The African Human Rights Judicial System

"The author has set the perennially relevant subject of human rights in the international context, while discerningly illuminating its anchorage-mechanisms in the national constitutional system and, in particular, in the adjudicatory scheme within the judicial organ. In this remarkably focused work, Dean Franceschi has placed before the readership fresh lines of legal scholarship, laying bare much information and learning that had not been accessible earlier."
—Justice J. B. Ojwang, Ph.D. (Cantab); CBS; Justice of the Supreme Court of Kenya

"Starting with the obligation of the international community to protect human rights, Luis Franceschi pulls together various strands of, and interaction between, constitutional and international law to explore the important question of the respect for, and the enforcement of, human rights. Of particular interest is his analysis of the history and jurisdiction of African commissions and courts to supplement the national protection of human rights."
—Professor Yash Pal Ghai, CBE, Fellow of the British Academy

"Dr Luis Gabriel Franceschi's study is beyond any doubt of great added value to the abundant literature on human rights in Africa. It is a comprehensive analysis of the whole African institutional framework aimed at the protection of human rights in the Continent. It embraces not only the continental mechanisms established under the African Charter on Human and Peoples' Rights, i.e. the Commission and the Court, but also the sub-continental regional judicial bodies established within the framework of the Regional Economic Communities. Dr Franceschi's study also captures the ongoing metamorphosis of the African Court on Human and Peoples' Rights, which is on the verge of being entrusted with four new kinds of jurisdiction: general legal issues, African Union constitutional issues, staff appeals, and criminal matters. This expansion of the jurisdiction of the African Court raises crucial questions to which Dr Franceschi has brought clear responses.

The author also examines the major challenges faced by the African human rights system, including, inter alia, the domestication and consideration of international law by national judges, as well as the search for appropriate and effective ways to enforce the decisions of the African Court at the municipal level, without any interference from the political organs of the States involved. These are some of the reasons why I strongly recommend the reading of this book to anyone interested in the past, the present and the future of the African Human Rights System."
—Justice Dr Fatsah Ouguergouz, Judge and former Vice-President of the African Court on Human and Peoples' Rights

The African Human Rights Judicial System: Streamlining Structures and Domestication Mechanisms Viewed from the Foreign Affairs Power Perspective

By

Luis Gabriel Franceschi

CAMBRIDGE SCHOLARS

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To you, reader, for having the courage to share my modest knowledge on this dear subject.

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LIST OF ABBREVIATIONS

AfDB	African Development Bank
ACCNNR	African Convention on the Conservation of Nature and Natural Resources
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
ACJHPR	African Court of Justice and Human and Peoples Rights
ACHPR	African Commission on Human and Peoples' Rights
AChHPR	African Charter on Human and Peoples Rights
ACtHPR	African Court on Human and Peoples' Rights
ADRDM	American Declaration of the Rights and Duties of Man
AGLDF	Adolescent Girls' Legal Defense Fund
AHRLR	African Human Rights Law Reports
AICT	African International Courts and Tribunals
AMU	Arab Maghreb Union
AMUIJ	Arab Maghreb Union *Instance Judicaire*
ASurICL	Annual Survey of International and Comparative Law
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
BEC	Bio-Energy Centre
BCLI	British Columbia Law Institute
CAADP	Comprehensive Africa Agriculture Development Programme
CCA	Cultural Charter for Africa
CD	Capacity Development
CDHR	Centre for Development and Human Rights
CDSF	Capacity Development Strategic Framework
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEMIRIDE	Centre for Minority Rights Development
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts on Constitutional Review (Kenya)

