LEGITIMATE GOVERNANCE AND STATEHOOD IN AFRICA: BEYOND THE FAILED STATE & COLONIAL SELF-DETERMINATION.

by

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ABSTRACT:

This thesis looks at the problem of governance and statehood in Africa from an international law perspective. Adopting a comparative analytical research method, the thesis investigated the idea of statehood in traditional Africa and Europe, and highlighted conceptual differences. It traced the origin and nature of the post colonial African state to an oppressive and totalitarian colonial state; and the coalescence of international law with European civilization and reality. The argument is made that the international law framework on statehood and international solutions of intervention and democratization, are inadequate for dealing with the problems of statehood in Africa and its consequences such as state collapse.The thesis proposes the legitimization of the African post colonial state through a combination of a process of self determination and democratization. The pattern of self determination proposed seeks to give normative expression to an African state's reality by using the equilibrium of the peoples incorporation and disengagement from the state as an index for determining the role and relevance of the state. It is proposed that this index, in determining the ambits of the right to self determination of the constituent political units in a state, should entitle an African nation to a minimum of the right to self governance in a confederate system. In complimenting the foregoing legitimization process, the thesis proposes a democratic framework that is constructed on cultural foundations of endogenous democracy and development.

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ACKNOWLEDGMENT & DEDICATION

Dear mother Africa, how did we come to this pass! My heart bleeds endlessly with the wounds of a continent that has become wasteland. Due to my passion for the topic of this thesis, I began the research in a frenzy of ideas and some assumptions, and a tendency to draw conclusions without the necessary analytical foundation. My success in toning down these emotional upstarts was due to the painstaking and thorough supervision of Professor Maurice Copithorne. I am grateful to him for the element of objectiveness that is to be observed in the comparative historical/sociological analysis of the thesis. I am also eternally indebted to him for his concern and assistance during difficult periods in the course of the masters program. I owe profound gratitude to Professor Ivan Head for very useful comments and inspiring suggestions. My thanks go to my friends and brothers, Obiorah Okwu-Okafor and Vitus Igbokwe for their unceasing encouragement. Above all I must thank All Mighty God without whom nothing can be accomplished.

I WISH TO DEDICATE THIS RESEARCH TO THE GOOD PEOPLES OF AFRICA

Surely, the break of dawn is nigh.

LEGITIMATE GOVERNANCE AND STATEHOOD IN AFRICA : BEYOND THE FAILED STATE & COLONIAL SELF-DETERMINATION.

I. INTRODUCTION

Backdrop

There is a common assumption that states possess a unity of identity of their population, government and territory, and this constitutes the moral underpinnings of the modern state system. That assumption of the organic coalescence of a population, its government and their territory that underpin the state is on trial in the African continent. The legitimacy of the post-colonial state in Africa is consistently being called into question as it is increasingly evident that most are incapable of performing the primary functions of sovereign states. Some of these include: playing the role of the sovereign authority-the accepted source of identity and the arena of politics; playing the role of the sovereign institution -and therefore being the tangible organization of decision-making and the intangible symbol of identity; and functioning effectively as the security guarantor for a populated territory.[1] The most severe manifestation of this problem is in the total collapse of states marked by the absence of governmental authority and a general breakdown in law and order. The history of post-colonial state collapse in Africa began with the Congo (formerly Zaire) in 1960-1961. Other cases have been Chad (1980-1982) Ghana (1979-1981), Uganda (1979-1981) Somalia and Liberia (1990), Rwanda (1994) Hanging on the

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[1] See: William Zartman, COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY (London: Lynne Rienner, 1995) p.5.

fringe of disintegration today are Burundi, Angola, Mozambique, Rwanda, Zaire, Chad, Sierra Leone. There are also those that are seriously threatened with collapse such as Algeria, Sudan, Cameroon, Nigeria, Madagascar, Malawi, Kenya, Djibouti, Niger, Togo, Mali.

The process of state collapse occurs with serious material, socio-economic and humanitarian consequences. Available statistics indicate that the most vulnerable victims in a disintegrating state are defenseless civilians particularly women, children and the elderly. These classes constituted ninety percent of the eighteen million refugee population and displaced persons in Africa in 1995.[2] In the horn of Africa, civilian populations have been the worst affected with most victims being peasants caught in the middle of fighting between warring groups. Consequently, of the most observable devastating effects of the collapse of a state in that region has been the teaming growth of refugee populations, usually the weak and elderly. The refugee crisis in Africa is one of the consequences of state collapse.[3] This alarming course of events appears to be headed towards systemic

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[2] See: Chief Segun Olusola, "Family concerns in the African refugee environment" in AREF NEWSLETTER (A Quarterly Publication of The African Refugees Foundation, Sept. 1995) Vol.2 No.3. Africa accounts for more than 47% of entire world population of refugees and displaced persons: see Kebede Tadesse, *Opening Statement on Symposium on Refugees And The Problems of Forced Population Displacements in Africa*, in INTERNATIONAL JOURNAL OF REFUGEE LAW, July 1995, special issue.

repetitiveness. The Burundi civil war which claimed over 100,000 lives between 1993-1995[4] was fast on the heels of the Rwandan one million deaths. A similar occurrence has taken place in Liberia and seems possible in Sudan, Sierra Leone, Democratic Republic of Congo, Uganda, in all of which rebel forces are in effective charge of significant territories. The crisis of the post-colonial state in Africa has fanned a new vocabulary of hate such as "ethnic cleansing", "ethnic pogrom", "ethnic purification" and "ethnic ghettos".[5] What the Economist[6] describes as a "violent continent", is the general perception of the malfunctioning of the post-colonial state in Africa.

The material and humanitarian devastation that occurs with the process of state collapse has continued to pull at the conscience of the international community, such that the incidence of state collapse is seen as one of the greatest challenges facing the

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[3] See: Ali Mazrui, "The African State as A Political Refugee: Institutional Collapse And Human Displacement" in INTERNATIONAL JOURNAL OF REFUGEE LAW, supra note 2, at page 21.

[4] See: Jean Pierre Chretien, "Burundi the obsession with genocide," in CURRENT HISTORY, May 1996, p. 210.

[5] See: Gerard Prunier, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (New York: Columbia University Press, 1995).

[6] See: THE ECONOMIST, Sept. 7 1996, p.5.

international system and international lawyers. However, the complexities surrounding the incidence of state collapse belies the possibilities of a uniform analysis. In general, states in Africa have not been simple mechanical products of a common process. They have had individual socio-economic experience as well as a shared historical experience. Also, provision has to be made for the influence of trans-cultural and post-industrial dynamics of the wider international community. How then should a scholarly analysis of such a complexity be carried out? What should constitute the borders of analysis so that the investigation neither loses sight of commonalities nor differences, and does not lump complexities into a generalized assumption? How should the problem of state collapse in Africa be examined?

Conceptual Framework

For useful analysis a concept is a necessary tool. Constructing a concept of state collapse is thus of major importance to any investigation of the phenomenon. The assumed unity of people, territory and government embodies certain fundamental elements that should define the dimensions of the needed concept. Inherent in this factor are "people" at various stages of human aggregation and evolution from families to societies. This requires that the concept be permeated by the sociological currents of state formation in order to explain state collapse. Thus, a useful concept should offer the means for critical post-structural investigation of statehood in Africa. A second factor "territory", primarily signifies a spatial regime -land, sea, air, and dictates that the juridical properties of the state constitute one of the dimensions of the concept. A third factor "government", refers

to the institutions of authority for the maintenance of law and order. This also requires that the concept maintain a political/institutional dimension. Finally, in the integrative unity of all three factors lies the essence of a process distinct from happenstance, and therefore requiring a historical dimension.

The desired concept of state collapse should possess a broad horizon that enables the investigator to see beyond the mechanism of the state into the origins of its idea, recognize the distinction between *the fact* of state collapse and *the causes* of state collapse. A concept such as envisioned above will hopefully underscore the African idea of state and juxtapose it to the international legal paradigm of statehood. By so doing, it will set the stage and provide the tools for interrogating the international response to the phenomenon of state collapse, tentatively suggested to be humanitarian intervention and democratization. It will then be pertinent to scrutinize the claims of self determination that often form the basis of the crisis of the state in Africa.

Dialectical questions surrounding any inquiry into the post-colonial state

With a concept of state collapse as an investigative tool, an examination of the African experience necessarily looks at the evolution of the international law of statehood and its substance in Africa. One query that is inevitable is what is the idea of state that developed into the international paradigm, and how does the African experience relate to the international concept? Within this analysis the legitimacy of the post-colonial state is also called into scrutiny raising the question whether the collapse of the African state is

ultimately a legitimacy crisis of the state element or simply a case of institutional malfunction / governmental failure. The corollary is does a sustainable solution to state collapse require measures that seek to address any legitimacy crisis, or can ad hoc external props by way of military intervention and reassembling of the collapsed state suffice? This interrogation will have to be carried on within dominant socio-legal patterns in the international system such as the liberal legal culture, and the projection of democracy as a universal civilization. To what extent do these patterns reduce or exacerbate the tensions in a collapsed African state? If liberalism professes individualism how does the advancement of singularism affect pluralistic claims and tensions in a collapsed state? If the dominant socio-legal patterns in the international system have an individualistic content whereas the conflict patterns in a collapsed state is groupcentric, does this lead to a deficiency in the legal and political mechanisms for dealing with state collapse? In the light of volatility of the issues of state sovereignty within the international system, and colonial boundaries in Africa, what alternative mechanism can address the legitimacy of the state element without opening up a Pandora's box? Can the legal history of the post-colonial state be located between the colonial partition performed by European treaty law, the Berlin Act of 1885[7]; and decolonization, written into international law by the 1960

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[7] See: infra note 51.

Declaration on The Granting of Independence To Colonial Countries And Peoples?[8] To the extent that the boundaries of the post-colonial state and its juridical status were imposed by European "international" law, is there a logical necessity for appealing to modern international law to mediate the reversal of the problems inherent in the post-colonial state? Is the international law of self-determination a rational and necessary framework for internal forces and processes of reconstruction in the post-colonial African state?

The Thesis argument

I have argued that the post-colonial state is terminally ill in many parts of Africa because by its nature it is abstracted from its people. It is maintained that the kingdoms and nations of Africa did not participate as sovereign partners in deciding the nature and structure of the post-colonial state. That, based on moral, legal and practical considerations, African peoples and nations should be provided an opportunity and the capacity to redefine their collective existence in a situation of state disintegration. I have thus advanced the norm of self-determination as the dynamic principle of human evolution whose historic flexibility can accommodate a new category for the troubled post colonial

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[8] See: DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES: *G.A. Res. 1514 , U.N. Doc A/ 4884 1960,* Reprinted in the UNITED NATIONS YEARBOOK (New York: UN DPI,1960) p.49.

state in Africa. A proposal is made for a category of the right of self determination that sets the criteria and establishes the institutions for the peaceful reconstruction of the collapsed state. The set of criteria chosen attempts to determine the prospective "self" (determining unit) in a manner that not only accommodates social changes, political alliances and cultural integration between nations over time, but also ensures a broad participation of all political units. Above all, it seeks a total reconstruction of the state.

The concept of self-determination proposed in this thesis as a logical and pragmatic mechanism that addresses the problems discussed above, vests an international right of confederate autonomy in the post-colonial African crisis situation. The nature of the confederacy envisioned is to be defined by the identified equilibrium between the observable levels of incorporation, and disengagement, of the constitutive political units to the post-colonial state. This model is presented as a mechanism with multiple benefits and limited risks in that it attempts to address the systemic (structural/pathological) basis of state collapse by engaging in some form of restructuring but without tampering with the state identity and thus the volatility of its sovereignty and inherited colonial boundaries. Most importantly, it accomplishes this together with providing the nations an opportunity for redressing their collective existence. It also vests a legal status on nations that are aggrieved by their coerced partnership with a post colonial state, and therefore offers these nations an incentive for recourse to pacific alternatives for settling their grievances. For the realization of this, the thesis urges the establishment of an appropriate international institution.

Methodology and structure of the research

The research method adopted is analytical and comparative. Part I is the introduction to the thesis. Part II deals extensively with the contemporary paradigm of statehood in international law. In carrying out the analysis of the paradigm it traces its roots in a discussion and comparison of European and African ideas of statehood over time. It underscores the fact that the contemporary framework of statehood in international law is an elevation of European civilization and reality. The argument is made that in the post-colonial African state situation where the substance of the European reality does not exist, the void is filled with juridical assumptions. Part III builds on the foregoing in constructing a post-institutional concept of state collapse as a working tool. Part IV uses this concept to reassess the sustainable benefits of interventionism and democratization as mechanisms for dealing with state collapse. Part V examines the dynamism of self-determination and its resources for a new category for the post-colonial state in Africa.

II. INTERNATIONALIZATION OF STATEHOOD : EUROPEAN AND AFRICAN IDEAS OF STATE

The African idea of state and the emergence of the post-colonial state.

The classical African state is recorded to have been efficient and influential caste systems.[9] From the observations of Isokrates and Karl Marx ancient African political systems were effective political models,[10] celebrated and idealized by classical philosophers such as Plato's Athenian *Republic.*[11] For the pre-colonial era Justice T.O. Elias observed that notwithstanding diversities between three broad categories of the traditional African state: traditional-monarchical (Chiefly), traditional-republican (Chiefless), and theocracies, African traditional political systems were modeled around the same principle.[12] The overarching framework of political organization was the lineage structure. This was manifold in segmentary systems of permanent, unilateral descent groups. Within it, public functions were carried out by way of joint cooperation along kinship lines (i.e. smaller social units whose membership is based on biological ties such as

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[9] See: C.H. Oldfather, DIODORUS OF SICILY (London: Heinemann; Cambridge: Harvard University Press, 1967). See also Aubrey de Selincourt, HISTORIES vl 55, (Hamondsworth : Penguin Books, 1954).

