

# TENSIONS BETWEEN INTERNATIONAL LAW AND DOMESTIC RESPONSIBILITIES.

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You'll notice that I have modified the title of my talk from one about "conflict" between "international law" and "domestic responsibilities," to a presentation on "tensions" among the two. That is because while conflicts may or may not be reconcilable, tensions almost always are.

But in exchange for this softening of the title, let me begin with a provocative statement. There is no objective or absolute truth out there. That's not the same as saying there are no truths. Far from it, truths and falsities are in fact contextual, and the most overwhelming context is that grounded in experience. So let me give you a bit of background, which I think is important in evaluating what I have to say; in your giving or withholding credence from the views that I shall be expressing.

I was born in Nigeria, just about the time that the majority of African countries were becoming independent self-ruling members of the international society. Independence and decolonization, I think, were primarily the products of Africans. However, they would have been impossible without the particular climate present throughout the world at that time. The climate was one in which international law gave a lot of credence to and actually bought into the notion of self-determination. So it would not have been possible to have the transference of political power if the international legal climate was not conducive to it.

On the other hand it is equally true that Africa's independence contributed quite a good deal to international law's understanding and formation of the concept of self-determination. In particular, the idea was transposed from its Central and East European setting of the first half of the twentieth century that involved claims of nationhood by ethnic minorities within territorially contiguous empires to claims for political independence by trans-oceanic colonially administered societies. While the two groups may have shared the desire for freedom from subjugation, it is the colonial setting with its subtext of racially tinged deprivation of human rights – economic and socio-cultural, as well as political – that came to dominate the international perspective of the struggle for self-determination. I shall return to this point at the back end of this talk.

## I. THE CROSSROADS OF INTERACTION

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The central point I want to make about the relationship of international law and domestic responsibilities, then, is that the relationship is best seen as an interactive process: that is, Africans are participants in the making of international law and international law influences their domestic politics and economies. Between 1960 and roughly 1975, Africa and Africans stood tall on the world stage. Part of what made that possible was simply that economic conditions allowed them to do precisely that. Aside from the hope and optimism that is inbred in youth, the price of raw materials, Africa's primary resource, other than its people, was very much on the increase. Africans joined other raw material producers, notably South Americans, in getting the international system to focus on issues related to the national sovereignty of peoples over the extraction of raw materials found in their territories. I arrived in the United States at the height (and, in retrospect, simultaneously end) of that age of Africa's decolonization and economic nationalism; that is, in the second-half of the 1970s. And I became very much an observer from outside, with more or less the relative dispassion of an insider-turned-outsider.

The history of the late 1970s through roughly 2000 was the reverse of what had happened from 1955 to 1975. The dominant discourses in international law were moved away from foundational issues of political independence, self-determination, or the sovereignty of states and peoples over their natural resources, to focus on microcosmic questions of structural adjustment programs, debt crisis, poverty, famine, and the like. The optimistic possibilities of the 1960s gave way to the pessimism of the 1980s. Post-1975 Africa was primarily about the absence of resources not their abundance. This could not help but shape attitudes about Africa's role in the international legal order and hence views of its contribution to that order.

The period from 1980-1990 is commonly called the "Lost Decade." It was not only lost to Africa but also to Latin America. This was a decade dominated by an international debt crisis, in which African societies either suffered benign neglect within the international capital system, or as wards of that system had dictated to them the implementation of certain structural adjustment policies that made evident their very limited capacity to fend for themselves.

I started teaching international law in 1989, a year that coincided with the coming to heads of the pressures that had been building up, and which foreshadowed the next decade of development in Africa. That year, the World Bank published a report that synthesized the paucity of good news on Africa.<sup>2</sup> The Report was a follow up to another that had ushered in the decade, and which presciently predicted much of the loss that the continent sustained.<sup>3</sup> *The Economist*, reporting on the World Bank 1989 Report, noted, as did other outlets and books, that the entire continent of Africa with about 600 million people had

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<sup>2</sup> See The World Bank Sub-Saharan Africa: From Crisis to Sustainable Growth (1989).

