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**GLOBAL GOVERNANCE AS PUBLIC AUTHORITY:
STRUCTURES, CONTESTATION, AND NORMATIVE CHANGE**

Jean Monnet Working Paper 09/11

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**Constitutionalization? *Whose* Constitutionalization?
Africa's Ambivalent Engagement with the International Criminal Court**

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**Global Governance as Public Authority:
Structures, Contestation, and Normative Change**

This Working Paper is the fruit of a collaboration between The Jean Monnet Center at NYU School of Law and the Global Governance Research Cluster at the Hertie School of Governance in Berlin. The Research Cluster seeks to stimulate innovative work on global governance from different disciplinary perspectives, from law, political science, public administration, political theory, economics etc.

The present Working Paper is part of a set of papers presented at (and revised after) a workshop on 'Global Governance as Public Authority' that took place in April 2011 at the Hertie School. Contributions were based on a call for papers and were a reflection of the intended interdisciplinary nature of the enterprise - while anchored in particular disciplines, they were meant to be able to speak to the other disciplines as well. The discussions at the workshop then helped to critically reflect on the often diverging assumptions about governance, authority and public power held in the many discourses on global governance at present.

The Jean Monnet Center at NYU is hoping to co-sponsor similar symposia and would welcome suggestions from institutions or centers in other member states.

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Prologue:

Global governance is no longer a new phenomenon – after all, the notion became prominent two decades ago – but it still retains an aura of 'mystery'. We know much about many of its instantiations – institutions, actors, norms, beliefs – yet we sense that seeing the trees does not necessarily enable us to see the forest. We would need grander narratives for this purpose, and somehow in the muddle of thousands of different sites and players, broader maps remain elusive.

One anchor that has oriented much work on global governance in the past has been the assumption that we are faced with a structure 'without government'. However laudable the results of this move away from the domestic frame, with its well-known institutions that do not find much correspondence in the global sphere, it has also obscured many similarities, and it has clouded classical questions about power and justification in a cloak of technocratic problem-solving. In response, governmental analogies are on the rise again, especially among political theorists and lawyers who try to come to terms with the increasingly intrusive character of much global policy-making. 'Constitutionalism' and 'constitutionalization' have become standard frames, both for normative guidance and for understanding the trajectories by which global institutions and norms are hedged in. 'Administration', another frame, also serves to highlight proximity with domestic analogues for the purpose of analysing and developing accountability in global governance.

In the project of which this symposium is a part, we have recourse to a third frame borrowed from domestic contexts – that of 'public authority'. It seeks to reflect the fact that much of the growing contestation over global issues among governments, NGOs, and other domestic and trans-national institutions draws its force from conceptual analogies with 'traditional rule'. Such contestation often assumes that institutions of global governance exercise public authority in a similar way as domestic government and reclaims central norms of the domestic political tradition, such as democracy and the rule of law, in the global context. The 'public authority' frame captures this kind of discourse but avoids the strong normative implications of constitutionalist approaches, or the close proximity to particular forms of institutional organization characteristic of 'administrative' frames. In the project, it is used as a heuristic device, rather than a normative or analytical fix point: it is a lens through which we aim to shed light on processes of change in global governance. The papers in the present symposium respond to a set of broad questions about these processes: what is the content of new normative claims? which continuities and discontinuities with domestic traditions characterise global governance? how responsive are domestic structures to global governance? How is global governance anchored in societies? and which challenges arise from the autonomy demands of national (and sometimes other) communities?

The papers gathered here speak to these questions from different disciplinary perspectives – they come from backgrounds in political science, international relations, political theory, European law and international law. But they speak across disciplinary divides and provide nice evidence for how much can be gained from such engagement. They help us better understand the political forces behind claims for change in global governance; the extent of change in both political discourse and law; the lenses through which we make sense of global governance; and the normative and institutional

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responses to competing claims. Overall, they provide a subtle picture of the pressure global governance is under, both in practice and in theory, to change its ways. They provide attempts to reformulate concepts from the domestic context, such as subsidiarity, for the global realm. But they also provide caution us against jumping to conclusions about the extent of change so far. After all, much discourse about global governance – and many of its problems – continue in intergovernmental frames. Global governance may face a transition, but where its destination lies is still unclear. 'Public authority' is an analytical and normative frame that helps to formulate and tackle many current challenges, though certainly not all. Many questions and challenges remain, but we hope that this symposium takes us a step closer to answering them.

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CONSTITUTIONALIZATION? *WHOSE* CONSTITUTIONALIZATION?

AFRICA'S AMBIVALENT ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT

By Theresa Reinold*

Abstract

While the concept of constitutionalism evokes the idea of taming politics through the force of law, the making of constitutions is in fact a contested social process in which different jurisgenerative actors vie for discursive hegemony. No wonder then that in a pluralist postnational setting, the project of global constitutionalism is continuously challenged by states from the periphery. The latter view constitutionalism as essentially a hegemonic project, which condenses Western notions of good governance, human rights, etc. into the nucleus of an emerging global constitutional order. This paper addresses the consequences of this challenge for the constitutionalization of international law, focusing on the rule of law dimension of global constitutionalism, more specifically the relationship between the African Union and the International Criminal Court. I shall argue that a realist conceptualization of the agent-structure nexus, which views constitutional structures as mere epiphenomena of hegemonic power, is too narrow to account for the myriad ways in which agents from the periphery and global constitutional structures interact. Instead, I shall distinguish between five interaction scenarios, namely transformation, localization, cooptation/adaptation, obstruction, and withdrawal. My claim is that the AU's refusal to be coopted by the system must be understood as part of a broader campaign aimed at reorganizing the relationship between the different public authorities involved in global (and regional) governance.

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I. Introduction

Constitutions do not emerge in a political vacuum. Even though the concept of constitutionalism usually evokes the idea of taming politics through the force of law, the making of constitutions is a contested social process in which power dynamics play a pivotal role. The idea that global constitutionalism “helps mankind into an a-political, a-ideological space, a realm somewhere beyond politics where people would no longer disagree with each other” thus turns out to be illusionary.¹ Instead, constitutionalization is an ongoing struggle over the allocation of authority, the interpretation of norms, and the balancing of conflicting interests. While writings on the constitutionalization of international law have been legion,² the bulk of this literature focuses on the structural dimension without paying due attention to the agency factor in the equation, that is, without inquiring into *who* shapes these normative structures, *whose* agenda constitutional norms mirror, *who* contests global constitutionalism, and on *what* grounds.³

¹ Jan Klabbers, *Constitutionalism Lite*, 1 INT’L ORG. L. R. 31, 54 (2004).

² See, e.g., Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT’L L. J. 223 (2006); Deborah Z. Cass, *The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EJIL 39 (2001); DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* (Oxford University Press 2005); Susan C. Breau, *The Constitutionalization of the International Legal Order*, 21 LEIDEN J. INT’L L. 545 (2008); Brun-Otto Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 61 DER STAAT 61 (2003); Erika De Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT’L L. 611 (2006); JEFFREY DUNOFF & JOEL TRACHTMAN, eds. *RULING THE WORLD. CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (Cambridge University Press 2009); BARDO FASSBENDER, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* (Martinus Nijhoff 2009); Andreas Fischer-Lescano, *Die Emergenz der Globalverfassung*, 63 ZAÖRV 717 (2003); ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, *REGIME-KOLLISIONEN. ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS* (Suhrkamp 2006); JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (Oxford University Press 2009); NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (Oxford University Press 2010); Matthias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EJIL 907 (2004); Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT’L L. 903 (2004); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT’L L. 579 (2006); RONALD ST. JOHN MACDONALD AND DOUGLAS M. JOHNSTON, *TOWARDS WORLD CONSTITUTIONALISM. ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* (Martinus Nijhoff 2005); NICHOLAS TSAGOURIAS, ed. *TRANSNATIONAL CONSTITUTIONALISM. INTERNATIONAL AND EUROPEAN PERSPECTIVES* (Cambridge University Press 2007).

³ But see Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. R. 1 (2007).

Such are the overarching themes that I will address in my paper. More specifically, I will focus on one particular building block of the nascent global constitutional order – the rule of law – and analyze the recent challenge to the ICC mounted by the African Union. The ICC is frequently regarded as the epitome of global constitutionalism.⁴ In contrast to other international courts (such as the ad hoc tribunals for Rwanda and the Former Yugoslavia), the ICC is a permanent institution which aspires to universality and which is *not* a creature of the UN Security Council but was established on the basis of a multilateral treaty. This gave rise to the hope that the ICC would apply international criminal law in a balanced fashion; in recent years, however, the Court’s legitimacy has been called into question, with Third World governments accusing the ICC of harboring neo-colonial intentions and singularly targeting the powerless.⁵ The controversy peaked after the ICC issued arrest warrants against Sudanese President Omar Al-Bashir on charges of war crimes, crimes against humanity, and later genocide. In response, the AU mounted a challenge to the entire edifice of international criminal justice, targeting not only certain primary norms of international law, but, even more importantly, calling into question the global separation of powers as such. The AU’s response to the Al-Bashir indictment must be read in the context of a broader narrative of double standards and international law’s perceived Eurocentricity, which is a long-standing grievance in Africa’s relationship with the West. Africa’s role in the constitutionalization of international law is therefore rather ambivalent. On the one hand, the AU’s normative architecture mirrors global standards of good governance, democracy, the rule of law, etc.⁶ However, the translation of these normative aspirations into actual state practice is hampered by a number of factors – such as the colonial legacy and the resulting desire to balance Western influence in Africa, the pervasiveness of corrupt, undemocratic leadership, as well as the problem of constructing normative fit between global norms and local African traditions, to name just a few. In my paper I will explore this tension between adaptation and emancipation in the field of international criminal justice and

⁴ Klabbers, *supra* note 1, at 35.

⁵ Branch, Adam, What the ICC Review Conference Can’t Fix (15 March 2010). Available from {http://www.fljs.org/uploads/documents/Justice_in_Africa.pdf}. Accessed 13 August 2010.

⁶ See, e.g., Art. 3(g), 3(h), 4(h), 4(m), 4(o), and 4(p) of the African Union Constitutive Act, 2158 UNTS 3, entered into force 26 May 2001.

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discuss its ramifications for the constitutionalization of international law more generally.