[10] Isokrates, BOUSIRIS, 30. (Pace Smelik & Hemelrijk ,1984) p. 1877.

[11] Karl Marx, KAPITOL, transl. by Andrew Drummond (London: New Park Pub., 1983) vol.1 pt. 4, p.299.

[12] Teslim O. Elias, THE NATURE OF AFRICAN CUSTOMARY LAW (Manchester: University Press, 1956) p.8.

family or ancestry) through various structures of social and political organization. The official status and functions of these organs were defined by traditional values and indices of social responsibility such as gender, age and personal achievement. Thus a hierarchy of political and social institutions that characterized most pre-colonial states include the family, age grade associations, clans, councils of elders, and various traditional societies. This organizational structure defined certain social responsibility for each group, and corresponding privileges and status which together determined the individual rights and political powers of their members. The economic structure that resulted from this vision of the state as a collective enterprise in some places was a form of communal-socialism. In the observations of one expert about the Ibo in pre-colonial Nigeria, "Pre-colonial Igbo society was marked by the use of extended family system as a welfare-mechanism; the view of society as a collective enterprise; the socialization of land and other means of production; production for relevant biological and social needs rather than for the expanded reproduction of profit; and the use of relevant socio-cultural norms attuned to the demands of self-centered economy...[T]he resultant absence of the profit motive associated with this mode of economic organization canceled the need for a coercive apparatus of the state" [13] (emphasis supplied). The distinction between chiefly and chiefless societies was based on their levels of political centralization. The chiefly societies were culturally heterogeneous with centralized authority, administrative machinery and judicial

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[13] Arthur Nwankwo, "The Igbo And The Tradition of Politics: An Overview" in U.D. Anyanwu, & J.C.U. Aguwa (eds.) THE IGBO AND THE TRADITION OF POLITICS (Enugu: Fourth Dimension Publishers, 1993).

institutions. Examples in west Africa included the empires of Ashanti, Mali, Songhai, Zaghawa, Takru, the Hausa states of Gobir & Katsina, Sokoto caliphate, Oyo empire, Ga-Adangbe, Benin, Dahomey; in east Africa - Bunyoro, Buganda, Urundi, Ankole, Karagwe, Pemba, Kilwa; in southern Africa- Zulu, Great Zimbabwe, Manyika, Mutapa, Basotu, Swazi, Imerina; in central Africa - Lunda, Ovimbundu, Luba, Kongo, Bemba, Axum, Kush, Adal; in north Africa - Libya, Garamantes, Ifriqiya, Morocco, Egypt, Nubia, Ethiopia. The republican (Chiefless) societies more culturally homogeneous, maintained rudimentary political arrangements with a dispersion of authority along lineage structures. Examples of this group include the Ibo and Tellensi in west Africa; Nuer, Kikuyu and Akamba in the east; and Kavirondo in the south. Theocracies were those centralized states based on the Islamic theology and law mostly found in northern Nigeria, northern Gold-Coast, and the Gambia.[14] However, all of the above variations were structured around a common principle which was an African traditional perception of the state as a material cultural heritage.[15] Consequently, the African attitude to the state was one of ingrained reverence for authority. Even in the so called chiefless societies groups of interlocking

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[14] See: Nii Lante Wallace Bruce, "Africa and International Law - Emergence to Statehood" in JOURNAL OF MODERN AFRICAN STUDIES, 1985, pp. 575-602.

[15] See: Joseph Ki-Zerba, "Reflections on Basil Davidson's The Black man's Burden", in DEVELOPMENT DIALOGUE (A Journal of International Development Cooperation, Pub. by Dag Hammarskjold Foundation Uppsala, 1995) 2 , 99.

segments retained their social cohesion and political structure by this sense of tradition.[16] State authority possessed an aura of mystical majesty and was defined as a composite of ritual functions and political leadership, the balance depending on the level of political centralization.[17] Political power incurred cultural and mystical responsibilities which acted as checks on authoritarianism. These were manifest in intangible factors such as myths, symbols, dogmas, ritual beliefs and mystical values. However, it is important to note that it was the traditional perception of the state, and the resultant mystical authority that evoked acceptance of the social order, and not secular sanction.[18] What some have described as "submissive fatalism"[19] in the African traditional attitude towards the state was in reality a result of the ontological connection of the state to the African being. Notwithstanding the enormity of authority reposed in the state it was rarely abusive. As Lord Hailey observed "it was rare to find any instance in which the indigenous form of rule previously in force could be described in a strict sense as authoritarian. It was a prevailing characteristic of

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[16] See: Teslim O. Elias supra note 12, at p.22.

[17] Id p. 44.

[18] Id p.23.

[19] Ali Mazrui, THE AFRICANS A TRIPLE HERITAGE (Toronto: Little Brown & Company, 1986).

the indigenous system of rule that whether power was vested in the hands of individual chiefs or of a ruling class, these had no machinery by the use of which they could enforce obedience to their orders".[20]

With the advent of colonial rule, African indigenous institutions and systems were either destroyed or significantly corrupted. In place of traditional land tenure rules and community relations, colonial regimes began a restructuring process that introduced the intrusive dominance of the colonial state in the social, political and economic lives of African societies. In centralized traditional states cultural checks on royal prerogative were destroyed, while in the decentralized states dispersion of power along cultural formations were reversed with the imposition of appointed warrant chiefs. This created an ideological foundation of hegemony for the colonial state that replaced the traditional state.[21] The transition to the post colonial state was marked by the strengthening of the inherited centralized control from the west, or the adoption of authoritative socialist institutions from eastern Europe.[22] In all cases, the systems were alien to the underlying conditions of

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[20] Lord Haily, NATIVE ADMINISTRATION IN THE BRITISH AFRICAN TERRITORIES, Pt.IV (London: H.M.S.O, 1951) P.2.

[21] See: David E. Sahn & Alexander Sarris, "The Evolution of States, Markets and Civil Institutions in Rural Africa" in THE JOURNAL OF MODERN AFRICAN STUDIES (1994) Vol. 32 No. 2, p.279-303.

Africa including the nature and structure of indigenous institutions. It should be noted that the colonial centralism was quite different from the European institutional model. While the latter evolved as an organic device for balancing interests, resolving conflicts and generating socio economic growth, the colonial central bureaucracy was designed as an exploitative and totalitarian mechanism. Although political independence brought some

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[22] The resulting post-colonial structure has been described as "political artifacts upheld by the international community": see Robert Jackson & Carl Rosberg, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis," in JOURNAL OF MODERN AFRICAN STUDIES (1986) p.1-31; "Why Africa's weak states persist: the Empirical and Juridical in Statehood," in WORLD POLITICS (1982). In the view of these scholars: "Juridical Statehood is more important than empirical statehood in accounting for the persistence of states in Black Africa. International Organizations have served as post imperial ordering devices for the new African States, in effect freezing them in their inherited colonial jurisdictions and blocking any post independent movements towards self determination": id at p.21. Their analysis of the cause of the crisis is that, "African states are direct successors of the European colonies that were alien entities to most Africans. Their legitimacy derived not from internal African consent, but from international agreements primarily among European states beginning with the Berlin Conference of 1884-5. Their borders were usually defined not by the African political facts or geography but by international rules of continental partition and occupation established for that purpose": see Jackson & Rosberg above, "Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis", p.13.

change among the state manager, the character of the state remained much as it had been in the colonial era. It continued to be totalistic in scope, constituting a statist economy. It presented itself as an apparatus of violence, having a narrow social base, and relying for compliance on coercion rather than on authority.[23] The post colonial state failed in its attempt to coercively construct nations out of the entities conscripted into the colonial state, a misadventure described as "muscular nation building". [24] The result is that the state in Africa quickly assumed obscene proportions. Statistics show that within the first decade post-colonial nation building led to an explosion in state bureaucracies such that "[the] expansion in the public economy ha[d] no direct relation with expansion in the national economy... [rather] in most African countries the public economy expanded at the same rate at which the national economy contracted".[25]

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[23] See: Claude Ake, DEMOCRACY AND DEVELOPMENT IN AFRICA (Washington D.C.: The Brookings Institution, 1996).

[24] See: Crawford Young, "The Dialectics of Cultural Pluralism: Concept and Reality" in THE RISING TIDE OF CULTURAL PLURALISM : THE NATION-STATE AT BAY? (The University of Wisconsin Press , 1993).

[25] John A. Ayoade, "States without citizens: An Emerging African Phenomenon" in Daniel Rothchild & Naomi Chazan (eds.) THE PRECARIOUS BALANCE: STATES AND SOCIETIES IN AFRICA (London: Westview Press, 1988).

The Western idea of the state and the internationalization of statehood

The word "state" is derived from the non-political Latin word *status* which means the condition of an object or order. It is recorded of Europe that at about 360 BC, the word acquired a political content to its original frame of order. It was initially used to describe an orderly community which at the time was predominantly made up of systems of ranks or estates bearing particular rights and duties.[26] It then came to denote government as some form of property whose management resembled that form applicable to feudal estates. The idea of the European state derived partly from the medieval recognition of the status and estate of a prince together with the legal responsibilities which flowed from it.[27] Hence, the English word "state", was a contraction of the word "estate".[28] From this notion of property and ownership with its matrix of rights and responsibilities, the idea of the state evolved as a conflictual concept and as a device for order. Western scholars acknowledge the close connection between pre-societal tension of private property and the development of the state as a conflict resolving mechanism.

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[26] Kenneth Dyson, THE STATE TRADITION IN WESTERN EUROPE (Oxford: Martin Robertson, 1980).

[27] See: J.H. Hexter, THE VISION OF POLITICS ON THE EVE OF THE REFORMATION : MORE MACHIAVELLI AND SEYSSEL (London: Allen Lane).

[28] See: Dyson supra note 26, at p. 28.

Classical liberal scholars were concerned in different ways with the lack of self sufficiency of civil society. The belief was that left to its devices, society would destroy itself through the excesses and inequalities born of private property. The essential nature of property title was described as *commununio negativa* (negative community of property) signifying an active repulsion of the notion of joint ownership. John Locke's social contract theory explained man's emergence from a condition of perfect liberty to one of political society as stemming from the necessity for a collective mechanism for the preservation of property.[29] Locke's synthesis of the notions of common property and private rights vividly captures the conflictual nature of the western classical idea of state. The western idea of state emerged in response to these social conditions of classical western societies.[30] The idea has undergone several transformations. From popular revolts against the feudal and patrimonial legacies of state forms between the fifteenth and sixteenth centuries, to the thirty years wars between the Church and secular empires leading to the Westphalia Treaty

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[29] See: John Locke, THE TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2d; New York: Cambridge University Press, 1988).The synthesis of the subalterean conflicts is captured by the Locke's argument that the Earth is the gift of God to Adam and his heirs in succession, a common heritage, but God wills the acquisition of private possessions through individual labor.

[30] See: John Hoffman, STATE, POWER AND DEMOCRACY (New York: St. Martins Press, 1988) at p.20.

in 1648, the idea of the state continued to develop as a political device for dealing with socio-economic tensions. In the Westphalia Treaty, it was used as the moral and legal basis for centralizing power which hitherto was dispersed among the church, feudal lords and secular authorities.[31] However the emergent dominance of the state often threatened private property. In addition a strong influence of semitism led to the fundamentalization of state power. Semitic doctrine's basic tenet of divine absolutism was borrowed and translated into royal absolutism, such that King Louis XIV could proclaim in 1730 "I am the State".[32] Reaction to abuse of state prerogative led to a renaissance in thinking and a reformation of the idea of the state for the protection of individual autonomy and choice of loyalty. This came to the fore in the eighteenth century with the gradual establishment of the notion of individuals as equal "subjects" in their subordination to the sovereign.[33] At the turn of the century the idea of the state had been reconstructed from an intrusive and regulatory mechanism to a more facilitative framework stressing individual capability and choice. Currently the same tension between private property and common property is leading to a transformation of the impersonal liberal state from the "formal" to the

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[31] Id.

[32] See: Ali Mazrui, supra note 19.

[33] See: Q. Skinner, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT (Cambridge: Cambridge University Press, 1978) Vol. 1.

"material" legal paradigm.[34] This change does not yet constitute a radical shift in political or legal premises, but rather a trend in the western idea of the state from the vision and ideology of a more individualistic society stressing a facilitative state framework for private activity, to the vision and ideology of a more managerial, redistributive and welfare state.

As indicated above, the western idea of the state as a conflictual concept evolved from internal dynamics of social formation. Scholarly analysis of western state forms show that sovereignty was believed to come from within the state. A community by virtue of its historical evolution as a united nation, and political achievement as an independent governing entity, was by emergent European law of nations entitled to equality of treatment with others. Hence the Dominican Monk and jurist, Vitoria, in the 17th Century,

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[34] Examining the changes over time in the structure of the western state, Habermas has noted the shift from a system of Formal Law or Private Law.Society to the Materialized Law i.e. the materialization of the formal law paradigm. In the former the political ideal of equal treatment was presumed to have been guaranteed through the universality of legal statutes. However, as experience showed that actual freedom does not derive its material basis in an environment controlled by the majority of the bearers of these rights, perception of the political society has admitted of the necessity for redistributing wealth and social power in order to secure actual equality of legal ability to acquire property: see Jurgen Habermas, "on Law and Democracy: Critical Exchanges"in CARDOZO LAW REVIEW (1996) Vol.17, pt.1 Nos. 4-5.

defined a sovereign state as "A perfect... community [i.e.] one which is not a part of another community, but has its own laws and its own council and its own magistrates, such as the kingdom of Castile and Arragon and the Republic of Venice."[35] Other definitions of the state presented statehood as the material of a dynamic social formation. For example Grotius defined it "as a complete association of free men, joined together for the enjoyment of rights and for their common interest";[36] and Pufendorf as "a compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and facilities of the individual members for the common peace and security."[37] In De Vattel's opinion "Nations or states are political bodies, societies of men who have united together and combined their forces in order to procure their mutual welfare and security... Every Nation which governs itself, under whatever form, and which does not depend on any other Nation is a sovereign state. Its rights are, in the natural order, the same as those of every

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[35] Fransisco de Vitoria infra note 40.