<sup>3</sup> ELLIOT BERG, ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA (The World Bank 1981), [http://www.uoregon.edu/~dgalvan/intl240-f08/World\\_Bank.001-01.pdf](http://www.uoregon.edu/~dgalvan/intl240-f08/World_Bank.001-01.pdf) ("The Berg Report").

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about the same output as the tiny country of Belgium with about 10 million people.<sup>4</sup>

It was about the same time that the term “Washington Consensus” was coined, and although formulated in the context of Latin America, the standard belief was that the neoliberal economic prescriptions of the Washington Consensus were just as relevant to Africa as to Latin America. The Washington Consensus received a fair amount of disapproving remarks but actually the guy who coined that term was offering a cure for the malaise of the 1980s in the context of Latin America.

In the context of Africa no one knew what to do about its ailments. Books on Africa during this period were filled with pessimism about the future of the African state as a political unit, and its indisputable failure as an economic and administrative entity; pessimism often unmistakably conveyed in their titles.<sup>5</sup>

Today, there’s a good deal less pessimism. About two months ago I read a book titled “*Africa’s Turn?*”<sup>6</sup> It is edited primarily by the economist Edward Miguel. His basic thesis is that there might be in Africa, during the early decades of the 21<sup>st</sup> century, the sort of sweeping economic transformation (a “miracle”) that is typically associated with the rapid development of the East Asian economies in the last quarter of the twentieth century. I’m an agnostic about miracles, whether of the religious or secular kind; so I take no position on their likelihood. But it does seem that Africa may once more be on the cusp of significant economic mobilization. Similarly the current director of the IMF, in his blogging while travelling through Africa, recently has had a remarkably optimistic take on the continent’s current prospects.<sup>7</sup>

What does all that have to do with the tensions between international Law and domestic responsibilities? Well part of it – the core point I want to make – is that there is no such thing as a static view of the relationship between Africa and the rest of the world. It has changed over time. And we should expect continuing change. One of the purposes of this presentation is to provide some basic (if you prefer, ‘raw’) material for anticipating and evaluating that dynamism.

But one last side trip that I hope nonetheless provides useful context for what I shall be saying shortly. At about the same time that I received the invitation to this conference, a student posed a puzzling question to me: “Why don’t you believe in the possibilities of Africa’s success?” Taken aback, I inquired into the basis for the question. The student drew my attention to a

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<sup>4</sup> I’ve written about these (and with more nuance) elsewhere. See Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 *Case W. Res. J. Int’l L.* 167 (1997).

<sup>5</sup> See e.g. Richard Sandbrook and Judith Barker, *The Politics of Africa’s Economic Stagnation* (1985); Jennifer Seymour Whitacker, *How Can Africa Survive?* (1988); Blane Harden, *Africa: Despatches from A Fragile Continent* (1990); Robert H. Jackson, *Quasi-States* (1990); Robert Klitgaard, *Tropical Gangsters* (1991).

<sup>6</sup> EDWARD MIGUEL AND WILLIAM R. EASTERLY, *AFRICA’S TURN?* (M.I.T. Press 2009).

<sup>7</sup> The current Managing Director of the International Monetary Fund is Dominique Strauss-Kahn. Like everyone else, he now blogs, and these may be viewed via the IMF web site.

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recently published review of a book to which I had been a contributor.<sup>8</sup> An objective of the volume as seen by the editor was an exploration of Africa's contributions to international law. In the framework of the reviewer, this apparently implied that Africa's involvement in the international legal order had to be either that of "an object" or that of "a maker" of international law. As is evident from what I've said thus far, and what I shall develop further in this talk, it is the sort of rigid and ossified dichotomy that I hope you will reject. Which, I suppose, is why I prefer to think of the tensions that indisputably arise in the balancing of the obligations of international law and those of domestic governance in terms of their fluidity rather than as hard cast or a zero sum relationship. Now, let me turn to those tensions.

