading to outcomes that are not consistent with the position of international law. One writer has argued for the possibility of allowing for the "full and open participation of all interested and affected players of the international community in the adjudication process in municipal courts" in any domestic litigation where a question of international law is in issue to ensure that the international law issues involved are fully articulated. See Julian Hermida, *A New Model of Application of International Law in National Courts: A Transjudicial Vision*, 11 WAIKATO L. REV. 37, 55 (2003).

270. See Jackson, *supra* note 48, at 327–28.

comparative law; an exercise that courts, especially in common law countries, routinely engage in by borrowing from the jurisprudence of other national courts.<sup>271</sup> It is dangerous, however, to think that the use of *all* international law is an exercise in comparative law and hence only persuasive authority.<sup>272</sup> International norms that bind a country at the international level and have been implemented at the national level cannot be treated merely as persuasive.

At the national level, in the absence of a constitutional or legislative mandate, we may query the authority of judges to rely on international norms, such as international judicial decisions in the creation of which the relevant country had no role to play, and unincorporated treaties.<sup>273</sup> The increasing use of international law by the judiciary threatens to disturb the balance of power between the executive and the legislature as regards law-making. While these concerns are legitimate, it should be borne in mind that decisions of international tribunals are relatively few and only serve as persuasive authority. Unfortunately, the African decisions noted above did not clearly articulate the basis upon which they used unincorporated treaties.<sup>274</sup> Nevertheless, the idea that a government could assume an obligation at the international level but remain free to breach it at the national level seems legally unattractive, and morally reprehensible; it paints a picture of an irresponsible government. By relying on unincorporated treaties, the judiciary brings the government onto the path of responsibility.

Elsewhere, courts have been trying to articulate the basis of relying on unincorporated treaties. In the New Zealand case of *Tavita v. Minister of Immigration*,<sup>275</sup> a submission was made that, because the Convention on the Rights of the Child had not been incorporated into New Zealand law, it had no effect in the national legal system. To Cooke P, this argument was “unattractive” since it implied that “New Zealand’s adherence to the international instruments has been at least partly window-dress-

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271. See Monks, *supra* note 148, at 222–23.

272. Jutta Brunnee & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 40 CAN. Y.B. INT’L. L. 3, 56 (2002).

273. See generally Kochan, *supra* note 148, at 538–51.

274. See *supra* notes 109–118, 123 and accompanying text.

275. [1994] 2 N.Z.L.R. 257 (CA).

ing.”<sup>276</sup> This Article suggests that, as an organ of government, the judiciary in Africa has a role in ensuring that governments fulfill their international obligations and respect international law. This is especially so where the obligations assumed or laws engaged are meant to protect the individual from domestic abuse, or foster and regulate commercial and other interactions among individuals transacting on the international plane.

*CONCLUSION: TOWARDS A NEW JURISPRUDENCE  
AND SCHOLARSHIP*

The increasing use and relevance of international law in national legal systems in Africa reveal a great deal about how open these countries are becoming to the influences of international law. Lawyers, judges, litigants, and policy-makers all need to be aware of how international law may impact on their choices. This makes it imperative for all countries to have mechanisms that ensure access to international law conventions, instruments, and academic works. The role of international law in the national legal system is largely a function of the extent to which counsel, judges, and academics are familiar with it. International law can no longer be consigned to a subsidiary discipline in law faculties. International law should, however, not be conceived as limited to international human rights law. While it appears that African academics, judges, legislators, and politicians have recognized the importance of international law, a significant amount of the international law discourse and jurisprudence in Africa has focused on international human rights law. Although this devotion to human rights law is to be encouraged, Africans appear to have neglected other equally significant areas of international law. Unless they broaden their focus, they risk losing the reformative and developmental benefits that can come from similar recognition of other areas such as international commercial law, international financial law, and private international law. It is only when engagement with “the interna-

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276. *Id.* at 266; see also Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 *CHI. J. INT'L L.* 311 (2004) (discussing the need for courts to take note of executive acts and statements in their attempt to allow private enforcement of international legal norms which might not have become part of domestic law).

tional” begins to recognize the unexplored potentials in these areas of law that Africans can secure the full benefits of international law for individuals in, and for the development of, Africa.