[36] Hugo Grotius, "De Jure Belli Ac Pacis Libri (1646)," (Translated by F. KELSEY) in CLASSICS OF INTERNATIONAL LAW SERIES (Oxford, 1925) vols 1 & 2.

[37] Samuel Pufendorf, "De Jure Naturae et Gentium Libri Octo (1672)," (Translated by C.H Oldfather) in CLASSICS OF INTERNATIONAL LAW SERIES (Oxford, 1934) ch. 11 Sec. 13.

other state ".[38] Therefore, classical law of nations accepted defactoism or declaratorism as the basis of recognition of states.[39]

The above situation describe the rules of statehood as applicable between European nations within the stated periods. The same set of criteria were not applied to non European nations. Rather, the standard for western acknowledgment of a non European entity as a state was European cultural civilization. Back in the 15th century, European legal systems were characterized by a hierarchy of categories: lex divina (divine law), lex humanis (human law), and lex naturalis (natural law). The dominant category was the divine law which was regarded as God's will as interpreted by the priestly class and implemented by the Church.The divine law enjoined the spread of the Christian faith and the forcible civilizing of heathens (classified as slaves by nature) by "superior" western cultures. Regarded as being of universal validity by European nations, the doctrine of the divine law permeated the European law of nations. This coalescence of international law and western religious and cultural civilization was later beset with ethical problems. This was because its endorsement of missionary crusading among unbelievers materialized in

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[38] Emerich De Vattel, LE DROIT DES GENS , OU PRINCIPLES DE LA NATURELLE A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET SOUVERAINS (1758); Cited in James Crawford, infra note 53 at p. 7.

[39] See: R.P. Anand, NEW STATES AND INTERNATIONAL LAW (Vikas Publishing, 1972).

forms of enslavement, slave trade and exploitation. Such inhumanity struck at the professed moral high ground of the Christian faith and western culture. This encouraged a radical and rationalistic movement which challenged the devastation of native Americans by Christian crusaders. Most influential in this movement was the work of Vitoria.[40] He commenced the secularization of the European law of nations by challenging the secular authority of the Pope. Borrowing the Roman legal concept of *jus gentium* (conceived as law established by natural reason among all nations), Vitoria reconstructed this concept as the basis of international law applicable as between European nations and others. However the content of Vitoria's body of jus gentium continued the coalescence of international law with European cultural civilization. Having challenged the secular authority of the Christendom, he reincorporated principles of the divine law into the contents of his jus gentium. According to one commentator "Vitoria used the jus gentium as evidence of universal rules to fill the gaps in moral guidance left by divine law process".[41] In particular one of Vitoria's norms was that sovereignty was a legal property that could alone attach to Christian nations.[42] Therefore the lack of Christian civilization denied an entity the

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[40] See: Francisco de Vitoria, "Franciscus de Victoria De Indis et ivre Relectiones (1557/1917)", in THE CLASSICS OF INTERNATIONAL LAW , first series (Washington: Carnegie Institute of Washington, 1917).

[41] Alfred P. Rubin, "International Law in The Age of Columbus," in NETHERLANDS INTERNATIONAL LAW REVIEW (1992) Vol. xxxix-issue 1, p.5 at 29.

status of sovereign statehood, even if it possessed all the qualities described by De Vattel above.

However, the elevation of the Roman notion of jus gentium as a universal standard became problematic in the18th century.[43] With a tremendous increase in inter-European trade and the heightening of territorial competition between European nations overseas, the content and application of European law of nations as derived from the notion of jus gentium, became a matter of controversy.[44] Under the triple impact of the disintegration of

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[42] See: Anthony Anghie "Francisco De Vitoria And The Colonial Origins of International Law," in SOCIAL & LEGAL STUDIES (1996) Vol. 5(3), p.321 at 330. See also: Robert A. Williams, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (New York: Oxford University Press, 1990).

[43] See: Rubin supra note 41, at page 25.

[44] Conflict caused by European expansionism has been a great influence on the development of the European law of nations. Some of the roots of these conflicts include the 1493 Papal Bulls of Pope Alexander VI (which divided the world between Spain and Portugal); the 1494 Treaty of Tordesillas between Spain and Portugal and its supplementary version, the 1529 Treaty of Saragossa. The increase in tension was aided by the emergence and assertion of national interests by new powers such as England, France, the Netherlands, Germany, Russia, and the United States. British rivalry with Russia in the Balkans and the Ottoman Empire brought European nations to the brink of war.

the unity of the European community of nations, the expansion of European societies into other spheres of the world society, and the continuing process of the concentration of political and economic power by a few European nations, the coalescence of international law and European cultural and religious civilization came under strain.[45] Western scholars of the 18th. century restarted the process of rationalistic reconstruction. Under the banner of pragmatic positivism, the doctrine of recognition began to emerge. Regarding initial controversy surrounding the doctrine, one commentator explains that "the writers of the early period of the eighteenth century positivism, whenever faced with the eventuality of recognition as a medium of fitting the new political reality into the law, on the whole rejected such a solution, choosing the solution more consistent with the natural law tradition. Even if the law of nations was conceived as based on the consent of states, this anti-naturalist trend was not yet allowed to extend to the field of recognition".[46] It was eventually propounded as a doctrine by Henry Wheaton in 1845.[47] Again at the inception

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[45] See: Georg Schwarzenberger, "The Standard of Civilization in International law," in CURRENT LEGAL PROBLEMS (1995) Vol. 3, p.212 at 220.

[46] Diedrich Saalfeld, HANDBUCH DES POSITIVEN VOLKERRECHTS (1833). Cited in Alexandrowicz, infra note 47, at p.189.

[47] See: Charles H. Alexandrowicz, "The theory of recognition in Fieri," in BRITISH YEARBOOK OF INTERNATIONAL LAW (1958) Vol.34, p.176. See also: B.V.A. Roling, INTERNATIONAL LAW IN AN EXPANDED WORLD (Amsterdam, 1960)

of this reconstructivist movement, the double standards of legal status were maintained. As between European nations it became treaty law that "the test whether a state was civilized, and thus entitled to full recognition as an international personality, was whether its government was sufficiently stable to undertake binding commitments under international law to protect adequately the life, liberty and property of foreigners".[48] But in substance the distinction between civilized and uncivilized, based on European cultural and political reality, was preserved as an index of sovereign statehood for non European

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p.10. The Declaratory Theory states that statehood is a legal status that derives from the effectiveness of a territorially defined political community notwithstanding its legitimacy or legality. The most authoritative proposition of the Declaratory theory is that of Lauterpatch which states that "The guiding juridical principle applicable to all categories of recognition is that international law, like any other legal system, cannot disregard facts and that it must be based on them provided they are not in themselves contrary to international law": H. Lauterpatch, RECOGNITION IN INTERNATIONAL LAW (London, 1948) p.91.

For the Constitutive Theorists, contrary to what Vitoria and Puffendorf had observed of classical and medieval practice, the matter of fact existence of a state is axiomatic but necessarily derives from the recognition of such a state by other states, an exercise of sovereign discretion: see F.E. Oppenheimer, "Governments and Authorities in Exile "in AMERICAN JOURNAL OF INTERNATIONAL LAW (1942) Vol.36, p.568-95.

[48] See: Schwarzenberger supra note 45, at 220.

nations.[49] Although the European law of nations did not expressly provide for recognition as the constitutive instrument of statehood, recognition was nevertheless the only medium of membership in the international society of "civilized" nations. Non members of the international society were not subjects of international law, and member states were not obliged to exercise international legal restraints in dealing with them.[50] In substance therefore, non recognition relegated a nation to the legal status of objects of international law as distinct from subjects denying them the status of sovereign statehood. Consequently, politically independent nations in Africa could be classified as "terra nullius" and divided up amongst European nations by treaty law.[51]

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[49] Id.

[50] See: James Crawford infra note 53, at p.13.

[51] See: THE GENERAL ACT OF THE BERLIN CONFERENCE, 26 Feb. 1885; PROTOCOLS AND GENERAL ACT OF THE BERLIN CONFERENCE, C 4361, 1885.

The relevant provisions of the Berlin Act were contained in its chapter 6 titled - *The Declaration relative to the essential conditions to be observed in order that the new occupations on the coasts of the African continent may be held to be effective.* It provided as follows :

Article 34-

Any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions , shall acquire them as well as the powers which assume a protectorate there, shall accompany the respective act with a

Statehood in international law : between norm and fact

In the contemporary international legal order, the coalescence of western civilization with the international standard of statehood has not abated. While uniform criteria now explicitly exist, the framework for its application invariably project western standards and realities. Where the empirical substance of these standards are lacking, the resulting vacuum is filled with juridical assumptions, as will be discussed presently.

There is no explicit definition of statehood in international law. However, there is a set of normative criteria that is used in an instrumental fashion, to determine legal personality. A territorially defined political community would be formally entitled to international legal personality if it possesses: a permanent population; a defined territory; a government; and capacity to enter into relations with other states. Since the 1933 Montevideo Convention[52] the international community has maintained a juridical vision

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notification thereof , addressed to the other signatory powers of the present Act in order to enable them, if need be, to make good any claims of their own(emphasis provided). Acquisition as a source of title is only legally valid of a tera nulluis : see The Advisory Opinion on THE WESTERN SAHARA CASE, 1975, ICJ Reports, p.124.

[52] Signed 26 December 1933: see Hudson, INTERNATIONAL LEGIS vi. 620. Article 1 provides as follows "The state as a person of international law should possess the following qualifications: a permanent population; a defined territory; government; and capacity to enter into relations with the other states."

of statehood based on a fluid application of those criteria. However from the practical manifestations of international legal personality, statehood in international law embodies certain principal legal properties to wit :

1. A state possesses plenary competence in the international sphere e.g. power to make treaties,

2. it enjoys exclusive competence with respect to its internal affairs,

3. it reserves a right to consent to any international process, jurisdiction or settlement before it can be bound by the results,

4. it possesses the right to equality of status with other states in the international system,

and

5. in any case of uncertainty on any of the above, the presumption will favor the freedom of action of states whether with respect to internal or external affairs.

As one commentator has observed, the forgoing features do not comprehensively depict the essence of statehood in international law; they are at best nominal because the legal context of statehood is predicated by several other functions and responsibilities[53]

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[53] Crawford James, THE CREATION OF STATES IN INTERNATIONAL LAW (Oxford: Clarendon Press, 1979) at p. 34.

such as those in article 4 of the United Nations Charter.[54] Within the United Nations system there exist some form of "collective recognition". Article 4 of the United Nations Charter restricts membership of the UN to "peace loving states" defined as states which "in the judgment of the organization ...are able and willing to carry out these [Charter] obligations"[55]. Based on articles 5 & 27(3) what amounts to the collective act of recognition is the recommendation of the Security Council with the concurring votes of the permanent members, and its acceptance by the General Assembly. It could be argued that membership of the UN is not a determining factor of statehood because the former is optional whereas the latter is based on the criteria set out by the Montevideo Convention. However, it is of great significance that based on article 1(6) of the United Nations Charter the election of non-membership does not discharge the burdens of international cooperation even though it disentitles the electing state to the benefits of membership.[56]

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[54] Article 4 of the United Nations Charter provides that "(1) Membership in the United Nations is open to all other peace loving states which accept the obligations contained in the present charter and, in the judgment of the organization, are able and willing to carry out these obligations; (2) The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council": see THE UNITED NATIONS CHARTER, 3 BEVANS, 1153.

[55] Id.

Upholding such an argument will result in a situation akin to classical European law of nations framework, whereof non membership of the international system relegated a nation to the status of an object of international law, as distinct from a subject with full sovereign rights. In addition the growing trend of interdependence and integration in the international system, makes it probable that an entity not recognized by other states as a state is not likely to function effectively as such. As a practical matter therefore the "collective recognition" of the United Nations necessarily trumps the Montevideo criteria. This trend is probably more pronounced in the current criteria set by post-industrialized European countries of the European Union for recognition of the legitimate statehood of new states emerging from eastern Europe.[57] The guidelines define the basis of statehood with respect to set standards and values such as the practice of democracy, a free market and respect for individual human rights. In the observations of one expert, there is no reference whatsoever to internal sociological and empirical realities such as the actual effectiveness of the states.[58] Again, it should be noted that the Montevideo Convention

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[56] Article 1(6) provides that "The [United Nations] shall ensure that states which are not members act in accordance with these principles so far as it may be necessary for the maintenance of international peace and security."

[57] See: GUIDELINES ON THE RECOGNITION OF NEW STATES IN EASTERN EUROPE AND IN THE SOVIET UNION (16 Dec. 1991) reprinted in *Symposium on Recent Developments in the Practice of State Recognition,* EUROPEAN JOURNAL OF INTERNATIONAL LAW (1993) Vol. 9, at 72.

merely provides for a set of legal criteria that do not, by themselves, concretize into the empirical substance. Moreover the factual substance of statehood depend much more on internal factors that are not exclusively susceptible to a set of broad international criteria. Consequently the convention has not prescribed rights, powers or capacities which all states must, in order to be states, possess. Rather it often has the effect of encouraging *presumptions* as to the actual existence of such rights, powers or capacities. Thus in most cases the actual powers, rights, and liberties of particular states in the international system vary considerably. As a result of the independence of the international law framework from factual reality, there is often a divergence of international practice from the legal criteria of the framework.[59] In some cases international law has withheld legal status from

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[58] See: Danilo Turk, "The Dangers of Failed States and a Failed Peace in The Post Cold War Era" in INTERNATIONAL LAW & POLITICS (1995) Vol. 27, at page 625.