### II. DECOLONIZATION AND THE TRADE-OFFS OF GLOBAL ACTIVITY

The standard regime of decolonization in Africa entailed gift-wrapping political independence as a packaged good. Immediately on (indeed concurrently with) gaining independence, African states sought and received memberships in international organizations, notably the United Nations system. Indeed, we are this year "celebrating" the half-century mark of the year declared by the United Nations to be Africa's. In short, taking up membership in international organizations and thereby assuming the obligations of international law was a reflexive act with hardly any consideration of calculating and weighing the cost of the investment and its return.

Yet there are at least three sets of tradeoffs involved in those transactions, each meriting different criteria with which to gauge their optimality – at least in terms of the topic of this talk. The first identifiable source of possible tensions between international law obligations and domestic responsibilities would be in the balancing of resource allocation or distribution among these arenas. The most obvious case is the financial costs of the one and the foregone consumption in the other. At the moment, this is a particularly poignant point as South Africa's hosts the world Cup; but it has always been an ever-present issue as African countries reflexively sought-out or accepted memberships in international organizations. Being a member of an international organization requires the expenditure of scarce and frequently rationed hard currency to maintain expensive diplomatic missions and ambassadorships while farmers do without fertilizers. Are the returns worth the tradeoff? The cost-benefit analysis becomes more complicated as African states are required to assume more and more the costs and responsibilities of the interventionist international system that has emerged over the last two decades.

"Peace keeping," "peace enforcement," "humanitarian intervention" and "responsibility to protect" have all become part of the vocabulary of international law. A fairly recent example of that is Rwanda who now must fund a peacekeeping group. Other African countries must do the same thing.

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<sup>8</sup> See Elisabeth S. Bradley BOOK ANNOTATIONS: Africa, Mapping New boundaries on international law, Jeremy Levitt, Ed., 42 N.Y.U. J. Int'l L. & Pol. 340 (2010).

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It is easy enough to argue that these expenditures can be subsidized by the international system, but rarely do subsidies ever make the recipient whole. And in any event, there are always the opportunity costs of diverting the talents of young persons from domestic national construction to intervention abroad, however meritoriously humanitarian the latter is said to be. And then, there is the rich history of Africa's military coup d'état leaders having been outstanding students of military officer training schools of Europe and the United States, presumably one of the forms of foreign assistance in our age of humanitarian intervention. How do we balance these tradeoffs, then, and are the costs worth the benefits?

A second set of tradeoffs is what one might call functional tradeoffs. An example is that recently the chief prosecutor of the International Criminal Court obtained warrants for the arrest of the President of Sudan. Many African member countries of the Court, in clear contravention of their undertakings under the Rome Treaty and the United Nations Charter, have explicitly declined to enforce the warrant. Those countries that have not explicitly taken a position (as indeed may be the case with the countries that have) clearly are in a bind. The discharge of their international legal obligations will have to be at the cost of disrupting the tenuous and fragile internal harmony that may exist among the country's plural religious, linguistic and ethnic population groups, and of course that hallmark of African identity, solidarity with other peoples of the continent. For legal formalists, human rights proponents, and indeed the vast majority of those who live outside the continent, the bind may appear artificial, but those who live on the continent will beg to differ.

The conflict in Darfur poses for many here no moral or political ambiguities; however, for many in Africa, it is as much a conflict about the distribution of limited resources and issues of political determination as it is about human rights and "genocides." But what is true about the place of an international criminal proceeding in the regulation of an internal political conflict is equally true in a host of other arenas in which an appeal to international law may be seen as intended to undermine the quite fragile internal institutional structures of governance within African countries.

And the issue here is not wholly systemic but raises questions of group affinities and personal identifications. Does one's membership in the African community transcend whatever commitments are implied by a country's accession to the International Criminal Court? Can the particularities or exigencies of the moment vitiate the obligation to follow an abstract principle, or comply with a legal commitment reflexively entered into? I cannot say that there are straightforward or easy answers to such questions.

