

The role of judicial lawmaking in enhancing judicial legitimacy: An African sub-regional court perspective

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,

Strathmore University Law School

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January 13th 2017

I, MUTUNGA PHYLLIS KASYOKA do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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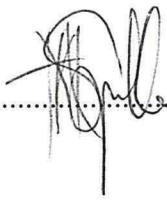
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ACKNOWLEDGEMENTS

I wish to express my sincere gratitude to my able supervisor, Mr Humphrey Sipalla for his guidance from the initial stages up to the final stages of this report. His input was indispensable and has gone a long way in making this dissertation a success.

I would also like to express my gratitude to my mom: my first friend. She has taught me over time, what it means to pour out oneself in service for others and my sister, who has loved me unconditionally. My grandmother, to whom I dedicate this work, made me promise her to learn fiercely so that my mind could find freedom beyond the ideas of my time. I dedicate to her my learning and my liberty.

ABSTRACT

This paper aims to establish a cogent understanding of the relationship between judicial lawmaking and legitimacy of African Regional Economic Community Courts (RECs). It undertakes this by broadening that previous understanding of legitimacy of International courts, defined as “whose authority is perceived as justified.” It asserts that previous conceptualization of legitimacy has impaired an appreciation of the necessity of judicial lawmaking in the development of human rights adjudication before the courts.

The paper aims to lay down a theoretical underpinning for situations that necessitate the exercise of judicial lawmaking by an international court for the preservation of its legitimacy. It lays down a framework for identification of situations in which judicial lawmaking would enhance legitimacy. The first step is to establish whether the matter involves allegations of violations of core human rights obligator norms. If yes, then the exercise of judicial lawmaking to improve the procedural and substantive rules of the rule-interpreting institution will translate into preserving or enhancing its legitimacy. Where the IC ignores such issues its legitimacy is threatened. Where the matters do not involve violations of core human rights obligatory norms, any form of judicial lawmaking would likely lessen the court’s legitimacy, as it would be espied to exercise authority that isn’t its own.

LIST OF CASES

ECOWAS COURT OF JUSTICE

- 1) ECW/CCJ/APP/01/03: *Afolabi Olajide v Federal Republic of Nigeria*.
- 2) ECW/CCJ/APP/05/05: *Professor Etim Moses Essien v Republic of The Gambia and another*.
- 3) ECW/CCJ/APP/01/05: *Hon. Dr. Jerry Ugokwe v Federal Republic of Nigeria*.
- 4) ECW/CCJ/APP/01/06: *Alhaji Hammani Tidjiani v Federal Republic of Nigeria & 4 others*.
- 5) ECW/CCJ/APP/11/07: *Musa Saidykhan v. The Republic of the Gambia*.
- 6) ECW/CCJ/APP/04/07: *Chief Ebrimah Manneh v. The Republic of the Gambia*.
- 7) ECW/CCJ/APP/05/07: *Moussa Leo Keita v. Republic of Mali*.
- 8) ECW/CCJ/APP/08/07: *Dame Hadijatou Mani Koraou v. Niger*.

- 9) ECW/CCJ/APP/05/08: *Ocean King Nigeria Limited v Republic of Senegal*.
- 10) ECW/CCJ/APP/07/08: *Hissein Habré c Republic of Senegal*.
- 11) ECW/CCJ/APP/08/09: *Socio-Economic Rights and Accountability Project v. Federal Republic of Nigeria*.
- 12) ECW/CCJ/APP/01/09: *Amazou Henri & 5 others v the Republic of Cote D' Ivoire*.
- 13) ECW/CCJ/APP/05/11: *Sikiru Alade v. Federal Republic of Nigeria*.
- 14) ECW/CCJ/JUD/03/13: *Hissein Habré c. Republic of Senegal*.

EAST AFRICAN COURT OF JUSTICE

- 1) *Omar Awadh and Six Others v Attorney General of Uganda and Attorney General of Kenya* (EACJ) First Instance Division App No 4/2011.
- 2) *James Katabazi v Secretary General of the EAC*, Ref. No. 1 of 2007.
- 3) *Attorney Gen. of Kenya v. Independent Medical Legal Unit*, App. No. 1 of 2011.
- 4) *Anyang Nyong'o v Attorney Gen. of Kenya*, Ref. No. 1 of 2006.
- 5) *Attorney General of Uganda and Attorney General of Kenya v Omar Awadh and Six Others* (EACJ) Appellate Division App No 2/2012.
- 6) *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (EAC) First Instance Division, Ref No 8 of 201.

- 7) *Secretary General of the EAC and Attorney General of Rwanda v Plaxeda Rugumba* (EAC) Appellate Division, Ref No 1 of 2012.

SOUTHERN AFRICA DEVELOPMENT COMMUNITY TRIBUNAL CASES

- 1) *Fick v. Zimbabwe*, Ruling, Case No. SADCT: 01/2010 (SADC, July 16, 2010).
- 2) *Campbell v. Zimbabwe*, Judgment, Case No. SADCT: 02/2007 (SADC, Nov. 28, 2008).
- 3) *Campbell v. Zimbabwe*, Judgment, Case No. SADCT: 2/07 (SADC, Dec. 13, 2007).
- 4) *Chirinda v. Campbell*, Ruling, Case No. SADCT: 09/08 (SADC, Sept. 17, 2008).
- 5) *Gongo v. Zimbabwe*, Judgment, Case No. SADCT: 05/2008 (SADC, Dec. 9, 2010).
- 6) *Tanzania v. Cimexpan*, Ruling, Case No. SADCT: 01/2009 (SADC, June 11, 2010).

INTERNATIONAL COURT OF JUSTICE CASES

- 1) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment, I.C.J. Reports 2005, p. 168.
- 2) *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3.
- 3) *Ahamdou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639.
- 4) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226.

INTERNATIONAL CRIMINAL TRIBUNAL OF THE FORMER YUGOSLVIA

- 1) *Prosecutor v Dragoljub Kunarac and others (ICT-Y)* Judgment IT- 96-23 & IT-96-23/1A (2001).
- 2) *Prosecutor v Milorad Krnojelac* IT-97-25 (2002).

INTER-AMERICAN COURT OF HUMAN RIGHTS

- 1) *Moiwana Community v Suriname*, IACtHR Judgment of 15th June 2005 (Preliminary objections, Merits, Reparations and Costs).

EUROPEAN COURT OF HUMAN RIGHTS CASES

- 1) *Varnava and others v Turkey*, ECtHR Judgment of 18th September 2009.
- 2) *Mahmut Kaya v Turkey* ECtHR Judgment of 28th March 2000.

PERMANENT COURT OF ARBITRATION CASE

- 1) *The Republic of the Philippines v The Peoples' Republic of China* PCA Case N° 2013-19.

TREATY

- 1) Treaty on the Establishment of the East African Community
- 2) Protocol A/P. 1/7/91 on the Ecowas Community Court of Justice
- 3) Amended Treaty for the Establishment of the East African Community
- 4) Protocol to the Southern Africa Development Tribunal
- 5) The Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights
- 6) The African Charter on Human and Peoples' Rights (ACHPR)
- 7) United Nations Convention on the Law of the Sea (UNCLOS)
- 8) International Covenant on Civil and Political Rights (ICCPR)
- 9) Vienna Convention on the Law of Treaties
- 10) The Charter of the United Nations

LIST OF ABBREVIATIONS

SADC	Southern Africa Development Community
UNSC	United Nations Security Council
EACJ	East African Court of Justice
ECCJ	ECOWAS Court of Justice
ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
UNCLOS	United Nations Convention on the Law of the Sea
ICCPR	International Covenant on Civil and Political Rights
PCA	Permanent Court of Arbitration
ICs	international courts
CIL	customary international law
MFN	Most-Favored Nation
EEZ	Exclusive Economic Zone
NGO	Non-governmental Organisation
FID	First Instance Division
ICJ	International Court of Justice
EALA	East African Legislative Assembly
SADC-T	Southern Africa Development Community- Tribunal
EAC	East African Community
VCLT	Vienna Convention on the Law of Treaties
REC	Regional Economic Community
UN	United Nations
CJEU	Court of Justice of the European Union

I. JUDICIAL LEGITIMACY AND JUDICIAL LAWMAKING

1.1. INTRODUCTION

The bosom of the judiciary is not wide enough, for the hopes and aspirations of all the people; but it is an ample bosom, which seeks to respond to the problems presented to it, with a love of justice under the law.

- Khanna J¹

This paper explores the relationship between judicial lawmaking and the legitimacy of regional economic community courts in light of their adjudication of human rights matters. The paper analyses three courts, namely, the ECOWAS Community Court of Justice (ECCJ)² the East African Court of Justice (EACJ) and the Southern Africa Development Community Tribunal (SADC-T). To further substantiate the study, the paper looks at the International Court of Justice (ICJ) and the decision by the Permanent Court of Arbitration (PCA) on the South China Sea dispute.

1.1.1 Statement of the Problem

The last decade has seen a rapid judicialisation of international law.³ International courts now exercise a wide range of jurisdiction over diverse subjects. Africa has seen the institutionalisation of regional economic community courts. A similar mandate among these courts is the interpretation of the treaties that enabled them for the purpose of greater economic integration among the member states. These courts, have however, marshalled the authority to hear human rights claims, despite initial legislative resistance.⁴ The EACJ for example has proclaimed that it has jurisdiction to adjudicate on

¹M Kirby, 'Judicial activism,' *Western Law Review*, 27 (1997).

²Alter K, Helfer L and McAllister J, 'A new international human rights court for West Africa: The ECOWAS community court of justice' 107, *American Journal of International Law*, (2013), 737-779.

³ Helfer L and Alter K, in 'Legitimacy and lawmaking: A tale of three international courts,' 14:479 *Theoretical Inquiries in Law*, (2013), 480.

⁴ Ebovrah S, 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges,' 17 *American Journal of International Law* (2009) and Ojienda T, 'The East African Court of Justice in the re-established East Africa Community: Institutional structure and function in the integration process', 11 *East*

human rights⁵ despite of article 27(2) of the Treaty⁶, the ECCJ has engaged in bold adjudication of human rights and the SADC-Tribunal has experienced backlash as a result of its human rights adjudication. The unforeseen proliferation of judicial lawmaking practice by African REC courts necessitates a study into the seemingly putative link between judicial lawmaking and judicial legitimacy.⁷ This paper traces this link by first, positing a broader definition of legitimacy. It is against this understanding that the paper undertakes a study of the impact of REC courts' judicial lawmaking [in light of their human rights cases pronouncements] on their legitimacy.

1.1.2 Justification of the study

There is criticism that judicial lawmaking is set to deprive the court of its legitimacy.⁸ There is however another claim that judicial lawmaking is an inherent function of international courts. This is because, it concretises programs' (in the sense that it implements the normative project of a treaty), when it fills in legal gaps and when it solves contradictions.⁹ In light of these differing assertions, this paper aims to establish a cogent understanding of the relationship between judicial lawmaking and legitimacy of REC courts.

It undertakes this by broadening that previous understanding of legitimacy of International courts, defined as "whose authority is perceived as justified."¹⁰ It asserts that previous conceptualization of legitimacy has impaired an appreciation of the necessity of

African journal of peace and human rights (2005) 220, 228. *James Katabazi v. Secretary Gen. of the East African Community* (East African Court of Justice Nov. 1, 2007).

⁵ *Democratic Party v Secretary General of the East African Community and four others* (Appeal No.1 of 2014): Previously Reference No.2 of 2013.

⁶ Article 27(2) EAC Treaty, 30th November 1999 Gathii J, 'Mission creep or a search for relevance: The East African Court of justice's human rights strategy' 24 *Duke Journal of Comparative and International Law*, (2013) 249-296.

⁷ Helfer L and Alter K, in 'Legitimacy and lawmaking: A tale of three international courts,' 14:479 *Theoretical Inquiries in Law*, (2013), 481.

⁸ Helfer L and Alter K, in 'Legitimacy and lawmaking: A tale of three international courts,' 14:479 *Theoretical Inquiries in Law*, (2013), 488 citing Murungi L & Gallinetti J, 'The Role of Sub-Regional Courts in the African Human Rights System' 7 *International Journal of Human rights* (2010) 119,133 and Ebobrah S, 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges,' 17 *American Journal of International Law* (2009).

⁹ BVerfG, Beschluss den Zweiten Senats vom 06. Juli 2010 – 2BvR 2661/06 – Rn. (1-116). See also Grossman N, 'The normative legitimacy of international courts' 86 *Temple Law Review*, (2013) 60-106.

¹⁰ The above definition is from Grossman N, 'Legitimacy and international adjudicative bodies,' 41 *George.Washington International Law Review* (2009), 107, 110 where she cites Bodansky D, 'The legitimacy of international governance: A coming challenge for international environmental law?' 93 *American Journal of International law* (1999), 596 – 600.

judicial lawmaking in the preservation of judicial legitimacy. This is especially so, in light of the increasing adjudication of human rights matters in ICs such as African REC courts. The paper aims to lay down a theoretical framework for situations that necessitate the exercise of judicial lawmaking by a court for the preservation of its legitimacy. It asserts that where the violation of a peremptory human rights norm is in question, judicial lawmaking to expand the substantive and procedural rules of a court is necessary to ensure its legitimacy. This is because legitimacy dictates that an IC; other than exercising authority perceived as justified, also complies with the fundamental normative principles underlying international law. To do otherwise, would be to compromise the court's legitimacy.

1.2. A THEORETICAL FRAMEWORK OF THE RELATIONSHIP BETWEEN JUDICIAL LEGITIMACY AND JUDICIAL LAWMAKING

1.2.1 Legitimacy in Law: A Municipal Concept

Rüdiger Wolfrum engages in an expository analysis of the growing interest in the legitimacy of international law.¹¹ He bases his analysis on the agreed upon definition of legitimacy as “authority whose exercise is justified.”¹² The particular branch of legitimacy he studies is normative legitimacy. Grossman explains the reason for fascination with this particular branch of legitimacy.¹³ She provides two reasons why the study of the normative legitimacy of the international legal order is crucial. One is that it provides a standard by which to judge an international court and determine whether it merits support.¹⁴ Second, is that it determines what qualities provide international courts with the right to rule or what justifies their authority.¹⁵ This paper, in the same vein, examines the concept of normative legitimacy of international courts to find the effect of judicial lawmaking on it.

¹¹ Wolfrum R, *Legitimacy in international law from a legal perspective: Some introductory considerations* in Wolfrum R and Röben Volker (eds), *Legitimacy in international institutions* Max-Planck Institut für ausländisches öffentliches Recht und Volkrecht, 2008.

¹² Wolfrum R, *Legitimacy in international law from a legal perspective: Some introductory considerations*, 1-25.

¹³ Grossman N, ‘The normative legitimacy of international courts’ *Temple Law Review*, 64.

¹⁴ Grossman N, ‘The normative legitimacy of international courts’ *Temple Law Review*, 64.

¹⁵ Grossman N, ‘The normative legitimacy of international courts’ *Temple Law Review*, 60-103.

Traditionally, international law has been defined as a body of rules and obligations.¹⁶ These rules and obligations are to be obeyed; indeed, any legal system is founded on the premise of compliance.¹⁷ Compliance has dominated analyses by legal theorists concerned with municipal law.¹⁸ Austin, in his descriptive theory of law, was unable to reconcile the idea of law with a system that lacked an enforcement mechanism.¹⁹ His theory propounded the existence of law in a society that had a sovereign: operating outside the law, who issued commands backed by sanctions to subdued subjects that habitually obeyed him. For Austin, law could only exist within such parameters.²⁰ Any form of rule existing outside the prescribed confines was only a watered-down version of law. Coercion hence, was the sole reason he isolated to justify compliance with municipal law. Coercion did not only enable compliance, it also validated and coalesced the coerced rule, into law.²¹

However, there is more that engenders compliance to a rule or institution than just coercion enabled by well-developed enforcement mechanisms.²² Another factor that engenders compliance is peoples' normative inclinations to obey a certain rule or rule making institution.²³ This constituted Hart's rebuff of the Austinian theory.²⁴ Hart's acceptance that there were more factors that enabled compliance other than coercion rejuvenated an age-old debate between positivists and neo-naturalists as to what really enabled fidelity to law.²⁵ It was understood that these non-coercive elements that induced compliance, constituted the legitimacy of the rule or the rule making institution.²⁶ Legitimacy was hence defined as that property of a rule or a rule making institution which itself exerts a pull towards compliance on those addressed normatively because those

¹⁶ Franck M T, *The power of legitimacy among nations* 3-27.