COMESA	Common Market for East and Sothern Africa
CSG	Continental Steering Group
CTBT	Comprehensive Nuclear Test Ban Treaty
CTBTO	Comprehensive Nuclear-Test-Ban Treaty Organization
CVK	Central Electoral Committee of Ukraine
DPD	Dewan Perwakilan Daerah of Indonesia
DPR	Dewan Perwakilan Rakyat of Indonesia
EAC	East African Community
EACJ	East African Court of Justice
ECCAS	Economic Community of Central African States
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
ECPHRFF	European Convention for the Protection of Human Rights and Fundamental Freedoms
EEC	European Economic Commission
eKLR	Kenya Law Reports, Electronic Edition
EN	Equality Now
ESC	European Social Charter
ESCR-Net	International Network for Economic, Social and Cultural Rights
ESCWA	Economic and Social Commission for Western Asia
EWLA	Ethiopian Women Lawyers' Association
FIS	Front Islamique du Salut (Algeria)
FJEA	Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order
FLN	Front de Libération Nationale (Algeria)
FGM	Female Genital Mutilation
GATT	General Agreement on Tariffs and Trade
GG	Grundgesetz für die Bundesrepublik Deutschland
IACtHR	Inter-American Court of Human Rights
IACHR	Inter-American Commission of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IGAD	Intergovernmental Authority for Development
IGO	International Governmental Organisation
IHRDA	Institute for Human Rights and Development in Africa
IJHR	International Journal of Human Rights,

IOC	Indian Ocean Commission
IUCN	International Union for Conservation of Nature
KANU	Kenya African National Union
MDGS	Millennium Development Goals
MOU	Memorandum of Understanding
NAP	National Action Plan on Human Rights
NCICK	National Cohesion and Integration Commission of Kenya
NCGD	National Commission on Gender and Development
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NQHR	Netherlands Quarterly of Human Rights
OAU	Organisation of African Unity
ODIHR	Office for Democratic Institutions and Human Rights
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PIDA	Program of Infrastructure Development in Africa
PTA	Preferential Trading Area
REC	Regional Economic Community
RIAA	Reports of International Arbitral Awards
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SSC	South/South Cooperation
TJRC	Truth, Justice and Reconciliation Commission
UEMOA	Unión Economique et Monétaire de l'Afrique de l'Ouest
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNIDROIT	International Institute for the Unification of Private Law (Institut International pour l'Unification du Droit Prive)
UN-INSTRAW	United Nations International Research and Training Institute for the Advancement of Women
UNTS	United Nations Treaty Series
WILDAF	Women in Law and Development in Africa
WTO	World Trade Organisation

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First and foremost, I would like to thank all the beautiful Kenyan people who have adopted me. Here in this fantastic country I have spent the best years of my life. A special thought is given to those who have suffered human rights abuses.

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I thank in a special way all my colleagues and students at Strathmore Law School. Their support has been fantastic!

I dedicate this book to my family, who has been patient, encouraging and supportive. From them I have learnt the divine and human value of work. And finally, and perhaps most importantly, to my parents, whose generosity and dedication has always been a source of inspiration for me. As I have written many times before, I am the eighth-born; had they stopped somewhere before I would not have seen this world!

FOREWORD

The special quality of Dean Franceschi's book is that it identifies and focuses upon one of those critical connecting interstitial bands to conventional pedagogic areas of public law: and as a result, this work is truly the prospector's, rather than the learner's, place of recourse.

Dean Franceschi weaves a sensitive yarn between the traditional platforms of public international law, and domestic constitutional law – building upon the special themes of human rights, and the foreign affairs power attached to the executive agency.

The author has set the perennially relevant subject of human rights in the international context, while discerningly illuminating its anchorage-mechanisms in the national constitutional system and, in particular, in the adjudicatory scheme within the judicial organ. Human rights is perspicuously portrayed as the pith and kernel of good governance universally; the domestic constitutional law, with its judicial accompaniment, is presented as the overriding norm that girds the fundamentals of human rights to the operational machinery on the national ground; and in this scenario, the vital role of the foreign affairs power is highlighted: it is the instrumentality that signifies the individual State's approach to, and mode of participation at, the forum of conception of international obligations – including obligations bearing on the fulfilment of the human-rights mandate.

In one of the patent instances of originality, Dean Franceschi urges that the foreign affairs power – itself an incident of the national Constitution – flows into the workings of international norm via its access to, and involvement at the platform of international legal obligations. As the author remarks:

> "….universal human rights impose certain checks and balances on powers that were traditionally reserved to the State over its subjects, thus arousing important questions over the nature of State sovereignty. Furthermore, universality has also come to mean the legal transference of certain jurisdictional prerogatives onto the international community, which is now bestowed with an innovative *locus standi* in certain human rights matters…."