The third set of tensions are, by my way of thinking, the most fundamental. These tensions (and perhaps here 'conflict' may not be too strong a term) go to the issue of when in resolving domestic legal conflicts, a domestic court must adopt international legal norms, regardless of local preferences or practices. Unlike the first two which raise essentially practical (even if admittedly difficult) problems of quantification and national identity, this third set of tensions exist as much in the realm of the conceptual as of the practical. What makes these

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tensions particularly problematic, however, is that they are inherent in any organic process of nation-building. Because of their importance to that process, and because the tradeoffs are not quite as transparently obvious as those already considered, it is worth taking a step back to engage in a didactic primer of a basic jurisprudential topic in international law discourse.

### **III. MONISM V. DUALISM: THE PERPETUAL DEBATE**

A well known disagreement among international lawyers revolves around the extent to which international law stands at the apex of law or whether international law is itself subject to domestic laws. One of the advantages that students of international law in the United States may have is that such a debate is not unfamiliar, even within the purely domestic context. In the United States, we generally think of international law as a distinct legal order that runs parallel (or, perhaps, perpendicular) to the domestic legal order, and that is subordinate to the Federal Constitution, and not infrequently, even as subordinate to statutory and common law. Since the institutions and officers of the United States owe their primary allegiance to the domestic order, the application of international law in the United States is commonly viewed as a matter of grace, not one of obligation.

Now, I recognize and admit that I may be oversimplifying matters, overlooking, for example, such canons of interpretation as the “later in time rule.” But I think my oversimplification does no harm to the basic points that I want to make here.

In much of Europe, on the other hand, certainly in their civil law systems, the tendency is to view the international and domestic legal orders as constituting a single unit. By subscribing to international law, a society is deemed to have accepted an obligation to assure the conformity of its domestic legal order to the demands of the international system. International lawyers use the terms dualism and monism to convey these distinctive views of the obligation that international law imposes on domestic legal regimes. Like much else in life, the working out of the relationship is driven both by a society’s philosophical bent as well as the demands of practicality. civil law legal orders, based as they are on codified legal rules, and administered primarily by technocrats, tend to be monists in their outlook. Those of us who have been trained to see life and the world through the lens of common law methodologies tend to be skeptical of monism, and prefer to incorporate international legal rules on the basis of the good (or lack of it) we see in the rule. Thus, in the United States, we start with a presumption that international legal rules are not “self-executing,” and can create only those obligations that the domestic legal order voluntarily assigns to them.

What is overridingly important in these approaches – at least for the purpose of this talk -- is less the doctrinal differences among them than the fact that notwithstanding the vigorous debates they engender, the international legal order itself does not mandate the adoption of one or the other. Under international law principles, each state is free to adopt either approach, or indeed to marry the approaches as it sees fit. Yet, there is no denying that in any given situation, the adoption of one or the other of these approaches gives a direct

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signification of the importance the society assigns to international law on the one hand, and its own history, customs and practices, on the other. And so it is generally assumed that Europeans, because of their monism, are more favorably disposed to the place of international law in the organization of their societies than are dualist Americans. For the same reason, it is also generally assumed that Europeans are more interested in the development, codification and promotion of international law and international legal institutions than are those of us who live on this side of the Atlantic; law students, of course, excepted.

And where do African states stand? One might think that those colonized or administered by the British may reliably be counted on to approach international law through the common law dualist lens, and we might expect the flip side from the Francophone African states whose modern administrative and legal structures impeccably were modeled after or descended from the Napoleonic codes and institutions.

Yet the rhetoric and practices of post-independent African states did not so readily breakdown along such predictable lines. Indeed, there is little in the writings of post-independent African jurists that recognize such a divide. Nor is there any evidence in the practice of the states that suggests that one group of African states more self-consciously uplift or relegate the place of international law within their domestic legal orders. These writers, all to a person, uniformly are unalloyed enthusiastic supporters of international law.

African jurists on international tribunals have been as fervent in advocating the primacy of international law as those from any other region in the world. African states have been at the forefront of signing on to international tribunals even where, as with regard to the International Criminal Court, one may rationally argue that such advocacy is in fact counter to the personal interests of the leadership, if not those of the population at large. A cursory glance at the submission of disputes to international judicial tribunals such as the International Court of Justice or the Permanent Court of Arbitration reveals that African states have participated as much as any other region in the world. And, to the extent that the General Assembly of the United Nations Organization and its various Committees and Commissions have been movers in the “progressive development” and codification of international law, African states have been prime supporters of the movement. These are realities, even if rarely acknowledged let alone credited by publicists of international law.