¹⁷ Franck M T, *The power of legitimacy among nations* Oxford University Press, 1990, 3-27.

¹⁸ Franck M T, *The power of legitimacy among nations* Oxford University Press, 1990, 16.

¹⁹ Austin J, *The province of jurisprudence determined*, London: John Murray, Albermarle Street, 1832, 9-33.

²⁰ Austin J, *Province of jurisprudence determined* 9-33. Austin viewed commands issued by a superior with the coupling of coercive power- the enforcer of obedience as 'inseparably connected' elements of law and therefore dismissed international law as mere 'positive morality.'

²¹ Franck M T, *The power of legitimacy among nations*, 15.

²² Franck M T, *The power of legitimacy among nations*, 3-26.

²³ Franck M T, *The power of legitimacy among nations*, 3-26.

²⁴ Hart, *Concept of law*, 2ed Clarendon Law Series (1961), 18-20.

²⁵ Fuller L, 'Positivism and fidelity to law: A reply to Professor Hart', 71 *Harvard Law Review* (1958) 630-672.

²⁶ Franck M T, *The power of legitimacy among nations*, 3-26.

addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.²⁷

It was empirically difficult to ascertain the non-coercive, compliance-inducing factors in municipal systems.²⁸ The inseparability of the coercive and non-coercive compliance-inducing elements made it difficult, if not improbable, to determine the composition, nature, strength and measure of the non-coercive compliance inducing factors.²⁹ The study of legitimacy was hence stunted. International law offers a chance unlike that advanced by municipal law.³⁰ The stunted development of its own enforcement enabling mechanism to ensure coercive compliance has occasioned many to find it unbecoming of a true legal system.³¹ However, as noted by Thomas Franck, its want of coercive, compliance-inducing factors leaves compliance solely enabled by non-coercive compliance-inducing elements. As non-coercive compliance inducing factors are essentially the legitimacy of the rule or rule making institution, this means that legitimacy in the international legal order exists in an unalloyed, empirically discernible state.³² This has hence made the international legal system a peculiar but most enlightening avenue to engage in a study of legitimacy as an independent variable.

1.2.2 Legitimacy in the International Judicial Order and State Backlash as its validating cue

Despite the unique avenue afforded by the international legal order, legitimacy as a concept is still under developed.³³ An incorrigible set of fundamental principles of international law have tethered inextricably and halted the development of legitimacy as a concept.³⁴ One of these principles is the overriding principle of state consent.³⁵ The international legal order is understood as a constituency of states.³⁶ Much of international law developed as either express or implied agreements among states.³⁷ Consequently,

²⁷ Franck M T, *The power of legitimacy among nations*, 3-26.

²⁸ Hart, *Concept of law*, 2ed Clarendon Law Series (1961), 18-20

²⁹ Franck M T, *The power of legitimacy among nations*, 24.

³⁰ Hart, *Concept of law*, 220-227.

³¹ Hart H, *Concept of law* (1961), Austin J, Province of jurisprudence determined, 213-232.

³² Franck M T, *The power of legitimacy among nations*, 26.

³³ Franck M T, *The power of legitimacy among nations*, 16.

³⁴ Franck M T, *The power of legitimacy among nations*, 183-195.

³⁵ Franck M T, *The power of legitimacy among nations*, 183-195.

³⁶ Hart, *Concept of law*, 220-227.

³⁷ Hart, *Concept of law*, 220-227.

state consent as the most fundamental skein in validating a law or rule in the international legal order was and has been an accepted claim.³⁸ Legitimacy, in international law, has hence been understood to mean that which is accepted and employed by states.³⁹

It hence seems to be the sole prerogative of States to craft signals to communicate when a rule or a rule making institution loses or gains legitimacy.⁴⁰ This is done through validating cues. Essentially, these communicate the validity and authenticity of a rule or a rule-maker.⁴¹ This communication is one way of establishing the legitimacy of a rule or a rule-making institution.⁴² Cues that are able to communicate validity of a rule or a rule-maker are true cues. Those that are unable to communicate validity are false cues.⁴³

Focussing on international courts as rule-making institutions, one such cue signifying the lack of legitimacy of an international court or a ruling by an international court could be state coordinated backlash.⁴⁴ Backlash entails a reaction against a court, ranging from cursory negative remarks to synchronized efforts to halt and reconfigure the court.⁴⁵ Where successful, the court's authority is effectively curtailed.⁴⁶ One could hence assume that a backlash reifies loss of an international court's judicial legitimacy.⁴⁷ It is this sort of understanding that has informed IC scholars, while analysing legitimacy in international courts.⁴⁸ The question however, is whether this has been and still remains a true cue.⁴⁹ Thomas Franck defines true cues by defining false cues.⁵⁰ A false cue, he says, constitutes cognitive dissonance between what is and what is being communicated or validated.⁵¹

³⁸ Hart, *Concept of law*, 220-227.

³⁹ Hart, *Concept of law*, 220-227.

⁴⁰ Franck M T, *The power of legitimacy among nations*, 91-135.

⁴¹ Franck M T, *The power of legitimacy among nations*, 91.

⁴² Franck M T, *The power of legitimacy among nations*, 91.

⁴³ Franck M T, *The power of legitimacy among nations*, 134.

⁴⁴ Interview with Mbori H on 16th December 2016.

⁴⁵ Interview with Mbori H on 16th December 2016.

⁴⁶ Interview with Mbori H on 16th December 2016.

⁴⁷ Interview with Mbori H on 16th December 2016.

⁴⁸ Interview with Mbori H on 16th December 2016. See also Helfer L and Alter K, in 'Legitimacy and lawmaking: A tale of three international courts', 479-504.

⁴⁹ Franck M T, *The power of legitimacy among nations*, 111-135.

⁵⁰ "Consider a Serbian admiral in a navy garb. As a cue, this is supposed to communicate that he or she is an official, representative of a state's territorial sovereignty, hence validating the uniform used as a symbol of the State. However, despite the cue, Serbia is a land-locked country hence in no need of a national navy. The cue is a false cue". In Franck M, '*The power of legitimacy among nations*' Oxford University Press, Madison New York, 1990, 111.

⁵¹ Franck M T, '*The power of legitimacy among nations*' 134.

This diminishes the potency of the cue in its ability to validate or legitimise. It is hence important to ascertain whether state backlash to ICs is a true cue or a false cue.

1.2.2.1 A Jurisprudential Examination of the Veracity of the Concept of State Consent as the Bedrock of Legitimacy in the International Legal Order

The reason advanced in support of backlash as a true cue of an international institution's loss of legitimacy is grounded in the underlying principle of state consent as the foundation of the international legal order.⁵² Essentially in international law, a legitimate function is understood as that which has been consented to by states.⁵³ Consequently, legitimacy is validated and invalidated by a state, against or for itself.⁵⁴ The question hence is whether the inviolable concept of state consent is truly the foundation of an international polity, making state backlash to an international institution a true cue to its loss of legitimacy. To examine whether state consent is truly the foundation of today's international legal order demands a study of theories of legal development.

1.2.2.1.1 Hart on the Centrality of State Consent as the legitimising factor in International law and The Normative Hierarchy of Rules

HLA Hart's expository analysis of the development of legal orders led him to conclude that the international system consists of a primitive form of organisation; a simple social structure.⁵⁵ This was because the only tool that engendered compliance to the rules was consent of the parties involved.⁵⁶ Compared to societies organised similarly to those in state of nature, this form of organisation was deemed to be only capable of yielding primary rules of obligation.⁵⁷ These are mere *ad hoc* reciprocal agreements between parties.⁵⁸ The organisation lacked secondary rules, which reinforce primary rules by

⁵² Hart, *Concept of law*, 220-227.

⁵³ Hart, *Concept of law*, 220-227.

⁵⁴ Hart, *Concept of law*, 220-227.

⁵⁵ "In form, international law resembles such a regime of primary rules, even though the content of its often elaborate rules are very unlike those of a primitive society, and many of its concepts, methods and techniques are the same as those of municipal law". Hart, *Concept of law*, 227.

⁵⁶ "The rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such..." Hart, *Concept of law*, 227, See also Hart, *Concept of law*, 235 and Franck M T, *The power of legitimacy among nations*, 183.

⁵⁷ Hart, *Concept of law*, 220-227.

⁵⁸ Hart, *Concept of law*, 227 and Franck M T, *The power of legitimacy among nations*, 184.

defining the rule-system's right process.⁵⁹ While primary rules constitute a system's workhorse, secondary rules provide an infrastructure that defines how rules are to be made, interpreted and applied.⁶⁰ Secondary rules validate primary rules, in a framework of normative hierarchy.⁶¹ The absence of a normative hierarchy consequently precludes validation of primary rules by anything other than reciprocal agreements between the parties.⁶²

According to Hart, the international legal system lacked crucial secondary rules, which permit an evolution and adaptation of rules through legislation and decisions by courts.⁶³ The lack of secondary rules only enabled a source of primary rules, which exist in the simplest forms as reciprocal arrangements, such as contracts or treaties.⁶⁴ These ad hoc reciprocal arrangements, whose validation comes from the consent of parties, were to Hart, incapable of wielding a strong obligatory compliance pull as is done by rules, which are made within a framework of organised normative hierarchy.⁶⁵

Hart's contribution is not devoid of its own incoherencies.⁶⁶ While noting that state consent is manifested by reliance on treaties as primary sources of law, he found the argument that treaties are binding because states have consented to them to be fallacious.⁶⁷ He wrote that the view that states may impose on themselves obligations by promise, agreement or treaty is not consistent with the view that states are subject only to rules that they have imposed upon themselves essentially doubting his own alleged primitiveness of the international legal order.⁶⁸ Hart's theory being a descriptive one, it was limited to the time in which the observation was made. It is discountable that the international system has remained averse to the development of secondary rules of recognition.⁶⁹ There are rules in international law that exhibit strong compliance pulls.

⁵⁹ Hart, *Concept of law*, 227 and Franck M T, *The power of legitimacy among nations*, 184.

⁶⁰ Franck M T, *The power of legitimacy among nations*, 184.

⁶¹ Hart, *Concept of law*, 220-227 and Franck M T, *The power of legitimacy among nations*, 183-184.

⁶² Hart, *Concept of law*, 220-227 and Franck M T, *The power of legitimacy among nations*, 183-184.

⁶³ Hart, *Concept of law*, 220-227 and Franck M T, *The power of legitimacy among nations*, 183-184.

⁶⁴ Hart, *Concept of law*, 220- 227 and Franck M T, *The power of legitimacy among nations*, 183-184.

⁶⁵ Hart, *Concept of law*, 220-227 and Franck M T, *The power of legitimacy among nations*, 183-184

⁶⁶ Franck M T, *The power of legitimacy among nations*, 187.

⁶⁷ Hart, *Concept of law*, 224.

⁶⁸ "...First, these theories fail completely to explain how it is known that states 'can' only be bound by self-imposed obligations, or why this view of their sovereignty should be accepted, in advance of any examination of the actual character of international law. Is there anything more to support it besides the fact that it has often been repeated?" Hart, *Concept of law*, 224.

⁶⁹ Franck M T, *The power of legitimacy among nations*, 186.

Examples include the rule on non-intervention, the ‘Most Favoured Nation’ principle and the rules on diplomatic relations among others.⁷⁰ The ingenuity of his contribution though, was the identification of an evolutionary and hierarchical process in legal development.⁷¹

Treaties, which could be said to be formal sources enabling the state-consent principle, are synonymous to contracts in municipal systems.⁷² Contracts are not binding because the parties to the contract have agreed to them. Neither are treaties binding because, as noted by Hart, the contracting States have agreed to be bound.⁷³ Both treaties and contracts are binding because the law has proscribed and defined the requirements of a valid commitment and if those are met, it is the law that imposes a binding obligation on the parties.⁷⁴ The law in essence, validates itself.⁷⁵ The normative rules on the creation, interpretation and application of either contracts or treaties are secondary rules of recognition, which in turn validate the contract or the treaty agreed upon.⁷⁶

The certain kind of evolutionary stage that the international legal order has attained is devoid of any appellation.⁷⁷ However, a study of the simplest rules in the international order reveals a development of both primary and secondary rules of obligation.⁷⁸ Consider as an example the existence of treaties. These are in themselves, primary rules of obligation between consenting parties.⁷⁹ However, there exists in addition, rules about treaties such as *pacta sunt servanda* (treaties are binding).⁸⁰ It is this rule that has enabled the evolution and adaptation of treaty law through legislation and interpretation by courts while validating the treaties that parties consent to.⁸¹ This is evidence of an existing secondary rule of recognition in the international legal order.⁸²

⁷⁰ Franck M T, *The power of legitimacy among nations*, 187.

⁷¹ Franck M T, *The power of legitimacy among nations*, 187.

⁷² *Reservations Cases (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide)*, Advisory Opinion, ICJ Reports, 1951. See Franck M T, *The power of legitimacy among nations*, 187.

⁷³ “... *pacta sunt servanda* has however been abandoned by most theorists since it seems incompatible with the fact that not all obligations under international law arise from ‘*pacta*’” Hart, *Concept of law*, 224.

⁷⁴ Franck M T, *The power of legitimacy among nations*, 187.

⁷⁵ Franck M T, *The power of legitimacy among nations*, 187.

⁷⁶ Franck M T, *The power of legitimacy among nations*, 187.

⁷⁷ Franck M T, *The power of legitimacy among nations*, 187.

⁷⁸ Franck M T, *The power of legitimacy among nations*, 187.

⁷⁹ Franck M T, *The power of legitimacy among nations*, 187.

⁸⁰ Article 26, *Vienna convention on the law of treaties*, 23 May 1969, 1155 UNTS 331.

⁸¹ Sinclair I, *The Vienna Convention on the Law of Treaties*, 2nd ed Manchester University Press, 1984.

⁸² Franck M T, *The power of legitimacy among nations*, 187.

Examining the rule *pacta sunt servanda*, it evidences the existence of higher norms, known as ultimate rules of recognition.⁸³ The rule *pacta sunt servanda* does not derive its binding force solely from the agreement of the parties.⁸⁴ Its binding force must come from an unwritten rule of recognition, the existence of which is inferred from the conduct and belief (*opinio juris*) of states.⁸⁵ To illustrate, consider the limitations on the principle of consent as regards treaties entered into between States. In the negotiations leading to article 26 of the Vienna Convention on the Law of Treaties (VCLT), an amendment to the text of article 23 as it was then, specified that a treaty even though declared by its parties as binding between them, remained invalid if it was contrary to the fundamental principles of international law.⁸⁶ The principle is now codified by article 53, 64 and 71 of the VCLT.⁸⁷ The fundamental principles of international law override any consensual undertaking between parties; whose purpose, derogates from them. These principles constitute unwritten rules of obligation for states.⁸⁸

An observation of state practice reveals that nations act based on the understanding that when they enter into agreements they have a duty to comply.⁸⁹ This obligation is superior to the states' sovereign will and continues until the agreement is amended or terminated in strict compliance with its requirements.⁹⁰ Ultimate rules of recognition validate the secondary and primary rules of recognition but they themselves, are not possibly validated by any other rule.⁹¹

⁸³ "Sovereignty, in the international community, thus resides in a set of principles of universal application, such as those pertaining to the binding nature of treaties and of custom. These ultimate rules of recognition are sovereign in the sense that, while they are not coercively enforced, they are known to obligate (and also entitle) all states, with or without their specific consent" Franck M T, *The power of legitimacy among nations*, 192.

⁸⁴ Franck M T, *The power of legitimacy among nations*, 188.

⁸⁵ Franck M T, *The power of legitimacy among nations*, 188.

⁸⁶ "A treaty did not become valid merely because the parties had brought it into force and had declared it to be binding between them; that view had been expressed by Hyde. The treaty would come into operation, but would not be valid if it was contrary to the fundamental principles of international law." Official Records of the United Nations Conference on the Law of Treaties, First Session A/CONF.39/C.1/SR.29 26 March – 24 May 1968, 152. See the original five states' amendment (A/CONF.39/C.1/L.1 18).

⁸⁷ Article 53, 64 and 71, *Vienna convention on the law of treaties*.

⁸⁸ Franck M T, *The power of legitimacy among nations*, 188.

⁸⁹ Official Records of the United Nations Conference on the Law of Treaties, First Session A/CONF.39/C.1/SR.29 26 March – 24 May 1968, 152. See the original five states' amendment (A/CONF.39/C.1/L.1 18). See also Franck M T, *The power of legitimacy among nations*, 188.

⁹⁰ Franck M T, *The power of legitimacy among nations*, 188.

