A LEGAL ANALYSIS OF THE DOMESTIC ENFORCEABILITY OF INTERNATIONAL HUMAN RIGHTS LAW: THE RULE OF LAW IMPERATIVE

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Introduction

The relationship between the rule of law and international human rights law is a somewhat novel concept in legal philosophy and human rights discourse. The majority of scholars and human rights advocates have examined international human rights law as an inter-nation concept which warrants international enforcement methods. This paper argues that the rule of law is a condition *sine qua non* for the domestic enforcement of international human rights conventions. This means that the existence of the rule of law in the country where the international convention, or the international decision, applies is an important pre-condition for the successful enforcement of the convention principles within that country. By contrast, if the rule of law is absent in the member-state, there is no guarantee that international norms will be upheld within that country.

To illustrate this argument, this paper relies on two case samples drawn from Cameroon, a country located in Central Africa. Cameroon has been criticized by Amnesty International and other human rights bodies for frequent violations of the human rights of citizens by government officials. Human rights violations in Cameroon are triggered by the breakdown in the rule of law and the absence of an independent judiciary to sanction government officials who perpetuate these violations. Thus, although Cameroon has ratified many international conventions, the breakdown in the rule of law in this country has made it impossible to respect human rights guaranteed in these conventions, as well as in decisions rendered by the United Nations Human Rights Committee.

The case of Cameroon suggests that effective implementation of international human rights principles must be backed by an effective domestic legal system. To effectively enforce international human rights conventions, the goal of the international community therefore must be to ensure that the rule of law is respected within specific countries. The difficulty is how to achieve the rule of law in a context where breaches of human rights are systemic.

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The Scope of the Rule of Law

The "rule of law" concept has been the subject of much academic analysis and interpretations advanced by scholars who endorse seemingly conflicting perspectives. The assertion that the rule of law "has many images, and it has many spokesmen"[1] describes the intricacy that is inherent in the concept. Joseph Raz has also highlighted the broadness of the rule of law, stating that "if the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy."[2] This uncertainty in the scope of the rule of law renders the concept one of open-texture,[3] flexible parameters and limitless subjectivity.

In his seminal work, *The Law of the Constitution*, Dicey clarifies the meaning of the concept. He begins by acknowledging that laws are essential not only for the orderly functioning of society but for restraining the arbitrary actions of people in positions of authority, especially those who hold political power. He was concerned about despotic governments which are not deterred by law. Dicey's conception of the rule of law is the embodiment of three kindred principles, namely:

> [I]n the first place, the absolute supremacy or predominance of regular law as opposed to the influences of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land...
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> In the second place ... not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

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[1]L. Kutner, "World Habeas Corpus and the Rule of Law" in L. Kutner, ed., *The Human Right to Individual Freedom: A Symposium on World Habeas Corpus* (Florida: University of Miami Press, 1970) at 25. Radin agrees that the concept is ambiguous and deeply contested. See M. Radin, "Reconsidering the Rule of Law" (1989) 69 Boston U.L. Rev. 781.

[2]J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 195-6. If law has the power to control human actions and establish security, justice, freedom and other virtues, then it is doing a "good thing" and deserves to be labeled "the good law." However, describing the rule of law as "the good law" places the rule of law within the parameters of very broad, subjective and conflicting interpretations. Law may meet its procedural requirements, yet not fulfil the desired virtues and purpose described above. This begs the question "what is the good law"? To answer this question, Raz reasonably concludes, is to "propound a complete social philosophy." This is because the "good law" may be influenced by numerous social factors and circumstances. Some such factors include the law-maker's interests, race, gender, class and the interests of those who will be affected by the law. Therefore, in order to determine and define "the good law," it is important to understand these broader social circumstances. Hence, interpreting the rule of law as "good law" is a ground for conflicting positions.

[3]S. De Smith, *Constitutional and Administrative Law* (Harmondsworth: Penguin Books, 1985) at 30.