What explains this love for international law among Africans? No doubt, the reflexivity of behavior already alluded to previously in this talk provides a partial explanation. But it alone does not suffice. I think a more accurate explanation must include an understanding of the character and nature of the international legal order into which African states were launched. At the time of decolonization, international law functioned to equalize differences of power and resources among states. States were viewed as the primary if not sole concern of the international legal order and respect for “sovereignty and territorial integrity” as the anchor of that order appeared to guarantee “basic national dignity” to all states without regard to national power and influence. It was thus in the self-interest of African societies to encourage the development of international law.

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However, we now inhabit a quite different international environment. Rather than functioning to promote “national sovereignty” (at least if that means insulating domestic policies from international scrutiny and criticism), international law today is at least as much about the protection of the right of individual and sub-national groups to assert claims under its auspices against national governments. This has invigorated arguments for piercing the shield of sovereignty. And it is of course this new movement in international law that most significantly and substantially fronts the topic of this talk. The scope of the problem and the future of its resolution are probably foreshadowed by the approach and decisions of the South African Constitutional Court.

The South African constitution purports to make international law at least as relevant as (if not superior to) purely domestic law in the lives of ordinary South Africans. To this end, the obligations of the South African Government and South African society in fostering “equality,” “liberty” and “human rights” are to be measured by international law standards. Domestic law deemed to be inconsistent with the asserted international legal norms is thus viewed with hostility. And so, cultural practices and traditions such as those that tolerate “polygamy” and the “patriarchal” conveyance of property (to take two well known examples) are not validated merely by pedigree or longevity, but must be subjected to scrutiny under international law standards, and if wanting, must be abandoned. The apparent underlying logic is that we now live in a “cosmopolitan” age that, like the previously totemic concept of “modernity,” provides the gold standard for valuing the legitimacy of legal orders.

This approach contrasts substantially with the attitude espoused in the United States Constitution and her legal order. The US Constitution states that it and the laws and treaties “made under” it are the supreme law of the land.<sup>9</sup> The plain language of the Constitution therefore creates a hierarchy of legal rules in which the statutory laws and treaties are subject to control by the Constitution. Treaties, of course, provide the primary articulation of international law. The US Constitution is however silent on the other main source of international law, customary international law, and this has led to interesting debates among US academics as to the place of customary international law within the US constitutional order.

One need not take a position, however, on this debate for not even the most vigorous proponent of controlling role for international law in the US legal order argues that it is on the same level as, let alone that of superseding, the Constitution. United States jurists thus argue over whether a statute should trump a treaty and vice versa, but not whether the Constitution controls US international law obligations. It is summarily accepted that any international law norm found to be inconsistent with the U.S. constitutional legal order is thereby invalid as law within the United States. International lawyers (at least those with a monist perspective) of course find this arrangement unsatisfying, but its legitimacy is nowhere questioned, even within the foundational doctrines of international law itself. But what is accepted as valid in the case of the United States does not necessarily command the same status of legitimacy when applied in discourse

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<sup>9</sup> U.S. Const. art. 6.

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about African societies. International humanitarians need not accept from these beneficiaries of international aid what they grudgingly accept as valid practices by a self-sufficient superpower.

There are then at least two distinctive tradeoffs for African states in the monism-dualism conceptualization of the relationship of the domestic legal order to international law. The dualist methodology is by far a good deal more developed – at least for common law oriented African states -- and offers the possibilities of the internal development of cultural traditions and practices. It runs the risk, however, of drawing hostile intellectual criticism from those with resources to fund not only the legal order, but much else that goes by the name of “development.” Monism on the other hand would be welcomed by this latter group, but the legal order that would emerge might well be alienating for the indigenous populations of the continent. But then, isn't that the history of colonization? And so, the struggle for self-identification and self-determination continues.