⁹¹ Hart, *Concept of law*, 110-117. See also, Franck M T, *The power of legitimacy among nations*, 188.

The compliance pull exerted by secondary and ultimate rules of recognition is much greater than that exerted by primary rules of obligation.⁹² One can much easily justify abrogation from the text of a treaty than from the underlying principle of *pacta sunt servanda*.⁹³ Existing independently of a state's sovereign will, these general principles of obligations were once explained as obligations deriving their status from natural/neo-natural law which towered over a state's sovereign will.⁹⁴ Following the desuetude of the natural law principles, the resulting vault was incorrectly filled by the principle of state consent: an incorrect exposition of the nature of the international legal order.⁹⁵ This inadvertently prevented a study into the evolving nature of international law by keeping it incorrectly affixed to a primitive consensual status while it had in fact mutated.⁹⁶

1.2.2.1.2 Dworkin's Associative Obligations, Community and Legitimacy

General principles of obligation engender compliance, not as a result of consent but rather, as a result of status in the international legal order.⁹⁷ The concept of 'obligating status' is analysed by Dworkin. He finds that in a community, there are general principles of obligation or "associative" obligations, which define what each member owes to the others.⁹⁸ The absence of community precludes the formation and development of associative obligations.⁹⁹ Consequently, the existence of these in the international system¹⁰⁰ if proven, would demonstrate the existence of an international community: a divisive subject among international legal theorists.¹⁰¹ Consider for example, the rule on non-intervention. "States are obligated to abstain from the threat or use of force against

⁹² Franck M T, *The power of legitimacy among nations*, 186.

⁹³ Franck M T, *The power of legitimacy among nations*, 186.

⁹⁴ Franck citing Suarez F, *A treatise on laws and God the law giver*, Knud Hakonssen, (1612) See Franck M T, *The power of legitimacy among nations*, 188.

⁹⁵ Franck citing Suarez F, *A treatise on laws and God the law giver*, Knud Hakonssen, (1612).

⁹⁶ See Franck M T, *The power of legitimacy among nations*, 188.

⁹⁷ Franck M T, *The power of legitimacy among nations* 195-208.

⁹⁸ Dworkin R, *Law's Empire* Harvard University Press, Cambridge, 1986, 176-225.

⁹⁹ Dworkin R, *Law's Empire*, 176-225. See also, Franck M T, 'The power of legitimacy among nations' 195-208.

¹⁰⁰ "Charles Hermann states, "A system is a set of actors (for example, nations, international organizations, and so on) interacting with one another in established patterns and through designated structures." Franck M T, *The power of legitimacy among nations* 199.

¹⁰¹ "Hart, publishing in 1961, would probably have been skeptical that the international system had evolved into what we have called a "community"—a term he does not employ—because he was unable to detect convincing examples of secondary rules of recognition, let alone an ultimate rule of recognition." Franck M T, *The power of legitimacy among nations* 201. See also Haass R, 'What international community' Project Syndicate, 27 March 2017—<https://www.project-syndicate.org/commentary/the-broken-tools-of-global-cooperation-by-richard-n--haass?barrier=accessreg> on 27th March 2017.

the territorial integrity or political independence of any State...”¹⁰² This obligation is owed generally to all members and accrues to each member by virtue of their status as a State in international law and not by their consent or lack thereof.¹⁰³ The only way such an obligation can be extinguished is not through revocation of consent, but rather through a revocation of status, in this case, statehood status.¹⁰⁴

In an Advisory Opinion following the US Congress’ enactment of a law requiring the closure of the Observer Mission of the Palestine Liberation Organisation, ICJ judges unanimously agreed that there are obligations, which derive their pull to compliance not from specific consent but from membership in community.¹⁰⁵ In the words of Judge Stephen M Schwebel, “the sovereign will of states is dwarfed or subordinated to obligations that derive from the state’s status as a member of the community.”¹⁰⁶ Judge H Mosler further asserted, “States are subject to these norms, by their status rather than by consent to the requisite public order. Public order,” he continues, “consists of principles and rules, the enforcement of which is of such vital importance to the international community as a whole that any unilateral action that contravenes these principles can have no legal effect.”¹⁰⁷

Membership in the international community demands that states relinquish the idea of ‘absolute sovereignty’ as a result of their statehood.¹⁰⁸ Hence, sovereignty in international law resides in a set of principles of universal application such as those pertaining to custom or those on the binding nature of treaties evident in the practice of the

¹⁰² Article 2(4), Charter of the United Nations, 26th June 1945, 1 UNTS XVI.

¹⁰³ See UNGA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN A/Res/25/2625, 24th October 1970.

¹⁰⁴ In this case, the pull to obligation, is much akin to that exerted by medieval law, by reference to divine law which exists out of temporal context, has not been made and can not be validated by reference to another, but is binding indirectly as a result of its being subsumed in “made” laws. Dworkin R, *Law’s Empire*, 208.

¹⁰⁵ *Applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters agreement of 26th June 1947*, Advisory Opinion, ICJ Reports, 1988, 12.

¹⁰⁶ *Applicability of the obligation to arbitrate under section 21 of the United Nations Headquarters agreement of 26th June 1947*, Advisory Opinion, ICJ Reports, 1988, Separate Opinion of Judge Schwebel,

¹⁰⁷ H. Mosler, *The International Society as Legal Community*, *Sijthoff & Noordhoff International Publishers*, Alphen aan den Rijn, The Netherlands, 1980, 19-20.

¹⁰⁸ Franck M T, *The power of legitimacy among nations*, 192.

community.¹⁰⁹ It is these ultimate rules of recognition that are sovereign as, while not coercively enforced; they obligate and also entitle States without their specific consent.¹¹⁰

1.2.2.1.3 Reconciling Legitimacy and the Principle of Sovereign International Community Principles

This section began by stating that legitimacy in the international order has been understood as deriving from that which States consent to. Backlash as a cue signifying the illegitimacy of a rule or a rule making institution has hence been accepted as a true cue of the loss of legitimacy. However, the analysis above reveals that State consent is not the underlying foundation of the international legal order. The legitimacy of the rules in primitive societies is derived from consent of the parties involved. If the international order were a primitive society, then rules would obligate as a result of the consent of its members. The international order, however, does not constitute a primitive society as can be seen by the presence of associative obligations. It is instead, a community and rules in a mature voluntarist community, do not only obligate as a result of the consent of its members but also, as a concomitant of the status of membership.¹¹¹

In a mature voluntarist community such as the international community, the legitimacy of its rules and rule-making institutions is validated by their adherence to the existing rule-hierarchy.¹¹² This is because, the rules and rule-making institutions are deemed to be legitimate if they adhere to a validating normative structure.¹¹³ Primary rules such as treaties are considered legitimate if validated by secondary rules of recognition such as the rule *pacta sunt servanda*.¹¹⁴ These secondary rules are deemed legitimate if validated by the ultimate rules of recognition.¹¹⁵ The legitimacy of a primary rule could be demonstrated by showing that it adheres to the rules of right process that are outlined in the secondary rules.¹¹⁶ The legitimacy of secondary rules could be demonstrated by specific or implied consent of states.¹¹⁷ However, the legitimacy of the ultimate rules

¹⁰⁹ Franck M T, *The power of legitimacy among nations*, 192.

¹¹⁰ Franck M T, *The power of legitimacy among nations*, 192.

¹¹¹ Dworkin R, *Law's Empire*, 176-225 and Franck M T, *The power of legitimacy among nations* 194.

¹¹² Dworkin R, *Law's Empire*, 176-225 and Franck M T, *The power of legitimacy among nations* 194.

¹¹³ Dworkin R, *Law's Empire*, 176-225 and Franck M T, *The power of legitimacy among nations* 194.

¹¹⁴ Franck M T, *The power of legitimacy among nations* 194.

¹¹⁵ Franck M T, *The power of legitimacy among nations* 194.

¹¹⁶ Franck M T, *The power of legitimacy among nations* 194.

¹¹⁷ Franck M T, *The power of legitimacy among nations* 194.

could only be inferred from the conduct of states and not from other validating rules or procedures. It can only be inferred from the nature of the system as a community of states.¹¹⁸ Consequently, backlash; a cue signifying the lack of state consent does not constitute an inviolable true cue to the loss of legitimacy of a rule or a rule-making institution. This is because; states consent is not an undisputable determinant of the legitimacy of a rule or rule-making institution. The subsequent sections demonstrate this further by focussing on the role of the principles of justice and international human rights law in determining normative legitimacy.

1.2.3 Legitimacy, Justice and International Human Rights Law

Thomas Franck devotes the last chapter of his book to examine justice and legitimacy. He identifies them as two distinct concepts, each creating a compliance pull.¹¹⁹ However, the two concepts never conflate. The reason is because, as justice is associated with individuals, it is considered futile to examine justice's compliance pull in an international legal sphere, whose subject is states. However, Thomas Franck foreshadowed the rise of international human rights as a basic concept of global politics and warned that such happenstance would require a re-evaluation of justice and legitimacy in international law.¹²⁰ The latter half of this section evaluates this in the light of a human rights dominated global space.

1.2.3.1 Principles of Justice in the International Legal Order

The Rawlsian attempt to identify principles of justice in the international legal order demonstrates why justice is an individual's concept that cannot be achieved by entities.¹²¹ Rawls puts equal states behind a *veil of ignorance* just as he does for the municipal legal

¹¹⁸ "There are important differences in the degree or extent to which obligations arise in a developed national legal system and in the fledgling international community. But it is also demonstrable that there are obligations owed by states, which they widely recognize as concomitants of community membership and which are accurate predictors of actual state behavior. There are rules which obligate not because they have been accepted by the individual sovereign state but because they come with membership in the community of peers." Frank M T, *The power of legitimacy among nations*, 192.

¹¹⁹ "There are two reasons for not including justice among the factors making for legitimacy. One is operational, the other theoretical. The operational reason is that justice can only be said to be done to persons, not to such collective entities as states. The second, or theoretical, reason for refusing to include justice among the indicators of a rule's legitimacy is that the concepts of justice and legitimacy are related but conceptually distinct." Franck M T, *The power of legitimacy among nations*, 209.

¹²⁰ "As the firm outlines of world order become readily apparent, and as that order increasingly focuses on the individual's place in global society, a keener understanding of the theory, function, and power of justice must surely move to the top of the agenda" Franck M T, *The power of legitimacy among nations*, 257.

¹²¹ Franck M T, *The power of legitimacy among nations* 208-246.

theory.¹²² This is done in a situation of moderate scarcity making it virtually impossible for the states to achieve their conceptions of good.¹²³ The result, Rawls opines, is that states would come up with principles of justice governing their interactions in an international community.¹²⁴ The principles that were identified by Rawls were those of self-determination and non-intervention.¹²⁵ He understood them to be principles of justice capable of being arrived at behind the (states') veil of ignorance.¹²⁶ The principle of self-determination, though agreeably just, has fallen into desuetude through its inconsistent application by states.¹²⁷ The principle of non-intervention on the other hand, preserves the authority of states and at times, demands that states fail to intervene in situations of gross domestic injustice.¹²⁸

Rawlsian principles illustrate that states even behind the Rawlsian veil of ignorance, would come up, not with principles of justice, but rather, with principles guarding their self-interest: especially, their sovereignty.¹²⁹ Indeed, there were demonstrations of conflict between principles of justice and fundamental principles protecting state-interest.¹³⁰ The periodic and selective interpretation of article 1 of the UN Charter illustrates this. The generally just principle of self-determination, once fiercely advocated for by colonised states in pursuance of their emancipation, is now rarely accepted by the

¹²² Rawls J, *A theory of justice*, Harvard University Press, Cambridge Massachusetts, 1947, 331-335.

¹²³ "I assume that these representatives are deprived of various kinds of information. While they know that they represent different nations each living under the normal circumstances of human life, they know nothing about the particular circumstances of their own society, its power and strength in comparison with other nations, nor do they know their place in their own society." Rawls J, *A theory of justice*, 331.

¹²⁴ "This original position is fair between nations; it nullifies the contingencies and biases of historical fate. Justice between states is determined by the principles that would be chosen in the original position so interpreted. These principles are political principles, for they govern public policies toward other nations." Rawls J, *A theory of justice*, 332.

¹²⁵ Rawls identifies three principles that would be agreed upon by states under the veil of ignorance. These are the principle of self-determination, the principle of self-defence (Article 51 of UN Charter) and the principle that treaties are binding. These however, would be done under the umbrella principle of equality of parties. Rawls J, *A theory of justice*, 332.

¹²⁶ Rawls J, *A theory of justice*, 332.

¹²⁷ There have been inconsistent applications of the principle of self-determination by states. European states employed it in the early 20th century such as in the case of the Danes of Schleswig, Czech, Alsace-Lorraine Aaland and others but not to colonial states in Africa. Following independence of the colonised states, the principle fell into desuetude in African states for the minority nations enclosed within the liberated borders. For further analysis of the principle of self-determination, see Franck M T, *The power of legitimacy among nations*, 150-183.

¹²⁸ "Applying such a principle as a principle of justice, justice would have been served when the world left Hitler free to kill the Jews of Germany and Field Marshal Idi Amin and Pol Pot free to decimate the populations of Uganda and Cambodia." See Franck M T, *The power of legitimacy among nations*, 150-183.

¹²⁹ Franck M T, *The power of legitimacy among nations*, 150-183

¹³⁰ Franck M T, *The power of legitimacy among nations*, 208-247.

same states for minorities in their jurisdictions.¹³¹ Instead, the principle of territorial integrity is advanced to quell calls for the right to self-determination.¹³² Thomas Franck understood that justice, as a concept, could not be broached except where individuals are concerned.¹³³ It would hence only gain importance in the international sphere, when individuals truly became subjects of international law.¹³⁴ This would probably be done, he propounded, through the globalisation of human rights law.¹³⁵

1.2.3.2 Increasingly Identifiable State Associative Obligations from International Human Rights Law: Finding Justice in Legitimacy

Stefan Hoffman, a human rights legal historian, propounds that human rights became a basic concept of global politics in the 1990s.¹³⁶ As the ideas subsumed into the international legal order, human rights principles brought to fore a greater understanding of norms and principles of justice that formed part of the body of secondary and ultimate rules of recognition of international law.¹³⁷ These principles clarified on existing ultimate

¹³¹ “Consider India, which became independent as the world’s largest example of voluntary compliance (by Britain) with the principle of self-determination but which thereupon used its armed forces, first, to deny self-determination to the state of Kashmir, which had a rather persuasive claim based on ethnic, religious, and legal grounds, and, later, to occupy Goa. The second example is Nigeria, the most populous African state, which, after being granted self-determination by Britain, thereafter denied it to its ethnically and religiously distinct Ibo region (Biafra). In this Nigeria received both global and regional support. Only four African states, and one non-African, recognized Biafra’s independence.” See Franck M T, *The power of legitimacy among nations*, 163.

¹³² Marxsen C, ‘Territorial integrity in international law – Its concept and implications for Crimea,’ 75, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Heidelberg Journal of International Law*, 2015, 7-26.

¹³³ “Since one can only talk metaphorically of justice among states, it is difficult to say anything meaningful or true about the justice of the international rule system. At its present stage of development, most systemic rules command not persons but states, allocating duties and benefits on an aggregate basis. To say that the rules operate justly among nations, however, is to say little about the rules’ actual impact on those who matter: the individuals who, unlike states, are capable of pleasure and pain. That this is an inevitable barrier to assessing the justice of the international rule system, however, does not affect our ability to measure quite accurately and usefully the legitimacy of those rules...” Franck M T, *The power of legitimacy among nations*, 219.

¹³⁴ Franck M T, *The power of legitimacy among nations*, 208-247.

¹³⁵ Franck M T, *The power of legitimacy among nations*, 208-247.

¹³⁶ Ludwig S, citing Stefan Hoffman in, Human rights and history past and present, *Oxford online journals*, Ludwig affirms Samuel Moyn’s assertions that human rights idealism propounded in the 1990s represented a strange return of earlier enthusiasms for: cosmopolitanism, civil society, free trade and humanitarian intervention. Moyn S, *The last utopia*, Belknap Press of Harvard University, 2010, 176. See also, Koselleck R, *Futures Past: On the sacredness of the person or the last utopia: A conversation about a history of human rights’ semantics of historical times*, Cambridge Massachusetts, 1985, and Hartog F, *Regimes of historicity: Presentism and experiences of time*, Columbia University Press, New York, 2015.