> Lastly, the laws of the Constitution are not the source but the consequences of the rights of individuals as defined and enforced by the courts.[4]

In the above quote, Dicey is referring to the supremacy of the law as well as the supremacy of the courts. This means that the actions of members of society, especially those in government, are subject to the law and to the courts. Subjecting governmental actions to the conditions prescribed by law will ensure procedurality, and provide members of society an equal opportunity to seek redress for the violation of their human rights before an objective and apolitical court of law. Judicial procedurality is an entrenched legal right which guarantees objectivity and fairness in judicial decisions. However, to ensure an objective judicial process, the courts must be independent of the actions of government or other potentially coercive social force. The essence of the rule of law, therefore, lies in judicial independence. If citizens are to pursue, attain and enforce their rights against the government through the law, it follows that the judiciary must be completely detached from the executive. Put differently:

> The power of the law, and of the judiciary, is in its independence. The power of the law and of those who administer it is in the very fact that they are not competing with the more partisan powers of the executive and even the legislature. Such independence of the "judicial department" may indeed be regarded as the very definition of the "rule of law." If the law and the judiciary come under government control, they cease to be necessary as such; if courts become a party of political struggles, they merely simulate parliament and parties and lose their function. Either way, the partisan administration of law is in fact the perversion of law, and the denial of the rule of law.[5]

Judicial independence is therefore the foundation of the rule of law. It assures citizens of judges' capacity to resolve disputes by the impartial application of authoritative general rules. By assigning institutional authority to trained judges, judicial decision-making escapes the scrutiny of the executive branch of government. Vulnerable citizens can thus feel protected from the powerful influence of state authority.

The role of the judge is to ensure the rights of citizens but the rights of citizens must be institutional before they can receive judicial notice. "Rights" differ in terms of their significance in law. For example, "human rights" and "institutional rights" are not equally weighted when it comes to legal protection and enforcement. The proceeding paragraphs explore this issue.

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[4]A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Holmes Beach, FL: Gaunt, Inc., 1996) at 193. Also see A. Goodhart, "The Rule of Law and Absolute Sovereignty" (1958) 106 U. Penn. L. Rev. 943.

[5]R. Dahrendorf, "A Confusion of Powers: Politics and the Rule of Law" (1977) Modern L. Rev. 9. For a more juridical perspective on judicial independence, see A. Lamer, "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 U.N.B.L.J. 3.

A Critique of the Legal Foundation of Human Rights Law

The currents of liberalism and humanism in the nineteenth century established, as essential attributes of modern progress, the existence and growth of freedom of thought and expression, the full development of self-conscious personality and the evolution of individual rights founded upon a high conception of the dignity and fundamental human rights of the person.[6] This prevalent ideal of liberty and human dignity ushered in an international human rights movement which developed after the events of the Second World War, during which various forms of human disasters were rampant. The human rights doctrine was the initiative of a group of nations[7] that were concerned about the degradation of the human condition resulting from the war and committed themselves to bringing an end to the problem.[8] They brought the development of human rights to the forefront of political and legal action and challenged both domestic governments and the international community to hold human rights issues in high regard. The United Nations subsequently produced a number of resolutions, treaties, conventions and laws which gave special protection to human rights.[9]

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[6]In the United States Supreme Court case of *Ware* v. *Hylton* [1796] 3 U.S. (3 Dall.) 199 at 227, it was recognized that international human rights law is human law, "established by the general consent of mankind." Also, see the following texts which treat international human rights law as a generally accepted belief in the sanctity of all human beings. W.K. Ferguson, *The Renaissance in Historical Thought: Five Centuries of Interpretation* (Boston: Houghton Mifflin Co., 1948) at 182; T.O. Elias, *New Horizons in International Law*, 2d ed. (The Hague: Martinus Nijhoff, 1992) at 89; M. McDougal, H. Lasswell & I. Vlasic, *Law and Public Order in Space* (New Haven: Yale University Press, 1963) at 116; L. Chen, *An Introduction to Contemporary International Law: A Policy Oriented Perspective* (New Haven: Yale University Press, 1989) at 361; H. Lauterpacht, *International Law and Human Rights* (Hamden, Conn: Archon Books, 1968) at 120.

[7]The word "nation" refers to a relevant group of people and differs from the "state," a more imaginary concept. See J. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1955) at 118.