In this remarkably focused work, Dean Franceschi has placed before the readership fresh lines of legal scholarship, laying bare much information and learning that had not been accessible earlier. Thanks to the book's origin in a thoroughly-executed doctoral-research initiative, at the University of Navarra, in Spain, its documentation is extensive, intensive, and by itself, a goldmine of reference for the avid reader: not to mention the work's bearing at a rare linguistic intersection – drawing from the mutually enriching strands in parallel traditions of scholarship.

For this special research initiative that touches on such fundamental issues of constitutional thought and practice, and at a time when Africa stands at a crossroads impelled by imperatives of good governance, Dean Franceschi's study merits high commendation. Learners of the law, as they clear prescribed modules, guided by standard texts, will be significantly enriched by this work of unlimited scholarly and intellectual effect.

JACKTON B. OJWANG, Ph.D. (*Cantab*); CBS;
Fellow of the Kenya National Academy of Sciences;
Professor of Law of the University of Nairobi
and Justice of the Supreme Court of Kenya

31 December, 2013

INTRODUCTION

The fact that the State is not an *absolute entity* prompts the existence of limitations that are actualized in the form of constitutional checks and balances. Checks and balances are regulators or valves that limit the strength, technique and manner with which the State may exercise power over its subjects and the extent of those powers. Those checks and balances fasten the State to the rule of law as may be required for the protection and enforcement of rights. Checks and balances may be found, inside, in the different layers of powers within the structures of the State, or outside, in the supranational quasi-judicial and judicial bodies.

In the *domestic field*, constitutions seem to be the most efficacious legal instruments in ensuring the highest degree for the protection of human rights.[1] This protection is conceived through properly drafted bills of rights. A well-conceived bill of rights should guarantee access to justice, including the possibility of protecting its own citizens against abuses perpetrated by the State itself. Additionally, this protection needs to be enforced through active, independent and autonomous judicial systems.[2]

In the *international field*, there has not been a consensus on the best means and ways to safeguard human rights. In some instances, such abuses may require the involvement of a neutral party. This involvement may be *de facto*, through the so-called 'responsibility to protect'[3] or *de*

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[1] See Silva Bascuñán, A., *Tratado de Derecho Constitucional*, Editorial Jurídica de Chile, vol. XI, Santiago, 2006, at 46.

[2] See Brewer-Carías, A., *Constitutional Protection of Human Rights in Latin America: a comparative study of 'amparo' proceedings*, Cambridge University Press, New York, 2009, at 417. Brewer-Carías asserts that after two centuries of constitutional tradition of inserting very extensive human rights aspirations and declarations in the constitutions of Latin-America, it has become clear that the solution necessitates an independent and autonomous judiciary.

[3] The concept of 'responsibility to protect' was first developed by the *International Commission on Intervention and State Sovereignty* ('ICISS'), on its 30th October 2001 report entitled 'The Responsibility to Protect', which was accompanied by a comprehensive supplementary volume of valuable research material. According to Ingo Winkelmann, the ICISS identified four basic criteria for military intervention

iure, through judicial decisions emanating from international or regional human rights courts. The fact is that once a State accepts, from a legal perspective, the universality of human rights, it opens a *Pandora* box with unimaginable effects on both the international and the national legal systems.

This has challenged the traditional understanding of the concept of State, sovereignty and domestication of international law. Hersch Lauterpacht asserts that the State "is an expression of the legal order operating within a defined territory."[4] This legal order requires identity. However, this identity was jeopardized in most African States by the unilateral colonial inclusion of heterogeneous societies within defined colonial boundaries with practical disregard to ethnicity. In fact, in East Africa alone, peoples experience – even today – the turmoil of having been split by foreign powers in a race to ransack a continent before and after the World Wars. The effects are still evident and it is perhaps too late to mend them. The fact is that there are nations within each country and those nations often spill over into neighbouring countries.[5] This scenario makes national identity and a true democratic process challenging.