The first part of the paper addresses the relationship between global constitutionalism and hegemony from a theoretical perspective. I shall argue that while the global constitutionalist project indubitably bears a hegemonic imprint, the constitutionalization of international law does not always lead to a cooptation of peripheral actors and hence a stabilization of hegemonic rule, as realism would have it. Instead, I argue that the relationship between power and law is much more complex. I will thus distinguish between five scenarios, or potential outcomes of agent-structure interaction, namely transformation, localization, cooptation/adaptation, obstruction, and withdrawal. Transformation and withdrawal each mark the opposite ends of the spectrum of possible outcomes; in the reality of public international law, however, the most frequent outcomes are probably those that lie in between these extremes. I will then illustrate my argument empirically, tracking the relationship between the AU and the ICC over the past couple of years, which were replete with controversy: After the Al-Bashir indictment, AU-ICC relations had reached an all-time low. Undeterred by the political fallout from the Al-Bashir arrest warrants, however, ICC Prosecutor Luis Moreno-Ocampo subsequently made use of his *proprio motu* powers to investigate the post-election violence in Kenya in 2007/2008, which resulted in summonses for six high-ranking Kenyan officials and again prompted retaliation from the AU. Third and most recently, the Security Council referred the situation in Libya to the ICC. As I will describe in more detail in part III, all of the scenarios sketched above were on the table in the AU's recent dealings with the ICC. I will conclude this paper with a reflection on the consequences of the challenge mounted by states from the global South for the project of global constitutionalism more generally. My claim is that the current AU-ICC controversy must be understood as part of a broader debate over the relationship between different public authorities operating at the regional and global levels and over means for resolving norm collisions that result from the fragmentation of international law into partly autonomous regimes. This is all the more relevant as the AU's tendency to emancipate itself from the authority of global governance institutions by establishing competing regional norms and mechanisms is not confined to the field of international

criminal justice, but also manifests itself in other areas of governance, such as collective security and democracy promotion.

II. Global constitutionalism and hegemony: A two-way-street

International law is in dire need of legitimacy. To the extent that it is being “upgraded” into a law of subordination which makes increasingly intrusive demands upon the internal make-up of nation-states, a need for justification arises: Why must states follow this blueprint of legitimate governance and not another? Whose standards of good governance are being universalized in the emergent global constitution, and whose are being discredited? Klabbers writes that the very term constitution implies legitimacy, in that “constitutionalism is thought of as a mechanism that can instantly bestow legitimacy on a political system”.⁷ I would argue, however, that rather than being unidirectional, the relationship between the concepts of constitution and legitimacy is circular: While constitutions confer legitimacy upon political systems, in order to retain their compliance pull towards those addressed normatively, constitutionalism simultaneously requires an ongoing process of legitimation. This process is contested and disruptive, however, as different actors hold diverging conceptions of the “good life”.

The concept of constitution is an elusive one for which various definitions have been advanced. Here the concept of constitution is used to denote a framework composed of primary and secondary norms - the former being a set of fundamental rules that directly regulate the behavior of the legal subjects, whereas the latter govern the (trans)formation, interpretation, application, and enforcement of these primary norms.⁸ In domestic societies, constitutions lay down the separation of powers within a given society and define the relationship between different public authorities. Analogously, the litmus test for the constitutionalization of international law is the emergence of overarching secondary rules that govern the relationship between the different layers of

⁷ Klabbers, *supra* note 1, at 48.

⁸ The distinction between primary and secondary norms was elaborated by H.L.A. Hart, who argues that if a legal system contained only primary rules, it would essentially be static, due to the absence of rules regulating a change of primary rules. The introduction of secondary rules, i.e. rules of change, by contrast, makes it possible for the primary rules to evolve, and to be adapted to changing political circumstances. See H.L.A. HART, *THE CONCEPT OF LAW* 78f, 91ff (Clarendon Press 1961).

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law and regulate the competencies of the various (sub-)regional and global bodies that make, apply, and interpret the law. An indicator of constitutionalization is thus what Zangl and Zürn have called *Kollisionsregeln*, i.e. means for resolving norm conflicts that inevitably arise in a world of global legal pluralism.⁹ In the absence of such rules, international law threatens to disintegrate into “self-contained” regimes that undermine the overall consistency of the international legal architecture.¹⁰ Yet constitutionalization is not only about the emergence of secondary norms that define the separation of powers and regulate norm conflicts. As pointed out above, constitutions also enshrine fundamental primary norms, some of which have even attained the status of peremptory norms that bind consenting and non-consenting states alike. The emergence of a stratified legal system - composed of *jus dispositivum* and higher-ranking *jus cogens* – and the concomitant erosion of the state consent requirement is therefore commonly regarded as one of the hallmarks of the constitutionalization of international law.¹¹ In sum then, the concept of constitutionalization is used here to denote the emergence of a normative order “in which the different national, regional and functional (sectoral) form the building blocks of the international community ... that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement”.¹²

The project of global constitutionalism is informed by such a “core value system”, that is, a collective aspiration to realize a particular concept of the “good life” universally. This naturally begs the question *whose* vision of the good life is being universalized and whose worldviews are being marginalized. “The universalization of the particular seeks to elevate a specific content to a global condition, making an empire of its local

⁹ BERNHARD ZANGL & MICHAEL ZÜRN, ‘MAKE LAW, NOT WAR’: INTERNATIONALE UND TRANSNATIONALE VERRECHTLICHUNG ALS BAUSTEIN FÜR GLOBAL GOVERNANCE, in *Ibid.*, eds. VERRECHTLICHUNG – BAUSTEIN FÜR GLOBAL GOVERNANCE 17-18 (Stiftung Entwicklung und Frieden 2004), see also Krisch, *supra* note 2, at 54.

¹⁰ INTERNATIONAL LAW COMMISSION, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW A/CN.4/L.682, 14 (2006).

¹¹ Peters, *supra* note 2, at 587ff.

¹² De Wet, *supra* note 2, at 612.

meaning,” Butler writes.¹³ The global normative order, as presently constituted, rests on a corpus of mainly Western norms, which, over time, came to be regarded as universal by the international community at large. The semblance of universality has not made existing geopolitical cleavages and Third World grievances disappear, however. Activist scholars from the Third World have therefore cautioned to treat all claims of universality with a healthy dose of skepticism: “[U]niversality is always constructed by an interest for a specific purpose, with a definite intent”.¹⁴ Universals are constantly contested, renegotiated, and possibly displaced: “However universal the terms in which international law is invoked, it never appears as an autonomous and stable set of demands over a political reality. Instead, it always appears through the positions of political actors, as a way of dressing political claims in a specialised technical idiom in the conditions of *hegemonic contestation*. By hegemonic contestation I mean the process by which international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents ... To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the *universal preference*”¹⁵. If the nascent global constitution is seen not as reflecting universal interests, but rather as a particularistic project launched by powerful actors seeking to cement their hegemony in world politics, this perception will undermine the constitution’s compliance pull towards actors from the periphery. This in turn means

¹³ JUDITH BUTLER, RESTAGING THE UNIVERSAL: HEGEMONY AND THE LIMITS OF FORMALISM, in IBID., ERNESTO LACLAU & SLAVOJ ZIZEK, CONTINGENCY, HEGEMONY, UNIVERSALITY. CONTEMPORARY DIALOGUES ON THE LEFT, 11-43, 31 (Verso, 2000).

¹⁴ Makau Mutua, *Universal Jurisdiction: Questions of Blind Universality*, AFRICA LEGAL AID, 21 (2001). Mutua’s writings are representative of a stream of Third World scholarship which has become known as TWAIL – Third World Approaches to International Law. For more on TWAIL, see, e.g., Antony Anghie and Buphinder S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L. L. 77 (2003); Upendra Baxi, *What May the ‘Third World’ Expect from International Law?* 27 TWQ., 713 (2006); Ruth Buchanan, *Writing Resistance Into International Law*, 10 INT’L COMM. L. REV., 445 (2008); James Thuo Gathi, *Rejoinder: Twailing International Law*, 98 MICH. LAW REV., 2066 (2000). Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT’L L.J., 353 (1997/1998); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOOD HALL L.J., 171 (2005); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC LEGAL STUD., 337 (1996); Balakrishnan Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 TWQ., 767 (2006).

¹⁵ Koskenniemi, *supra* note 3, at 3f.

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that the constitutional order ceases to fulfill its function as a stabilizing device for the consolidation of hegemonic rule. Norms that are perceived as infinitely pliable cannot perform a legitimizing function, because subordinate states will view them as mere reflections of the underlying distribution of power. It is therefore in the interest of the powerful to conform to the rules laid down in the constitution in order to uphold an impression of impartiality and hence legitimacy.

The relationship between constitutionalism and hegemony is complex, in that constitutionalism (or international law more generally) is both an instrument of power as well as a constraint upon its exercise.¹⁶ Some authors have sought to reduce this reciprocal relationship to a unidirectional relation, claiming that constitutional norms merely reflect the underlying distribution of power. Hirschl, for instance, who focuses on the domestic dimension of constitutionalism, argues that constitutions do not “develop separately from the concrete social, political, and economic struggles that shape a given political system”¹⁷. Hirschl tracks how powerful “juristocracies” use constitutions as a means of “freezing” the status quo by locking in political arrangements that are favorable to their interests: “[A] realist approach to constitutionalization emphasizes human agency and specific political incentives as the major determinants of judicial empowerment. Such an approach suggests that the expansion of judicial power through the constitutionalization of rights and the establishment of judicial review reflects appropriation of the rhetoric of social justice by threatened elites to bolster their own position in the ongoing political struggles of a specific polity”.¹⁸ Hirschl’s IR-counterpart is the theory of hegemonic stability, which highlights the paramount role of powerful states in the creation and maintenance of international regimes. According to this theory, which forms the core of realist theorizing about inter-state cooperation, powerful states have the resources to form and maintain international regimes that they believe to be in their interest. Hegemonic influence is thus the single most decisive independent variable in explaining the

¹⁶ Koskenniemi, *supra* note 3; Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369 (2005).

¹⁷ RAN HIRSCHL, *TOWARDS JURISTOCRACY. THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 28 (Harvard University Press 2004).

¹⁸ Hirschl, *supra* note 17, at 49.

formation, persistence, and decline of international norms and institutions.¹⁹ The post-World War II global separation of powers, for instance, which concentrates far-reaching prerogatives for the maintenance of international peace in the hands of a small number of “first-class sovereigns” on the UN Security Council is a frequently cited example of hegemonic bias in the global normative order.