[8]Thus, it has been said that international law was "generated by ... beliefs of the civilized people of the world." M. Frankel & E. Saideman, *Out of the Shadows of Night: The Struggle for International Human Rights* (New York: St. Martin's Press, 1989) at 37. Blackstone also noted that "the law of nations is a system of rules ... established by universal consent among the civilized inhabitants of the world" and "all the people." See W. Blackstone, *Commentaries on the Laws of England* (London: Printed for J. Murray *et al*, 1765) at 66. Historically, the phrase "civilized people" was used to describe white people who inhabit the Western Hemisphere. But Third World scholars argue that human rights did not originate in Western societies, that human rights existed in traditional African societies as well. These scholars believe that human rights practices were obvious in the people's sense of community and in their interaction with one another as human beings. See, generally, the articles in A. Pollis, & P. Schwab, eds., *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1980). Also see Y. Khushalani, "Human Rights in Asia and Africa" in F.E. Snyder & S. Sathirathai, eds., *Third World Attitudes Toward International Law: An Introduction* (The Hague: Martinus Nijhoff, 1987) at 321; J. Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" in Snyder & Sathirathai, *ibid.*, at 341.

[9]But the scope of what international law really is, and what the exact rules are, has led to numerous speculations. Basically, according to Bilder, "a claim is an international human right if the United Nations General Assembly says it is." R. Bilder, "Rethinking International Human Rights: Some Basic Questions" (1969) 2 Human Rights J. 557 at 559. Marks has offered a deeper insight into this issue, stating that international human rights is a combination of "rules of international law concerning human rights according to the law-creating process as defined by international law." S.P. Marks, "Emerging Human Rights: A New

The notion of human rights, therefore, rests on the assumption of the natural right of all men and women to equality of concern and respect, a right they possess by virtue of birth.[10] In this regard, one primary justification underlies human rights provisions – the respect for the dignity of the person.[11] This accounts for the recurrence of the term "dignity" in international human rights declarations and covenants.[12]

Since their development after the Second World War, human rights norms have served as moral lessons about the integrity of the human being and the necessity of respecting that integrity. These norms impose an ethical obligation upon the human community to respect the humanity of each individual. However, a moral commitment

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Generation for the 1980s?" in R. Falk, F. Kratochwil, & S.H. Mendlovitz, eds., *International Law: A Contemporary Perspective* (London: Westview Press, 1985) at 501.

[10]The natural law theory of international law was first advanced by the Dutch jurist, theologian and philosopher, Hugo Grotius (1583-1645), who is believed to be the founder of the law of nations. His idea of the law of nature was based on reason and on the nature of the human being as a rational and social entity. Thus, to him, the law of nature amounted to:

> [a] dictate of right reason which points out that a given act, because of its opposition to or conformity with man's rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the author of nature.

See V.D. Degan, *Sources of International Law* (The Hague: Martinus Nijhoff, 1997) at 26.

[11]Dignity refers to the respect of the humanity of the human being and the respect for the conditions to fulfil his/her autonomy. See H.H. Cohn, "On the Meaning of Human Dignity" (1983) Israel Yearbook of Human Rights 228.

[12]See for example, Preamble 2 of the *United Nations Charter* of June 26, 1945 and Preamble 5 of the *Universal Declaration of Human Rights* of Dec. 10, 1948, which states:

> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the *dignity* and worth of the human person and in the equal right of men and women and have determined to promote social progress and better standard of life in larger freedom.

The Preamble of the UDHR stipulates, further, that:

> recognition of the inherent *dignity* and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Art. 1: "All humans are born equal in *dignity* and rights."

Art. 22: "Everyone is entitled to the rights indispensable for his *dignity* and the free development of his personality."

Art. 23: "The right to just remuneration ensuring for himself and his family an existence worth of human *dignity*."
Also, Preamble 2 of both the *International Covenant on Civil and Political Rights* and the *Covenant on Economic, Social and Cultural Rights* (both adopted on December 16, 1966) stipulate that "rights derive from the inherent *dignity* of the human person." Preamble 8 of the *African Charter on Human and People's Rights* (1981) addresses the struggle of the African people for *dignity* and the *Charter* guarantees every individual the right to respect for the *dignity* inherent in the human being *(Art. 5)*.

to the human rights of persons does not impose a duty recognizable in law. Hence, there is a string of questions that lingers around the substance of international human rights norms; these questions focus on the *legal* significance of the notion of "human rights." For instance, are human rights legally enforceable? How important is the difference between human rights and rights in law? What is the relationship between the rule of law and the enforcement of international human rights law?