[59] The basic criteria set by international law has in many cases been the lowest in the hierarchy of considerations in international determination of statehood. Israel in 1948 did not have a defined territory as almost all her boundaries were vigorously and violently contested. But it became a member of the United Nations in 1949 (See General Assembly Resolution 273 (III) (37-12:9); S.C Res. 70, 4 Mar. 1949, 9-1 (Egypt): 1 (UK). Similarly the borders of Kuwait and Mauritania were subjects of dispute at the times of their admission into the United Nations: see Al Baharna, THE LEGAL STATUS OF THE ARABIAN GULF STATES (1968); Rosalyn Higgins, THE DEVELOPMENT OF

an effective political entity as in the case of Taiwan, and in others it has conferred status on an ineffective entity as is illustrated by the experience of Guinea-Bissau.[60] It creates a vacuum in each situation which is filled with juridical assumptions. Some of the most common of these assumptions include: the collective acceptance of the state element by all its constituent units as a legitimate symbol of identity; and the capacity of the entity to act as a state. It is important to reiterate that these assumptions become a convenient tool because statehood is no longer viewed predominantly as an internal sociological fact, but as the existence of a western type nation-state. In the observation of one commentator "statehood is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is fact; that is a legal status attaching to a certain state of affairs by virtue of certain rules ".[61] It should be added that the applicable rules are a concretization of the western historical experience, and where the state of affairs lacks the relevant

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INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (London, 1963).

[60] With the effective withdrawal of the Portuguese from Guinea-Bissau in 1974 it started exercising sovereignty. However before that date it was already a state in international law: see Security Council Resolution 322 (1972) recognizing the rebel government of Amilcar Cabral; and the General Assembly Resolution 3061 (XXVIII) Nov. 2 (1973) recognizing the sovereignty and statehood of Guinea-Bissau. The Agreement between Portugal and Guinea-Bissau which marked the effective independence of the latter was only signed in 1974 : see 18 ILM, 1244.

empirical texture, as in the case of many post colonial African states, specious assumptions are erected to fill the void. The legal consequence is that in places where the state did not evolve from internal social dynamics, the overall legitimacy of the state itself is juridically presumed.[62]

For some decades these juridical assumptions have remained influential because, in Brownlie's observation,[63] the importance of the origins of statehood has largely been downplayed, and not reflected in abundant literature. In addition questions of statehood did not raise long-standing disputes; literature and practice paid prominent attention to incidents of statehood such as sovereignty and equality of states; conflicts that came close to questioning statehood stopped short at issues of non-recognition of governments; and the new states in Africa that joined the class of international statehood started off by aligning with factions in the bi-polar ideological war between the liberal west and the

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[61] See: James Crawford supra note 9.

[62] That the focus on vested juridical properties such as territorial sovereignty bears little relevance to the internal legitimacy of the state element, is borne out by the fact that nationality (clearly a genealogical factor in state formation) is not an influential factor in statehood at international law: See Crawford, supra note 9.

[63] See: Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (Oxford: University Press, 1990) at page 12.

communist east. As experts observe,[64] the cold war funneled material and military support to the new states in Africa providing them with the means to maintain an appearance of stability. In extreme difficulties they enjoyed the unwavering support of the international community as in the suppression of Katanga secession in Congo (formerly Zaire)[65], and the condemnation of the Biafran rebellion in Nigeria. The juridical assumptions continued to be propped up in Africa until the end of the cold war, and the virtual withdrawal of

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[64] See: Henry J. Richardson, "Africa many challenges, much hope" in ASIL PROCEEDINGS (1995) p.484. The two dominant views on this issue maintain a common ground - that since the cold war ended Africa has lost international assistance which it had taken for granted for decades. It is widely accepted that the destruction of the Soviet option has removed Africa from the international priority list. While the position of the Arab states that border on the Mediterranean is mixed (due to their influence in the Islamic and oil rich Arab worlds), sub-Saharan Africa has been expressly discounted by the foreign policy of many western states. The United States Institute for National Strategic Studies stated the policy of the US in 1995 as follows, "the US has essentially no serious military/geostrategic interests in Africa anymore, other than the inescapable fact that its vastness posses an obstacle to deployment in the middle East and South Asia, whether by sea or air": THE ECONOMIST, Sept. 7, 1996, p.4.

[65] In 1961 the Security Council unanimously decided to "assist that government [of Congo] ...to maintain ...national integrity": see *UN Doc./S/Res/169, 1961.*

uncritical support for African states by the west and east. Since then statistical data has taken a reverse turn in Africa, and statehood is now at the center of crisis and discourse; and the conflicts are no longer entirely that of legitimacy of governments but also of legitimacy of the state element.[66]

The problem of dealing with the crisis of legitimate statehood and state collapse in post colonial Africa within the framework of international law.

There is an important difference between the meaning, origin and transformations of the western idea of the state, and that of pre-colonial Africa. The material difference is that whereas that western idea found ultimate expression in rational institutions, the African submissive perception of the state discounted its expression in coercive institutions. The most important dimension of the foregoing to this research, is that underlying the material difference, are fundamental differences of a cultural and philosophical nature regarding the understanding of the state, its role, function and

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[66] Makau is right that "The protracted problems of the post-colonial state have raised anew the meaning of state legitimacy, and brought forward disturbing questions about the concepts of sovereignty and statehood ...[I]t is becoming increasingly apparent that sovereignty and statehood are concepts that have trapped Africa in a detrimental time capsule": see Makau Wa Mutua, "Conflicting Conceptions of Human Rights : Rethinking The Post-Colonial State" in ASIL PROCEEDINGS (1995) p. 487.

relevance to society. Hence the coalescence of the western idea with the international law on statehood poses critical problems for the effectiveness of the framework within which state collapse and the crisis of legitimate statehood is dealt with in Africa.

The western experience of the state as rational institutions of social ordering dictate that state collapse be interpreted as a case of institutional failure. The fact that African traditional society did not subscribe to rational institutionalism as evidence of statehood, is not allowed to inform a proper understanding of the real causes of state collapse in post colonial Africa. As a result, the concern of the international system with the collapse of states and the crisis of legitimate governance is about the loss of ascribed sovereign properties. This loss usually manifests in the collapse of governmental apparatus. There has been no incentive for interrogating the question of the legitimacy of the state element.

III. A POST INSTITUTIONAL CONCEPT OF STATE COLLAPSE

" A concept more up to date :
a soul that's open to life , tracing its destiny
on the road ahead , on the road left behind "

Amilcar Cabral (1946)

The Concept

State collapse is observed in the disintegration of all material symbols of the unity of a people to their territory and their government. The phenomenon of disintegration

manifests itself in stages: in governmental institutional decay, in juridical crises, and finally in collapse of government - a juridical "state of anarchy."[67] However state collapse in post-colonial Africa is not just an extreme case of institutional decay; it is a failure of juridical assumptions of an organic unity of a people, territory and government. This failure is due primarily to the puerility of the factual and historical foundation on which it is erected. On the whole, the collapse of the post-colonial state in Africa is the manifestation of a deeper socio-political crisis that has historical, cultural and philosophical dimensions. It is finally experienced in the collapse of the apparatus of government , but is by no means an entirely institutional or managerial problem.

Unpacking The Concept

Unpacking this concept reveals two dimensions worthy of investigation:

1. Internal legitimacy of the state

Internal legitimacy of the state includes but goes beyond governmental legitimacy to the root of the state element. It involves a deeper cultural and philosophical crisis of identity.[68] This aspect of the concept suggests that the post-colonial state is most

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[67] See: G.B. Helman & S.R. Ratner, "Saving Failed States", in FOREIGN POLICY, Winter 1992-93, p.1 at 44.

vulnerable to the malaise of state collapse because it is alien.[69] It thus underlines the pathological nature of the problem[70]. Its analytical application requires the reintegration of

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[68] See: Makau Wa Mutua infra note 88, at p.489. Makau is right that the disconnection between the people and the modern African state is not merely a function of the loss of independence or self governance over precolonial political and social structures, and the radical imposition of new territorial boundaries with unfamiliar citizenry. It is, above all, a crisis of cultural and philosophical identity; the consequence of a delegitimation of values, notions and philosophy about the individual, society, politics and nature developed over centuries.

[69] See: Basil Davidson, THE BLACKMAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE (London: Currey Ltd., 1992).

[70] See: Crawford Young, THE AFRICAN COLONIAL STATE IN COMPARATIVE PERSPECTIVE (New Haven: Yale University Press, 1994). However, no one has put this crisis of internal legitimacy in clearer terms than Makau Wa Mutua. Makau holds the view that the post-colonial state is a violation of the basic idea of state, and should be deconstructed. He blames its contrived nature and its concocted citizenry as the cause of its unviability. In his own words, "The Post Colonial State, the uncritical successor of the colonial state, is doomed because it lacks basic moral and legal legitimacy. Its normative and territorial construction on the African colonial state, itself a legal and moral nullity, is the fundamental basis of its failure": see Makau Wa Mutua, supra note 66. See also

African history and sociology into studies of state collapse. It supports the adoption of a more structural approach to the crisis of state collapse and legitimate statehood in Africa.

However any concept that focuses entirely on internal legitimacy will be inadequate. States such as Botswana, Cote d'Ivoire, Gabon, and arguably South-Africa, Uganda, Benin and Ghana, are seen to have demonstrated the potential to rise above historical constraints. It is unlikely that the economic liberalization and democratization undertaken by these states in compliance with demands of western donors and investors, will alone result in the legitimization of the state. That notwithstanding, these states are functioning relatively well, and arguably occupy a promising position in the African crisis. Also a moderation in the application of the internal legitimacy factor is necessary to make room for variations in experience especially post-colonial economic fortune. Furthermore an unmediated application of the internal legitimacy factor, pronounces the African post-colonial state literally still born, and ignores the capacity of democracy and exceptional leadership to reverse the systemic problems of the post colonial state.

2. Institutional legitimacy:

Makau Wa Mutua: "The Banjul Charter and The African Cultural Fingerprint: An Evaluation Of The Language of Duties," in VIRGINIA JOURNAL OF INTERNATIONAL LAW (1995) Vol. 35; "Putting Humpty Dumpty Back Together Again: The Dilemmas of The Post-Colonial African State," in BROOKLYN JOURNAL OF INTERNATIONAL LAW (1995) Vol.xxi, P. 505.

The condition of state collapse is an extreme degree of incapacity to perform its primary responsibilities, that of protecting the security of lives and property. Such an advanced stage of structural, legal and socio-economic decay is usually preceded by years of inept and corrupt leadership, and systemic injustice in various forms of domination. The crisis of institutional legitimacy leading to total collapse has been identified as a process characterized by stages such as:

(a) the disorganization and disunity of civil society,

(b) a disintegration of internal political forces creating a vacuum of legitimacy,

(c) a contraction of the state; widespread disengagement from the state as the subject of loyalty and symbol of identity; an emotional, economic, social and political detachment from the state,

(d) a shift in focus to the informal economy (black market); the capacity and authority of the state to harness resources is challenged and resisted; public infrastructure and social services deteriorate; state institutions and agencies translate from collective and constructive instruments to divisive and destructive mechanisms,

(e) a resurgence of sectional sentiments and widespread embrace of such groupings as the ultimate unit of identity and provider of security,

(f) with the growing irrelevancy of the state to the lives of the peoples, it resorts to extreme coercion as a means of maintaining power and control over the territory; this

marks the height of the crisis of institutional legitimacy as coercive order replaces legitimate authority, and

(g) the total collapse happens with the state's loss of its monopoly of force as organized rebel groups take effective charge of territories. At this point "the state as a legitimate functioning order is gone".[71]

Again an exclusive focus on the institutional legitimacy suggests that the states in question have been effective prior to the collapse. This contradicts the African reality as many African states are known to have existed since independence almost entirely on external props. In some states such as Chad, Niger, Sudan, Burkina Faso, Zaire, Rwanda and Burundi the citizens have not at any time patriotically embraced the post colonial state.[72] Others such as Ghana, Guinea and Tanzania which at certain times appeared to have embraced the state, did so more out of passionate ideological reaction to colonial

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[71] See: Zartman supra note 1; See also Naomi Chazan, AN ANATOMY OF GHANAIAN POLITICS: MANAGING POLITICAL RECESSION 1969-1982 (Boulder: Westview Press, 1982) 334-35.

[72] See: Victor Azarya, "Reordering state society relations: incorporation and disengagement" in Daniel Rothchild & Naomi Chazan (eds.) THE PRECARIOUS BALANCE: STATE AND SOCIETY IN AFRICA (London, Boulder: Westview Press, 1988).

state experience than as a result of sober and critical reflection. In addition focusing on institutional malfunction raises an assumption that state collapse is an abnormal situation arising in the recent history of independent Africa. Unless based on racism, this assumption is inadequate to explain the perversiveness of state disintegration which has reached epidemic proportions in Africa. The only other rational explanation for the general malaise of the African state is that there is a systemic problem common to all African experience. The history of the effectiveness of pre-colonial African political organizations supports this view. Finally the fact that the African idea of state de-emphasized institutionalism means that an entirely institutional approach will be superficial.

Re-uniting the concept:

Reconnecting what has been classified into internal and institutional legitimacy provides a holistic concept which eliminates a-priori assumptions that attach to each segment separately. The reunited post institutional concept creates room in the discourse for studies of the historical, cultural and sociological connection or disconnection between the African post-colonial state and its people. It succeeds in looking beyond the juridical properties of sovereignty, but without abandoning the mechanism of the state. This post-institutional concept will serve as a critical tool for reexamining the international prescriptions of humanitarian intervention and democracy as the ultimate solution to state collapse. This will be discussed next.

PART IV. INTERVENTIONISM AND DEMOCRACY AS A SOLUTION TO STATE COLLAPSE.