While Hirsch and his fellow neo-realists in IR do have a point, it seems rather simplistic to reduce the project of global constitutionalism to a mere epiphenomenon of the underlying distribution of power. Instead, I would argue that the relationship between power and constitutionalism is a two-way-street. Power that collides openly with universal norms remains precarious. The strong thus have to make an effort to render their actions legitimate in the eyes of the weak by committing themselves to a shared constitutional framework. Yet not only the relationship between power and constitutionalism is complex - the notion of power itself is an elusive one which is still poorly understood, despite its ubiquity in the study of international relations. Due to neo-realism’s long-standing dominance in the field of IR, scholars did not systematically reflect upon the concept of power, which was usually measured in terms of economic/military strength and other approximations based on the assumption that power is nothing more than material capability. Waltz, for instance, writes that in order to assess the power of a nation-state one has to look at the cumulative index of the following items a state can own: The size of its population and territory, its endowment with natural resources, its economic strength, military capabilities, political stability and competence.²⁰ However, this power-as-a-resource approach fails to distinguish between potential and actual power, i.e. it confounds (material) resources with influence over outcomes. Second, by ascribing general fungibility to certain material power resources, such as money and weapons, it overlooks the problem that power is issue-area specific, which in turn directs our attention to the third point, namely that the traditionalist focus on material power fails to take into account other possible non-material forms of power

¹⁹ Robert O. Keohane, *The Theory of Hegemonic Stability and Changes in International Economic Regimes 1967-1977*, in *CHANGE IN THE INTERNATIONAL SYSTEM*, 132, 136F. (Ole R Holsti, Randolph M Siverson and Alexander L. George, eds. 1980).

²⁰ KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS*, 131 (Random House 1979).

that may be fungible in different issue areas and that thus complement material forms of power. The power-as-a-resource-approach treats material resources as if they were power itself, as if they were automatically translated into effective influence over outcomes.

Neo-realism's classical predecessor had more to say about the different faces of power. Morgenthau, for instance, defined power as comprising anything "that establishes and maintains the control of man over man. Thus power covers all social relationships which serve that end, from physical violence to the most subtle psychological ties by which one mind controls another ... When we speak of power, we mean man's control over the minds and actions of other men."²¹ This definition not only takes into account the relational aspect of power, it also gives due consideration to the fact that the exercise of power is not only visible in situations of conflict, in which compliance is enforced through physical coercion or material inducements, but also in situations in which one actor shapes the preferences of another actor and thus prevents conflict from arising in the first place. Power can thus be exercised in different forms - through coercion and through consent. Some have referred to these forms of power as hard and soft power,²² others, like Gramsci, have used the concepts of domination and hegemony to grasp the difference between the two. Hegemony in Gramsci means intellectual and moral leadership which is principally built on the consent of the led - consent which is secured by the popularization of the culture and value systems of the ruling class.²³ A social group thus exercises hegemony to the extent that it is able to spread certain norms that come to be accepted as universally valid by the rest of society. Such universals are the stuff of global constitutionalism, which is why authors writing in a neo-Gramscian tradition have emphasized the role of international law for sustaining existing power structures.²⁴ Gramsci's historical materialism is non-reductionist in that material and

²¹ HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE*, 10, 31 (Knopf 1973).

²² JOSEPH S. NYE, *SOFT POWER. THE MEANS TO SUCCESS IN WORLD POLITICS* (PublicAffairs 2004).

²³ ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI*, 57, 182, 269 (International Publishers 1971).

²⁴ ROBERT W. COX, *GRAMSCI, HEGEMONY AND INTERNATIONAL RELATIONS: AN ESSAY IN METHOD*, in GRAMSCI, *HISTORICAL MATERIALISM AND INTERNATIONAL RELATIONS* 49 (Gill, Stephen ed. 1993).

immaterial/normative sources of power are closely linked and mutually reinforcing.²⁵ This is what makes Gramsci's theory so appealing from an IR-perspective: His conceptualization of hegemony as one form of power and domination as the other speaks to the various notions of power advanced by the major IR-traditions, who, with the exception of hard-headed neo-realists, would probably all subscribe to Gramsci's differentiated account of how actors exert influence over outcomes. International norms and institutions are crucial resources for powerful states, because they legitimize the pursuit of hegemonic goals, coopt peripheral countries, absorb counter-hegemonic ideas and thus stabilize hegemonic rule: "Hegemony is like a pillow: it absorbs blows and sooner or later the would-be assailant will find it comfortable to rest upon".²⁶ However, cooptation fails if the would-be-assailant views hegemonic institutions as mere reflections of the particularistic interests of the powerful. The assailant will consequently try to tear the pillow apart instead of resting upon it and being lulled into tacit acceptance of an unjust international order. Legitimation of a hegemonic normative order hence requires self-restraint on the part of the hegemon. Legitimate power is limited power. A powerful state which is able to portray its actions as being in accord with collective standards of appropriate behavior will encounter less resistance from subordinate states and thereby stabilize its rule. It is therefore in the hegemon's interest that the emerging global constitution is seen as binding the powerful and the weak alike.

In light of constitutionalism's potential for restraining the powerful, constructivist scholars have emphasized above all constitutionalism's promise for improving the deliberative quality of international relations and thereby leveling the highly uneven global playing field. Based on Habermas' theory of communicative action, Risse argues that an increasingly thick global normative order can provide what Habermas' called the "common lifeworld"²⁷ prerequisite for truth-seeking discourses.²⁸ Such truth-seeking discourses, in which each actor is prepared to be persuaded by the better argument, must be distinguished from rhetorical action, in which actors merely aim at imposing

²⁵ Gramsci, *supra* note 23, at 366.

²⁶ Cox, *supra* note 24, at 63.

²⁷ JÜRGEN HABERMAS, *THEORIE DES KOMMUNIKATIVEN HANDELNS*, Vol. 2, 209 (Suhrkamp 1981).

²⁸ Thomas Risse, 'Let's Argue!' *Communicative Action in World Politics*, 54 *INT'L ORG.*, 1 (14-16) (2000).

their own worldviews on their interlocutors, without being willing to question their own beliefs.²⁹ In a situation where each actor is prepared to be persuaded by the power of the better argument (instead of being bribed by the power of the purse or coerced by the barrel of a gun), existing inequalities thus become irrelevant because each actor has a similar chance of making her voice heard, independently of her material resources. Skeptics have argued that a common lifeworld does not exist in the anarchic global realm, which is a system based on self-help and power politics and as such can only give rise to decidedly non-ideal speech situations. *Contra* neo-realism, however, Risse claims that the increasing legalization of international affairs has produced an environment which at least approximates a common lifeworld, albeit to varying degrees, depending on the issue-area in question.³⁰ Highly legalized – or even constitutionalized - segments of international relations thus enable actors to engage in truth-seeking discourses and make it possible for weaker actors to exert influence over outcomes.³¹

This reading of global constitutionalism as the great equalizer, however, does not sufficiently take into account that the parameters of such discourses – criteria for what constitutes a legitimate argument, for example, or for which actors are considered legitimate interlocutors, etc. – were already set by the powerful long before weaker actors entered the system, who had no say in the design of the post-World War II normative order. States from the developing world were born into a pre-constituted system of international law, in which a small group of states had already determined what constitutes a legitimate polity, which actors are entitled to all the privileges and immunities of sovereignty and which aren't, and with which pre-existing norms arguments must resonate in order to be accepted as legitimate. Constitutionalist orders can therefore also be used to cement existing inequalities and lock in certain privileges for the powerful, and because of their inherent inertia, such orders are then difficult to change from below. From this perspective, constitutionalism is thus more of a constraining than an enabling force for “true” deliberation.

²⁹ *Ibid.*, at 8-9.

³⁰ *Ibid.*, at 15.

³¹ *Ibid.*, at 15, 18-19.

Ultimately, the question of whether global constitutionalism opens or rather diminishes space for truth-seeking discourses, and thus mitigates or further exacerbates existing inequalities, can only be answered empirically. The jury is still out on these questions, and empirical studies are unlikely to yield unequivocal results.³² Constitutionalism is therefore best seen as a knife that cuts both ways - an ambivalence which is nicely captured by a “realist constructivist” approach to the constitutionalization of international law, an approach which seeks to elucidate the myriad ways “in which power structures affect patterns of normative change in international relations and, conversely, the way in which a particular set of norms affects power structures”.³³ If hegemony is defined as the “point of convergence between objectivity and power”³⁴, constitutionalism can be interpreted as an attempt by powerful political actors to *reify* a certain set of rules, to make them seem objective, universal, and hence “immunize” them against contestation. Yet the consensus thus reached is merely “a *temporary* result of a provisional hegemony, a stabilization of power, and always entails some form of exclusion”.³⁵ Because of this exclusion, stabilization is unlikely to succeed in the long run: “To the extent that universality fails to embrace all particularity and, on the contrary, is built upon a fundamental hostility to particularity, it continues to be and to animate the very hostility by which it is founded”.³⁶ Actors from the periphery whose norms are excluded from the constitutional edifice represent an important source of normative innovation and self-reflexivity, because they articulate alternatives to existing norms and institutional arrangements and thus challenge the reification of the system’s structures. In response to this challenge, the system might transform its norms to make them more attuned to the preferences of marginalized groups, or it may choose to coopt the challengers. The latter in turn might refuse to be coopted and take the route of obstructionism, or they might withdraw from the system entirely. Cooptation implies the neutralization of dissenting voices by making minor concessions that leave the

³² See, e.g. Krisch, *supra* note 2 for a discussion of the ambivalent effects of constitutionalism v. pluralism in levelling the global playing field.

³³ J. Samuel Barkin, *Realist Constructivism*, 5 INTERNATIONAL STUDIES REVIEW, 325 (337) (2003).

³⁴ CHANTAL MOUFFE, DAS DEMOKRATISCHE PARADOX, 101 (Turia + Kant 2008).

³⁵ *Ibid.* at 106, emphasis added.