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for human protection purposes: (1) the threshold of large scale loss of life or large scale, e.g. ethnic cleansing; (2) the precautionary principles of right intention, last resort, proportional means and reasonable prospects, i.e. proportionality; (3) the requirement of right authority; and (4) sound operational principles: clear mandate, unity of command, protection of a population as the prime objective, appropriate rules of engagement and maximum possible co-ordination with humanitarian organizations [See Winkelmann, I., "Responsibility to Protect", *Max Planck Encyclopedia of Public International Law*, *www.mpepil.com*, Oxford University Press, (2006), No. 5. See also "Responsibility to Protect", *Report of the International Commission on Intervention and State Sovereignty*, published by the International Development Research Center, Ottawa, Canada, December 2001, at paras 4.19 and 4.20.]

[4] Lauterpacht, H. "The Subjects of International Law", in Lauterpacht (ed), *International Law. Being the Collected papers of Hersch Lauterpacht*, vol. I – The General Works, Cambridge University Press, London, 1970, at 148.

[5] For example, the colonial boundaries partitioned the Maasai and Luo between Kenya and Tanzania, the Luhya, Luo and Teso between Uganda and Kenya, the Tutsis and Hutus in Rwanda and Burundi, the Somali people between Kenya and Somalia and so on and so forth. The division was so arbitrary that, for example, the former Vice-President of Kenya, H.E. Moody Awori, had a brother who was a minister in the Ugandan Cabinet of President Museveni, for in spite of having the same father and mother one registered as Kenyan while the other registered as Ugandan.

African constitutions have been drawn, legal structures created and international organs established, sometimes, with little connection to reality.[6] Therefore, the relation between the national and international judicial systems, which appears to be a theoretical challenge to the legal mind in the West, turns into a vivid challenge – legal as well as political – for most African systems. It is not just a matter of finding the best channels to domesticate international law or decisions. It is also a constitutional challenge that involves separation of powers, institutionalisation of checks and balances and a properly defined regulation of the foreign affairs power. Africa is home to some of the most extraordinary legal minds of the modern world.[7] Innovative jurisprudence and brilliant scholarly thought is here intermingled with a deficient political will of what seems to be an inadequately trained political class that constantly challenges the rule of law.[8]

Furthermore, there has been a mushrooming of supranational judicial organs, whose extent and nature is unclear as well as the opportunity and

[6] The legal tradition was determined by the colonizing power: Liberia (American Colonization Society), Libya (Italy; Britain/France), Egypt (Britain), Sudan (Britain), Tunisia (France), Morocco (France/Spain), Ghana (Britain/Germany), Guinea (France), Cameroon (Germany; France/Britain), Senegal (France), Togo (Germany; France), Mali (France), Madagascar (France), DR Congo (Belgium), Somalia (Italy), Benin (France), Niger (France), Burkina Faso (France), Côte d'Ivoire (France), Chad (France), Central African Republic (France), Congo (France), Gabon (France), Nigeria (Britain), Mauritania (France), Sierra Leone (Britain), South Africa (Britain), Tanzania (Germany; Britain), Rwanda (Germany; Belgium), Burundi (Germany; Belgium), Algeria (France), Uganda (Britain), Kenya (Britain), Malawi (Britain), Zambia (Britain), The Gambia (Britain), Botswana (Britain), Lesotho (Britain), Mauritius (Britain), Swaziland (Britain), Equatorial Guinea (Spain), Guinea-Bissau (Portugal), Mozambique (Portugal), Cape Verde (Portugal), Comoros (France), São Tomé and Príncipe (Portugal), Angola (Portugal), Seychelles (Britain), Djibouti (France), Zimbabwe (Britain), Namibia (Germany; South Africa).

[7] For example, Yash Pal Ghai, Mohamed Bedjaoui, J.B. Ojwang, Patricia Kameri-Mbote, Migai-Akech, PLO Lumumba, J. Okoth-Ogendo, Makau Mutua, Enoch Dumbutshena, F. Ouguergouz, Gérard Niyungeko, Sophia A. B. Akuffo, Bernard Makgabo Ngoepe, Desmond Orjiako, Charles Okidi, Joseph Nyamihana Mulenga, George W. Kanyeihamba, and many others.