International solutions to state collapse

The broader implications of international focus on the juridical properties of sovereignty of a collapsing state is "the characterization by the number of western policy makers of many African states as 'failed' coupled with assertions that such failures are the sole and exclusive responsibility of African governments themselves... That the only remedy to these alleged failures is to allow under international law massive outside intervention to reform local governmental and wealth processes, whether through expanded peacekeeping operations or unilateral state action"[73] (emphasis supplied). Successive Secretaries General of the United Nations have emphasized the acceptance of intervention in the event of state collapse. In Javier Perez de Cuellar's words there is emerging a right to intervene based on an "irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents".[74] Interventions and peace keeping operations in Africa

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[73] Henry J. Richardson III, "Africa: Many Challenges, much hope" in ASIL PROCEEDINGS (1995) P.484.

[74] UN PRESS RELEASE SG/SM/4560 Apr. 24 1991. See also Boutrous Boutrous-Ghali, AN AGENDA FOR PEACE, *UN Doc No. S/24111 Jun. 14 992,* p.5.

include those in Congo(formally Zaire) (1960-64); Namibia (1989-90); Somalia (1992-95); Rwanda (1993-96); Angola and Mozambique. While intervention is the prescribed reconstitutive measure, democratization and market liberalization are always prescribed as the needed reconstructive process. The concept of state collapse developed in the preceding chapter raises certain critical issues: Does the concept's identification of the African post colonial state as inherently vulnerable to collapse portray post-facto interventionism as being reactive and costly in human and material terms?; the concept's internal legitimacy crisis underscores the systemic nature of the problem, does this not challenge the reconstructive benefits of any democracy that is not premised on such structural and systemic changes in response to the national claims that have been at the heart of the phenomenon of state collapse?

Interventionism

Within the United Nations framework, intervention must be collective to be legitimate; and can only be undertaken upon a Security Council determination of a threat to international peace, a breach of the peace or an act of aggression.[75] The civil wars that lead to state collapse may not be contained within the collapsing state's boundaries as the experience of massive refugee migration into neighboring states has shown. Hence it may be legitimate for a neighboring state to entertain fears of territorial insecurity or outbreaks

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[75] See: Article 2 (7) and Chapter VII of the United Nations Charter.

of epidemic from the refugee migrants, and a possible collapse of health care delivery. Also the central African region presents a good example where, due to identical geo-political realities, an outbreak of war in Burundi is a potent catalyst for similar occurrences in Rwanda, Zaire and Uganda; and a real threat to internal stability in Tanzania, Kenya, Angola, Sudan and Ethiopia.

However, in general it is doubtful whether the socio-economic stress on a neighboring states caused by migrant populations comes within the contemplated family of "aggression and breaches of the peace", that would legally found a Chapter VII collective intervention. Secondly, there is no known case where intervention has been undertaken solely at the behest of a neighboring state, and simply to deal with its transnational effects, for example to keep the conflict and its consequences within the borders of the collapsing state. Rather, current international practice has accorded some legitimacy to collective intervention undertaken on humanitarian grounds, such as egregious violations of human rights that may not threaten international peace and security.[76] While cold war calculations are believed to have informed the manner of the 1967 Congo intervention, which saw the United Nations expressly intervening on the side of the government of the day, post cold war interventions have formally targeted humanitarian goals. In the 1992 Somalia operation the intervention was commenced on the authorization to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief

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[76] See: Fernando R. Teson, "Collective Humanitarian Intervention" in MICHIGAN JOURNAL OF INTERNATIONAL LAW (1996) Vol. 17, p.323.

operations in Somalia".[77] Similarly, resolution 929 authorized the use of all necessary means to protect civilians in the 1994 Rwanda civil war.[78] In these cases the mandates had been essentially protective of the civilian population. Indeed the Security Council had expressly reaffirmed that the Somali people "bear ultimate responsibility for the reconstruction of their own country".[79] Subsequent expansions in the mandate to include nation building and the reconstitution of the state created uncertainties about the exact ambits of the mandate and the goal of the operation, and contributed to its failure.[80]

In the experience of African countries from the Congo to Rwanda, United Nations interventions have offered little benefits in terms of broad systemic, political and structural reconstruction. However, this logical deficit results from the very nature of the mechanism

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[77] See: United Nation Security Council Resolution 794, UN SCOR, 47th Sess., 3145th mtg at 3, *UN Doc. S/RES/794, 1992.*

[78] See: United Nation Security Council Resolution 929, UN SCOR, 49th. Sess, 3392d mtg *UN Doc. S/Res/929, 1994.*

[79] See: Resolution 794, supra note 77, at p. 2.

[80] See: Mark Hutchinson, "Note, Restoring Hope: UN Security Council Resolutions for Somalia and an expanded Doctrine of Humanitarian Intervention" in HARVARD INTERNATIONAL LAW JOURNAL (1993) Vol.34, p.624.

because, as the name implies, "humanitarian intervention" is a moral and principled interference whose legitimacy is anchored on a philosophy of *protective humanitarianism*. As one commentator has observed, this mechanism looks beyond the letter of the UN Charter to the core human values and principles of the international community[81]; and in the view of another commentator its primary goal has been to regulate and mitigate the negative humanitarian effects of the internal conflicts that mark the process of state collapse.[82] Therefore, as a mechanism for dealing with the incidence of state collapse it holds out little structural benefits. More importantly, in the African situation of a widespread malaise of the nation-state, it is a *reactive* mechanism and therefore grossly inadequate as a major tool for dealing with the problem of state collapse.

Democracy

International agreements and instruments clearly indicate that the basic principle of democracy that governance be based on the consent of the governed is a universal

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[81] See: Fernando R. Teson, supra note 76 at p. 341.

[82] See: Thomas Franck, "Post-modern Tribalism and the Right to Secession " in Catherine Brolman, Rene Lefeber & Marjoleine Zieck (eds.) PEOPLES AND MINORITIES IN INTERNATIONAL LAW (Dordrect: Martinus Nijhoff Pubs., 1993).

civilization.[83] These instruments that embody the notion of democracy as a right do not expressly advance any comprehensive political theory or ideology as exclusively democratic.

Tentatively, it could be argued that the broad democratic right of consent to governance is wide enough to accommodate the aspiration of nations which challenge the legitimacy of the nation-state; and claims of secession would be seen as the collective and democratic wish of a people. Indeed the relationship between self-determination and individual human rights could be one of mutual reinforcement whereof the latter humanizes the former, and the former lends to the latter a powerful metalanguage to

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[83] This is a minimum universal consensus entrenched in international instruments such as: The African Banjul Charter on Human & Peoples Rights (reprinted in *21 International Legal Materials 58*, at 61); CSCE Copenhagen Document (reprinted in *29 International Legal Materials*, 1305); The European Convention for The Protection of Human Rights and Fundamental Freedoms (*213 United Nations Treaty Series [U.N.T.S.] 262*); American Convention on Human Rights (*1144 U.N.T.S.*) The United Nations Charter; International Covenant on Civil & Political Rights (*999 U.N.T.S*); Universal Declaration on Human Rights (General Assembly Resolution 217A, UN GAOR, 3d Sess., *UN Doc. A/810/1948*); Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (*213 U.N.T.S.* 262). See generally, Reginald Ezetah, "The Right To Democracy: A Qualitative Inquiry" in BROOKLYN JOURNAL OF INTERNATIONAL LAW (1997) Vol.22, No.3, at p.495 .

harness the totality of a people's demands and aspirations.[84] In this sense the right to democracy would be a right of peoples as well as individuals. Such a broad conceptualization of the right to democracy offers a legal framework for evaluating the claims of nations and peoples which may have precipitated the collapse of the state, and as such offers alternative pacific avenues to violent revolutions for nations to address their grievances. It also possesses inherent reconstructive potential when used as a mechanism in a collapsed state.

However, the reality is that although international instruments on the right to democracy do not expressly advance any particular political theory, a particular political ideology, liberal individualistic ideology, is inherent in the nature of rights recognized as flowing from the general right to democracy, and the consequent responsibilities for political societies.[85] This is clear from the consistent note of the said international agreements and international human rights agreements which guarantee "the free

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[84] See: Patrick Thornberry, "The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism" in Christian Tomuschat (ed.) MODERN LAW OF SELF-DETERMINATION (Dordrecht: Martinus Nijhoff, 1993), at 101.

[85] See: Louis Henkin, THE AGE OF RIGHTS (New York: Columbia University Press, 1990).

expression of the will of the elector",[86] in all ramifications of such freedom even as regards rights which are essentially groupcentric such as cultural rights[87] (emphasis supplied).

Makua's observation that read as a whole, these agreements require variations of liberal democracy is instructive.[88] One commentator has even opined that this paradigm has displaced groupcentrism by setting in motion the evolution of the right to self determination from a plural (group) to a singular (individual) entitlement ; "a personal right to compose one's identity ...from a right of peoples to one of persons".[89] This formulation of democracy completely ignores its evolutionary aspect, the enduring process of critical self examination that leads to the collective internalization of a particular

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[86] See: International Covenant on Civil & Political Rights, Article 25 (b).

[87] See: International Covenant on Civil & Political Rights, Article 27. This article vests cultural rights on individuals who are free to exercise it in their cultural groups whereas culture is necessarily a collective attribute.

[88] See: Makau Wa Mutua, "The Politics of Human Rights: Beyond The Abolitionist Paradigm In Africa," in MICHIGAN JOURNAL OF INTERNATIONAL LAW (1996) Vol. 17.

[89] See: Thomas Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice" in AMERICAN JOURNAL OF INTERNATIONAL LAW (1996) Vol.90.

culture and system of democracy.[90] This is what Rawls believed to be the process for attaining the necessary democratic minimum of an *overlapping consensus*[91]; and what Habermas sees as a hermeneutic consensus on questions of collective self understanding[92], whereby self understanding is "a process concept of collective identity".[93] This process of collective self-identity can only be realized within the horizon of a shared historical, cultural and social life. The critical minimum of this process of self identification is a level of political integration materializing in a common political culture, such that citizens of a multicultural democratic state can transcend their own particular subcultures when

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[90] See: Vaclav Havel, "Democracy's Forgotten Dimension," in STANFORD JOURNAL OF INTERNATIONAL LAW (1995).

[91] See: John Rawls, POLITICAL LIBERALISM (New York: Columbia University Press, 1993).

[92] See: Jurgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehd Trans.; Cambridge, Mass.: MIT Press, 1996).

[93] See: Jurgen Harbamas, "Reply To Symposium Participants, Benjamin N. Cardozo School of Law ," in CARDOZO LAW REVIEW (1996) Vol.17, P.1457.

discussing public issues on a national level. Habermas' illustrative model on the attainment of this process is instructive, and is reproduced as follows:

> "At the national level we find what in the United States is called 'civil religion', a 'constitutional patriotism' that binds all citizens together regardless of their different cultural background or ethnic heritage. This is a metalegal quantity; that is, this patriotism is based upon the interpretation of recognized universalistic constitutional principles within the context of a particular national history and tradition. Such a legally unenforceable constitutional loyalty anchored in the citizen's motivations and convictions can be exacted only if citizens conceive the constitutional state as an achievement of their own history. Constitutional patriotism will be free of the usual aspects of ideology only if the two levels of ethnical integration - national and subnational- are kept separate. Normally this separation must be fought for against the resistance of the majority culture. Only then does a favorable motivational base emerge as support for the expectations of tolerance entailed by legally maintained difference between ethnically integrated communities within the same nation "[94] (emphasis supplied).

In vindication of Habermas' assertions above, contemporary variations of western democracies have been the results of peculiar historical experiences and evolution towards shared ideals. This is evident in their material differences. The United Kingdom identifies

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[94] Id at p.496.

the root of its democracy as the Magna Carta of 1215. But the construction of an actual British identity was achieved over centuries. Its beginning may be linked to the religious revolution in which nationalistic passion cleared the path for Protestantism. The shared experience of a religious rebellion against the Pope brought momentum to the construction of a British national consciousness. As regards popular participation in the running of the state, until 1911 an hereditary House of Lords exercised as much power as the comparatively representative House of Commons. British women were admitted into the select class of electors only in 1928 while additional voting rights for the elite was abolished only in 1948. Today, the mixed elitist, egalitarian, traditionalist and moralistic nature of the British political culture is a historical synthesis of cultural varieties of England, Scotland, Wales and Northern Ireland.[95] While the English contribute the traditionalist and individualist elements, the Scots and the Welsh make the moralistic input. The brew is unique in the coexistence of traditional and modern institutions, norms and values, in the United Kingdom's political system. The United States in its own case declared its independence in 1776. In 1778 politics was legally reserved for the propertied white male class as the constitution restricted voting rights to those who paid property tax, or poll tax. It was in 1920 that women became eligible to vote, and only in 1965 that formal legal obstacles to black participation were abolished. Hence the minimum constitutional patriotism identified by Habermas as the political culture of the United

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[95] See: Daniel Elazer, FEDERAL SYSTEMS OF THE WORLD (United Kingdom: Longman Group, 1991) at p. 291.

States is the product of significant racial, gender economic and ideological revolutions. Other western democracies such as France and Germany have significant history and tradition behind them. The French revolution of 1788 marked the commencement of the search for a French collective identity. A French collective consciousness assumed material form for the first time only in 1803 with the promulgation of the Napoleonic Code. This marked the establishment of a uniform legal system in France which hitherto was made up of multiple jurisdictions. In general, this search for a collective identity witnessed five republics and two monarchs between the 18th. and the 20th century, fired by revolutionary passions of equality, fraternity and egalitarianism. The Germans locate their experience in a unique history: the Napoleanic liberation wars, an unsuccessful Weimar Republic, Nazi Hitler and his schizophrenic brand of nationalism, the erection of the Berlin wall and its subsequent fall in 1989. All of the foregoing democracies rest on the strongly cohesive identities acquired through time.