³⁶ JUDITH BUTLER, RESTAGING THE UNIVERSAL: HEGEMONY AND THE LIMITS OF FORMALISM, *in Ibid.*; ERNESTO LACLAU AND SLAVOJ ZIZEK, CONTINGENCY, HEGEMONY, UNIVERSALITY. CONTEMPORARY DIALOGUES ON THE LEFT 11 (Verso 2000).

fundamental rules of the constitutional game unaltered. If, however, the attempt at cooptation fails because marginalized groups refuse to be bought off with trinkets, a genuine dialogue and possibly the transformation of the system might result. Structural transformation “occurs not merely by rallying mass numbers in favour of a cause, but precisely through the ways in which daily social relations are rearticulated, and new conceptual horizons opened up by anomalous or subversive practices”.³⁷ Yet even though each subversive practice contains the “seed of a new legality”³⁸, this does not mean that the challenging of established rules necessarily needs to their transformation. If this were indeed the case, international law would cease to perform its stabilizing function, that is, to guarantee a modicum of predictability in an otherwise very unpredictable world. Rule-breaking may even ultimately lead to a strengthening of the rule in question rather than to its erosion, depending on the justificatory strategies used by those who violate a particular rule as well as the reactions of other members of the interpretive community. In the event that no new consensus emerges among the various jurisgenerative actors regarding the need to change the rules of the system, this experience of frustration may prompt marginalized groups to obstruct the operation of the system or to withdraw from the playing field entirely. Another possible outcome of agent-structure interaction (apart from transformation, cooptation, obstruction, and withdrawal) is norm localization, which describes a process in which global norms are modified to make them more congruent with local values and traditions.³⁹ This process of “pruning” entails the construction of normative fit between global norms and local needs, i.e. local actors appropriate certain elements of foreign norms that are compatible with their own values and jettison the rest.⁴⁰

Overall then, the constitutionalization of international law is an inherently disruptive and contested social process, which is why we need to look at the role of agency in propelling (or impeding) the constitutionalist project. In a world of legal pluralism, representatives of different legal cultures hold a multiplicity of views about what a

³⁷ Butler, *supra* note 36, at 14.

³⁸ ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW*, 97 (Cornell University Press 1971).

³⁹ Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 *INT'L. ORG.*, 239 (2004).

⁴⁰ *Ibid.*, at 239.

global constitutional order should look like. Sometimes these visions converge, yet sometimes they strongly diverge, which causes what legal scholars have labeled “fragmentation”, that is, the disintegration of the international order into self-contained regimes, which threaten to undermine the overall consistency of international law.⁴¹ If we thus seek to understand why or why not international law is constitutionalizing, whose agenda is being constitutionalized, etc. we must look at the norm entrepreneurs that are behind this process. The following analysis focuses on the role of one particular norm entrepreneur from the developing world, namely the African Union, whose relationship with the institutions of global governance has often been conflict-laden. The AU was founded upon the premise of African emancipation from Western tutelage, and with regional integration in Africa deepening, norm collisions between the regional and global levels become increasingly likely.

III. Africa’s ambivalent engagement with the International Criminal Court

International criminal law, Koskenniemi writes, “always consolidates some hegemonic narrative”.⁴² Yet even though hegemonic influence was at work at many critical junctures in the history of international criminal justice, the negotiations over the establishment of a permanent international criminal court cut across the usual geopolitical fault lines, bringing together Western as well as non-Western states (and non-state actors) in a concerted effort to create a strong and independent court. At Rome, African members of the so-called like-minded group made a significant contribution to shaping the normative framework underlying the ICC. Individual African states and subregional communities such as the Southern African Development Community (SADC) lobbied for a strong court which would have automatic jurisdiction over the core crimes of genocide, crimes against humanity, and war crimes, a court which would be spearheaded by an independent prosecutor, and one which would not be a puppet of the UN Security Council.⁴³

⁴¹ Pauwelyn *supra* note 2, at 904.

⁴² Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 2004, online at <http://www.helsinki.fi/eci/Publications/Koskenniemi/MHegemony.pdf>, at 17 [accessed on 2 April 2011].

⁴³ MAX DU PLESSIS, *THE INTERNATIONAL CRIMINAL COURT THAT AFRICA WANTS*, 6f (Institute for Security Studies 2010).

A decade later, however, the relationship between Africa and the ICC turned sour, when the latter decided to indict Sudanese leader Al-Bashir on charges of genocide, war crimes, and crimes against humanity. The court's recent decision to issue summonses against six high-ranking Kenyan leaders (the so-called Ocampo Six) further exacerbated tensions between the AU and the court. Many African governments view the ICC as a hegemonic tool used by Western powers to bully states from the global South. The AU feels that the UN Security Council failed to give serious considerations to African concerns over the potential political fallout of the Bashir indictment for the peace process in Darfur and that the Security Council applies double standards when deciding upon the referral and deferral of cases. African governments moreover criticized the ICC for prosecuting an incumbent head of state of a non-party to the Rome Statute, which raises questions of head of state immunity as well as the relationship between Art. 98 and 27 of the Rome Statute.⁴⁴ In the following, I will analyze these developments in more detail and explore their consequences for the project of global constitutionalism.

3.1 Al-Bashir

The ICC's indictment of Sudanese President Omar Al-Bashir has not only thrown into sharp relief the contestedness of fundamental primary norms of international law (such as the principle of head of state immunity in the case of *jus cogens* violations), but has moreover reignited the controversy over the perceived illegitimacy of the current global separation of powers. The far-reaching prerogatives of the UN Security Council at the expense of more egalitarian bodies such as the UN General Assembly continues to be a major grievance in Africa's relationship with the institutions of global governance: "The al-Bashir saga, and the work of the ICC, is now integrally bound up with (some might say infected by) the long-standing complaint, prevalent in the developing South, about the illegitimacy of the UN".⁴⁵ The origins of the "Al-Bashir saga" date back to the year 2005, when the UN Security Council decided to refer the situation in Darfur to the ICC,⁴⁶ which eventually issued an arrest warrant for President Bashir on charges of war

⁴⁴ *Ibid.*, at vii-viii.

⁴⁵ MAX DU PLESSIS, THE AFRICAN UNION, THE INTERNATIONAL CRIMINAL COURT AND AL-BASHIR'S VISIT TO KENYA (Institute for Security Studies 2010), online at http://www.issafrica.org/iss_today.php?ID=1025 [accessed on 2 April 2011].

⁴⁶ S/RES/1593, 31 March 2005.

crimes and crimes against humanity.⁴⁷ The AU, while reiterating its “unflinching commitment to combating impunity”, asked the UN Security Council to defer the proceedings against Bashir pursuant to Art. 16 of the Rome Statute, which provides for the suspension of an investigation or prosecution for a renewable period of twelve months.⁴⁸ The AU also decided to establish an African Union High-Level Panel on Darfur (AUPD), which submitted its report on how to reconcile demands for accountability with the exigencies of the ongoing Darfur peace process in October 2009.⁴⁹ The AUPD recommended an integrated accountability system which would draw on mechanisms from the international, national, and local levels: For the most serious offenses, it suggested the establishment of a hybrid court, composed of Sudanese and non-Sudanese judges, the latter being nominated by the AU.⁵⁰ Second, the AUPD called for a strengthening of Sudan’s national legal system,⁵¹ and third, recommended the usage of traditional justice mechanisms.⁵²

The UN Security Council briefly discussed the AU’s bid for a deferral of the Bashir proceedings and in so doing exposed the North-South divide on the Council and beyond, with the non-Western Council members backing the request⁵³ and most Western states on the Council members opposing it.⁵⁴ In Resolution 1828 on the renewal of UNAMID’s mandate in Darfur, the Security Council merely “noted” the deferral request, and expressed its willingness to consider the matter further,⁵⁵ yet never did. The Council’s failure to give due consideration to the AU’s concerns angered the organization. In response to the Security Council’s snub the AU, at its Sirte summit in July 2009, directed its member states to withhold cooperation from the ICC in the arrest and surrender of Al-Bashir, “pursuant to the provisions of Article 98 of the Rome Statute of

⁴⁷ Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009.

⁴⁸ Assembly/AU/Dec.221(XII), 3 February 2009.

⁴⁹ Darfur: The Quest for Peace, Justice and Reconciliation - Report of the African Union High-Level Panel on Darfur (AUPD), PSC/AHG/2(CCVII), 29 October 2009.

⁵⁰ *Ibid.*, xvi, xix.

⁵¹ *Ibid.*, xvi.

⁵² *Ibid.*, xvii.

⁵³ Outside of the Security Council, the Non-Aligned Movement, the Organization of the Islamic Conference, as well as the League of Arab States also spoke out in favor of a deferral.

⁵⁴ DAPO AKANDE, MAX DU PLESSIS AND CHARLES CHERNOR JALLOH, AN AFRICAN EXPERT STUDY ON THE AFRICAN UNION CONCERNS ABOUT ARTICLE 16 OF THE ROME STATUTE OF THE ICC, 10 (Institute for Security Studies 2010).

⁵⁵ S/RES/1828, 31 July 2008.

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the ICC relating to immunities”.⁵⁶ According to Ghana’s Foreign Minister Alhaji Mumuni, the AU perceived the Security Council’s failure to act on the AU’s deferral as a “slap”.⁵⁷ However, not all of the African states parties went along with the AU’s decision.⁵⁸ Also at the Sirte summit, the AU decided to reject the ICC’s request for the establishment of an AU-ICC Liaison Office which was supposed to facilitate communication between both organizations. Apparently, delegates even contemplated an African mass withdrawal from the Rome Statute – a proposal which ultimately failed to garner sufficient approval, however (later, information leaked that the contemplated mass withdrawal was in fact the pet project of only one – albeit powerful – figure in the continental organization, Libya’s now-deposed leader Muammar Gaddafi⁵⁹).

The diplomatic backlash triggered by the Bashir indictment also determined the AU’s legal strategy for the first ever ICC Review Conference held in Kampala, Uganda. Underscoring the need for Africans “to speak with one voice to ensure that the interests of Africa are safeguarded”, the AU agreed to suggest, among others, the following agenda items for Kampala: An amendment of Art. 16 of the Rome Statute, a code of conduct for the exercise of prosecutorial discretion by the ICC Prosecutor, as well as the clarification of immunities of officials representing states that are not parties to the ICC (relationship between Art. 27⁶⁰ and 98).⁶¹ The amendment proposal for Art. 16 in particular proved highly controversial. It was aimed at authorizing the UN General Assembly to assume the Security Council’s deferral powers, should the latter fail to act

⁵⁶ Assembly/AU/Dec.245(XIII), 3 July 2009. Art. 98 of the Rome Statute prevents the ICC from asking a state to arrest a suspect if the affected state would have to violate the immunity of an individual from a third state (unless the third state waived the immunity of the suspect). Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002.