[8] For example, the recent crisis in Ivory Coast, the Kenyan post-election violence and the inconsistent political statements that have followed the involvement of the International Criminal Court, the persistent constitutional reforms that aim at allowing additional presidential terms of office as happened in recent years in Uganda, Cameroon and Egypt.

necessity of their mediation or even 'intrusion' to safeguard, protect or restore the rule of law. These are essential and relevant questions for our time. Perhaps international law theories have not grown at the same speed at which international organizations and jurisprudence have developed. Thus, important questions immediately arise as to whether access to supranational jurisdictions should be granted to the individual; what should the power and legal foundation for the enforcement of human rights international decisions be; who should enforce them; whether international decisions imply the usurpation of sovereignty; how should these decisions be domesticated and enforced.

According to Ayala Corao, for international matters, including human rights as may be applicable, international bodies with appropriate jurisdiction may be called to intervene.[9] According to Boye, "in spite of the appreciable but very recent effort to codify the rules of international public law, the decisions rendered by international courts, including international arbitration courts, remain an essential source of international law. The problem raised is whether, and to what extent, the municipal judge takes such decisions into consideration when he is called on to adjudicate a case in which the question raised has already been subject of a decision by an international court."[10]

A greater challenge emerges when the State accesses or ratifies human rights treaties that may go beyond the consecrated constitutional rights or ratifies treaties allowing human rights extra-territorial jurisdictions to enter into play. The matter is complex; it is precisely here where constitutional law and international law are deeply related through what is known as the Foreign Affairs Power (FAP).[11]

Therefore, the protection of human rights may be challenged, on the one hand, by poorly drafted constitutional dispensations and, on the other,

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[9] See Ayala Corao, C.M. "La Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos", *Estudios Constitucionales*, vol. 5, Universidad de Talca, (2007), at 128.

[10] Boye, A., "The Application of the Rules of International Public Law in Municipal Legal Systems", in Bedjaoui, M. (ed), *International Law: Achievements and Prospects*, UNESCO & Martinus Nijhoff Publishers, Paris, 1991, at 295.

[11] See generally Ojwang, J.B., and Franceschi, L.G., "Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment", *Journal of African Law*, vol. 46, Cambridge University, (2002), at 43-58. Ojwang and Franceschi argue that the FAP consists mainly of four identifiable elements: 1. Treaty-making; 2. Diplomacy; 3. War and Peace; and 4. Recognition of States and Governments.

by a disjointed interplay between the domestic and supranational legal orders. This goes hand in hand with a suitable regulation of the foreign affairs power, which not only opens avenues for domestication, but it also triggers the creation of international governance structures. These structures may play a vital role in monitoring, validating and enforcing human rights, even when the rule of law and the political will may be deficient at the domestic level.[12]

Certainly, the relationship between domestic and supranational systems needs to be harmonised. This process includes not only the necessity to harmonise laws, it also involves a proper understanding of the nature of international decisions as the ultimate result of the exercise of the 'foreign affairs power', and the subsequent obligation of the State to guarantee their enforcement at the domestic level.

As Gonzalo Aguilar argues, a human rights system is an integrated organic regulatory body, which is not susceptible of dissections, and which cannot be separated.[13] To dissect human rights is unnatural and discriminatory. Human beings cannot enjoy a higher degree of protection in international law than within the domestic system. In this sense, human rights standards call on the State, first, to aim at the highest possible standard, which is done primarily through the constitution's bill of rights. Second, to respect international law's peremptory norms and the treaties it has ratified or acceded. Third, to realise that if the State fails to protect human rights the political society has the right to activate available and legal means to secure such protection.