¹³⁷ Bianchi A, ‘Human rights and the magic of *jus cogens*’ 19 *European Journal of International Law*, 491-508.

rules of recognition underlying the body of the international legal order.¹³⁸ Writing in 1966, Judge Tanaka dissenting from the majority opinion in the *South West Africa case* recognised that certain human rights principles were understood to belong to a category of law, (*jus cogens*), which, differentiated from *jus dispositivum*, could not be changed by way of agreement between States.¹³⁹ Recognising various human rights principles as peremptory or *jus cogens* norms, (a body of secondary and ultimate rules of recognition), the obligations owed by states to preserve and respect these norms, were *obligations erga omnes*.¹⁴⁰

Human rights principles developed to shelter individuals from the machinations of a state by providing an avenue of redress in international law.¹⁴¹ By making the individual a subject of international law, international human rights law enabled an interrelationship of the principles of justice and legitimacy in the international sphere. Human rights law, essentially a codification of perceived principles of justice, introduced into the international legal order, a recognised body of associative obligations; existing as secondary and ultimate rules of recognition which engender compliance, not by consent of the States involved, but rather, by virtue of the status of statehood.¹⁴²

1.2.3.3 The role of Judicial Lawmaking in Preserving Judicial Legitimacy

Judicial lawmaking is understood to be as Judge Robert Jennings once wrote, the creation of law in the sense of developing, adapting, modifying, filling gaps, interpreting or even branching out in a new direction.¹⁴³ Though a controversial topic in international law, it is

¹³⁸ Bianchi writes of the metaphorical empty box that was created by article 53 of the VCLT, which recognises the existence of peremptory norms from which no derogation is permitted. He states that if the inventory of the box is difficult to draw, it is nevertheless difficult to deny that human rights are contained within it. Bianchi A, 'Human rights and the magic of *jus cogens*' 19 *European Journal of International Law*, 491-508.

¹³⁹ "If we can introduce in the international field a category of law, namely *jus cogens* recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*' See *South West Africa case (Ethiopia v South Africa: Liberia v South Africa)*, Second Phase, Judgment, I.C.J. Reports 1966, Judge Tanaka dissent, 250.

¹⁴⁰ These *jus cogens* norms include but are not limited to: freedom from torture, cruel and inhuman treatment, freedom from slavery, freedom from arbitrary arrest and detention, the right to habeas corpus, the prohibition of genocide, prohibition of enforced disappearances, and the prohibition from refoulement. Cassese A, *The human dimension of international law*, Oxford University Press, New York, 2008, 75.

¹⁴¹ Cassese A, *The human dimension of international law*, Oxford University Press, New York, 2008, 75.

¹⁴² Bianchi A, 'Human rights and the magic of *jus cogens*' 19 *European Journal of International Law*, 491-508.

¹⁴³ Shahabuddeen M, *Precedent in the World Court*, Cambridge University Press, New York, 1996, 1-31.

well perceived as a necessary function that inheres in the incompleteness of any system of rules.¹⁴⁴ However, no strict understanding of judicial lawmaking can be given.¹⁴⁵ It is instead to be understood as existing in a continuum, that progresses from mild forms such as rule interpretation and adaptation to moderate forms such as modification, filling gaps and development of the rules, to much severe forms such as branching out in a new direction. The mild and moderate forms are accepted as necessary in any system of rules. However, branching out in a new direction attracts questions of legitimacy of the rule that is developed by the judiciary. It is the latter, moderate and severe forms of judicial lawmaking that this paper confronts to establish the legitimacy of the rules thus constructed and the necessity of this kind of judicial lawmaking in the preservation of judicial legitimacy.

Nienke Grossman, drawing from Professor Joseph Weiler, propounds that an international court of law, regardless of its mandate, has an inherent responsibility to give effect to existing peremptory norms.¹⁴⁶ She states that a court's refusal to honour these norms would lessen its normative legitimacy.¹⁴⁷ The reason, she asserts, is because to do so, would fragment the enabling body of international law.¹⁴⁸ This could be explained by the fact that legitimacy in the international community is derived from adherence to the existing normative structure. Failure to adhere to the validating normative structure makes the constructed rule or the rule-making institution, lose its legitimacy.¹⁴⁹ Consequently, an international court charged with the interpretation of a treaty on trade is not exempt from drawing from the inviolable human rights norms when violation of the core human rights obligations of a State are in question.¹⁵⁰

¹⁴⁴ Judicial lawmaking is enabled by the capacity of judicial precedent to create law. The unclear capacity of precedent in international law, makes the topic of judicial lawmaking a controversial one. See Shahabuddeen M, *Precedent in the World Court*, 1.31 and Ginsburg T, 'International judicial lawmaking' *Berkeley Journal of International Law*, 2004, 3.

¹⁴⁵ Ginsburg T, 'International judicial lawmaking' *Berkeley Journal of International Law*, 2004, 1.

¹⁴⁶ "International law prohibits states from violating some core set of human rights guarantees, no matter what the circumstances. They cannot commit genocide, enslave, torture, or engage in racial discrimination. Consequently, an international court's authority is justified when it helps states comply with these prohibitions and when it takes these prohibitions into account when issuing its decisions." Grossman N, 'The normative legitimacy of international courts', 68-76.

¹⁴⁷ Grossman N, 'The normative legitimacy of international courts', 68-76.

¹⁴⁸ Grossman N, 'The normative legitimacy of international courts,' 65-76.

¹⁴⁹ Franck M T, *The power of legitimacy among nations*, 192.

¹⁵⁰ Grossman N, 'The normative legitimacy of international courts,' 65-76.

The conflict arising from these assertions is noticeable. Governments endowing international courts with jurisdiction may exclude human rights jurisdiction from the courts.¹⁵¹ This is tribute to the contest between the rules preserving sovereignty of states and those limiting state authority as human rights law does.¹⁵² In principle, a court's technical finding that it has no jurisdiction to hear a matter, should stay exercise of its authority.¹⁵³ To do so however, where the matter involves state violation of core human rights principles would delegitimise the same court, as it would be acting oblivious to the existing hierarchy of norms in international law.¹⁵⁴

Judges in ICs without a human rights mandate are not shielded from meeting these cases.¹⁵⁵ Recognising the compliance pull of core human rights norms and lacking the mandate to hear human rights matters, these judges respond by finding facts, identifying and interpreting relevant rules, filling lacunae in the law and eventually, by branching out in new directions.¹⁵⁶ This judicial lawmaking, in cases where it corrects the abrogation of peremptory norms embodied in core human rights State obligations, is done in adherence to the normative hierarchy in the international legal order.¹⁵⁷ Adherence to the normative hierarchy ensures a judicial pronouncement, rule or order that is normatively legitimate.¹⁵⁸ Consequently, judicial lawmaking is not only necessary but also crucial, when it comes to adjudication of core human rights norms, for the preservation of normative judicial legitimacy.¹⁵⁹

Judicial lawmaking will hence transform the procedural rules of the court and in its substantive rules.¹⁶⁰ Procedural rules may be altered to allow for greater access rules,

¹⁵¹ Neither the EAC nor the SADC provided for a human rights mandate for the Court and Tribunal. This jurisdiction was to be determined by member States at a future date. See article 27(2) of the Treaty on the Establishment of the EAC Grossman N, 'The normative legitimacy of international courts,' 100.

¹⁵² Grossman N, 'The normative legitimacy of international courts,' 65-76.

¹⁵³ Grossman N, 'The normative legitimacy of international courts,' 65-76.

¹⁵⁴ Grossman N, 'The normative legitimacy of international courts,' 65-76.

¹⁵⁵ "International courts and tribunals are deciding more disputes involving sovereign states than ever before. They no longer merely decide one-time disputes before them. They shape and promote specific normative regimes like international investment, human rights, humanitarian law, and trade law." Grossman N, 'The normative legitimacy of international courts,' 62-63.

¹⁵⁶ Grossman N, 'The normative legitimacy of international courts,' 62.

¹⁵⁷ Grossman N, 'The normative legitimacy of international courts,' 94-103.

¹⁵⁸ Grossman N, 'The normative legitimacy of international courts,' 94-103.

¹⁵⁹ Grossman N, 'The normative legitimacy of international courts,' 94-103.

¹⁶⁰ Rüdiger's work that identifies source-, procedure-, and result-oriented approaches for legitimating authority. Wolfrum R, '*Legitimacy in international law*' Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, 12.

which allow for greater participation by those to whom the pronounced rules apply.¹⁶¹ Substantive rules of the courts will alter the applicable law to allow for protection of core human rights.¹⁶² Grossman conflates the concept of altering substantive rules with the inclusion of the principles of justice in evaluating the legitimacy of rules.¹⁶³ The transformation of these procedural and substantive rules, occur intra-judicially: enabling the court to adhere to normative principles, which in exchange, endow it with normative judicial legitimacy.¹⁶⁴

1.3. Summary and Conclusion

This section has identified a theoretical justification for the exercise of judicial lawmaking by an IC to preserve its legitimacy. When an IC, not expressly mandated to hear human rights claims meets cases, which concern a state's violation of *jus cogens* norms and it exercises judicial lawmaking to give effect to these norms, such undertaking preserves the normative legitimacy of the IC regardless of State backlash. This is because, judicial lawmaking is a necessary process that allows for adherence to the normative hierarchy of international norms and such adherence legitimises the constructed rule and the rule-making institution, Judicial lawmaking would potentially transform interpretation of the applicable law in two ways. The first would be to widen the procedural rules to give greater access to participants to whom the law would have an effect. The second, would be to widen substantively the interpretation of the applicable law to enable just ends to be met. Where judicial lawmaking occurs outside the prescribed ambit, legitimacy is threatened and State backlash could then serve as a true cue to the loss of the rule and/or the rule-making institution's legitimacy. The subsequent chapters examine this theory through an expository analysis of the sub-regional courts in Africa and their growing penchant for judicial lawmaking when confounded by human rights matters.

¹⁶¹ Grossman N, 'The normative legitimacy of international courts,' 79-94.

¹⁶² Grossman N, 'The normative legitimacy of international courts,' 91-97.

¹⁶³ Grossman N, 'The normative legitimacy of international courts,' 96-103.

¹⁶⁴ Rudiger Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations, in Legitimacy in international law,' 12.

II. AN EVALUATION OF JUDICIAL LAWMAKING AND JUDICIAL LEGITIMACY IN THE ECCJ

2.1 A Brief History of the ECOWAS Community Court of Justice (ECCJ)

The 1991 Community Protocol to the 1975 ECOWAS Treaty created the ECOWAS Community Court of Justice (ECCJ).¹⁶⁵ It entered into force in 1996.¹⁶⁶ The Court's main purpose was to enable economic integration among member States.¹⁶⁷ It was authorised to hear and adjudicate first, disputes arising between member states or the Authority, when such disputes arose between the Member States or between one or more Member States and the Community. Secondly, the Court could hear proceedings instituted by a member state on behalf of its nationals against another member state or institution of the Community, after attempts to settle the disputes amicably had failed.¹⁶⁸ This section traces how the REC Court acquired a human rights mandate, its exercise of judicial lawmaking and the impact on its legitimacy. The evaluation begins with the first case heard by the ECCJ, which was itself, a human rights case.

2.1.1 The *Afolabi* Decision

In *Afolabi v Nigeria*¹⁶⁹ a Nigerian trader, entered into a contract to purchase goods in Benin. Afolabi could not complete the transaction because Nigeria had closed the borders between the two countries. He filed the suit alleging that the closure had violated his right to free movement of persons and goods. Nigeria challenged the court's jurisdiction and Afolabi's standing, arguing that the 1991 protocol did not authorize private parties to litigate before the Court.¹⁷⁰

¹⁶⁵ Protocol A/P. 1/7/91 on the Community Court of Justice.

¹⁶⁶ Many stipulate that the reason for delay in ratification was because the supra-national concept lacked support among the member states. See Alter K, Helfer L and McAllister J, 'A new international human rights court for West Africa: The ECOWAS community court of justice', 737-779.

¹⁶⁷ Protocol A/P. 1/7/91 on the Community Court of Justice.

¹⁶⁸ Article 9 (2) and (3) of the Protocol A/P. 1/7/91 on the Community Court of Justice.

¹⁶⁹ ECW/CCJ/APP/01/03: *Afolabi Olajide v Federal Republic of Nigeria*.

¹⁷⁰ It is important to note that Afolabi countered on an interpretative front and asked the court to read the word 'may' in the proviso, '*A member state may on behalf of its nationals institute proceedings against another member state*' as permitting states to raise such cases but not precluding the court from hearing applications from individuals. He also invoked the principles of equity in the 1991 protocol to assuage the court to employ a purposive interpretation of the court's jurisdiction. *Afolabi v. Nigeria*, Case No. ECW/CCJ/APP/01/03.

The court ruled in favour of the government. The reason was because Article 9 of the 1991 protocol was plain and unambiguous to the effect that only states could institute proceedings on behalf of nationals.¹⁷¹

2.1.2 Consequences of the Afolabi decision

This case brought to fore the need for reform of the Court's procedural and substantive rules.¹⁷² This first case concerned a supposed abrogation of a community right.¹⁷³ These are defined as rights, which derive their existence from the Community. The existence of these 'community' rights would not serve any integration purpose unless their beneficiaries could access both national courts and the regional Court to enforce the vested rights in case of a violation. The judges exercised judicial restraint and did not interpret the substantive or procedural rules to allow for adjudication.¹⁷⁴ Ukaigwe reports that the ECCJ was in fear of legitimacy challenges that the Court of Justice of the European Union (CJEU) faced in response to their broad interpretation of the Rome Treaty to allow for individual access rules.¹⁷⁵ The judges however, coordinated campaigns with civil society and non-governmental organisations for the review of the Protocol.¹⁷⁶ This led to member states, agreeing to expand the Court's authority, most notably giving it a capacious human rights mandate as enshrined in the 2005 Protocol.¹⁷⁷

2.1.3 The 2005 Protocol

¹⁷¹ The court proposed a literal interpretation of the Protocol regardless of whether states would be insulated against suits by their own nationals alleging violations of ECOWAS rules. See *Afolabi Olajide v Federal Republic of Nigeria* and Alter K, Helfer L, and McAllister J, 'A new international human rights court for West Africa: The ECOWAS community court of justice' 107 *American Journal of International Law* 2013 737-779.

¹⁷² Alter K, Helfer L, and McAllister J, 'A new international human rights court for West Africa: The ECOWAS community court of justice,' 737-779.

¹⁷³ *Afolabi Olajide v Nigeria*. See, Ukaigwe J, *Ecawas law*, Springer International Publishing, Switzerland, 2016, 18.

¹⁷⁴ Afolabi asked the Court to interpret the word 'may' in the proviso, "A member State may on behalf of its nationals institute proceedings against another member State" as permitting States to raise such cases but not precluding the Court from hearing applications from individuals. He also relied on the principles of equity in the 1991 protocol to ask the Court to employ a purposive interpretation of the Court's jurisdiction. See *Afolabi Olajide v Nigeria*.

¹⁷⁵ Ukaigwe J, *Ecawas law*, 18.

¹⁷⁶ Alter K, Helfer L, and McAllister J, 'A new international human rights court for West Africa: The ECOWAS community court of justice,' 737-779.

¹⁷⁷ Article 4 (d) Supplementary Protocol A/SP.1/01/05 amending the preamble and articles 1, 2, 9 and 30 of the Protocol A/P.1/7/91 relating to the Community Court of Justice and article 4(1) of the English version of the said Protocol.

The 2005 most important provisions appear in two articles. Article 3 revised Article 9 of the 1991 Protocol and listed each ground for jurisdiction. The fourth paragraph provided that the Court has jurisdiction to determine cases of human rights violations occurring in any member state.¹⁷⁸ Article 4 revised the previous Article 10 of the 1991 Protocol. It provided that the Court could receive complaints from litigants concerning relief for violation of their human rights.¹⁷⁹ Despite the simplicity in the provisions, they overhauled the structure of the Court and created one peculiar to other human rights courts by espousing three distinctive features of the Court.¹⁸⁰

- a) An indeterminate human rights jurisdiction
- b) Direct access for private litigants
- c) No requirement for exhaustion of local remedies¹⁸¹

This created a Court with not only an extensive human rights mandate, but also provided the avenue for judicial lawmaking as will be analysed below.

2.2 Post Afolabi ECCJ jurisprudence

The three above-enumerated features in the Supplementary Protocol enabled the judges' judicial lawmaking, which in moderate and mild forms has taken the forms of creating law by interpreting, adapting, filling gaps. In more severe forms, the law espoused by the Court has branched out in a new direction. This section evaluates judicial lawmaking through the use of selected human rights cases through which the Court pronounced itself, on new interpretations of the applicable law.