⁵⁷ Dieu-Donné Wedi Djamba, *Africa: Continent’s Leaders Undermine the ICC* (24 September) 2009. Available from {<http://allafrica.com/stories/printable/200909240879.html>} [Accessed 12 December 2009].

⁵⁸ Amnesty International, International Criminal Court. The Contribution Africa Can Make to the Review Conference, (2009) available at <http://www.amnesty.org/en/library/asset/AFR01/017/2009/en/aea118fe-c7ed-4e8b-9590-a0b91c559f9d/afr010172009en.pdf> [accessed 11 August 2010].

⁵⁹ Nicole Fritz, *Mail & Guardian, Security Council Referral Confirms ICC as a Critical International Institution*, 2 March 2011, online at <http://mg.co.za/article/2011-03-02-security-council-referral-confirms-icc-as-a-critical-international-institution> [accessed on 3 April 2011].

⁶⁰ Art. 27 lifts head of state immunity in the case of states parties to the Rome Statute.

⁶¹ Assembly/AU/Dec.270(XIV), 2 February 2010.

upon a deferral request by a state within a period of six months.⁶² As Akande et al. point out, the amendment proposal seeks to endow the General Assembly with competencies which it does not have under its own constituent instrument (i.e. the UN Charter), according to which only the Security Council has the authority to make binding decisions regarding the maintenance of international peace and security: “The Rome Statute is a multilateral treaty. It is separate from the UN Charter and cannot be used to amend it ... [I]f the proposal attempted to modify the relationship between the General assembly and the UNSC, that conferral of power would have to be done by amending the UN Charter”.⁶³ The Al-Bashir case thus raised thorny issues that affect the global constitutional architecture as a whole, and not just the relationship between the AU and the ICC. In light of the legal and political hurdles an amendment of Art. 16 would face, only two African states – Namibia and Senegal – spoke out in favor of discussing the proposal at the ICC Review Conference, while thirteen non-African states parties objected to it. The latter argued that consideration of the amendment at Kampala would be premature and pointed to the proposal’s potential for politicizing the work of the Court.⁶⁴ It was agreed that the AU’s initiative would be addressed by a working group as from the ICC Assembly of States Party’s ninth session. The issue of immunities of

⁶² EX.CL/568 (XVI), 29 January 2010.

⁶³ Akande et al. *supra* note 54 ,at 13.

⁶⁴ *Ibid.* The Bashir indictment was a landmark decision in that it was the first occasion on which the question of immunity of an incumbent head of state had been raised before an international criminal tribunal. As the *Arrest Warrant* case has shown, the scope of protection offered by the principle of immunity continues to remain disputed, especially when immunity is weighed against the need to prosecute international core crimes. Disagreement currently persists over whether sitting heads of state enjoy immunity not only in the courts of other states but before international tribunals as well. While Art. 27 of the Rome Statute lifts immunity in the case of states parties, according to Art. 98 representatives of non-state parties like the Sudan continue to enjoy the privileges of immunity. One could plausibly argue, however, that the Security Council, by referring the situation to the ICC on the basis of a Chapter VII mandate, implicitly lifted Bashir’s immunity (DAPU AKANDE, THE BASHIR INDICTMENT: ARE SERVING HEADS OF STATE IMMUNE FROM ICC PROSECUTION? Oxford Transitional Justice Research Working Paper Series, (Oxford University 2008)). Those who support this interpretation favor a teleological exegesis of the Rome Statute, emphasizing above all its object and purpose, namely the eradication of the culture of impunity. This object, they argue, would be frustrated if suspects from third parties referred by the Security Council could invoke their official position to shield themselves from prosecution (Amnesty International, *supra* note 59). Another argument in support of prosecuting Bashir is that Sudan has ratified the Genocide Convention, which provides for the removal of head of state immunity in cases of genocide.⁶⁴ Since the ICC issued a second arrest warrant for Bashir on charges of genocide, the invocation of immunity cannot shield him from prosecution anymore. Art. IV posits that “persons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”. Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, entered into force 12 January 1951.

officials representing states not parties to the Rome Statute will also be raised by the African group at the level of the ASP working group.⁶⁵

3.2 The Ocampo-Six

In 2009, ICC Prosecutor Luis Moreno-Ocampo requested the authorization of the Pre-Trial Chamber II for an investigation into the post-election violence that shook Kenya in 2007/2008. The political dynamics underlying the Al-Bashir case essentially replicated themselves here: In both cases, high-ranking African political leaders were the subject of ICC arrest warrants/summonses, in both cases, the AU reacted with indignation, suspecting the ICC of harboring neo-colonial intentions, and acted according to “a now established pattern on the part of African states ... to seek deferrals in cases when political elites are implicated”⁶⁶. In both cases the Security Council failed to take the AU’s requests seriously, thus further alienating the AU from the ICC.

Kenya descended into violence after the 2007 presidential elections, when opposition leader Raila Odinga accused incumbent president Mwai Kibaki of election fraud. According to reports, more than a thousand people died. ICC Prosecutor Moreno-Ocampo subsequently made use of his *proprio motu* powers to investigate the incidents and eventually convinced the ICC’s Pre-Trial Chamber II to issue summonses for six individuals, a.k.a. the “Ocampo Six”⁶⁷. All of them are prominent political figures in their home-country. The summonses “served to inflame Kenya’s growing anti-ICC sentiment” and sent Kenya’s leadership “into reactive overdrive”.⁶⁸ Seeking to shield the six high-ranking individuals from the ICC’s reach, the Kenyan government (or rather parts of the government, because apparently the decision did not have the support of Prime Minister Raila Odinga’s faction in the cabinet⁶⁹) embarked on a diplomatic mission to convince fellow African leaders to ask the UN Security Council for a deferral of the case, arguing

⁶⁵ Assembly/AU/Dec.270(XIV), 2 February 2010.

⁶⁶ MAX DU PLESSIS, KENYA AGAIN TESTS AFRICA’S COMMITMENT TO THE ICC (Institute for Security Studies 2011), online at http://www.iss.co.za/iss_today.php?ID=1223 [accessed on 2 April 2011].

⁶⁷ Coalition for the International Criminal, *Kenyan Government Challenges ICC Involvement in Post-Election Violence Case*, 1 April 2011, online at http://www.iccnw.org/documents/Kenya_article_19_CICC_advisory_010411.pdf [accessed on 3 April 2011].

⁶⁸ Du Plessis, *supra* note 67.

⁶⁹ Fred Oluoch, *Kibaki Sees Political Calculus in ICC Trials*, THE EAST AFRICAN, 14 March 2011.

that as a sovereign state it should be allowed to deal with its own problems by establishing local accountability mechanisms.⁷⁰

The Kenyan government's maneuvering was criticized by African and Western civil society organizations as an attempt to escape accountability.⁷¹ While admitting that local justice mechanisms would be preferable to ICC involvement, the prevailing sentiment was that it was not Western neo-colonial meddling, but rather Kenya's own inaction that had compelled the ICC Prosecutor to commence investigations into the Kenya situation: "While, in principle, a local justice mechanism would be desirable ... it is not possible, for the time being, to put in place a credible local justice mechanism. In the circumstances, there is little chance for now of demonstrating to the ICC that Kenya can meet its complementarity obligations as expected under the Rome Statute".⁷² Neither did the government's initiative have the support of the Kenyan people, which overwhelmingly endorses the ICC process.⁷³

Despite strong public support in favor of the ICC, and despite some African governments' reluctance to go along with the Kenyan initiative,⁷⁴ the AU decided otherwise, calling upon the UN Security Council to defer the investigation against the Ocampo Six: "The Assembly ... endorses Kenya's request for a deferral ... under Article 16 of the Rome Statute to allow for a National Mechanism to investigate and prosecute the cases ... in line with the principle of complementarity, and in this regard requests the UN Security Council to accede to this request ... in order to prevent the resumption of

⁷⁰ Stella Ndirangu, *The African Union is Setting Itself Up for Failure*, THE EAST AFRICAN, 31 January 2011.

⁷¹ International Center for Policy and Conflict, *Defender of Impunity Exposed*, 16 March 2011, online at http://www.icpcafrica.org/site/index.php?option=com_content&view=article&id=300:defender-of-impunity-exposed&catid=42:featured&Itemid=107 [accessed on 1 April 2011].; Human Rights Watch, *Gabon/Nigeria/South Africa: Reconsider Support for Deferral of ICC Kenya Investigation*, 2 March 2011, online at <http://www.hrw.org/en/news/2011/03/02/gabonnigeriasouth-africa-reconsider-support-deferral-icc-kenya-investigation> [accessed on 1 April 2011].

⁷² George Kegoro, *Kenya Still a Long Way from Local Justice for Post Election Violence* (2011) online at http://www.icj-kenya.org/index.php?option=com_content&task=view&id=347&Itemid=90 [accessed on 3 April 2011].

⁷³ According to newspaper reports, 87 percent of Kenyans support the ICC's work (Ndirangu, *supra* note 71; see also International Federation for Human Rights, *Kenya Must Uphold the Rule of Law by Continuing to Engage with the ICC*, 21 January 2011, online at <http://www.fidh.org/Kenya-must-uphold-the-rule-of-law-by-continuing> [accessed on 2 April 2011].)

⁷⁴ Ashine Mbao et al, *Kenya: African Leaders Split on Bid to Defer Hague Trials*, allAfrica.com, 27 January 2011, online at <http://allafrica.com/stories/201101271286.html> [accessed on 1 April 2011].