In the African experience the process of collective self identification was interrupted by colonialism. Many Africanist scholars believe that the post colonial state in Africa has so far failed to wrest the loyalties of its citizenry from their pre-colonial ethnic identities.[96] This is evident from the predominantly ethnic pattern of the conflicts across

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[96] See: Makau Wa Mutua, "Putting Humpty Dumpty Back Together" supra note 70. See also: Basil Davidson supra note 69; Crawford Young supra note 70, and Art Hansen, "African Refugees: Defining and Defending Their Human Rights " in Ronald Cohen (ed.) HUMAN RIGHTS AND GOVERNANCE IN AFRICA (1993) 139.

sub-Saharan Africa, for example in Liberia, Congo (formerly Zaire), Burundi, Rwanda, and Sudan. The consequence of the absence of this historical foundation is that the political culture of the post colonial state is often dramatically different from those of its constituent parts, and it neither embodies common characteristics nor reflects similar values. Rather it often embodies their differences and divisions. A good illustration is Nigeria which has unsuccessfully experimented with British Parliamentary democracy (1960-66), and American Presidential system (1979-83). In those civilian regimes the Nigerian state had no discernible political culture, at least not in the same sense as did the United Kingdom or the United State; even though its federating units effectively maintained their pre-colonial traditional heritage. In the east, Ibo societies and communities have continued with their republican communal-cooperative systems, while Hausa communities in the north are still organized on theocratic hereditary systems. In the same vein, the western Yoruba communities have preserved their traditional monarchical structures. In all of these societies, political authority has continued to rest on pre-colonial traditional positions of power such as Emir and Sultan in the north, Oba and Chiefs in the west, and Eze and Ichies in the east. However the practice and organization of politics by the state itself has been totally different from what obtains in the local communities. Therefore, the depiction of the Nigerian colonial state in 1947 as "a mere geographic expression"[97] is an appropriate description of the total absence of affinity between the

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[97] In 1947 Obafemi Awolowo commented that Nigeria was not a nation, but "a mere geographic expression": this is cited by Crawford Young, "The Impossible Necessity of

peoples political culture, and the political pattern of the state. The dominant western perception of the post colonial Nigerian state's political culture is expressed as follows:

> "Nigeria's large and highly diverse population means that its political culture is also diverse. The Moslem Hausa have a very hierarchical political culture which is strongly reflected in their political behavior. Yoruba were ruled traditionally by the nobility that represented a hereditary oligarchy. This too is reflected in their political culture which is less hierarchical than that of the Hausa but is still quite elitist. The Ibo, whose traditional society was tribal-participatory, have been most open to a political culture emphasizing democratic participation and individual initiative. What is shared in common by all these groups is the expectation that politics is a means to reward one's relatives and friends and to gain personal benefit beyond office holding itself. Thus the system suffers from what in the west would be considered endemic nepotism and corruption"[98] (emphasis supplied).

The elevation of the individual as the primary bearer of the right to democracy has inherent limitations on the instrumentality of liberal democracy as a reconstructive mechanism in a collapsed African state. By underscoring the juridical primacy of the

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Nigeria : A Struggle for Nationhood," in FOREIGN AFFAIRS (1996) Vol.75, No.6, at page 139.

[98] See: Daniel Elazer, supra note 95, at p.185.

individual over his group and recognizing him as the sole bearer of the ultimate political right, liberal democracy threatens the collective expression of the nations and groups, and strengthens the position of the nation-state by downgrading the quality of opposition to that of the individual. Also, to the extent that it fails to recognize the legal standing of the nation, it diminishes any legal forum for the pacific resolution of conflicts between the aggrieved nation and the post-colonial state.[99]

V. LEGITIMIZING THE AFRICAN POLITY : THE SELF-DETERMINATION IMPERATIVE.

Transforming the African state from an innately implosive colonial contraption to a moral community of consenting and cooperating citizens and peoples animated by the ideals of their collective existence is the ultimate challenge of state legitimization. As the preceding section has argued, this cannot be achieved by democratization alone because the historical and sociological foundation for a multicultural democracy, attainable in the form of an enduring collective self-identification, was eroded by colonial rule. This is the reason why democratic processes in post colonial Africa have largely been mired in ethnic

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[99] See: Anthony Anghie, "Human Rights And Cultural Identity: New Hope For Ethnic Peace?" in HARVARD INTERNATIONAL LAW JOURNAL (1992) Vol.33, No.2, P.341.

division and tension, a phenomenon described as the "vexing problem of [democratization in] the post-colonial state".[100]

The legitimization of the African state can be achieved by two measures: a pattern of self determination that restructures the political landscape in such a way as to reintegrate African peoples into the dynamic of nation building; a process of democratization which is not anchored on any given models, but which, borrowing from the past, responds to contemporary realities and strives to be a vehicle for the desired future of a given African state. This is not a novel proposition; African peoples and their leaders have at various times acknowledged these measures as the needed impetus for restoring legitimacy to the African state. They have affirmed that " ... unless the structure, pattern and political context of the process of socio-economic development are appropriately altered"[101] to galvanize the enthusiastic and popular participation of African

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[100] See: Makau Wa Mutua, supra note 88, at 602. Ali Mazrui also made the observation that "In post colonial Africa, ethnicity continues to be a major factor conditioning success or failure of the state": see Ali Mazrui, supra note 3, at 27. In addition Naomi Chazan, POLITICS AND SOCIETY IN CONTEMPORARY AFRICA (Boulder, C.O: Lynne Rienner, 1988) pages 101-25.

[101] The AFRICAN CHARTER FOR POPULAR PARTICIPATION IN DEVELOPMENT AND TRANSFORMATION, Arusha-Tanzania, *4 United Nations Economic Commission For Africa (UNECA), 1990*, pp.17-18.

peoples, nation building in Africa will remain crisis prone. Hence across the continent there has recently been a re-enactment of the type of people's convention that was used as a reconstructive mechanism in revolutionary France, the sovereign national conference.[102] However, none of these processes has yet resulted in a radical restructuring of the African political landscape.

On the process of democracy that would achieve legitimacy, the African (Banjul) Charter on Human And Peoples Rights[103] expresses general guiding principles. It is important to note that the Charter does not explicitly provide for any model of democracy; what I have attempted to do hereafter is to piece together the idea of democracy that is implicit in the nature of rights and duties provided for, and generally consistent with the spirit of the Charter.

The Charter prescribes that the virtues of African tradition and civilization should characterize the juridical framework for promoting individual and peoples rights.[104]

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[102] Sovereign national conferences and constitutional conferences have been held in Nigeria (1990 & 1995), Republic of Benin (Feb. 1990), Gabon (March - April 1990), Congo (Feb-June,1991), Niger (July - Nov 1991), Togo (July - August, 1991), Mali (August, 1991), Democratic Republic of Congo, formerly Zaire (July 1991 - Dec. 1992), and Ethiopia (1991).

[103] See: AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES RIGHTS, Reprinted in 21 I.L.M, 1981, 58, p.59.

From the provisions of this charter, the envisioned framework is not limited to the liberal vertical trajectory of the individual claiming upon the state,[105] but includes other juridical subjects or bearers of rights and duties such as the family, the community and the society.[106] The prime political right of association is made subject to an "obligation of

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[104] Id, Preamble paragraphs 5 & 11. Paragraph 5 notes some of the primary African social values that underlie the charter to be that of "Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of 'human and peoples' rights"; and paragraph 11, that Africans are "Firmly convinced of their duty to promote and protect 'human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa."

[105] Liberal democratic notion of state legitimacy is well stated by John Locke. It is based on the assumption that in pre-societal era each individual contracted to transfer to the state his right to implement the law of nature. This right vested on the state is however defined by a duty of the state to protect and promote individual rights, and it is upon the preservation of the latter that the legitimacy of the state depends: See John Locke, supra note 29.

[106] Paragraph 6 of the Preamble to the African (Banjul) Charter on Human and Peoples Rights provides "...that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone"; and the beneficiaries of these rights and duties include individuals (Art. 3-17), families (Art. 18, 27, 29) communities and societies (Art. 14, 17.2

solidarity",[107] which entails that political freedom is to be exercised in the interest of the harmonious development of the family and community. Article 26[108] imposes a duty on African states to "allow the establishment and improvement", perhaps by civic and cultural associations, of appropriate institutions for the promotion of the above framework. The Charter read in entirety advances a democratic process that facilitates the re-distribution of public responsibilities as between the state, individuals, families, communities, societies and "peoples"; and the material framework of the anticipated democratic setting would be

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& 3, 27, 28,29.2-4-7) and peoples (Art. 19, 20, 21, 22, 23, 24). "Peoples" vested with the rights and duties under the Charter include: "dominated peoples" (Art 19), for instance minority cultures; "colonized peoples" and "oppressed peoples" (Art. 20).

[107] See: Articles 10, 27 & 29. Article 10(2) provides that "Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association"; and 29 provides in parts, "The individual shall have the duty to serve his national community by placing his physical and intellectual abilities at its service; to preserve and strengthen social and national solidarity, particularly when the latter is threatened; to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation; and, in general, to contribute to the promotion of the moral well being of society".

[108] Article 26 provides as follows: "States parties to the present charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and

based on the organizational principles and values of African historical tradition and civilization. The cross connecting and intersecting jural relations in the Charter between the state, individual, family, community and society clearly anticipate a democratic framework of a minimal and facilitative state supervising and sharing public responsibilities with the other bearers of rights and duties. For example, the Charter translates the traditional extended family obligation of individuals to provide for the welfare of their parents into a legal obligation[109]; it logically follows that social security is to be a combined legal responsibility of the state, and individuals acting independently and collectively in the family. Again article 29 (2 & 4) obliges every individual, in the spirit of solidarity, to volunteer his intellectual and physical abilities to the service of his community and the nation. In the light of the Charter's expressed objective of borrowing from the finest virtues of African tradition and civilization, a legal status and responsibilities for traditional and voluntary grass roots cultural formations that are committed to communal development is contemplated in this democratic framework. Consequently, the civic institutions anticipated by Article 26 would include, to the extent feasible, such traditional organizations as age grade associations, various gender associations and cooperative societies. The Charter would appear to encourage their formal participation in the running

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improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present charter".

[109] Article 29(1) provides that, "Every individual shall have the duty to preserve the harmonious development of the family, and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need ".

of public affairs. It thus sanctions the transformation of these institutions, some of which have managed to survive the colonial era as voluntary cultural organizations, to legal subjects and participants in the democratic state. The Charter's notion of democracy is therefore one of a continuos process beyond electoral competition whereby grassroots communities and rural populations have real political power and control over their destiny. Accomplishing this will require a decentralization of power to traditional democratic formations in communities; and the institutionalization of the state based upon cultural foundations of endogenous democracy and development. At the national level the state should, in addition to permitting plurality of opinions, also institutionally acknowledge and provide for the plurality of nationalities. The reason for this is simply that ethno-national identity is an empirical reality all through Africa, and any process of state legitimization that does not make room for this will only succeed in burying implosive energy in the fabric of the state. The suggestion for an establishment of "chambers of nationalities" [110] in the legislative mechanisms, is the sort of imaginative thinking that is required of managers of the post colonial state for dealing with the problem.

It is also important to note that the unique dialectic of right-duty conception does not endorse the abusive state which violates individual rights in the name of social duties. Most of the individual duties under the Charter are owed primarily to families and communities[111]. The intent of the drafters of the Charter was to recreate the bonds of pre-

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[110] See: Claude Ake, supra note 23 at p.132.

[111] See: Art. 17(2); 27; 28 & 29.

colonial era among individuals and between individuals and the state. It has been observed that the African philosophy which the Charter brings to the legal relations between the individual and the state revolves around core values such as:

> "...respect for, and protection of, the individual and individuality within the family and the greater socio-political unit; deference to age; commitment and responsibility to other individuals, family and community; solidarity with fellow human beings; tolerance for difference in political views and personal ability; reciprocity in labor issues and for generosity; and consultation in matters of governance".[112]

However, African leaders have lacked the will to implement these legitimizing measures for reasons varying from selfish considerations, to the preservation of short term benefits accruing to dominant ethno-cultural groups to which they may belong.

International law, as set out in the United Nations Charter, clearly proscribes external interference in the political processes of a state.[113] Nevertheless, it is now

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[112] Makau Wa Mutua, "The Banjul Charter And The African Cultural Fingerprint," supra note 70, p.339-380.