2.2.1 Judicial lawmaking on Procedural Rules of the Court

2.2.1.1 Procedural access for private litigants provision

It is predictable, that considering the effect of direct access for private litigants in an international human rights court, such a feature would come under attack by governments. It not only de-nestles the concept of state sovereignty but also completely restructures the principles of international law as are known. The Court has nevertheless developed this

¹⁷⁸ Article 3(4) of Supplementary Protocol A/S.P/01/05.

¹⁷⁹ Article 4 (d) of Supplementary Protocol A/S.P/01/05.

¹⁸⁰ Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister, 'A new international human rights court for West Africa: The ECOWAS community court of justice.' 2013.

¹⁸¹ Articles 3 and 4 Supplementary Protocol A/S.P/01/05.

concept judicially, leaving no doubt as to its existence and expanding the reach of the feature to cover Non-Governmental Organisations (NGOs).

Despite the provision in the Protocol allowing individual access to the Court, Nigeria argued, in the case of *Tidjani v Federal Republic of Nigeria* that the individual applicant, Tidjiani, had no right of access to the ECCJ.¹⁸² The issue was the violation of rights of a private litigant who claimed that he had suffered as a result of arbitrary arrest occasioned in his country of residence, Benin, and forceful extradition to his country of origin, Nigeria.¹⁸³ Despite the Court's decision to rule in favour of Nigeria, the ECOWAS Court emphasized the procedural rule that private litigants had direct access to the court when they claimed that their rights were violated.¹⁸⁴ To rule otherwise, would have opened the Court up to legitimacy questions as the issue, involving the violation of core human rights norms necessitated application of a rule which allowed greater access to those involved; in this case, individuals. Clarifying the rule enabled judicial lawmaking that broadened the provision to include access to the Court by NGOs.¹⁸⁵

2.2.1.2. Judicial lawmaking aided by the procedural lack of 'requirement to exhaust local remedies' provision.

The requirement to exhaust local remedies consists a provision of customary international law (CIL).¹⁸⁶ However, the procedural requirement for exhaustion of local remedies is not an express provision in the Supplementary 2005 Protocol to the ECCJ.¹⁸⁷ Considering that the exhaustion of local remedies has gained CIL status, in the exception of an express provision that provides for non-exhaustion in the treaty, or the lack of an implied intention by the drafters of the Protocol to avoid the application of the provision, it would be expected that CIL would apply to fill the lacuna. This is indeed the argument that member states have employed demanding an exhaustion of local remedies before the

¹⁸²ECW/CCJ/APP/01/06: *Alhaji Hammani Tidjani v Federal Republic of Nigeria & 4 others*.

¹⁸³ Ukaigwe J, 'ECOWAS Law' Institutions of the community Springer Publications, 78.

¹⁸⁴ The Court also emphasised the right of private litigants to access the Court in ECW/CCJ/APP/08/09: *Socio-Economic Rights and Accountability Project v. Federal Republic of Nigeria* 59–61.

¹⁸⁵ *Socio-Economic Rights and Accountability Project v. Federal Republic of Nigeria*.

¹⁸⁶Interhandel case

¹⁸⁷ In ECW/CCJ/APP/05/08: *Ocean King Nigeria Limited v Republic of Senegal* paragraph 38, the Court stated that the provisions in the Protocol do not require directly or indirectly, the exhaustion of local remedies before an action was admissible in Court.

Court.¹⁸⁸ However, the Court has repeatedly rejected this in a creatively constructed argument that branches out in an unforeseen direction.

Advanced in the cases of *Mani Karaou v Niger*¹⁸⁹ and the case of *Saidykhan v The Gambia*¹⁹⁰, the Court held that the provision could not be ousted by implication. It stated that the rule is not inflexible since it can be legislated away or compromised by the parties. In *Mani Karaou*, the Court found that rather than allow the exception of the requirement to exhaust local remedies only in cases where such provision for exception has been expressly elucidated in the treaty, onus was instead on the drafters to ensure that the provision was provided, without which, the Court construed, that the intention was not to allow the exception.

This novel interpretation of the rule allowed the Court to hear cases concerning gross violation of human rights norms. By circumnavigating a vestigial, State centred provision of international law; this Court broadened the procedural access rules to individuals and cases that would previously not have been admitted in an international human rights tribunal.¹⁹¹ This was made possible by the Court's adjudication of cases involving violations of peremptory norms by member states. Obliquely, the Court seemed to suggest that the rule in CIL could be supplanted as a result of adherence to a highly placed norm in the hierarchy of norms. This was not only novel, but incredibly illustrative of the ability of judicial lawmaking to increase the legitimacy of a rule-interpreting institution.¹⁹²

2.2.2 Judicial law making on the Substantive rules of the Court

2.2.1.3. The Court's indeterminate human rights jurisdiction

¹⁸⁸See ECW/CCJ/APP/05/05: *Professor Etim Moses Essien v Republic of The Gambia* and another, ECW/CCJ/APP/08/07: *Dame Hadijatou Mani Koraou v. Niger*, ECW/CCJ/APP/05/08: *Ocean King Nigeria Limited v Republic of Senegal*, ECW/CCJ/APP/11/07: *Musa Saidykhan v. The Republic of the Gambia and ECW/CCJ/APP/01/05: Hon. Dr. Jerry Ugokwe v Federal Republic of Nigeria*.

¹⁸⁹ The Court in *Dame Hadijatou Mani Koraou v. Niger* held that the absence of the provision is not a lacuna to be filled and the court could not impose on individuals more onerous conditions and formalities than those provided for by the texts without infringing on the rights of such individuals.

¹⁹⁰ *Musa Saidykhan v. The Republic of the Gambia*.

¹⁹¹ Ukaigwe J, 'ECOWAS Law' 78.

¹⁹² Ukaigwe J, 'ECOWAS Law' 78.

The lack of mention of the treaty that the Court interprets provides wide interpretation tools. In the Gambian cases,¹⁹³ the Court had to adjudicate in cases where the government had conveniently not ratified the Convention Against Torture (CAT). Despite the fact that the Court could have adjudicated by asserting that torture is a recognised violation of *jus cogens*, the Court instead declared that it was not limited to State ratified human rights treaties.¹⁹⁴ Predictably, this decision faced criticism as it overlooked the concept of ‘consent to be bound’, a pillar guiding the law of treaties.¹⁹⁵ Essentially, the lack of a clearly defined human rights jurisdiction means that the Court has the avenue to give effect to human rights principles that individual states are not bound by for the purpose of preventing State impunity.¹⁹⁶ Consequently, the decision-fuelled backlash from the Gambian government that was not successful in clawing back the Court’s authority.¹⁹⁷

The Court has also pronounced that it has the mandate to regularly apply the Universal Declaration of Human Rights and other UN human rights conventions that member states have ratified as was seen in the cases of *Alade v Nigeria*¹⁹⁸ and the case of *Keita v Mali*.¹⁹⁹ This broadens the scope of human rights instruments that are enforceable by the ECCJ to include ‘soft law.’

The potency of this is illustrative in the case of *Mani Kouraou v Niger*.²⁰⁰ This case is considered historical, as it is one of the first slavery cases to be won in the international

¹⁹³ *Musa Saidu Khan v. The Republic of the Gambia* and ECW/CCJ/APP/04/07: *Chief Ebrimah Manneh v. The Republic of the Gambia*.

¹⁹⁴ Alter K, Helfer L and McAllister J, ‘A new international human rights court for West Africa: The ECOWAS community court of justice’ 107, *American Journal of International Law*, (2013), 737-779.

¹⁹⁵ Helfer L, ‘Terminating treaties’ accessed at: d:/womat-filecopy/0001537712.3D634 on 11/4/16 at 12:50:09.

¹⁹⁶ This was the argument that was advanced by civil society later, when the decision occasioned backlash from the Gambian government. as quoted from Karen Alter’s article, Four IFEX Members, Civil Society Groups Fear Gambia Proposal Will Prevent ECOWAS Court from Ruling in Saidu Khan Case, IFEX (Sept. 28, 2009), at http://www.ifex.org/west_africa/2009/09/28/ecowas_court_jurisdiction/ This understanding has not shielded the Court from criticism that its wide judicial interpretation mandate could be construed as an overbroad delegation to interpret extensively, a rapidly evolving area of international law. Ebobrah ST, ‘Critical issues in the human rights mandate of the ECOWAS Court of Justice’, 54 *J. African Law Institute* 3–7 (2010).

¹⁹⁷ See Alter K, Helfer L and McAllister J, ‘A new international human rights court for West Africa: The ECOWAS community court of justice’, 737-779.

¹⁹⁸ *Alade v. Nigeria*, Case No. ECW/CCJ/APP/05/11, Judgment, para. 24 (June 11, 2012).

¹⁹⁹ *Keita v. Mali*, Case No. ECW/CCJ/APP/05/06, Judgment, para. 34 (Mar. 22, 2007).

²⁰⁰ *Hadijatou Mani Koraou v. Niger*, Case No. ECW/CCJ/APP/08/07, Judgment, paras. 74–75, 77 (Oct. 27, 2008)

level.²⁰¹ The judges cited various sources in reaffirming the international peremptory norm against slavery.²⁰² The Court, in a non-conventional decision, also adopted the definition of modern day slavery and consequently developed the law as understood in light of the Slavery Convention²⁰³ that was adopted by the International Criminal Tribunal of the Former Yugoslavia.²⁰⁴

The provision has enabled the use of judicial lawmaking to give effect to general principles or norms underlying the international legal order.²⁰⁵ In reinforcing its lack of a determinate human rights jurisdiction, the Court has been able to exercise judicial lawmaking (through drawing on accepted principles of human rights law), in respect of existing norms, to give redress to gross violations of human rights norms and essentially, preserve its judicial, moral and normative legitimacy.²⁰⁶

2.3 Analysis of the ECCJ

Reform of the Court gave it express jurisdiction to hear and adjudicate human rights matters. Despite the mandate however, interpretation of the enabling treaty provisions required the exercise of judicial lawmaking to enhance the Court's normative and moral legitimacy.²⁰⁷ The definition of moral legitimacy is best given by Grover who studies the legitimacy of courts mandated to hear human rights matters. She finds that legitimacy in such cases demands moral integrity to the underlying fundamental norms explained in Part II.²⁰⁸ She terms this as moral legitimacy. This makes the ECCJ an interesting Court to study as it reveals the importance of judicial lawmaking even for international institutions endowed to hear human rights matters.

²⁰¹ Duffy H, '*Hadijatou Mani Koraou v Niger: Slavery unveiled by the ECOWAS Court*' *Human Rights Law Review* (2009) Oxford University Press.

²⁰² The Court cited the case of *Barcelona Traction*, Judgment, ICJ reports, 1970, para 33 and 34 and the cases of *Prosecutor v Dragoljub Kunarac and others* (ICT-Y) Judgment IT- 96-23 and IT-96-23/1A (2001) and *Prosecutor v Milorad Krnojelac* IT-97-25 (2002).

²⁰³ Article 1(1) of the Slavery Convention of 1926.

²⁰⁴ *Prosecutor v Dragoljub Kunarac and others* (ICT-Y) Judgment IT- 96-23 and IT-96-23/1A (2001) and *Prosecutor v Milorad Krnojelac* IT-97-25 (2002). This was done in a judicially innovative context that allowed the Court to view the 1929 Convention in light of differentiating concepts: the "notion of ownership" and the "rights to ownership over a person."

²⁰⁵ See Alter K, Helfer L and McAllister J, 'A new international human rights court for West Africa: The ECOWAS community court of justice', 737-779.

²⁰⁶ See Alter K, Helfer L and McAllister J, 'A new international human rights court for West Africa: The ECOWAS community court of justice', 737-779.

²⁰⁷ Ukaigwe J, '*ECOWAS Law*' Institutions of the community Springer Publications.

²⁰⁸ Grover S, *The European Court of Human Rights as a pathway to impunity for international crimes*, Springer-Verlag Berlin Heidelberg 2010.

There are undeniably situations when the Court exposed judicial restraint in its adjudication.²⁰⁹ Most of these consist of decisions that reveal the conflicting tensions between respect for judicial subservience to state sovereignty and the Court's duty in the protection of fundamental human rights. Ukaigwe finds that some of these decisions, such as *Tidjani* and the *Hissene Habre* case, lessened the legitimacy of the Court.²¹⁰ The Court's failure to give cognisance to fundamental norms of international law found in the body of IHRL, contravened the Court's adherence to normative hierarchy, thereby, lessening its legitimacy.²¹¹ In contrast, in *Ugokwe v Nigeria*, the Court attempted to actively circumnavigate the restraints on its jurisdiction and proclaim its authority. However, the issue concerned an election dispute. To do so, would have also been in contravention to the hierarchy of norms and the action did temporarily cause a marring of the Court's legitimacy.²¹²

The response by the Gambian government following the decisions on *Saidy Khan* and *Manneh* yielded an unsuccessful backlash. A successful backlash would have constituted a false cue as to the legitimacy of the Court. Other member countries, though themselves taunted by the broad interpretation powers of the Court, restrained themselves and rebuffed Gambia's suggestions to reign in the Court. This was in recognition of the Court's legitimate aims: for which they also had an obligation to comply.²¹³ The ECCJ has managed to stay within the ambit of legitimate interpretation of normative principles by weighing the different compliance pulls exerted by conflicting principles and hence, subverted a successful backlash.

2.4 Conclusion

²⁰⁹See the cases of *Tidjani v. Nigeria*, Case Judgment, para. 22 (July 2007), *Amazou Henri and others v the Republic of Cote D' Ivoire* 2009, *Hissene Habré c République du Senegal*, ECW/CCJ/APP/07/08, 18TH November 2010 among others.

²¹⁰Ukaigwe J, 'ECOWAS Law' Institutions of the community Springer Publications, 79.

²¹¹Ukaigwe J, 'ECOWAS Law' Institutions of the community Springer Publications, 79.

²¹² See ECW/CCJ/APP/01/05: *Hon. Dr. Jerry Ugokwe v Federal Republic of Nigeria*, and Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister, 'A new international human rights court for West Africa: The ECOWAS community court of justice, 737-779.

²¹³Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister, 'A new international human rights court for West Africa: The ECOWAS community court of justice, 737-779.

Within a decade, the Court had in five cases, broadened the Court's procedural access rules and its substantive rules to allow for individual access and greater human rights violations redresses as a result of judicial lawmaking.²¹⁴ The Court pronounced itself on most of these cases by asserting that the rights of individuals could not be taken away by mere implication. This way, the Court was able create and assert its indeterminate human rights jurisdiction, clarify individual access and broaden it to include NGOs and free itself from the provision to exhaust local remedies. This was done in cases that involved ultimate human rights norms, which underlie international law, bringing about an adherence to norms that gave the Court moral and normative legitimacy.²¹⁵

²¹⁴ These are *Musa Saidu Khan v. The Republic of the Gambia*, *Chief Ebrimah Manneh v. The Republic of the Gambia*, *Hadijatou Mani Koraou v. Niger*, *Socio-Economic Rights and Accountability Project v. Federal Republic of Nigeria* and *Ocean King Nigeria Limited v Republic of Senegal*.

²¹⁵ Ukaigwe J, 'ECOWAS Law' Institutions of the community Springer Publications, 110.

III. AN EVALUATION OF JUDICIAL LAWMAKING AND JUDICIAL LEGITIMACY IN THE EACJ

3.1 A brief history

Unlike the ECCJ's history, the EACJ lacks a definite period in which the Court transitioned from a tribunal focussed on economic integration among its members into a Court exercising human rights jurisdiction.²¹⁶ The Court's inauguration in 2001 as a judicial community organ for the East African Community (EAC) did not foreshadow a human rights development. One could even argue that it precluded it.²¹⁷

The EACJ represents a court whose jurisdiction was tethered by the negotiating member states. Their resolve to shield the represented states' sovereignty made them withhold a human rights mandate from the Court. Herein lies a representation of the existing antagonism between antediluvian concepts of international law which viewed the state as their fulcrum and the emerging notions of justice brought to fore by human rights principles. The Court has instead adhered to the governing principles and norms underlying international law, asserting a seamless rubric of ultimate rules of recognition, which enable the interpretation, and application of international law rules. Regardless of its lacking an express mandate to hear human rights matters, the EACJ has recognized state responsibility to respect prevailing *jus cogens* norms. This has strengthened its legitimacy in the region.