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conflict and violence.”⁷⁵ The organization’s legal adviser Ben Kioko later explained the decision with reference to the AU’s preference for an African approach to addressing the Kenya accountability challenge: “The African Union supports the search for solutions and gives preference to local solutions”.⁷⁶ The deferral move which was criticized as a “legal folly”,⁷⁷ however, because it confounds the admissibility challenge under Art. 17 of the Rome Statute (which bars the ICC from proceeding if a state which has jurisdiction over a case is prosecuting or investigating the case) with the deferral provision in Art. 16. An admissibility challenge under the complementarity provision is made to the ICC, a deferral request to the UN Security Council. Art. 16 on deferrals is limited to cases where the Security Council finds a threat to international peace and security - which clearly does not exist with respect to the situation in Kenya.⁷⁸

Aside from the legal difficulties, political factors also make it rather unlikely that the AU’s bid will succeed: Apparently, the Western powers on the UN Security Council have already signaled that they would veto a deferral resolution.⁷⁹ South Africa, currently one of three African members on the Security Council, wants the Council to at least listen to the AU’s concerns, arguing that the latter has a “right to be heard” before the Council: “In this case when a member state, such as Kenya has done, writes to the council, South Africa believes it is its right to be heard,” South African UN envoy Baso Sangqu argued.⁸⁰ South Africa’s calls for a right to be heard were - at least partially - answered when powerful members of the Council agreed to hold informal consultations with an African delegation in March. However, during the consultations a rift emerged between Russia, China and the African Council members on the one hand, who were pro-

⁷⁵ Assembly/AU/Dec.334(XVI), 31 January 2011.

⁷⁶ Inter Press Service, *ICC Justice a Dream Deferred*, 31 January 2011, online at <http://ipsnews.net/news.asp?idnews=54304> [accessed on 1 April 2011].

⁷⁷ MAX DU PLESSIS, AU DECISION EXPOSES SA POLICY ON SECURITY COUNCIL “MISSION CREEP” (Institute for Security Studies 2011), online at http://www.iss.co.za/iss_today.php?ID=1236 [accessed on 2 April 2011].

⁷⁸ *Ibid.*

⁷⁹ Peter Leftie, *Slim Hope as Kenya Pushes for ICC Deferral*, SUNDAY NATION, 12 March 2011, online at <http://www.nation.co.ke/News/politics/Slim+hope+as+Kenya+pushes+for+ICC+deferral+/-/1064/1123972/-/ckk2ry/-/> [accessed on 3 April 2011].

⁸⁰ quoted in Mail & Guardian, *Kenya Seeks UN Help in Crimes Against Humanity Case*, 9 March 2011, online at <http://www.mg.co.za/article/2011-03-09-kenya-seeks-un-help-in-crimes-against-humanity-case/> [accessed on 3 April 2011].

deferral, and the Western powers, who want the Kenya investigations to go ahead without delay.⁸¹

The Kenya investigations also added more fuel to the debate over the amendment of Art. 16, prompting the AU Assembly to admonish all African states parties to the Rome Statute “that have not yet done so to co-sponsor the proposal for the amendment to Article 16”, and underscoring the need for Africans “to speak with one voice during the forthcoming negotiations at the level of the New York and The Hague Working Groups respectively” in order to ensure that the amendment proposal “is properly addressed during the forthcoming negotiations”.⁸² Finally, the AU also called upon African states parties to lobby for an African candidate to replace Moreno-Ocampo as the ICC’s next Prosecutor.⁸³

3.3 Libya

In February 2011, Libyans rose against Muammar Gaddafi, prompting the latter to initiate a bloody campaign of repression against his own people. A week into the carnage, the AU Peace and Security Council issued a statement condemning the violence.⁸⁴ The UN Security Council in turn sprang into action rather swiftly, adopting Resolution 1970 on 26 February, which referred the situation in Libya to the ICC.⁸⁵ Remarkably, the Council voted unanimously. Its three African members – South Africa, Nigeria, and Gabon - who had previously sided with other African governments in frustrating the ICC process in the cases of Al-Bashir and the Ocampo Six – not only did not veto the resolution, but even cast an affirmative vote. Yet again, the AU did not want to leave the resolution of the crisis to extra-continental powers alone, and therefore adopted another statement on 10 March in which the AU Peace and Security Council decided to set up an 'Ad Hoc High Level Committee' tasked with seeking a diplomatic solution to the conflict.⁸⁶ When the UN Security Council upped the ante on 17 March by

⁸¹ Leftie, *supra* note 80.

⁸² Assembly/AU/Dec.334(XVI), 31 January 2011.

⁸³ *Ibid.*

⁸⁴ PSC/PR /COMM(CCLXI), 23 February 2011.

⁸⁵ S/RES/1970, 26 February 2011.

⁸⁶ PSC/PR/COMM.2(CCLXV), 10 March 2011. The AU High Level Committee’s mission to Libya was frustrated by the onset of the allied bombing campaign, however – which some Africans perceived as the

authorizing “all necessary measures” to end the bloodshed,⁸⁷ its African members voted in favor, even though the AU Peace and Security Council had previously rejected any foreign military intervention.⁸⁸ The onset of the NATO bombing campaign frustrated AU’s High Level Committee’s diplomatic mission, however, because the eminent personalities could not even get into the country – which again, left the AU with a bitter taste of marginalization and further exacerbated tensions between the AU and the Western powers .⁸⁹

African states’ support for Resolution 1970 was somewhat of a surprise, considering the AU’s previous anti-ICC posture. Whence this volte-face? One obvious reason is that Gaddafi was the prime orchestrator behind the AU’s anti-ICC campaign. With Gaddafi having fallen from grace – shunned even by his fellow Arab leaders⁹⁰ – the AU’s stance toward the ICC could be softening. Yet even though the AU decided not to stand in the way of justice, it did not actively promote it either. Its initial response to the outbreak of violence in Libya was rather tepid, as Rwanda’s President Kagame himself admitted: “From the African perspective there are important lessons to learn, the main one being that we as the African Union need to respond faster and more effectively to situations such as these”.⁹¹ Other commentators judged the AU even more harshly: “The circus of African inadequacy plays out even more glaringly in the case of Libya ... As the Butcher of Sirte bombed his country's oil refineries and hospitals, and sent snipers to shoot unarmed civilians in the streets, Africa needed a collective voice of outrage and movement towards stopping or getting help to stop the genocide in the making”.⁹²

ultimate snub (Yoweri Museveni, *Reflections on the Libyan Crisis*, THE HERALD, 24 March 2011, online at http://www.herald.co.zw/index.php?id=5717:reflections-on-the-libyan-crisis&option=com_content&catid=39:opinion&Itemid=132 [accessed on 3 April 2011].)

⁸⁷ S/RES/1973, 17 March 2011.

⁸⁸ PSC/PR/COMM.2(CCLXV), 10 March 2011.

⁸⁹ Charles Onyango-Obbo, *How AU Dropped the Ball in North Africa*, THE EAST AFRICAN, 28 March 2011.

⁹⁰ Richard Leiby and Muhammad Mansour, *Arab League Asks UN for No-Fly-Zone Over Libya*, WASHINGTON POST, 12 March 2011.

⁹¹ Paul Kagame, *Rwandans Know Why Gaddafi Must Be Stopped*, allAfrica.com, 24 March 2011, online at <http://allafrica.com/stories/201103240033.html> [accessed on 3 April 2011].

⁹² Mukhisa Kituyi, *Libya, Cote d'Ivoire Burns as Africa Runs in Circles*, allAfrica.com, online at <http://allafrica.com/stories/201103280161.html> [accessed on 1 April 2011].

Various African leaders tried to downplay the carnage – with Zimbabwe’s Mugabe predictably treating the Libyan uprising as merely a “domestic hiccup”⁹³ and Uganda’s Museveni defending Gaddafi as a “true nationalist”.⁹⁴ At a time where Gaddafi is slaughtering his own people with the entire world watching, Museveni’s defense of the Libyan dictator as a “true nationalist” will sound like the purest form of irony to most non-Africans; yet in Africa this kind of anti-Western reasoning apparently continues to strike a chord with many of the continent’s autocratic leaders. For a long time, many of these despots were rulers by the grace of Gaddafi, who generously funded their political ambitions. Unsurprisingly then, some of Gaddafi’s former vassals were rather reluctant to turn against their long-time benefactor.⁹⁵ It came as no surprise that at their most recent summit in Malabo in June 2011, AU member-states followed a by now well-established pattern of defiance, resolving not to cooperate with the ICC in the execution of the arrest warrant against Gaddafi and deciding to ask the UN Security Council for a deferral of the proceedings.⁹⁶ Also at Malabo, the AU decided to further explore possibilities for empowering the African Court of Justice and Human Rights to try atrocity crimes committed in Africa.⁹⁷ The latter proposal had emerged from the debate over the alleged abuse of the principle of universal jurisdiction and has recently received increasing attention in the context of the ICC’s controversial involvement in Africa.

With Gaddafi deposed, the African anti-ICC alliance has lost its central figure, prompting some observers to express hope for a more constructive relationship between the AU and the ICC: “Gaddafi has been a key protagonist in bringing the relationship to its current low ... While the AU has kept mum as the Security Council intervenes to demand accountability for the crimes in Libya, make no mistake: the apparent African support for the Libyan referral is because Gaddafi is increasingly yesterday’s man”.⁹⁸ African leaders are obviously beginning to feel the wind of change blowing across North

⁹³ *Ibid.*

⁹⁴ Museveni, *supra* note 87.

⁹⁵ Kituyi, *supra* note 93.

⁹⁶ African Union, Assembly/AU/Dec.296(XV), 27 July 2010.

⁹⁷ *Ibid.*

⁹⁸ MAX DU PLESSIS, UNSC REFERRAL OF LIBYA GIVES ICC THE OPPORTUNITY TO PROVE ITS WORTH (Institute for Security Studies 2011), online at http://www.iss.co.za/iss_today.php?ID=1243 [accessed on 2 April 2011].

Africa and the Middle East. Now that their own peoples are calling for “Western values” such as democracy and the rule of law, it becomes increasingly difficult for African governments to play the anti-colonial card. The new political leaders in Egypt and elsewhere are making a point of associating themselves with exactly those norms and institutions which their predecessors had rejected as biased and hegemonic. This “rule of law ripple effect”⁹⁹ manifested itself for instance in Tunisia’s recent accession to the Rome Statute. Egypt may be next. Egyptian MP Mohamed Sherdy, a leader of the Egyptian revolution, commended Tunisia's decision and urged his fellow Egyptians to become leaders “in promoting democracy, justice and the Rule of Law in the Arab world: While working to re-establish a democratic order in our society, with free and fair elections to be held within 2011, the transitional rulers of Egypt must accept the Rome Statute of the ICC to maintain the promise of the 'never-again' vis-à-vis persecution and widespread torture that have victimized our people for too long”, he declared.¹⁰⁰ In the next section I will inquire into the consequences of these recent developments for the relationship between the AU and the ICC, and for the constitutionalization of international law more generally.