In the past few decades, there has been a proliferation of literature on human rights, as well as widespread concerns about the declining state of human rights in the international community. Despite the increasing attention given to human rights, especially in developing countries plagued by illegality and arbitrary government rule, there seems to be little improvement on the human rights situation in many such countries. International human rights conventions, in and of themselves, have not succeeded in providing a deep-rooted solution to persistent human rights abuses. This begs the question: why has there been a failure in the enforcement of international human rights norms? To answer this question, as well as the preceding set of questions, it is important to address the legal foundation of international human rights law and whether that foundation has the capacity to effectively place a legal *duty* on states to abide by its provisions.

The central problem with international human rights doctrine is that it does not have a legal mandate enforceable in law. In effect, international human rights norms have yet to achieve the status of *jus cogens*.[13] As human beings, we acknowledge the importance of respecting the dignity of one another, but the failure of many governments to actually respect that dignity is compelling evidence that international human rights laws have not successfully obliged governments to abide by human rights principles. In addition, the practice of making reservations to international human rights treaties indicates that states do not consider these treaties as constituting obligations to which they are formally bound.[14] Notwithstanding the enforcement difficulties, obliging stipulations have been incorporated into the terms of some international human rights treaties. For example, the objective and purpose of the *Covenant on Civil and Political Rights* is drafted in these terms:

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[13]Such a status will preclude the possibility of declining to apply a particular right when ratifying a particular human rights treaty because there will be a pre-existing, non-negotiable obligation to do so. See J. McBride, "Reservations and the Capacity to Implement Human Rights Treaties" in J.P. Gardner, ed., *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (London: British Institute of International and Comparative Law, 1997) at 120.

[14]C. Vega, "The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?" (1994) 11 Harv. Blackletter L.J. 37 at 43. See, for example, Djibouti's reservation with respect to the *Convention on the Rights of the Child*. It stipulates that Djibouti does not "consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values." Cited in McBride, *supra* note 13 at 175. For a wide range of these reservations, see generally C. Chinkin, "Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women" in Gardner, *ibid.* at 64-84.

> To create *legally binding* standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those states which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.[15]

Similarly, the objective of the *Covenant on Economic, Social and Cultural Rights* states:

> a *minimum core obligation* to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party... . If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'etre*.[16]

It is true that these international human rights treaties embody universal standards of human dignity and have made attempts to oblige states to respect guaranteed human rights but these standards are still subordinated to the freedom of contract of individual states.[17] The age-old principle of domestic sovereignty[18] has been a thorn in the flesh of international human rights conventions.[19] In fact:

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[15]Cited in McBride, *supra* note 13 at 164 [emphasis added].

[16]*Ibid.* at 165 [emphasis added].

[17]In fact, the only reason some developing nations comply is so as to appear democratic and collect financial aid from donor countries. Others, reluctant to appear antipathic to human rights values, may commit themselves to something which they are in no position to deliver.

[18]The principle of sovereignty developed as an instrument for the assertion of royal authority in the construction of modern territorial states. The creation of viable governments which could affirm "sovereignty" over territory and population was necessary to prevent social disorder and instability. Hence, the essence was not the form of government but that the government should have the capacity to provide order through sovereignty. This historic transition from medieval society to the modern world was marked by the *Settlement of Westphalia* which, in 1648, ended the Thirty Years' War and opened the quest for independent states to pursue their interest without intervening in the affairs of other member states of the international community. See G.M. Lyons & M. Mastanduno, "Introduction: International Intervention, State Sovereignty, and the Future of International Society" in G.M. Lyons & M. Mastanduno, eds., *Beyond Westphalia?: State Sovereignty and International Intervention* (Baltimore: The John Hopkins University Press, 1995) at 5; T. Meron, "Common Rights of Mankind in Gentili, Grotius, and Suarez" (1991) 85:99 American J. Int'l L. 110; R.J. Vincent, *Nonintervention and International Order* (Princeton: Princeton University Press, 1974); L. Gross, "The Peace of Westphalia, 1648-1948" (1948) 42 AJIL 20.

[19]The essence of sovereignty requires that certain matters, in particular matters broadly referred to as domestic policy, be left outside the reach of international law and that these matters should be left to the state's own sovereign judgement. Thus, the constitutional, political and social organization of a state, as well as the decision to implement international human rights conventions, is essentially a matter coming under the sovereignty of the state, that is, within its domestic jurisdiction. D. Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (The Hague: Martinus Nijhoff, 1970) at 186. Other authors have written extensively on the concept of sovereignty. See, for example, M. Sellers, *The New World Order: Sovereign Human Rights and the Self-Determination of Peoples* (Oxford: Berg, 1996); L. Henkin, *International Law Politics and Values* (The Hague: Martinus Nijhoff, 1995), and M. Martinez, *National Sovereignty and International Organizations* (The Hague: Klumer, 1996).