3.2 An analysis of the EACJ's jurisprudence

Jurisprudence coming from the East African Court of Justice (EACJ) is shrouded in the cloak of judicial creativity from the very onset.²¹⁸ Unlike the ECCJ, which espoused restraint when confounded by a human rights question at a time when it lacked jurisdiction *ratione materiae* to adjudicate on the same, it was the EACJ's bold judicial

²¹⁶ Wolfgang H. Thome, *Seek Justice at the East African Court, Registrar Tells Environmentalists and Conservationists*, Wolfgang H. Thome's blog (Mar. 24, 2012), <http://wolfganghthome.wordpress.com/2012/03/24/seek-justice-at-the-east-african-court-registrar-tellsenvironmentalists-and-conservationists> Rwanda and Burundi became members 10 years after its establishment. The early members were Kenya, Uganda, Tanzania.

²¹⁷ Article 27(2) of the Treaty for the Establishment of the East African Community.

²¹⁸ J Gathii, 'Mission creep or a search for relevance: the East African Court of Justice's human rights strategy' 24, *Duke Journal of Comparative and International Law*, 2013, 249-294. The primary purpose of the EAC is to establish a customs union, a common market, a monetary union and ultimately, a political federation. In 2005, the EAC became a customs union and in 2010, it became a common market. The rest are yet to be achieved.

undertaking that allowed for the creation of a human rights mandate. The first case before the Court that included a human rights angle was the *Katabazi case*. It is from this case that a gradual development of the concepts can be espied.

3.2.1 The James Katabazi Decision²¹⁹

This case concerned the arbitrary re-arrest and detention of sixteen people by Ugandan security personnel, after the Ugandan High Court's issue of bail. The detainees claimed that in doing so, the government had breached articles 6, 7(2) and 8(1)(c) of the Treaty for the Establishment of the East African Community (EAC).²²⁰ The Court stipulated that it did not have jurisdiction to hear human rights matters.²²¹ Such jurisdiction would have to be granted by the Council through a Supplementary Protocol. In the absence of the Protocol, the Court was precluded from adjudicating human rights issues.²²² However, the Court read articles 5, 6, 7 and 8 as guidance on conduct of Member States in fulfilment of the EAC Treaty. In doing so, it found that it could not be reasonably expected to abdicate from its jurisdiction of interpretation of the EAC Treaty as provided for under article 27(1) merely as a result of the fact that reference included among other allegations, allegations of human rights violations.²²³

The Court constructed a principle. It stated that where other issues threaten the realisation of the Community's objectives other than alleged human rights violations; the Court ought not abdicate its responsibility to interpret the Treaty as a result of the alleged human rights violations. The subtle innovation enabled the Court to adjudicate on human

²¹⁹ *James Katabazi v Secretary General of the EAC*, Ref. No. 1 of 2007, at 2

²²⁰ Article 6, that Member States ought to adhere to the principles of good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. Article 7 reiterates the same principles while article 8 places an onus on member states to refrain from jeopardizing achievement of the objectives of the Treaty or those of the community.

²²¹ *James Katabazi v Secretary General of the EAC*, 'Does this Court have jurisdiction to deal with human rights issues? The quick answer is: No it does not have.' Page 14.

²²² Article 27(2) of the EAC Treaty

²²³ 'While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation.' page 16 of the *Katabazi decision*, *James Katabazi v Secretary General of the EAC*. The *Katabazi reference* included among other issues, the abrogation of the principle of the rule of law, good governance and the principle of democracy. A reading of article 8 of the Treaty provides that, a failure to honour these principles constitutes jeopardizing the objectives of the Community as provided under the Treaty.

rights issues.²²⁴ The following sub-section illustrates an analysis on the human rights jurisprudence post Katabazi.

3.2.2 Post Katabazi Jurisprudence

Post Katabazi reveals a bolder initiative to tackle human rights violations disputes. Consider the *Rugumba v Secretary General of the East African Community*²²⁵ case, which was brought on behalf of a Rwandan Citizen that was held incommunicado without trial for five months. The court, relying on article 6(d) and 7(2) asserted that Rwanda was in breach of its obligations to the Treaty as it had failed to adhere to the principles of good governance and the rule of law. In the case of *Independent Medical Legal Unit v Attorney General of Kenya*²²⁶ involving acts of torture, cruelty and inhuman and degrading treatment committed by agents of the government of Kenya on people in the Mount Elgon area, the court relied on the arguments supplied above to show that it had jurisdiction to hear the claim.

3.2.3 The Anyang' Nyong'o Backlash

The backlash towards the Court came as a result of a non-human rights issue. It was occasioned by the *Anyang Nyong'o case*.²²⁷ The legal issue before the Court was interpretation of article 50 of the Treaty. The article mandated that members be elected to the East African Legislative Assembly (EALA). The Kenyan government had instead, appointed them. The Opposition approached the Court in retaliation and the Court ruled in favour of the applicants. The Kenyan government orchestrated a most devastating backlash to the EACJ.²²⁸ The result was an introduction of a two-month time limit for private litigants filing complaints challenging national decisions or actions contrary to the Treaty,²²⁹ reform of the Court into two divisions; a first division and an appellate division and appeal rules.²³⁰ These were structured to curb the Court's future judicial lawmaking.

²²⁴ Possi A, 'Its official: The East African Court of Justice can now adjudicate human rights cases' Africa Law accessed at <https://www.africlaw.com> It is critical to note that almost 90% of the cases that have come before the Court since then concern human rights violations.

²²⁵ Ref. No. 8 of 2010

²²⁶ *Attorney Gen. of Kenya v. Independent Medical Legal Unit*, App. No. 1 of 2011 (App. Div. Mar. 15, 2012), available at <http://eacj.huriweb.org/wp-content/uploads/2012/11/No-1-of-2010.pdf>.

²²⁷ *Anyang Nyong'o v Attorney Gen. of Kenya*, Ref. No. 1 of 2006,

²²⁸ Alter K, Gathii J and Helfer L, 'Backlash against international courts in West, East and Southern Africa: Causes and Consequences' 27, *European Journal of International Law*, 2016.

²²⁹ Revised EAC Treaty article 30(2).

²³⁰ Revised East Africa Community Treaty articles 26(1), 26(2) and 27(1).

It was a judicially expansive approach that enabled the Court's circumnavigation of the imposed hindrances, enabling it to deal conclusively with human rights matters. This happened through development of the continuing violations doctrine and the court's assertions on the requirement to exhaust local remedies.

3.2.4 Emergence of the continuing violations doctrine

In the *Independent Medico Legal Unit case*,²³¹ the main contentious issue before the Courts was whether the time-bar imposed under article 30(2) barred the Court from hearing the matter which concerned ubiquitous human rights violations.²³² Evidence was adduced to show that IMLU had known about the government's failure to investigate at least one and a half years before filing suit. The time restriction under article 30(2) had hence, not been complied with. The First Instance Division (FID) responded by stating that the time-bar was not applicable as the violations were of a continuing character. The government's failure to provide a remedy was continuing up to the point the applicants filed their application.

The Appellate division reversed the ruling of the FID and found that the time-bar denied the Court jurisdiction to hear the matter. The Court found that "continuing violations" or "continuing breaches" were not recognised as an exception to application of article 30(2). Consequently, the Appellate division succeeded in curbing a most expansive judicial undertaking through strict construction of the Treaty. The FID reasserted its initial finding on continuing violations, in the case of *Omar Awadh and Six Others*.²³³ It found that arbitrary detention consisted of a continuing violation. The Appellate division reversed this finding by reasserting its position that continuing breaches were not a substantive exception to the requirement by article 30(2).²³⁴

²³¹ *Attorney Gen. of Kenya v. Independent Medical Legal Unit*, App. No. 1 of 2011 (App. Div. Mar. 15, 2012).

²³² The issues involved abrogation of the rule of law, democracy and principles of good governance as seen in article 6(d) of the Treaty. This was noted in both the First Instance Division and the newly created Appellate division. also ²³² *Attorney Gen. of Kenya v. Independent Medical Legal Unit*, App. No. 1 of 2011 (App. Div. Mar. 15, 2012).

²³³ *Omar Awadh and Six Others v Attorney General of Uganda and Attorney General of Kenya* (EACJ) First Instance Division App No 4/2011.

²³⁴ *Attorney General of Uganda and Attorney General of Kenya v Omar Awadh and Six Others* (EACJ) Appellate Division App No 2/2012.

The *Plaxeda Rugumba case* reveals a thawing in the Appellate Division position.²³⁵ Following its previous decisions, the FID found that the time bar (from the Colonel's arrest to the filing of the case) did not apply as the Rwandan government's failure to provide a remedy was one failure in a continuous chain of events.²³⁶ The Appellate Division avoided the use of "continuous breaches" but held that the application was not time barred. The Court found that the government of Rwanda retained information regarding the Colonel's arrest and the information was never supplied to the applicant, making it impossible to identify precisely when the time began to run. Future constructions of this nature by the Appellate Division guaranteed a more "human rights responsive" Court.

The 'continuing violations' doctrine is used to afford an international court a remedy, consistent with international law, to the challenge posed of ex post facto application of human rights treaties.²³⁷ The doctrine's use is to expand the temporal jurisdiction of a Court. The FID employed the doctrine within its known confines²³⁸ to address grave violations of human rights. It creatively used the doctrine to expand its temporal jurisdiction over matters that were time-barred under article 30(2). The claw-back responses of the Appellate division curtailed progressive judicial lawmaking. However, its own recent responses reveal a unity of mind developing between the divisions.

3.2.5 The Court's response on the requirement to exhaust local remedies

The Court's response on the requirement to exhaust local remedies reveals deliberate creation of a greater avenue for judicial lawmaking.²³⁹ Similar to ECCJ's jurisprudence, the First Instance Division ruled that the applicant was not barred from seeking remedy in

²³⁵ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (EAC) First Instance Division, Ref No 8 of 2010. The case concerned detention *incommunicado* of one Lieutenant Colonel Seveline Rugigana Ngabo.

²³⁶ *Secretary General of the EAC and Attorney General of Rwanda v Plaxeda Rugumba* (EAC) Appellate Division, Ref No 1 of 2012.

²³⁷ Altiparmak K, 'The application of the concept of continuing violation to the duty to investigate, prosecute and punish under international human rights law' *Turkish Yearbook of Human Rights* (1999-2004) 3-50.

²³⁸ It is argued by Grover that the doctrine of continuing violations is used in cases of grave violations of human rights: Torture, arbitrary arrest; inclusive of detention *incommunicado*, enforced disappearances, genocide, crimes against humanity among others. See Grover S, *The European Court of Human Rights as a pathway to impunity for international crimes*, Springer-Verlag Berlin Heidelberg 2010.

²³⁹ *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (EAC) First Instance Division, Ref No 8 of 2011.

the EACJ, as the EAC Treaty did not provide for the requirement to exhaust local remedies. The Appellate Division rebuffed the FID's assertion by asserting that there were no available remedies in Rwanda for the applicant.²⁴⁰ It is not clear what the Appellate Division meant by these assertions and the pronouncement by the FID is ripe for development akin to that of the ECCJ.

3.2.6 A clear human rights jurisdiction: Democratic Party v Secretary General of the EAC and others²⁴¹

Despite its penchant for judicial restraint, the most judicially expansive decision came from the Appellate division. The case concerned the delay by Kenya, Uganda, Rwanda and Burundi to file declarations under article 34(6) of the Protocol to the Creation of the ACtHPR.²⁴² The applicant contended that such delay was in violation of the EAC Member States' duties under the African Charter to promote human rights in their jurisdictions.²⁴³ The issue rested purely on a human rights ground. FID ruled that it only had the mandate to hear and adjudicate matters concerning the interpretation of the EAC Treaty. In a peculiar undertaking, the Appellate Division unreservedly held that it had the jurisdiction to interpret the African Charter by virtue of article 6(d) and 7(2) of the EAC Treaty.²⁴⁴ Consequently, in as far as article 6(d) recognised the African Charter's relevance in promotion and protection of human rights, then compliance with the Charter, became ipso jure, an obligation imposed upon Member States by the Treaty.²⁴⁵

The result of the decision was double fold. One was to take away the approach used in *Katabazi* and its consequent jurisprudence. The EACJ did not have to prove anymore, the existence of other violations of the EAC Treaty to adjudicate on a human rights matter in a particular case. The Court could adjudicate solely on human rights matters. Secondly, the Court identified its applicable law as the African Charter and universally accepted

²⁴⁰ The appellate division asserted that the requirement has the status of CIL, though not contained in the EAC Treaty and caution should be taken not to distort the Treaty in *Plaxeda Rugumba v Secretary General of the EAC and another*.

²⁴¹ (EAC) Appellate Division Appeal No. 1 of 2014.

²⁴² Article 5 of the Protocol to the African Charter on the creation of the ACtHPR. Such a declaration would allow individuals and Non-Governmental Organisations (NGOs), direct access to the ACtHPR.

²⁴³ Paragraph 15-17 of the Democratic Alliance decision.

²⁴⁴ 'Articles 6 (d) and 7(2) of the Treaty empower the East African Court of Justice to apply the provisions of the Charter, the Vienna Convention, as well as any other relevant international instrument to ensure the Partner States' observance of the provisions of the Treaty, as well as those of other international instruments to which the Treaty makes reference.' paragraph 69 of the *Democratic Alliance case*.

²⁴⁵ Paragraph 71 of the *Democratic Alliance case*.

standards of human rights.²⁴⁶ The decision, asserted the Court's human rights jurisdiction, affirming the gradual development of the Court's mandate to a fully-fledged human rights tribunal. A journey traversed entirely, on judicially activist wheels.

3.3 An analysis and conclusion on the EACJ jurisprudence

The jurisprudence of the EACJ reveals a bold tribunal. Unlike the ECCJ, the EACJ has through incremental innovative steps, asserted its own jurisdiction to hear human rights matters. It has been argued that this is a usurpation of the legislative role of the Community parliament.²⁴⁷ However, the text of the enabling Treaty pays tribute to the role of EACJ judges to give a purposive interpretation for the fulfilment of the normative aims of the Treaty through article 6, 7 and 8. These articles espouse an understanding of the underpinning ultimate rules of recognition inherent in international law and bring principles of justice into a forum dominated by state preferences.

Employing the normative framework inherent in the Treaty, the Court has been able to respond to many a tyrannical government's violation of *jus cogens* norms as enumerated above. These range from violations of the right to liberty through arbitrary arrests and detention incommunicado, violation of human dignity through torture, cruel and inhuman treatment, violations of the right to life through enforced disappearances of people and other such violations. Confounded by such claims of such blatant contraventions to obligatory norms by the states, the Court exhibited legitimacy in its use of judicial lawmaking to ensure that these state owed obligations towards their constituents and towards international law were met.

The *Anyang' Nyong'o* decision manifested competing claims between principles of right-process and state sovereignty. The Court correctly upheld the principle of right process. The backlash upon the Court was hence, a false cue of the loss of legitimacy.²⁴⁸ The same

²⁴⁶ Paragraph 69 of the Democratic Alliance decision. 'The role of the Court in the instant Reference, was to ascertain the Partner States' adherence to observance of, and/or compliance with the Treaty provisions – including the provisions of any other international instruments which are incorporated in the Treaty, whether explicitly [as in Article 6(d)], or implicitly [as in Article 7 (2)] ' Article 7(2) gives the Court wide leverage but this is more restricted compared to the wide leeway afforded to the ECCJ.

²⁴⁷ Alter K, Gathii J and Helfer L, 'Backlash against international courts in West, East and Southern Africa: Causes and Consequences' 2016.

²⁴⁸ J Gathii, 'Mission creep or a search for relevance: the East African Court of Justice's human rights strategy' 249-294. Uganda and Tanzania initially rejected Kenya's proposals to claw back the Court's

could be said about the Democratic Society decision. At the time of compilation of this paper however, despite challenges to the Court's legitimacy, only mere speculation could foreshadow the repercussions of the decision to the Court's legitimacy. However, such speculation would pose caution to the exercise of judicial lawmaking that fails to weigh compliance pulls of competing norms of international law. Unbridled judicial lawmaking is a sure way to threaten and lessen judicial legitimacy.

authority. Kenya's attempt to delegitimize the Court by suspending some judges was rejected. However, its less damaging proposals were accepted.

IV. AN EVALUATION OF JUDICIAL LAWMAKING AND JUDICIAL LEGITIMACY IN THE SADC-T

4.1 A brief history

The suspended Southern Africa Development Community Tribunal (SADC- Tribunal) was properly constituted in 2003 by the SADC Council of Ministers in light of article 4 of the Protocol on Tribunal and Rules of Procedure.²⁴⁹ The Court had jurisdiction over matters that involved interpretation of the SADC- Treaty.²⁵⁰ Article 15 describes the Scope of the Court's jurisdiction as limited to conflicts arising between States, and between Member States and States.²⁵¹ There was no mention of a future human rights jurisdiction of the Court in the Protocol.