3.4 Africa, the ICC, and the constitutionalization of international law

One rather persistent feature of the AU’s legal strategies in the cases described above is the organization’s seemingly schizophrenic oscillation between playing by established rules of the global constitutional game on the one hand, and trying to subvert these on the other hand. The AU’s policies affect the global constitutional architecture in two ways: On the one hand, the organization sought to influence the content of fundamental primary norms, as evidenced by its attempts to engage the international community in a discourse over the scope of head of state immunity of officials whose states are not parties to the Rome Statute. Even though the ICC ASP decided not to discuss this at the first ever ICC Review Conference last year, the item remains on the ASP agenda and will be further considered at the working group level.

⁹⁹ Parliamentarians for Global Action, *Parliamentarians for Global Action Welcomes the Intervention of the International Criminal Court (ICC) in Libya and the Decision of Tunisia to Accede to the Rome Statute of the ICC*, 1 March 2011, online at <http://www.pgaction.org/uploadedfiles/PGA%20Press%20Statement%20on%20Libya%20and%20Tunisia%20re%20ICC.pdf> [accessed on 3 April 2011].

¹⁰⁰ quoted in *Ibid.*

In addition to seeking to influence the interpretation of fundamental primary norms, the AU also targeted the secondary rules of international law, namely those norms regulating the allocation of authority for the maintenance of international peace and security. When the Security Council failed to respond positively to the African bid for deferring the Al-Bashir proceedings, the AU decided to target the Security Council's deferral powers *per se*, seeking to curtail the Council's prerogatives by endowing the UN General Assembly with a fallback responsibility should the Security Council fail to act within a specified time-frame. Moreover, the AU's strategies evince a desire to remove African matters from the purview of global institutions by conferring authority upon local, national, and/or regional institutions. In the case of Al-Bashir, the AUPD suggested the establishment of a hybrid court for Darfur, which would be a purely African matter with no involvement whatsoever of the international community at large. In the case of Kenya, the AU endorsed the usage of local justice mechanisms to try the Ocampo Six, despite the fact that before the ICC's intervention, Kenya had already failed twice at establishing such local tribunals, which makes the AU's invocation of the complementarity principle seem rather hypocritical. Finally, in the Gaddafi case, the AU called for empowering the African Court of Justice and Human Rights to try atrocity crimes, which, in the words of one AU official, could turn the AC into a "continental ICC for Africa".¹⁰¹

All of these initiatives show that in the controversies over Al-Bashir, the Ocampo Six, and Gaddafi there was much more at stake than the political fate of a number of powerful African political figures. Rather, the controversy brought to the fore fundamental disagreement over the shape of the global constitutional order, especially as regards the allocation of public authority in global governance. While initially disagreement revolved merely around questions of *policy*, that is, the UN Security Council's decisions to refer the Darfur situation to the ICC and its subsequent decision to ignore the AU's deferral requests in the case of Al-Bashir and the Ocampo Six, over time the focus of the debate shifted from questions of policy to the issue of how to constitute the global *polity* as a fair and equitable international order which would give

¹⁰¹ Interview with Admore Kambudzi, Secretary of the AU Peace and Security Council, 13 May 2011.

due consideration to the interests of the global South: “Today, from the perspective of many African leaders, the ICC’s involvement in Sudan has come to reflect their central concern about the UN – the skewed nature of power distribution within the UNSC and global politics. Because of the UNSC’s legitimacy deficit, many African and other developing countries see its work as ‘a cynical exercise of authority by great powers’, in particular, the five permanent members. The UNSC’s (dis)engagement with article 16 since the Rome Statute became operative will have exacerbated rather than softened those impressions”.¹⁰²

The AU’s grievances against the UN Security Council were exacerbated by the Council’s record of using its deferral powers rather selectively, thus reinforcing the impression of double standards: Before Al-Bashir, it had made use of its deferral powers twice, each time at the insistence of its most powerful member, the United States, which feared that its peacekeepers could become the subject of politicized charges before the ICC. In Resolution 1422, adopted shortly after the Rome Statute entered into force, the Council called upon the ICC not to commence or proceed with an investigation or prosecution in cases “involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omission related to a United Nations established or authorized operation”.¹⁰³ Reportedly the US had used the renewal of the mandate of the UN mission in Bosnia and Herzegovina as a bargaining chip to coerce the Council into compliance with its demands.¹⁰⁴ A year later, the deferral was renewed in Resolution 1487,¹⁰⁵ which many governments criticized for compromising the ICC’s credibility and independence.¹⁰⁶

To add insult to injury, the Security Council not only did not conform to the AU’s deferral requests, it even failed to seriously consider them. It seems that it was above all the Council’s failure to respect Africa’s “right to be heard” in the Al-Bashir matter which caused the AU to turn radical and obstruct the ICC’s work. Radicalization does not

¹⁰² Akande et al., *supra* note 54 at 6.

¹⁰³ S/RES/1422, 12 July 2002.

¹⁰⁴ Sean D. Murphy, *Efforts to Obtain Immunity from ICC for US Peacekeepers*, 96 AJIL, 725 (725-726) (2002).

¹⁰⁵ S/RES/1487, 23 June 2003.

¹⁰⁶ Akande et al., *supra* note 54, at 9.

necessarily imply the resort to military means - to my knowledge, none of the AU resolutions on the ICC contain an authorization to bomb The Hague, as was the case in the 2003 American Service-Members Protection Act; rather, radicalization here is used to capture how the thrust of the AU's legal strategies shifted from the policy- to the polity-dimension, from challenging the content of specific decisions to contesting the global constitutional framework as such. While the UN Security Council did not make much of an effort to engage with the AU's deferral requests in the Bashir and Kenya cases, the ASP at least feigned to take African concerns seriously by addressing the Art. 16 amendment proposal in informal consultations at a working group level, which could probably be interpreted as an attempt at cooptation. Yet it seems as if the AU will not be bought off that easily, as its second deferral request to the UN Security Council in the Kenya case, as well as its continuing resolve to push for a discussion of the amendment proposal at the upcoming ICC ASP in December 2011 show.

Now, what implications can we derive from the present case study for the study of global constitutionalism? In section II, I explained my understanding of the concept of constitution as laying down basic primary as well as secondary norms. The present case study has shown that the rules regulating the relationship between the different public authorities involved in global governance are being called into question, because they are viewed as serving the particularistic interests of the powerful. The ICC is not just an organization dedicated to the promotion of human rights (this in and of itself would not suffice to warrant talk about constitutionalization), but is simultaneously nested in the broader framework of global governance institutions whose interrelationships are regulated through various instruments, such as the UN Charter, the Rome Statute, and the Vienna Convention on the Law of Treaties. The distribution of competencies between these public authorities has been challenged by peripheral states, however, who view the global separation of powers as skewed and thus campaigned for a redistribution of competencies between the UN GA and the UN SC. This push for recalibrating the global separation of powers is not confined to the field of international criminal justice, however, but is part of a broader challenge to international law emanating from the African Union. In the field of collective security, for instance, Africa has developed a rather idiosyncratic interpretation of the rules governing the use of

force, first, when adopting the 1999 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, and later when drafting the AU Constitutive Act, which lays down the right of the Union to intervene in a member-state in the event of grave human rights abuses in Art. 4(h). The UN Charter, which posits that all UN members “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state” (Art. 2(4)) is obviously at odds with Art. 4(h) of the AU Act. What is more, the prohibition of the use of force codified in the UN Charter belongs to a sublime subset of *jus cogens* principles, principles which are widely viewed as the nucleus of an emerging global constitutional order. The prohibition of genocide, which underlies Art. 4(h) of the AU Act, on the other hand, equally falls into the category of peremptory international law. This begs the question whether the project of global constitutionalism is not doomed to fail if there is disagreement over the scope of these higher-order norms embodied in *jus cogens*, i.e. if at the apex of the international legal order there are norms that are in seemingly irresolvable conflict with each other? This again raises the issue of collision rules, and here again, we see the AU departing from traditional norms regulating the relationship between different layers of the law. The norms that are usually adduced for coping with regime collisions are Art. 103 of the UN Charter, which establishes the primacy of the UN Charter over other international treaties, and Art. 25, which stipulates that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. These two provisions combined give the Security Council “crude supranational power over member states”.¹⁰⁷ According to Art. 103 of the Charter, Art. 4(h) of the AU Act would thus be nil and void, because the obligations that states have under the UN Charter prevail over any other obligations that states may have under other legal regimes. The AU, by contrast, has largely ignored these collision rules and has instead adduced norms like local ownership and subsidiarity to justify its circumvention of the law.¹⁰⁸ While the AU’s desire to come up with African solutions to

¹⁰⁷ NIGEL D. WHITE, HIERARCHY IN ORGANISATIONS: REGIONAL BODIES AND THE UNITED NATIONS 135, 142, *in* TRANSNATIONAL CONSTITUTIONALISM. INTERNATIONAL AND EUROPEAN PERSPECTIVES (Nicholas Tsagourias ed. 2007).

¹⁰⁸ *See*, for example, the so-called Ezulwini consensus, which allows for a pragmatic response to continental crises but nonetheless violates the black letter law of the UN Charter: African Union, The

African problems has frequently been welcomed by the international community on *policy* grounds, the fact remains that from a legal perspective the AU's disregard for universally accepted rules poses a challenge to the emerging global constitution. Moreover, while in the field of conflict prevention African exceptionalism has frequently been accepted for reasons of political convenience (witness, for instance, the international community's lenient reaction to ECOWAS' unilateral interventions in Liberia and Sierra Leone in the 1990s), such pragmatism might ultimately backfire in situations like the ones discussed in this case study, when African states resolved not to carry out UN Security Council's decisions on the arrest and surrender of Al-Bashir and Gaddafi, despite their obligations to do so under Art. 25 of the UN Charter. Here again the AU invoked the notion of local ownership and suggested a) the establishment of an African court for Darfur, and b) an expansion of the mandate of the African Court of Justice and Human Rights which the AU hopes to turn into a continental ICC for Africa in order to withdraw African matters from the purview of global institutions. Considering the AU's parallel push for renegotiating the global separation of powers between the SC and the GA (the Art. 16 debate triggered by the Al-Bashir indictment was mirrored by discussions at Kampala over the crime of aggression and the role of the UNSC or the GA as jurisdictional filters), the AU's challenge seems like more than just merely sporadic expressions of discontent with isolated features of global governance institutions. Africa is trying to make its voice heard in global governance, seeking to reconstitute the global polity as a normative order more responsive to the global South. The establishment of the African Union Commission on International Law (AUCIL) is another indicator of this emerging trend in African politics. Africa is the only region in the world to have established such a regional international law commission. According to one AUCIL member, the primary rationale behind its establishment was to ensure that the African approach to international law, that African peculiarities would be taken into account globally, to make sure that Africa's voice is heard.¹⁰⁹

Common African Position on the Proposed Reform of the United Nations: The "Ezulwini Consensus", Ext/EX.CL/2 (VII), 7-8 March 2005.