[113] See: Article 2(4) & (7) of the United Nations Charter. See also decision of the International Court of Justice in MILITARY AND PARAMILITARY ACTIVITIES IN AGAINST NICARAGUA (NICARAGUA. Vs UNITED STATES), [1984] ICJ Reports, p.392.

questionable whether the legitimization of the post colonial state in Africa can be accomplished entirely through internal processes. The reality in the post cold war period is that the African political elite, due to selfish or narrow ethnic loyalties, are unwilling to forge real structural changes. The only form of radical change that is now taking place is in one rebel group chasing out a corrupt ethnocentric dictator, and itself becoming worse than its predecessor. Such a transition has occurred in Uganda, is currently taking place in Congo (formerly) Zaire, and is a likely future occurrence in places like Kenya, Sudan, Burundi, Rwanda, Ethiopia, and Nigeria. This is a process that marks the collapse of the state with devastating human and material costs. Where changes have occurred within the constitutional framework, they are largely discredited by ethnic undertones and have not lead to such broad and just changes that are likely to be sustainable. A good illustration of this point is Ethiopia. Ethiopia was never under colonial rule, but years of ethnic repression under Haile Selassie and the communist regime of Mengistu Haile Mariam ethnicised the Ethiopian polity. The Tigrayan ethnic group led a rebellion which successfully ousted Mengistu Haile Mariam in 1991. A conference was held in Ethiopia in July 1991 under the leadership of the Ethiopian People's Revolutionary Democratic Front in 1992.[114] Ethiopia became the first African state to attempt a radical reconstruction of the state within a constitutional framework. Its new constitution made a bold attempt to redesign the political landscape of Ethiopia to reflect its ethnic diversity by dividing it into

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[114] See: the TRANSITIONAL PERIOD CHARTER OF ETHIOPIA, Charter No. 1 of 1991, *NEGARIT GEZETA, 50th year, No. 1.*

nine "self governing regions".[115] The territories of the federating regions are defined along major ethnic and linguistic lines such as the Tigrinya, Ometo, Sidano, Tigre, Oromo, Amhara, Ajar, Gurage and Somali. Article 47 (2) vests on each of these ethnic regions "the right to establish at, any time, a state of their own." To make the secession option abundantly clear, Article 39 (1) provides that "every nation shall have the unrestricted right to self-determination up to secession". However, what is apparently a bold attempt to come to terms with Ethiopia's ethnic realities is widely believed to be a political maneuver by Tigriyans to keep Amharas, who in the past dominated the political scene, out of power by exploiting the ethnic factor. It has been pointed out that, beyond the formal right to secession, actual political and economic power remain concentrated in the Tigrayan led government, and the Ethiopian federation remains as concentric as ever.[116] For practical reasons therefore, some form of overriding set of rules and guide lines may be needed to channel internal processes towards peaceful, just and substantive reforms in the legitimization of the state. From a moral and pragmatic perspective, internal conflicts that have their genesis in external wrongs, and that may give rise to genocide or trigger repercussions on international or regional security, cannot be left entirely to internal

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[115] See: PROCLAMATION TO PROVIDE FOR THE ESTABLISHMENT OF NATIONAL REGIONAL SELF-GOVERNMENT, No. 7 of 1992, *NEGARIT GEZETA, 51st year, No. 2.*

devices if there is to be hope that they can be overcome. Also, from a legal perspective, there may be ground for seeking to expand the juris-competence of legitimization outside internal political processes. The legal history of the post-colonial state itself is founded upon: colonial partition performed by European "international" law, the Berlin Treaty Act of 1885[117]; the process of decolonization within the framework of the Declaration on the Granting of Independence to Colonial Countries and Peoples;[118] and the preservation of colonial partitions by article 3 (3) 1963 OAU Charter,[119] and 1964 OAU Resolution on Border Disputes among African States.[120] The collective effect of these instruments has been to preserve the colonial political landscape. In the view of the International Court of Justice, this option was chosen in the interest of stability,[121] and therefore not necessarily

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[116] See: Paul Brietze, "Ethiopia's Leap In The Dark: Federalism And Self Determination In The New Constitution" in JOURNAL OF AFRICAN LAW (1995) Vol.3, No.1, p.19 at 29.

[117] See: THE GENERAL ACT OF THE BERLIN CONFERENCE, supra note 51.

[118] See: supra note 8.

[119] See: Brownlie, infra note 120.

[120] See: Ian Brownlie, BASIC DOCUMENTS ON AFRICAN AFFAIRS (Oxford: Clarendon Press,1971) p. 360.

[121] See: CASE CONCERNING THE FRONTIER DISPUTE (BURKINA FASO Vs. MALI) JUDGMENT [1986] ICJ Reports, p.554 at 567.

in response to the wishes of African peoples. In the course of the decolonization process, enlightened Pan-Africanists under the umbrella of the *All-African Peoples Conference* expressed the popular wish for a restructuring of colonial frontiers and political landscape.[122] But the wishes of the African colonial elite for the preservation of the frontiers prevailed. The post colonial African state and its sovereignty, are international political and juridical constructs,[123] and its legitimization is a fundamental process that must involve the legal pillars upon which it was erected. In the absence of outright abandonment of the state, it will be very difficult to accomplish systemic reforms without some form of normative mediation by international law. For the form of international normative involvement, the principle of self determination readily comes to mind .

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[122] See: *Resolutions Adopted By the All-African Peoples Conference*, Accra, December 513, 1958 quoted in Colin Legum, PAN-AFRICANISM: A SHORT POLITICAL GUIDE (New York: F.A Prager, 1965) p.228 at 231.This resolution denounced the artificial frontiers and called for their abolition or adjustment at an early date. Indeed, amongst the African colonial elite there were divisions as to the wisdom of preserving the colonial mutilation of African geo-political landscape. Initially Ghana, Morocco, Somalia and Togo rejected the idea: see Saadia Touval, THE BOUNDARY POLITICS OF INDEPENDENT AFRICA (Cambridge; Mass.: Harvard University Press, 1972).

[123] See: Robert Jackson, supra note 22.

VI. STATE LEGITIMIZATION THROUGH POST COLONIAL SELF-DETERMINATION.

Is self-determination an outdated concept?

The notion of self-determination has over several decades remained the primary basis of human struggle against domination. Controversial to all, inconveniencing to many, and passionately vexing to a few, it has remained central to political changes and scholarly discourse. Notwithstanding attempts at its doctrinal delegitimization,[124] the idea has refused to go away. In small places like Ogoni, it is believed to be the last hope of generations unborn for freedom and justice. In all of Europe and America, aborigines and native Indians proclaim the truth of self determination with religious fervor. From the Irish, to Quebecois, Palestinians, East Timoreans, West Papuans, Tibetans, to all the

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[124] It has been denigrated as "social poetry" and "post modern tribalism": see Phillip Allot, "Self Determination - Absolute Right or Social Poetry?" in Christian Tomuschat (ed.) MODERN LAW OF SELF DETERMINATION (Dordrecht: Martinus Nijhoff, 1993); and Thomas Franck, "Post Modern Tribalism And The Right To Secession" supra note 82 at page 3. See also Thomas Franck, supra note 89. In the latter paper, Franck's legendary scholarly gracefulness is strained by the apparently "vexing" issue of national secessionism. His description of it almost degenerates into name calling: from "schismatic movements," to "ennobling past," "self-invented future," "backward looking," "murderous clans," "centrifugal tribalism," "collective schizophrenia," "xenophobic loyalty," "invented myths," "romantic myths," and "drab single-hued identities".

corners of the earth, the claim of self determination remains a major medium, and the universal language for articulating collectively felt, feared or imagined injustice.

However the doctrine of self determination is at a crossroads. Because of a widening gap between statements of the doctrine and its application, many respected jurists believe it is now a bad case of "opportunistic doctrine creation".[125] This is not without justification. Woodrow Wilson's idea of self determination in 1918, which is widely seen by western scholars as the political and legal foundation of self determination,[126] was that of a liberating principle for nations in German, Austro-Hungarian and Ottoman empires. However its application by the Allied powers in the Versailles Peace Conference only served to prepare the ground for a post war scramble for German overseas colonies.[127] Also its application in Africa introduced a colonial

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[125] See: Thomas Franck, "Post modern Tribalism And the Right To Secession", supra note 82.

[126] See: Alfred Cobban, THE NATION-STATE AND NATIONAL SELF-DETERMINATION (New York: Th.Y. Crowell Co.). See also Michla Pomerance, "The United States And Self-Determination: Perspectives On The Wilsonian Conception" in AMERICAN JOURNAL OF INTERNATIONAL LAW (1976) Vol. 1, No.2.

[127] See: Martii Koskenniemi, "The Police In Temple; Order, Justice And The United Nations: A Dialectical View," in EUROPEAN JOURNAL OF INTERNATIONAL LAW (1995) Vol. 6., No. 3 at 329.

inversion, transforming its demographic logistics from cultural nations to colonial multi-nations,[128] and expanding its legitimate objective from ethnocultural liberation to post-colonial stability.[129] The misery of the doctrine has further been worsened by the prioritization of national interests by major powers and players in the international system. Calculations of an ideological, economic, and political nature by these major players have contributed to a confusion that has engulfed the doctrine. For example the application of the doctrine in the eastern European Baltic states is totally different from its application to the Kurdistan nation in the middle east, and Western Sahara in north Africa. In the same manner, self determination means totally different things in the contexts of Chechnya, Northern Ireland, Ogoni, Quebec, East Timor, Tibet, West Papua, Taiwan and Alaska to nations of diverse interests. In addition, an explosion of theories on self determination has left many skeptics wondering if the doctrine has submerged into a "jurisprudential confusion".[130]

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[128] See: Thomas Franck, supra note 82. Franck's' opinion on why the application in Africa could not benefit cultural nations is that Africa's "tribes" numbering in thousands did not have the numerical, organizational, political and cultural logic of the European "nations" that had benefited from Wilsonian version of the concept.

[129] See: FRONTIER DISPUTE CASE, supra note 121 and accompanying text.

[130] See: Paul Brietzke, "Self-Determination or Jurisprudential Confusion: Exacerbating Political Conflict " in WISCONSIN INTERNATIONAL LAW JOURNAL (1995) Vol.14, No. 1, at 69.

By and large, the fact, inexplicable to many experts, is that while the doctrine is slowly descending into scholastic incoherence, claims of self determination continue to be a feature of major political events; and the idea continues to gain ground as a primary socio-political force. These asymmetries suggest that the essence of self determination is broader than the dimensions which doctrine and political applications concede to it. Perhaps the inner truth of self determination, which is liberation for a group subjugated because of its distinctiveness, is a social expression of a natural drive. Certainly, this aspect of self determination pre-dated Woodrow Wilson and 1918. At least to the extent that recorded history recounts, it influenced the Christian faith and its transcendental individualism in classical times. At certain points it translated the Christian belief of individual responsibility to God into ecclesiastic denouncement of alien subjugation and exploitation of native Americans. In the Papal Bull Sublimus Deus of 1537, Pope Paul III had acknowledged the legitimacy of native American struggle for independence by declaring that "Indians ...are by no means to be deprived of their liberty or possession of their property even though they be outside the faith of Jesus Christ... [S]hould the contrary happen it shall be null and void and of no effect".[131] The resistance of native Americans to incursions of the Greek, Spanish and the British at various times in history is consistent with the philosophy of self determination. Similarly the historic struggle of African peoples against colonial rule from 1885 to 1910 were movements of self

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[131] Quoted in Cohen, "Original Indian Title", MINNESOTA LAW REVIEW (1947-48), Vol.xxxii P.28 at 45.

determination.[132] The revolutions that set the stage for modern society were significant achievements of self determination struggles. Between 1776 to 1900 the principle and goal of self determination marked the American war of independence, liberation of South and Central America from European colonial powers, the freedom of the Greeks from the Ottoman empire, and of Belgium from the Netherlands. In the period after the second world war the same principle legitimized the decolonization process all through Africa, Asia and Oceania.

Broadening the intellectual and historical horizon of self determination may enhance an understanding of the inconsistency of the doctrine with political application, and socio-political movements. This will enable an appreciation of the following facts. For the law of self-determination to perform the traditional role of law, to wit guiding and charting the transformation of social tensions and conflicts into positive energy, the essential nature of self-determination must be rescued from its obscurity by doctrine and selective historicism. This is necessary in order to capture the essence of the idea, and to understand that its socio-political primacy, and probable continuing relevance in the future, cannot be wished away by doctrinal delegitimization and theoretical abstraction. Self determination is probably a human evolutionary current that is charged with both positive and negative energy, and it is in the nature of its re-imagination and application that intellectual focus should now rest.

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[132] See: Michael Crowder, WEST AFRICAN RESISTANCE: THE MILITARY RESPONSE TO COLONIAL OCCUPATION (New York: Africans Pub. Corp., 1971).

In the particular context of Africa it will be suicidal to dismiss, as romantic poetry, a naked and pulsating reality as the claims of self determination. Continual disregard for it has encouraged its violent assertion in the Western Sahara, Sudan, Nigeria, South Africa, Kenya, Uganda, Angola, Cameroon, Gabon, Burundi, Rwanda, Somalia, Djibouti, and Liberia.[133] Its widespread nature is sufficient *vox populi* that the legitimization of the post colonial African state cannot take an alternative route.

For a proper articulation of the concept of self determination that would facilitate the necessary legitimization process, described in part V above, it is pertinent to briefly examine the present situation of Africa in normative history of self-determination. In short what is colonial self determination?

Colonial self-determination

What may suffice as a legal definition of self-determination was given in 1960 by *the Declaration On The Granting Of Independence To Colonial Countries and Peoples*[134] as follows, "All peoples have the right of self determination; by virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development". This definition was reproduced verbatim by Articles 1 of both the

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[133] See pages 1 & 2.

[134] See: General Assembly Resolution 1514, *U.N. Doc. A/4884 1996*, Reprinted in UNITED NATIONS YEARBOOK (New York : UN DPI , 1960) at page 49.

International Covenant on Civil And Political Rights,[135] and the International Covenant on Economic, Social, and Cultural Rights,[136] both of which are the broadest binding human rights agreements in international law.[137] The ambits of this right, in terms of "who" may exercise it, and " what" it may entail, are not explicit. However other instruments and judicial pronouncements provide some assistance. A day after the Declaration on Granting of Independence to Colonial Peoples, another resolution, *Principles Which Should Guide Members In Determining Whether or Not An Obligation Exists To Transmit The Information Called in Article 73e of The Charter of The United Nations,*[138] gave indications of the ambit of the right and its beneficiaries. The latter resolution stipulated that the exercise of the right of self-determination may range from independence, free association, to incorporation in an existing state; and that this right may only be exercised against a colonial state. For purposes of clarifying the colonial context of the right, it defines the object state as states that include geographically separate, and ethnically distinctive non-self governing territories. Within the United Nations system the doctrine

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[135] See: 999 UNITED NATIONS TREATY SERIES, 171.

[136] See: 993 UNITED NATIONS TREATY SERIES, 3. The right to self determination also figures, but without comparable clarity of definition, in Articles 1 & 55 of the United Nations Charter: see UN CHARTER, 3 BEVANS, 1153.