This tribunal was only able to hear a few cases during life-period.²⁵² The SADC is currently suspended and information discussed spans the Court's exercise of its original mandate up till 2010.

4.2 An analysis of the SADC- Tribunal's (SADC-T) jurisprudence

*The Mike Campbell case*²⁵³ was among the first major cases that the Court heard. It involved Zimbabwe's redistribution land laws. The first applicant of European decent, owned land that the government of Zimbabwe sought to acquire for the purpose of redistribution of resources following decolonization. He approached the SADC-T for

²⁴⁹ Southern Africa Legal Information Institute, accessed at <http://www.saflii.org/content/sadc-tribunal-decisions>

²⁵⁰ Article 14 of the Protocol on the SADC Tribunal accessed at <http://www.saflii.org/content/sadc-tribunal-decisions>. Its main objective was to allow for economic integration among its Member States, which include Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

²⁵¹ Article 15 of the Protocol to the SADC Tribunal. The text of the Protocol is constructed in a constricting manner, compared to the texts of the enabling texts of the EACJ and the ECCJ

²⁵² International Justice Resources Centre on the SADC accessed at <http://www.ijrcenter.org/regional-communities/southern-african-development-community-tribunal/> It is critical to note here as with the EACJ, majority of the cases concerned human rights issues..

²⁵³ Series of cases which include *Mike Campbell (pvt) limited first applicant and William Michael Campbell second applicant v The republic of Zimbabwe* respondent 2/07 (2007) SADCT 1(13 December 2007), *Nixon Chirinda and Others v Mike Campbell (Pvt) Limited and Others* (09/08) [2008] SADCT 1 (17 September 2008), the decision on merits in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008) and *Fick and Another v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8 (16 July 2010).

different reasons. The first was to plead with the Court to issue a preliminary injunction to halt the acquisition scheme by the government of Zimbabwe. The second, was to ask the Court to find that the acquisition scheme was contrary to human rights as it was discriminatory and hence, a violation of provisions of the SADC Treaty. The Court granted both pleas. This was despite the government's attempt to prove that the Court lacked jurisdiction, as human rights violations were not matters within the Court's purview.²⁵⁴ To reach its highly controversial findings, the Court made three determinations. Two were substantive and one was procedural.

4.2.1 The Court's substantive argument that it had jurisdiction to hear the matter regardless of the fact that it concerned human rights violations

Much akin to the provision in the EAC Treaty, the State had argued that member states could only grant the Court a human rights jurisdiction by virtue of a Protocol. In reply to this, the Tribunal held that the Protocol mandated the Court to develop its own jurisprudence.²⁵⁵ Read together with article 4(c) of the Treaty, which provided that Member States were to act in accordance with the principles of human rights, democracy and the rule of law, it meant that the Court could adjudicate on matters concerning human rights violations.²⁵⁶

4.2.2 A procedural ruling on exhaustion of local remedies

²⁵⁴ Statement made in the case *Mike Campbell (pvt) limited first applicant and William Michael Campbell second applicant v The republic of Zimbabwe* respondent 2/07 (2007) SADCT 1(13 December 2007... 'The Respondent went on to argue that there are numerous Protocols under the Treaty but none of them is on human rights or agrarian reform, pointing out that there should first be a Protocol on human rights and agrarian reform in order to give effect to the principles set out in the Treaty. The Respondent further submitted that the Tribunal is required to interpret what has already been set out by the Member States and that, therefore, in the absence of such standards, against which actions of Member States can be measured.'

²⁵⁵ Article 21(b) of the Protocol to the SADC Treaty on the creation of the SADC Tribunal mandated the Court to do so having regard to applicable treaties, general principles and rules of international law and any rules or principles of the law of States.

²⁵⁶ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007)* [2008] SADCT 2 (28 November 2008) 'In deciding this issue, the Tribunal first referred to Article 21 (b) which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so 'having regard to applicable treaties, general principles and rules of public international law' which are sources of law for the Tribunal. That settles the question whether the . can look elsewhere to find answers where it appears that the Treaty is silent. In any event, we do not consider that there should first be a Protocol on human rights in order to give effect to the principles set out in the Treaty....'

The Court was expectedly confounded with the question on exhaustion of local remedies. The State claimed that the applicants had not exhausted all available local remedies as provided for in article 15(2) of the Protocol. The Court agreed that exhaustion of local remedies was a vital element to be considered. However, it asserted itself in finding that the requirement need not be fulfilled in cases where the remedy was unavailable, ineffective or unduly prolonged.²⁵⁷ An examination of the judicial remedies offered in Zimbabwe in relation to the land redistribution scheme found them unavailable. This finding set precedent for later human rights cases; mandating the Court's prior examination of the availability and efficiency of judicial local remedies.²⁵⁸

4.2.3 Applicable law in relation to human rights matters before it

The SADC-T had in its decisions, employed human rights legislation that does not fall within the SADC body of laws.²⁵⁹ This was most evident in the case of *Barry Gondo v Zimbabwe*.²⁶⁰ The applicants in this case were victims of violence occasioned upon them by agents of the respondent State. They sought remedies in the national courts in Zimbabwe and were awarded. However, the respondent State did not comply with the orders of the courts and the applicants were unable to enforce the judgment because section 5(2) of the State Liability Act prevented the execution of judgments on the State's property.²⁶¹ The Tribunal found that section 5(2) was discriminatory in content under the International Convention on Civil and Political Rights (ICCPR).²⁶² The Court did not delimit the extent to which the ICCPR was used as either an interpretative instrument or a

²⁵⁷ This was in affirmation of the law on exhaustion of local remedies, including its exceptions as set out in the case of *Dawda Jawara v The Gambia* in supranote 23 above. Unlike the rulings by the ECCJ and the EACJ, this particular decision served to harmonise, rather than fragment, international human rights law in the Continent as it affirmed judgments by the ACtHPR. See *United Republic of Tanzania v Cimexplan (Mauritius) Ltd and Others* (SADC (T) 01/2009 (2010) SADCT 5 (11 June 2010).

²⁵⁸ Eborah S, 'Human rights developments in sub-regional courts in Africa during 2008' 9, *African Human Rights Law Journal* No 1 of 2009. He especially expressed fear for the absence of the requirement to exhaust local remedies by the ECCJ. He questions whether the approach used by the ECCJ could apply to proceedings before the African Commission, as it is a quasi-judicial body rather than an international court. Where such an approach is adopted, Mr Eborah notes that the threat of fragmentation of international human rights law in the continent would certainly be bigger.

²⁵⁹ *Michael Campbell and William Cambell* cases quoted supranote 98. also *the Cimexplan case* supranote 103, and the *Barry Gondo case* supranote 106. The Tribunal used the Universal Declaration on Human Rights (UDHR), the ICCPR, and the Convention Against Torture (CAT) among other international treaties to find violations of human rights where applicable.

²⁶⁰ *Barry Gondo and 8 Others v The Republic of Zimbabwe* SADC (T) 05/2008.

²⁶¹ Cap 8:14

²⁶² Article 26 of the ICCPR.

treaty, whose breach, incurred a liability under the SADC regime.²⁶³ Before its suspension, debates on the use of these treaties were rife. It has been argued that a lack of limitation on the applicable human rights instruments was a deliberate strategy of the Tribunal to strengthen its human rights mandate.²⁶⁴

4.3 Analysis of the SADC jurisprudence

The SADC-T represents a Tribunal, whose judicial lawmaking brought about a successful backlash: A true cue to the Court's waning legitimacy. The antagonism evidenced in the SADC reveal the judicial sabotage occasioned by having judicial lawmaking untethered to the proposed normative hierarchy of rules. The degree of legitimacy exerted by the different norms varies considerably. Weighed against the principle of state sovereignty, its compliance pull is inadequate to tower that of state sovereignty. This lack of coherence exposed the Court to attacks on its legitimacy, which were successful.²⁶⁵ Had the Court restrained itself on the Mike Campbell case and pronounced itself more forcefully on the *Barry Gondo case* involving torture, the theory suggested propounds it would have been difficult for Zimbabwe to marshal support for a successful backlash against the Court.

The principle of state sovereignty towered over the asserted human rights claim as the legitimacy of the antediluvian concept was much stronger than that of the emerging norm.²⁶⁶ This however could not be the only explanation. There is an emerging practice that is incongruent to previous understanding of the role of law in the international order.²⁶⁷ The role of law in an inherently chaotic political chasm has been to constrain political discretion: hence the birth of law from international relations. However, recent practice of states is to beget law that expands political discretion. The resolve taken by the SADC-T could be said to be evidence of such undertaking. The Court's existence manifests the inherent antagonism between concepts of international law before the advent of the principles of justice: which states seek to preserve and those that arise as a

²⁶³ Adeyemi A, '*Barry Gondo and 8 Others v The Republic of Zimbabwe* SADC (T) 05/2008' Southern Africa Development Community Legal Journal (2011) 11

²⁶⁴ Adeyemi A, '*Barry Gondo and 8 Others v The Republic of Zimbabwe*,' 2011

²⁶⁵ Zimbabwe's tactics yielded a much-divided Court with the Secretariat abandoning judicial push to sustain the Court. J Gathii, 'Mission creep or a search for relevance: the East African Court of Justice's human rights strategy'

²⁶⁶ The property issue in this case was and still is an emotive issue in most Southern African countries. Eborah S, 'Human rights developments in sub-regional courts in Africa during 2008' 2009

²⁶⁷ Sipalla H, 'The historical irreconcilability of international law and politics and its implications for international criminal justice in Africa.' accessed at

https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2593184

consequence of the principles of justice limiting state discretion, which states would advertently seek to overwrite.

Essentially, the concept as developed in part II is illustrated by the relationship between judicial lawmaking and the judicial legitimacy of African sub-regional courts. International human rights matters have gradually confounded these Courts whose mandate was steeped in enabling regional economic integration efforts. It is their exercise of judicial lawmaking in expanding the procedural and substantive applicable law when adjudicating cases involving gross violations of human rights core norms that have preserved and enhanced their legitimacy. In cases where they have engaged in such lawmaking without respecting the differing compliance pull of the pre-existing hierarchy of norms, their legitimacy has been threatened.

V. COMPARATIVE ANALYSIS WITH THE ICJ AND THE PCA

This section seeks to evaluate the veracity of the concept developed in part II and part III in relation to non-human rights international courts (ICs). These two are the International Court of Justice (ICJ) and the Permanent Court of Arbitration's decision in the South China Sea dispute (*Philippines v China*).²⁶⁸ This part seeks to establish that judicial lawmaking is also exercised in international courts for the same purpose of preserving and enhancing their legitimacy, even when such courts are not mandated to interpret and apply human rights law.

4.1 Judicial lawmaking and legitimacy in the International Court of Justice (ICJ)

The ICJ is the principal judicial organ of the United Nations.²⁶⁹ The main purpose of the Court has been to subject state disputes to judicial resolution. A consequence of the devastating effects of a war that threatened the existence of humanity, the Court is a testament to the subjugation of state authority by recognition of universal principles and norms underlying the international legal order. The Court has been immensely successful in adjudicating state disputes, consequently, achieving one of its normative aims.

Its inherent design, however, reveals its most potent weaknesses. Its inability to evolve is consigned to the international legal antediluvian concepts of the state centeredness approach in international law. Similar to the other international courts, there exists an inherent antagonism between established principles of international law centred on state sacrosanctity and emerging norms centred on the principles of justice due to the inclusion of individuals as subjects of the international legal order. The study looks into selected human rights cases that have revealed this innate antagonism, the Court's response and the resulting effect on the Court's legitimacy. The Court reveals a certain trajectory in its adjudication of these matters. The initial history reveals a conservative Court that leans to preserving state sovereignty principles through the concept of state consent. The latter period reveals a much bolder Court that recognises the existing normative hierarchy of

²⁶⁸ *The Republic of the Philippines v The Peoples' Republic of China* PCA Case N° 2013-19.

²⁶⁹ It was established in 1945 and began work in April 1946. It was a direct descendant of the Permanent International Court of Justice that came before the Second World War as a creation of the League of Nations. B. Simma, Human Rights and State Responsibility, in: *A The Law of International Relations—Liber Amicorum for Hanspeter Neuhold*, Reinisch/ U. Kriebaum (eds.), 359 (2007).

norms underlying international law and justice and seamlessly integrates them in its adjudication.

The first is the case of *Armed Activities on the Territory of the Congo*.²⁷⁰ In this case, DRC brought a case against its neighbour Rwanda on atrocities committed against DRC's people as a result of the Great Lakes War (1980s-1990s). The claimant alleged violations of the Genocide convention by Rwanda but the court decided that it lacked jurisdiction based on the fact that Rwanda had excluded the legal effect of the Convention's compromissory clause by way of reservation, which the court regarded, as validly made. The court further explained that even the peremptory nature of substantive obligations of the Genocide Convention could not compensate for or replace the lack of consent that was expressed by Rwanda's reservation, to have the court decide on the allegation of genocide.

The obligation of states to prevent genocide constituted an *erga omnes* norm, meaning, norms that are agreed upon as non-transgressible by the community of nations and concerning the basic rights of the human person.²⁷¹ Many commented that the Court's response, though unjust, served to preserve its legitimacy. However, separate opinions and dissenting expositions that were done revealed the extent to which the ICJ had exposed the Court to criticisms of losing its legitimacy in the international legal sphere.²⁷²

The second is the *Arrest Warrants Case of Belgium v Congo*.²⁷³ In this case, Belgium issued an arrest warrant against a former minister of the Congo for crimes against humanity, war crimes and other egregious crimes that were committed during his tenure in office. The Congo countered that Belgium had in doing so, breached its sovereignty and that the foreign minister still retained, under international law, immunity over acts

²⁷⁰ *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda).

²⁷¹ B. Simma, *Human Rights and State Responsibility*, in: A. Reinisch/ U. Kriebaum (eds.), *The Law of International Relations—Liber Amicorum for Hanspeter Neuhold*, 359 (2007).

²⁷² While this finding only followed its earlier jurisprudence the Court took the opportunity to explain that even the peremptory nature of substantive obligations of the Genocide Convention could not compensate for, or replace, the lack of consent, expressed by Rwanda's reservation, to have the Court decide on the allegation of genocide. Five members of the Court, among them myself, found this position unsatisfactory enough to write a joint Separate Opinion.

²⁷³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ. Reports 2002, p. 3.

that were committed in official capacity. Belgium argued that such crimes were international criminal crimes, which denied their perpetrator immunity, regardless of his or her position.

The case centred on the diplomatic rules of immunity: which exert a great compliance pull in the community of nations. There are two kinds of diplomatic immunities that this state official enjoyed. The first was diplomatic immunity as to functional immunity, (*rationae materiae*).²⁷⁴ The second was personal immunity (*rationae personae*).²⁷⁵ The ICJ resolved to the use of Customary International Law (CIL).²⁷⁶ The Court found that functional immunity only extends to acts that are done by state officials that aren't international crimes. However, the state official remains shielded by personal immunity, which is inviolable. Hence, it would not be possible to bring a state official to court during his tenure. The court lacked jurisdiction to hear such a matter.

The Court's choice to employ ICL in the light of developing treaty practice by the international community to ensure punishment of perpetrators of such egregious violations of human rights norms was an act of extreme judicial restraint. Legitimacy of the ICJ's decision was questioned.²⁷⁷ Bruno Simma encapsulates the zeitgeist when he writes that the Arrest Warrant case falls at a time when the court is struggling to retain balance between the classical view of state sovereignty and the growth of community norms among the nations.²⁷⁸

²⁷⁴ This immunity covers acts done in official capacity. These acts are state acts and not the individuals. ²⁷⁴ Cassese A, 'When may senior state officials be tried for international crimes? Some comments on the Arrest Warrants Case' accessed at <http://ilmc.univie.ac.at/uploads/media/Cassese.pdf>.

²⁷⁵ This relates to acts done in personal capacity by the state official, though it is only extended to certain class of officials. Personal immunity extends total inviolability and as a result, can be seen to protect the acts done by the state official completely. Cassese A, 'When may senior state officials be tried for international crimes? Some comments on the Arrest Warrants Case' accessed at <http://ilmc.univie.ac.at/uploads/media/Cassese.pdf>.

²⁷⁶ The law on immunities is not completely echoed in the VCLT. Cassese A, 'When may senior state officials be tried for international crimes? Some comments on the Arrest Warrants Case' accessed at <http://ilmc.univie.ac.at/uploads/media/Cassese.pdf>.