¹⁰⁹ Interview with Lilian B. Mahiri-Zaja, General Rapporteur, African Union Commission on International Law, 1 June 2011.

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Now, even if one concedes that the present situation is more than merely a political hiccup in response to a slew of controversial decisions taken by the UN SC and the ICC, the question remains: So what? After all, Africa is not widely seen as an important player in world politics. However, we should care because a constitutionalizing global order which makes increasingly intrusive demands upon nation-states crucially depends upon shared perceptions of legitimacy. Put differently, if global constitutionalism is to succeed, it must be perceived as more than merely a cooptation device enabling the powerful to pursue their particularistic interests more effectively. And while there is nothing novel or unprecedented about Africa's push for a more equitable international order (in fact, few things in world history are), the international community would be well advised to engage seriously with African grievances towards the institutions of global governance. Even though African reform proposals are unlikely to garner sufficient support internationally to alter the landscape of global governance institutions and curtail Western privileges in these institutions, Africa's *obstructionist* potential for undermining the operation of the system of international criminal justice is immense. After all, African countries constitute the largest regional bloc in the ICC ASP and all cases currently before the ICC involve African country situations. It was only during a recent trip to Africa that I realized how strained the relationship between Africa and the ICC had become. A high-ranking African diplomat told me that African opposition hardened only after the ICC Prosecutor had visited Africa several times in the context of the various ongoing investigations and was overheard saying that he would go after the "African monkeys". "Then we said no, we are not letting him act like that! Who do you think you are white man, coming to Africa and calling us monkeys?" the diplomat recalled.¹¹⁰ Another African official told me that "as long as African cases before the ICC keep multiplying, there are no grounds for reconciliation", and that the relationship between Africa and the ICC was unlikely to improve in the medium-term.¹¹¹ A grievance that was expressed by many African interviewees was that the ICC singularly targets Africans because they are easy prey and that many other country situations around the world that would deserve to be before the ICC will never make it onto the Court's docket list because of power politics, and because the system of international criminal justice

¹¹⁰ Confidential interview, 13 May 2011 [transcript on file with author].

¹¹¹ Interview with Admore Kambudzi, Secretary of the AU Peace and Security Council, 13 May 2011.

explicitly provides for such politicization of the ICC by granting the UNSC certain prerogatives for the deferral and suspension of situations before the Court. One African policy official criticized that “the Vienna Convention on the Law of Treaties stipulates that parties can only be bound by a treaty which they have willingly signed and ratified. I find the codification of those matters in the Rome Statute wrong. For instance, I find the whole issue of Security Council referrals to the ICC very mind-boggling. Some members of the UNSC are not even members of the ICC, so how can they make a decision on applying a treaty that they are not even bound by?”¹¹² This is yet another indicator of the contestedness of the distribution of public authority in the global realm. Another general impression I gleaned from the interviews was that it was above all the disregard displayed by the UN SC and the ICC for African concerns which had brought the relationship to the current low. The ICC ASP’s decision to set up a working group to deal with the African group’s reform proposals, for instance, was seen as an all-too-obvious attempt at cooptation, as a “polite way of letting the African proposal die”.¹¹³ As a result, we now have a situation where truth-seeking discourses are no longer possible, where positions have hardened and the African side continues to retaliate by obstructing the course of justice – a situation which can best be described as deliberative closure, and which is exactly not what the proponents of global constitutionalism had in mind.

But then again, constitutionalism is a double-edged sword. While the ICC controversy ended in deliberative closure in the relationship between the AU and the ICC, it might well lead to increased activism at the sub-state level. In particular the Kenyan case has shown in order to get a comprehensive picture of the political dynamics underlying the constitutionalization of international law, one must open the black box of the state and take into account the preferences of African citizens, whose views on the ICC do not necessarily square with those held by their elites. The irony is that those governments who perceive themselves as counter-hegemonic agents engaged in a struggle for a more equitable international order are themselves exercising domination over their own peoples. Usage of the adjectives “subaltern” or “counter-hegemonic” is rather widespread in the self-characterization of Third World governments speaking out

¹¹² Confidential interview, 13 May 2011 [transcript on file with author].

¹¹³ Confidential interview, 13 May 2011 [transcript on file with author].

against Western hegemony and also quite pervasive in the writings of postcolonial theorists. Ayoob, for instance, writes that “Third World states form the quintessential subaltern element within the society of states given their relative powerlessness and the fact that they constitute a large majority in the international system”.¹¹⁴ While it is certainly true that on an inter-state level, African governments have frequently been dominated by their Western counterparts, in relation with their own constituencies African governments become agents of domination. Ironically, subaltern African citizens then tend to turn to the same global governance institutions which their governments had previously denounced as hegemonic - in Kenya, for instance, domestic constituencies overwhelmingly endorsed the ICC process. Whether or not this is a general trend remains to be seen, because representative data from other countries is difficult to come by. Foreign aid organizations working in Africa point out that most ordinary Africans are simply unaware of the ICC’s existence, and that strong civil society organizations who lobby for the Court exist only in a handful of African countries.¹¹⁵ Where such organizations exist, however, they support the work of the Court.¹¹⁶ The resulting picture is thus complex. While the ICC and other institutional pillars of the global normative order are without a doubt the product of Western hegemony, the values they enshrine apparently resonate with people – if not governments – across the globe, and therefore at least partially redeem the constitutionalist promise.

IV. Conclusion

Each universal, Laclau writes, is a “battleground on which the multitude of particular contents fight for hegemony”.¹¹⁷ The global constitutional architecture is built on such universals, which are constantly challenged by actors from the periphery, however. In order to understand the pace and direction of the constitutionalization of international

¹¹⁴ MOHAMMED AYOOB, SUBALTERN REALISM: INTERNATIONAL RELATIONS THEORY MEETS THE THIRD WORLD, *in* INTERNATIONAL RELATIONS THEORY AND THE THIRD WORLD, 31, 45 (Stephanie G Neuman ed. 1998).

¹¹⁵ Interview with Gerhard Mai, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Sector Manager, Capacity Development for the AU Peace and Security Council, 12 May 2011.

¹¹⁶ *See, e.g.*, International Refugee Rights Initiative, African NGOs Speak Out on International Justice, May 2009, online at <http://www.refugee-rights.org/Publications/RRN/2009/May/V5.I3.AfricanNGOsSpeakOut.html> [accessed 1 September 2011].

¹¹⁷ ERNESTO LACLAU, IDENTITY AND HEGEMONY, *in* CONTINGENCY, HEGEMONY, UNIVERSALITY. CONTEMPORARY DIALOGUES ON THE LEFT, 44, 59 (Judith Butler, Ernesto Laclau and Slavoj Zizek, eds. 2000).

law then, we need to explore the thrust of these challenges from the global periphery. In this paper I argued that in responding to contestation from the global periphery, the global constitutional architecture faces two basic options: Transforming its fundamental norms in order to make them more attuned to the preferences and traditions of the global South, or coopting its challengers in order to neutralize dissent, which would leave the basic rules of the constitutional game unaltered. As the empirical cases analyzed in this paper show, cooptation – which from the system’s perspective is obviously the less costly option - was clearly the most prominent strategy. From the perspective of the challenger in turn we see a mix of strategies: Initially, the AU played by the rules of the game and sought to make use of the provisions of the Rome Statute to shield Al-Bashir from prosecution. When, however, the system did not respond to its grievances, i.e. the UN Security Council did not seriously engage with the AU’s request to defer the proceedings against Al-Bashir, the AU reportedly even contemplated withdrawal from the playing field (that is, the Rome Statute). Ultimately, however, the AU decided that its goals would be better served by staying in the game and trying to transform the rules from within. At the same time, it used its leverage as the ICC ASP’s biggest regional bloc to obstruct the system’s operation by refusing to cooperate in the arrest and surrender of Al-Bashir. The system reacted to this obstructionism with an attempt at cooptation by engaging in informal consultations over the AU’s concerns. Yet the AU continues to defy the ICC and the UN Security Council, thus frustrating the system’s attempt at cooptation. However, while the Sudan and Kenya investigations have put a serious strain on the relationship between the AU and the ICC, the political dynamics are currently changing in subtle but nonetheless perceptible ways. The Kenya investigations show that African governments’ attempts to rally their citizens around the anti-colonial flag are increasingly dismissed by the latter as brazen attempts to obstruct the course of international justice. Simply put, many ordinary African citizens don’t buy the neo-colonialist argument anymore. Opinion polls show that most Kenyans, while maintaining a preference for local justice mechanisms, understand that a local approach is not always feasible and that in cases of governmental unwillingness to prosecute grave human rights violations, the ICC provides a legitimate fallback option. Moreover, even among African political elites there are signs of fissures in the anti-ICC front, with the leading agitator Muammar Gaddafi having fallen from grace recently, and two major

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players in North Africa – Tunisia and Egypt - rethinking their attitude towards the court. Thus, the AU's criticism of the ICC as a reflection of the hegemonic nature of global constitutionalism – although not entirely unfounded – is increasingly out of touch with the will of the African peoples.

The framework developed in this paper represents an admittedly rather basic conceptual grid for describing the interaction between peripheral agents and constitutional structures. It therefore should be seen as merely a preliminary sketch which needs further elaboration. It might turn out that the reality of global constitutionalism is much more complex and that the framework used here is located too high up on the ladder of abstraction. This in turn underlines the necessity to conduct future research on this nexus, with cross-regional comparisons as well as comparisons across issue-areas suggesting themselves as promising avenues for elucidating how the challenge from the periphery affects the shape of the global constitutional order.