Hence, the present study deals with these two interconnected yet often forgotten realities of the constitutional order in Africa: First, the 'foreign affairs power' that gives the specific organs of the State the capacity to

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[12] See *Daily Nation*, Special Report by Alphonce Shiundu, Wednesday 22nd December 2010, at 19. In 2007-2008 Kenya suffered widespread post-election violence. More than 1,000 were murdered and approximately 300,000 lost their property. After disagreeing on the establishment of a local tribunal to try these cases the country requested the ICC to intervene. The hidden hope of the political class was that nothing would be achieved by the ICC. However, once the ICC incriminated 6 high-level suspects there was uproar and the Kenyan Parliament passed a motion requesting the President to withdraw from the Rome Statute. The Vice President of Kenya started lobbying African countries to pressure the AU to request the deferral of the 6 cases and the AU agreed.

[13] Aguilar Cavallo, G., "La Internacionalización del Derecho Constitucional", *Estudios Constitucionales*, vol. 5, No. 001, Centro de Estudios Constitucionales, Santiago de Chile, (2007), at 231.

create and empower universal, regional and sub-regional governance and judicial structures.[14] Secondly, the 'international judicial function in Africa', with focus on the African Court on Human and Peoples' Rights and the upcoming merger with the African Court of Justice. In this regard, we have proposed what seem to be the best domestication channels for supranational human rights judicial decisions in Africa. We have also proposed amendments to the so-called 'Protocol on the Statute of the African Court of Justice and Human Rights.'

[14] This is usually achieved through multilateral diplomacy.

CHAPTER ONE

THE LINK BETWEEN CONSTITUTIONAL AND INTERNATIONAL HUMAN RIGHTS LAW

The 1994 genocide in Rwanda awakened the international conscience and brought to question concepts and systems for the protection of human rights. The broader international community became aware of their duty to mediate and actually get involved whenever and wherever there was a systematic and widespread abuse of Human Rights; when a State was unable or reluctant to protect its own citizens from avoidable human rights catastrophes – mass murder, rape, starvation, etc.[1]

[1] See UNGA, "World Summit Outcome", *Res*. 60/1 (2005), at paras 138 and 139. The paragraphs read: "138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out." See

As a consequence, a new concept has taken shape: "The Responsibility to Protect", also referred to as R2P. The R2P is the result of a deeper comprehension in the international community of the need to intercede on behalf of the victims of a system that is unable or unwilling to protect. Certainly, 'intervention' has always been a repugnant term in both constitutional and international law. However, the balance between the duty to protect human rights anywhere in the world and the nation's right to self-determination and autonomy has shaped an exciting debate in the legal field: The State has the duty to protect and the international community has the subsidiary duty to guarantee that protection. Thus, the classical model of State sovereignty would seem to weaken against the centeredness and universality of human rights.

Edward Luck says that "today, the UN member States are united in their support for the goals of 'Responsibility to Protect' but less so on how to achieve them."[2] He adds:

> "At the 2005 World Summit, the assembled heads of State and government agreed that R2P rests on three pillars: First, the responsibility of the State to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitement. Second, the commitment of the international community to assist States in meeting

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also UNGA, "Implementing the Responsibility to Protect", *Report of the Secretary-General*, A/63/677, 12 Jan2009, available at: *http://www.unhcr.org/refworld/docid/4989924d2.html*. See also Winkelmann, I., "Responsibility to Protect", *Max Planck Encyclopedia of Public International Law*, *www.mpepil.com*, Oxford University Press, (2006), No. 4. According to Winkelmann, 'the very notion of the responsibility to protect was first developed by the International Commission on Intervention and State Sovereignty ('ICISS'), which was established by Canadian Foreign Minister Lloyd Axworthy on 14 September 2000 and co-chaired by Gareth Evans (Australia) and Muhamed Sahnoun (Algeria). Ten more Commissioners were drawn from around the globe. A high-level advisory board provided further guidance. On 30 September 2001, the ICISS published its report entitled 'The Responsibility to Protect', which was accompanied by a comprehensive supplementary volume of valuable research material.' On this regard, see "Responsibility to Protect", Report of the International Commission on Intervention and State Sovereignty, published by the International Development Research Center, Ottawa, Canada, December 2001, at VIII. Available at: *https://docs.google.com/viewer?url=http%3A%2F%2Fwww.iciss.ca%2Fpdf%2FCommission-Report.pdf*