²⁷⁷ This immunity covers acts done in official capacity. These acts are state acts and not the individuals. ²⁷⁷ Cassese A, 'When may senior state officials be tried for international crimes? Some comments on the Arrest Warrants Case' accessed at <http://ilmc.univie.ac.at/uploads/media/Cassese.pdf> and Simma B, 'Human rights before the International Court of Justice: Community interest coming to life' accessed at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199653218.001.0001/acprof-9780199653218-chapter-13>.

²⁷⁸ Simma B, 'Human rights before the International Court of Justice: Community interest coming to life' accessed at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199653218.001.0001/acprof-9780199653218-chapter-13>.

The Court's most progressive declaration came with the *Belgium v Senegal* case that concerned the prosecution of war crimes and crimes against humanity committed by Hissene Habre of Chad. This was what Bruno Simma named, a pure human rights case.²⁷⁹ Belgium requested Senegal to either convict or extradite the former dictator, Hissene: evidencing the principle of *et dedere at judicare*.²⁸⁰ The court decided this on pure human rights stance, and ordered Senegal to prosecute which it began doing in the year 2015 under the Extraordinary Chamber of the African Court in Dakar Senegal.²⁸¹ The level of support for the seemingly judicially unfounded decision that came outpouring from the international community was illustrative of the strong compliance pull to honour the existing normative obligations.

Analysis on the ICJ's jurisprudence

The difference underlying the Court's conceptions were driven by an appreciation of the increasing strong compliance pulls of general norms of international law that were incorporated through the inclusion of justice in the framework for evaluation of legitimacy of international rule-interpreting institutions. The cases concerning gross violations of jus cogens norms that were not met with a certain level of judicial lawmaking to ensure state adherence to their *obligatio erga omnes* revealed an underlying weakness in the Court's procedural and substantial rules. Consider the responses to the Arrest Warrants Case and the Armed Activities case. The incorrigibility of the Court: illustrated by its inability to engage in judicial lawmaking lessened its legitimacy in the eyes of evaluating constituents. In contrast, the response to the decision of the Court in the *Belgium v Senegal* case represents the recognised compliance pull of these general norms and principles and the unwritten ultimate obligation of states to adhere to them.

²⁷⁹ Simma B, 'Human rights before the International Court of Justice: Community interest coming to life' accessed at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199653218.001.0001/acprof-9780199653218-chapter-13> It met the double pronged standard in that, it was neither a *Nebenkriegsschauplatz*, (meaning concerned with ongoing hostilities between the two states), and neither was it a case that concerned the right of diplomatic protection of states.

²⁸⁰ Belgium was relying on the passive personality principle. Simma B, 'Human rights before the International Court of Justice: Community interest coming to life' <https://www.hrw.org/blog-feed/trial-hissene-habre>

²⁸¹ <https://www.hrw.org/blog-feed/trial-hissene-habre>

The ICJ, an inherently international court, purely for state disputes, serves as perhaps the best illustration of the existence of normative rules in international law. The merge of the principles of justice with the old principles governing international law is manifested in the ICJ's ruling in *Belgium v Senegal* and that of *Ahmdou Diallo*²⁸². Its decision in the *Nuclear Weapons*²⁸³ case is also illustrative. Justice has developed into a core element of adjudging the legitimacy of not only international rules, but also international rule-interpreting institutions. This, the international community, owes to the rise of international human rights core obligatory norms.

4.2 The effect of judicial lawmaking in the South China Sea dispute heard by ITLOS

A study of a recent decision of the PCA is necessary to illustrate a conflict between international legal principles and norms and consequently, evidence an existing hierarchy of norms to which states and rule-interpreting institutions are bound to. The dispute herein does not manifest a human rights issue. However, it is elucidative of a pre-existing normative hierarchy of rules in the international legal order. The outcome of the decision illustrates that an institution's work, when compounded by such antagonistic principles, is to choose among them, the one exerting the most compliance pull and give fulfilment to it. In the absence of this, the PCA's enforcement of a less-compliance exerting norm, would undoubtedly lead to the loss of legitimacy of the decision it seeks to muster compliance for.

The South China Sea dispute involves several states in East Asia.²⁸⁴ Among them are the Philippines and China. The dispute, as had been explained, concerns maritime boundary issues and territorial sovereignty disagreements among the states in the South China Sea. China's main argument was that the PCA lacked the jurisdiction to hear the matter as it pertained an issue that it lacked the authority to determine.²⁸⁵ Furthermore, China opted out of the compulsory arbitration clause for disputes concerning the interpretation or

²⁸² Republic of Guinea v. Democratic Republic of the Congo),. Merits, Judgment, I.C.J. Reports 2010, p. 639.

²⁸³ Legality of the threat or use of nuclear weapons (ICJ) Advisory opinion 1996

²⁸⁴ The rest include but are not limited to: Vietnam, Taiwan, Malaysia, Indonesia, and Brunei

²⁸⁵ Talmon S, 'The South China Sea arbitration: Is there a case to answer?' and Stefan Talmon interview on <https://www.youtube.com/watch?v=sSQXNpXWhpw>.

application of certain treaty provisions.²⁸⁶ In order to circumnavigate the limits placed upon the PCA, it chose to view, what was essentially was a territorial sovereignty dispute between the Philippines and China as one about ocean rights.²⁸⁷

The PCA's lengthy decision attempts to rationalise its refusal to acknowledge the relevance or legitimacy of China's historical claims that predate UNCLOS. The tribunal concluded that, to the extent China had any historic rights to resources in the waters of the South China Sea, such rights were extinguished if incompatible with the exclusive economic zones provided for in UNCLOS. This decision has been criticised heavily for its refusal to recognise China's pre-existing historical rights to resources in the South China Sea by applying UNCLOS retroactively to delegitimize China's claims.²⁸⁸ The spokesperson for the UN Secretary General refused to endorse the findings of the PCA in its application of the Treaty before it.²⁸⁹ Despite a conflation of possible issues that could have led to the lack of a compliance-pull by the PCA's decisions, this paper proposes that the issue was hinged on the recognition of conflicting rules of international law and enforcement of the most compliance exerting of those. These rules were the principle of state sovereignty and UNCLOS rules on Exclusive Economic Zones (EEZs).

Analysis of the decision

The enforcement of the rule on UNCLOS negotiated rules on EEZs over the principle of sovereignty of states is to be examined in line with the framework proposed in Part II. The rules prescribed by UNCLOS constitute primary norms of obligations. In contrast, the principle of state sovereignty constitutes secondary rule of recognition. The framework propounded suggests that the compliance pull exerted by the secondary rules of recognition is much stronger than that exerted by the UNCLOS rule on EEZs. Rules existing, as primary rules of obligations require consent to exert compliance.

²⁸⁶ China opted out of "relating to sea boundary delimitations, or those involving historic bays or titles Article 298, UNCLOS.

²⁸⁷ Klein J, 'South China Sea: UN Law of the Sea Tribunal sinks the rule of law' *Foreign Policy Journal*, 2016.

²⁸⁸ Chanock A, 'An Analysis of China's Legal Position and its Implications in the South China Sea', *Journal of Law, Technology and Public Policy*, 2015.

²⁸⁹ Al Jazeera and agencies, 'No legal basis' for China's South China Sea claims' Al Jazeera, 13 July 2016 <http://www.aljazeera.com/news/2016/07/historic-title-china-south-china-sea-court-160712090955493.html> on 11 January 2017.

Consequently, China's decision to opt out of the compulsory dispute resolution clause of UNCLOS as regards specific matters ought to have been respected by the Court. The opt-out clause derives from the principle of state consent, which is derived from the principle of state sovereignty. The Court, inadvertently chose to enforce the rules on the EEZ that were borne out of consent of states without particular recognition of an underlying ultimate rule that exerted greater compliance. The attempt of the Court to enforce the primary rule over the underlying principle denied the derived rule its legitimacy and threatened the legitimacy of the institution as evidenced from the rebuffs occasioned upon the Court.

This reveals that there exists, as propounded in chapter 2, an existing hierarchy of norms. A Court seeking to preserve its legitimacy is to rely on the enforcement of norms that exert greater compliance pulls: those that validate lower level rules, over those that don't.

VI. CONCLUSION

5.1 Summary of Chapters

5.1.1 Part 1

Chapter 1 set out the legal question that the paper would inquire into. This was whether exercise of judicial legitimacy by sub-regional international courts in adjudicating human rights matters affected their legitimacy.

5.1.2 Part 2

Chapter 2 gave an expository analysis of the concepts of legitimacy in order to lay a conceptual framework that would guide in evaluating whether judicial lawmaking affected judicial legitimacy. It is found that the concept of legitimacy in international law is not steeped in the concept of state consent as previously conceived. Normative legitimacy is to be found in an evaluation of adherence to a pre-existing hierarchy of norms. The least of these norms manifest as primary norms of obligation. Primary rules of obligation are validated by secondary rules of recognition. These detail how rules are to be interpreted and applied rather than the rules themselves. These are essentially, rules about rules. The last in the hierarchy are the ultimate rules of recognition, which validate both primary norms, and secondary rules. From them, there is no further validation.

A coherent skein of validation of rules endows a rule with legitimacy and legitimizes the rule-interpreting institution, which adheres to this. Pre-existing human rights core obligatory norms, termed jus cogens norms exert compliance pulls on international courts that may not be mandated to hear human rights cases as they form part of the unwritten body of secondary and ultimate rules of recognition. Consequently, an international court exercising its judicial lawmaking to enable it to hear human rights matters that constitute violations of these jus cogens norms is adhering to a legitimate end and hence, the act preserves and enhances its legitimacy. Essentially, judicial lawmaking, when exercised in these parameters preserves and enhances a court's legitimacy.

5.1.3 Part 3

Chapter 3 evaluates tests out the concept formulated in Chapter II to see the effect of judicial lawmaking in sub-regional African courts: EACJ, the ECCJ and the now defunct SADC-T. It is found that the concept is coherent and applies to explain why some backlashes were successful while others were not.

5.1.4 Part 4

Part 4 evaluates this concept with regard to the ICJ's rare exercise of judicial lawmaking when confounded by human rights matters. It is found that the concept is coherent and explicative of the surges in ICJ legitimacy that have been observed over time.

5.1.5 Part 5

Part 5 lays down the conclusion and the conceptual recommendation.

5.2 Theoretical recommendation

The exercise of judicial lawmaking indeed blurs the margins between the legislative bodies and the judicial bodies. The castigations, of many a scholar are not unfounded. There is threat to the legitimacy of institutions, if they fail to adhere to the functions that they were set up for. However, judicial lawmaking is necessary in certain instances to preserve and enhance the judicial legitimacy of international courts. This paper lays down a framework for identification of situations in which judicial lawmaking would enhance legitimacy. The first is whether the matter involves allegations of violations of core human rights obligator norms. If so, judicial lawmaking exercised to improve the procedural and substantive rules of the rule-interpreting institution will translate into preserving or enhancing legitimacy. Where the IC ignores such issues its legitimacy is threatened. Where the matters do not involve violations of core human rights obligatory norms, any form of judicial lawmaking would likely lessen the court's legitimacy, as it would be espied to exercise authority that isn't its own.

Thomas Franck ends his book with an appeal to the study of justice and its role in the international legal order, following the advent of international human rights law. The aim

of this paper has been to study the change that justice occasioned onto the international legal order. The streams of justice and legitimacy, which Franck once identified as different, are now mixed and the waters run in the same channel. The advent of international human rights law does not only bring a realisation of more underlying international norms and principles, but essentially elevates the individual to a subject of international law. This endows the international legal order with principles of justice to which power kneels.

BIBLIOGRAPHY

BOOKS

Wolfrum R, *Legitimacy in international institutions*, Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, 2008.

Alter K, *The new terrain of international law: Courts, politics, rights*, Princeton University Press, Princeton New Jersey, 2014.

Hart, *Concept of law* Clarendon Law Series 2edn 1961.

Franck T, *The power of legitimacy among nations* Oxford University Press, New York, 1990 .

Calamari J& Perillo J, *The Law of Contract*, West Group Publishers, 2003.

Dworkin R, *Law's Empire* Harvard University Press, Cambridge, 1986.

Mosler, *The International Society as Legal Community* 1980.

Rawls J, *A theory of justice* Harvard University Press, Cambridge Massachusetts, 1999.

Moyn S, *The last utopia: Human rights in history*, The Belknap Press of Harvard University, 2010.

Koselleck R, *Futures Past: On the sacredness of the person or the last utopia: A conversation about a history of human rights' semantics of historical times* Cambridge Massachusetts, 1985.

Francois Hartog, *Regimes of historicity: Presentism and Experiences of Time* Columbia University Press, New York, 2015.

Cassese A, *The human dimension of international law*, Oxford Publishers, 2008.

Ukaigwe J, *'ECOWAS Law' Institutions of the community* Springer Publications, 2016.

Grover S, *The European Court of Human Rights as a pathway to impunity for international crimes* Springer-Verlag Berlin Heidelberg 2010.

JOURNAL ARTICLES

Linderfalk U, 'The effect of *jus cogens* norms' *European Journal of International law*, 2005, 205-208.

Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister, 'A new international human rights court for West Africa: The ECOWAS community court of justice.' *American Journal of International Law* 2013 737.

Duffy H, 'Hadijatou Mani Koraou v Niger: Slavery unveiled by the ECOWAS Court' *Human Rights Law Review* (2009) Oxford University Press.

Alter K, Gathii J and Helfer L, 'Backlash against international courts in West, East and Southern Africa: Causes and Consequences' *27 European Journal of International Law* 2016.

Altiparmak K, 'The application of the concept of continuing violation to the duty to investigate, prosecute and punish under international human rights law' *Turkish Yearbook of Human Rights* 1999, 3-50.

Eborah S, 'Human rights developments in sub-regional courts in Africa during 2008' *African Human Rights Law Journal*, 2009.

Adeyemi A, 'Barry Gondo and 8 Others v The Republic of Zimbabwe SADC (T) 05/2008' *Southern Africa Development Community Legal Journal*, 2011.

Sipalla H, 'The historical irreconcilability of international law and politics and its implications for international criminal justice in Africa.' accessed at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2593184.

B. Simma, Human Rights and State Responsibility, in: *A The Law of International Relations—Liber Amicorum for Hanspeter Neuhold*, Reinisch/ U. Kriebaum (eds.), 359 (2007).

Cassese A, 'When may senior state officials be tried for international crimes? Some comments on the Arrest Warrants Case' accessed at <http://ilmc.univie.ac.at/uploads/media/Cassese.pdf>

Simma B, 'Human rights before the International Court of Justice: Community interest coming to life' accessed at <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199653218.001.0001/acprof-9780199653218-chapter-13>

Talmon S, 'The South China Sea arbitration: Is there a case to answer?' *Bonn Research Papers on international law*, 2014.

Klein J, 'South China Sea: UN Law of the Sea Tribunal sinks the rule of law' *Foreign Policy Journal*, 2016.

Chanock A, 'An Analysis of China's Legal Position and its Implications in the South China Sea' *Journal of Law, Technology and Public Policy*, 2015

ONLINE SOURCES

Four IFEX Members, Civil Society Groups Fear Gambia Proposal Will Prevent ECOWAS Court from Ruling in Saikyhan Case, IFEX (Sept. 28, 2009), at http://www.ifex.org/west_africa/2009/09/28/ecowas_court_jurisdiction/

Wolfgang H. Thome, Seek Justice at the East African Court, Registrar Tells Environmentalists and Conservationists, Wolfgang H. Thome's blog (Mar. 24, 2012), <http://wolfganghthome.wordpress.com/2012/03/24/seek-justice-at-the-east-african-court-registrar-tellsenvironmentalists-and-conservationists>

Southern Africa Legal Information Institute, accessed at <http://www.saflii.org/content/sadc-tribunal-decisions>

Article 14 of the Protocol on the SADC Tribunal accessed at <http://www.saflii.org/content/sadc-tribunal-decisions>

International Justice Resources Centre on the SADC accessed at <http://www.ijrcenter.org/regional-communities/southern-african-development-community-tribunal/>

Al Jazeera and agencies, 'No legal basis' for China's South China Sea claims' Al Jazeera, 13 July 2016 <http://www.aljazeera.com/news/2016/07/historic-title-china-south-china-sea-court-160712090955493.html> on 11 January 2017

Helfer L, 'Terminating treaties' accessed at: d:/womat-filecopy/0001537712.3D634 on 11/4/16 at 12:50:09.