[137] See: THE UNITED NATIONS AT 50: NOTES FOR SPEAKERS (New York: UN DPI, 1995) at page 52.

[138] General Assembly Resolution 1541 (XV).

became restricted in its application to reversing trans-continental colonization by European states. Hence the thematic rapporteur appointed by the United Nations on discrimination and protection of minorities, Hector Gros-Espiell, reported that:

> "self-determination of peoples is a right of peoples, in other words of a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future. Under contemporary international law, minorities do not have this right. Modern international law has deliberately attributed the right to peoples and not to nations and states. The United Nations has established the right of self-determination as a right of peoples under colonial and alien domination. This right does not apply to peoples already organized in the form of a state which are not under colonial and alien domination".[139]

The African colonial elite who succeeded to the management of the post colonial state, made a declaration in Cairo preserving the colonial boundaries in 1964.[140] The exercise of the right of self determination in Africa followed this colonial doctrine, and secessionist attempts by Biafra (from Nigeria) and Katanga (from Congo) were roundly condemned by African leaders[141].

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[139] See: THE RIGHT TO SELF-DETERMINATION, IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS (New York: UN DPI, 1980) at page 11, paragraph 70.

[140] See: supra notes 121 & 122, and accompanying texts.

However, because of the irrepressibility of the philosophy of self determination, political activity has far outpaced the colonial doctrine. Post colonial sovereign mutations and boundary changes include those of: Ruanda-Urundi into Rwanda and Burundi; the splitting of British Cameroon for the purposes of referendum after which the northern part joined Nigeria and the other parts became the state of Cameroon; the separation of Eritrea from Ethiopia and Somaliland from Somalia. Likely entrants into this post colonial class of self-determinants are southern Sudan from Sudan, and Western Sahara from Morocco. This effervescent current is not limited to the African continent. It is evident in the emergence of Bangladesh from Pakistan, the Baltic states from the former Soviet Union, the Czech and Slovak Republics from Czechoslovakia, and the break up of Yugoslavia.

Because the breadth of the right of self determination is not coterminous with secession alone, it has provided room for imaginative construction of legal relations that will enhance peaceful coexistence between minorities and majority cultures. Its legitimate exercise could range from a democratic framework, through several degrees of autonomy with an existing state to outright separation.[142] For example internal pressures

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[141] See: *O.A.U. Resolution on The Situation In Nigeria*, 1967, in Ian Brownlie, BASIC DOCUMENTS ON AFRICAN AFFAIRS (1971) at page 364; General Assembly Resolution 1474 (ES-IV), UN GAOR . 4th Emer. Spec. Sess., Supp. No.1 at 1, *UN Doc. A/4510 (1960)*. This resolution, which condemned the Biafran secession attempt, originated from an African draft about the katanga situation in Congo.

and conflicts in Europe have encouraged the creation of laws, such as the Helsinki Final Act,[143] that tried to address problems of minorities by vesting in them the right of political autonomy. Also, unparalleled by any comparable advancement of collective right in the international system, indigenous peoples may soon have a right to political autonomy in international law. In 1993 the United Nations Working Group On Indigenous People (UNWGIP) adopted the Draft Declaration of The Rights of Indigenous Peoples. It provides in part that: "Indigenous peoples have the right of self determination, in accordance with international law by virtue of which they may freely determine their economic, social and cultural development. An integral part of this is the right to autonomy and self-government".[144] Different models of political autonomy are some of the ways that European nations are re-imagining self determination to deal with the continuing

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[142] See: Frederic L. Kirgis, "The Degrees Of Self-Determination In The United Nations Era" in AMERICAN JOURNAL OF INTERNATIONAL LAW (1994) Vol. 88, at page 304.

[143] See: CSCE CONFERENCE ON THE HUMAN DIMENTION (Adopted in June 1990), Reprinted in Hurst Hannum (ed.) DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS (Dordrecht: Martinus Nijhoff, 1993). Article 35 obliges signatory states to consider possibilities of appropriate local or autonomous administration for national minorities.

[144] See: DRAFT DECLARATION ON RIGHTS OF INDIGENOUS PEOPLES, in Annex to REPORT OF THE WGIP (1993), *UN Doc. E/CN.4/SUB.211993/29.*

negative consequences of their imperialism. The degrees of self determination are not also limited to political autonomy. The success of the Federated States of Micronesia and United States is illustrative of the variety of options open to the exercise of the right; the reunification of Germany in 1989 and, although debatable, the current closing of ranks between Russia and Bylorussia, both illustrate that it is a process that underlines the genuine wishes of the people at any given time. In Africa, a re-imagination of the idea for an appropriate concept is now needed as a vehicle to the legitimization of the state.

A legitimizing concept of self determination

The "self"

Self determination is at the bottom, an exercise of the free choice of a people. If the free choice of peoples is not to be blurred by formalism, the search must begin from the reality on the ground. In other words, instead of an a-priori determination of the eligible "self" based on some abstract criteria, such criteria should pace the manifest "self," or facilitate the manifestation of an emergent "self ". Hence, a primary criteria for identifying the "self " should be the physical and political manifestation of a group that believes itself to be culturally and politically distinctive, and its express assertion of the right. Therefore, the overt expression of socio-cultural distinctiveness, and the clear assertion of a right of self determination should constitute the primary index for determining the eligible "self ". In many African countries these self-announced candidates are pretty obvious. For instance it is clear that a Somali state of independent confederating

Somali clans is more acceptable to the Somali people, and thus probably more legitimate than the past Somali state.[145] In the same vein, a Burundi state and Rwanda state of self governing Hutus and Tutsis is certainly consistent with the demonstrated aspirations of the masses of these entities, neglect of which has fanned some of the worst ethnic rivalry in history.

The construction of a set of secondary criteria should proceed upon an understanding that the broad goal of the process of legitimization is the reclamation of the state, or all public spheres, back to peoples; and the revitalization of the enthusiastic and patriotic embrace of the state by the citizenry. These criteria should aim at identifying the various loci of collective political and cultural loyalties in the state as such units are most likely to generate the measure of selfless patriotism that is needed for genuine statehood. In addition, the pattern of the conflict is also very important. Benign distinctions can be made between ethnic conflicts, for instance as between an ethnic struggle for power

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[145] International observers have wondered with amazement how a Somali nation, rolled back to its primary political unit of the clan, and without the post colonial state, appears to be doing better than when it had the post colonial state. The Economist commented that "True, it has no national government, no nationwide institutions. Yet there is considerable co-operation between the different parts of the country, and between different clans. Rather than anarchy, Somalis have created a decentralised society, where life goes on in a surprisingly effective- if peculiar-way": see THE ECONOMIST, Sept. 16, 1995, at page 50.

simplicita, and an ethnic rivalry based on a deep seated distrust and hatred. In general, the predominantly ethnic pattern of the conflicts in Africa can not be ignored. A secondary set of criteria that reflects the African reality should include the following variables: ethnic identity; cultural homogeneity; linguistic unity; natural territorial connection; historical tradition; common economic life; common political culture; religious or ideological affinity; and pre-colonial forms. It is not suggested here that these should apply in any order. Rather the nature and dimension of the conflict should determine what criteria should have priority. The resulting "self" could vary from a village, to a local government area, or a province in the state. However, in all cases an exercise of the right by one group, should entitle any other nation to determine itself in like manner in relation to the state.

The "right"

What should the exercise of the right entail within the wide spectrum between democracy and secession? It is pertinent to recall that the root cause of state collapse in Africa is the failure of the juridical assumptions upon which the post colonial state was erected. Therefore determining the ambits of the right of self determination should be based on the alternative African assumptions regarding the role, purpose and relevance of the post-colonial state. Some indications of these can be obtained by examining the nature and intensity of the crisis in a state. The objective would be to identify the equilibrium between the levels of incorporation and disengagement of the constituent units from the

state. A normative translation of this equilibrium will result in forms of confederate autonomy. This proposal is based on the following guidelines, conceived from common historical experiences and problems of the post-colonial state :

1. There is a rebuttable assumption that co-existence by African peoples in their post-colonial identities has become a historical necessity. This assumption derives from the apparent difficulties of the complete deconstruction of the post-colonial state boundaries; the fact that cross-cultural integration and assimilation over several decades has rendered the re-establishment of political and cultural homogeneity very difficult in many places; and the fact that a recreation of pre-colonial political forms may be impossible or may lead to the entrapment of new minorities. Thus total secession would not be the first available option in the exercise of self-determination.

2.The ethnic pattern of conflicts lends credence to an assumption that political loyalties have not exceeded ethnic boundaries. This pattern of conflict should be seen as virulent competition by ethnic groups for control of the public sphere so that their particular problems and aspirations may be addressed - a task in respect of which the state has either failed, or become ethnically involved in the conflict. Such agitation is legitimate.

3. A widespread assertion of ethno-national self-determination is in itself a rejection of the state as a symbol of national unity. It is an expression of the explicit desire of the peoples of a state for the restoration of original and independent sovereign power to component nations. Where a people have, by conduct, words and claims, expressed their collective

doubt about being a nation, this reality can only be normatively expressed in a reconstruction into some form of league system, or a union of distinct peoples and nations.

4.The right to self determination where all of these variables exist, should create an entitlement to a minimum of self governance in a confederate association, and a maximum of secession.

5.In cases where the assertion of the right is isolated to a particular ethnic nation, its exercise should range from a negotiated autonomy to complete secession, with records of the severity of past maltreatment or subjugation of the group determining the breadth of the negotiation option.

As regards the institutional medium of implementation, an international commission with judicial and investigative organs, will be necessary for overseeing internal mechanisms and processes. This commission may be established under the auspices of the Organization of African Unity, but should be fully answerable to the international community. It should have the mandate to intervene on behalf of the international community where local sentiments undermine the credibility and fairness of the internal processes.

CONCLUSION

In this paper, I have attempted to demonstrate that the legal framework within which statehood of the post colonial African state is affirmed, or its collapse redressed,

does not enable a proper appreciation of the problem of statehood in Africa. I have argued that statehood means different things to Africans and Europeans; and that as a result, investigation of the crisis of statehood in Africa needs to be carried out from a post structural perspective, with critical sociological and historical dimensions. I tried to accomplish this by showing that whereas the African traditional idea of statehood did not equate it with rational institutionalism, the international legal framework, in coalescence with western civilization, views problems of statehood from the lens of governmental existence. The international system has continuously presumed the prior existence of the necessary sociological foundations of genuine statehood for the African post-colonial state. I have argued that these presumptions are based on facile extrapolations of western experiences. I have tried to show that a combination of the Montevideo Convention, the United Nations system and international practice, has continued the coalescence of the international paradigm and western civilizational realities, albeit underneath explicit rules of statehood. I argued that the consequence of this in the African context is the creation of an ominous vacuum between the norm on statehood and the observable fact; and that the international community glosses over this problem with juridical assumptions, such as an acceptance by Africans of the overall legitimacy of the state element. Based on the apparent convenience of these assumptions, the international community's concern about the crisis of statehood in Africa is in restoring or preventing the loss of ascribed sovereign properties, normally manifest in the collapse of the institutions of state. Using the analysis of the international legal framework in Part II, I have argued that the predominant mechanisms employed by the international system for addressing the crisis of legitimate

statehood and state collapse in post colonial Africa, intervention and democracy, are grossly deficient. The argument is made that interventionism in the context of a systemic and widespread crisis, is reactive and costly; while the liberal democratic framework shuts out one of the conflicting parties thereby discouraging peaceful resolution of conflicts. I have thereafter argued that a legitimization of the state can be accomplished by twin measures: a facilitation of the exercise of self-determination by nations legitimately seeking it to the extent of a right to self governance in a confederate association, and a democratization of the confederate union and component states based on devolution of powers to grassroots cultural formations as organs of democracy. I have presented this proposal as little more than giving normative expression to the realities of the post colonial state in Africa. The implementation of the suggested broad based self determination, and grassroots based democracy, will hopefully restart the process of evolved statehood and national consciousness on the note of the African idea of the state as a collective enterprise. It is probable that the proposed confederate framework would lead to subsequent reintegration of African nations into strong federations that reflect their uniqueness and the aspirations of their collective existence. Historical transformations of confederations to viable federations in the United States, Canada, Switzerland, Netherlands and Germany, suggest that a balkanization of Africa is not likely to result from the proposed legitimization measures.

The on going integration of European Community states shows that national consciousness, or an equally strong trans-national consciousness, can be built on non cultural, linguistic or religious foundation. This is a very important lesson for African

leaders. Because the sociological differences between African nations were transformed into genocidal hatred and distrust by the divisive colonial pattern of rule, the usual focus of nation building, such as collective culture, common identity and the construction of a sui generic community, is an illusion in the post colonial context. As a result efforts at post colonial nation building on those premise, materialized in retrogressive "muscular nation building".[146] The African common historical consciousness and past remembrances in the post colonial assemblage, is that of division, distrust, and domination. Therefore the foundation for post-colonial nation building needs to shift from the illusion of a composite identity, to contemporary realities such as the collective needs of peoples and constituent nations in the post-colonial state. Such a paradigm shift is incompatible with the nature of the overbloated and intrusive post-colonial state structure. The proposed concept of self determination will significantly reduce the role and function of the post-colonial state, and provide the atmosphere for redefining the role of the state in terms of positive collective realities of Africans, such as common needs. It will then be the responsibility of the confederate state to emphasis the benefits of collective existence and cooperative solutions to common problems in its structural framework. In the same vein, it would have to allow national consciousness to evolve from those collective terms, instead of the post colonial state strategy of forced nationalism. The shared needs of an African confederating state could be common economic, political or security interests. African peoples can then accept themselves as a nation on those terms. Such voluntary loyalty to the union will hopefully lead to the evolution of stronger, united, and uniquely African federations.

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[146] See: Crawford Young, supra note 24 and accompanying text.

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