[2] Luck, E.C., "The United Nations and the Responsibility to Protect", *Policy Analysis Brief*, The Stanley Foundation, August 2008, at 1. Available at: *www.humansecuritygateway.com/documents/TSF_theUNandR2P.pdf&pli=1*

> these obligations. Third, the responsibility of the member States to respond in a timely and decisive manner when a State is manifestly failing to provide such protection."[3]

When former UN secretary-general Kofi Annan was called in 2008 to mediate the postelection crisis in Kenya he declared:

> "I saw the crisis in the R2P prism with a Kenyan government unable to contain the situation or protect its people. I knew that if the international community did not intervene, things would go hopelessly wrong. The problem is when we say 'intervention,' people think military, when in fact that's a last resort. Kenya is a successful example of R2P at work."[4]

The R2P is a subsidiary measure to guarantee the respect for human rights. As a subsidiary measure it is only used when all other means have failed. This means that the R2P will find application when the State in question is unable or unwilling to protect human right catastrophes, i.e. when the rule of law is rendered ineffective, inefficient or its systems have been shattered.

It is therefore essential for law-makers to be able to put into place the necessary legal foundations that may regulate the activation and extent of the so-called 'responsibility to protect'. This is essential if this R2P is to be effectively used and not abused.

Thus, the recourse to the R2P brings into play two essential components of the State: Sovereignty, which has traditionally been the protective wall that ensured self-determination, and the foreign affairs power, as the channel that allows a State to relate to the outside world, beyond that protective wall. Both sovereignty and the foreign affairs power are primarily regulated through constitutional law and/or practice.

In this chapter we look into the nature of these two areas of constitutional law that bring the State into contact with other States: the foreign affairs power, its constitutional regulation and practice, which serves as the constitutional gateway that ultimately allows the supranational judicial bodies to play a role in securing the protection of universal human rights within States, vis-à-vis the concept of sovereignty, which aims at preventing foreign intervention and defends the right to self-determination.

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[3] *Ibid*.
[4] Annan, K. in Luck, E.C., *op. cit.* Available at: *www.humansecuritygateway.com/ documents/TSF_theUNandR2P.pdf&pli=1*

Foreign Policy, Foreign Affairs and the Constitution

Samuel Blay argues that "territorial integrity and political independence are two core elements of Statehood. Territorial integrity refers to the territorial 'oneness' or 'wholeness' of the State [while] political independence refers to the autonomy in the affairs of the State with respect to its institutions, freedom of political decisions, policy making, and in matters pertaining to its domestic and foreign affairs."[5]

Foreign affairs are directed by what is known as international policy, which refers to the course of action or decisions desired and taken by a section of the government of a State in pursuit and promotion of national interests in the international systems.[6] International policy actualizes itself through the conduct of international relations.

There are three key factors for the successful conduct of international policy in a constitutional democracy. First, is the personal or psychological factor, i.e. identification. This refers to the need and the convenience of achieving a satisfactory degree of identification with the political society,[7] i.e. between people, government and State so that they are fused into one image, and they all travel in the same direction. Second, political. International policies must be compatible with domestic policies. In addition, international policies are made by popular legitimised authorities and, although there may be no recognisable form of democratic participation, the State is meant to be one with the people who are its nation so as to achieve a satisfactory degree of identification. And third, legal international policy evolves in a context where there is an imperative need to find a balance between *separation of powers* and administrative effectiveness.

This identification is one of the most important elements for political integration. The key to foreign policy as a tool for nation building is that foreign policy can create a situation in which the people can perceive a threat to their communal identity, or an opportunity to protect and enhance it. Foreign policy can create a situation in which the whole national

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[5] Blay, S., "Territorial Integrity and Political Independence", *Max Planck Encyclopedia of Public International Law*, *www.mpepil.com*, Oxford University Press, (2011), No. 1.

[6] Katete Orwa, "Foreign Relations and International Co-operation", *Kenya Official Handbook*, Ministry of Information and Broadcasting, (1988), at 1.

[7] See generally Maritain, J., *Man and The State*, University of Chicago Press, Chicago, 1951. Maritain calls it *body politic*.