> A state's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligations of international law. Every state possesses a fundamental right to choose and implement its own political, economic, and social systems.[20]

This principle of the doctrine of sovereignty curbs the effective enforcement of international human rights laws. Furthermore, international human rights laws do not impose legally enforceable obligations on nations.[21] Relying strongly on ethical obligations, human rights are merely a promise, not a guarantee, of justice still to come. They do not create rights enforceable in national courts.[22] As one analyst puts it:

> Human rights are a special class of rights, the rights one has by virtue of being a human being. Human rights are predicated on the recognition of the intrinsic value and worth of all human beings. As such, human rights are considered universal, vested equally in all persons regardless of their gender, race, nationality, economic status, or social position. Like other moral rights, human rights exist independently of legal recognition. Human rights are also characterized as inalienable or not separable from right-holders. *While human rights are high priority norms, they do not confer absolute claims.*[23]

If international human rights "do not confer absolute claims" then what kinds of rights do confer such claims? Are international human rights legally enforceable rights within domestic courts? To answer this critical question, there is a need to revisit the core issues in the debate on rights, and examine whence *rights* originate and on whom they impose a legal *duty*.

A Dworkinian Interpretation of "Enforceable" Rights

Rights in political theory are justified claims. A right is an entitlement based on the laws of the state. Rights create a correlative obligation to secure or not to interfere with the enjoyment of one's entitled rights. Thus, rights claims entail an obligation to supply and fulfill the rights of the claimants. Human rights claims, on the other hand, unless otherwise legally enforced, do not define who is obligated to enforce the stipulated

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[20]F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: TransnationalPublishers, Inc, 1997) at 282.

[21]Leary argues that since International Human Rights Laws are not enforceable, we can at least store them as basic knowledge about democratic rights and fundamental freedoms. See V. Leary & S. Wickremasinghe, *An Introductory Guide to Human Rights Law and Humanitarian Law* (Colombo: The Nasden Centre, 1995) at 1.

[22]A. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford: Clarendon Press, 1983) at 20-22.

[23]A.R. Chapman, "Reintegrating Rights and Responsibilities: Towards a New Human Rights Paradigm" in K. Hunter and T. Mack, eds., *International Rights and Responsibilities for the Future* (Connecticut: Praeger, 1996) at 5 [emphasis added].

rights.[24] For example, international human rights laws are not enforceable unless there is a commitment by national governments to implement and uphold the rights specified in the international human rights documents. For rights to be valid, they must be grounded in obligations, responsibilities and duties. Rights entrench the protection that law provides to the weaker members of society. The entrenched right is the only tool that weaker members of society have to protect themselves from those who hold political and economic power in that society.[25] Thus, the rights incorporated in law enjoy a kind of fundamental protection that not even an executive action or statute can remove. Classical rights theory presents the notion of a right as protecting the intrinsic dignity and worth of the individual[26] from political and legal abuse.[27] Consequently, a right is followed by a correlative *duty* on the part of the state and other persons to uphold that right.[28] Aside from the duty owed, the powers of government are limited by this fundamental right of persons, which right must be enjoyed freely without intervention from the sovereign state.[29]

An erudite scholar, Dworkin carefully outlines the sources of rights in society and the important role of the judge in applying, upholding and promoting those rights. He confesses, first, that rights must be *institutional* as opposed to background rights and that it is the institutionalized rights that should be the guiding framework for a judicial decision. He states:

> Any adequate theory will distinguish, for example, between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution.[30]

To speak of institutional rights is to present rights not merely as an instrument to define and influence discretional government policies (as in human rights) but one which is grounded in, and justified by, valid legal and constitutional ideals that must be

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[24]J.W. Nickel, "How Human Rights Generate Duties to Protect and Provide" (1993) 15 Human Rights Q. 77.

[25]D. Nolan, "A Right To Meritorious Treatment" in C. Gearty and A. Tomkins, eds., *Understanding Human Rights* (London: Mansel, 1996) at 260.

[26]"Dignity and worth" are not the only advantages that result from the respect of rights. It has been asserted that "in Rawls' version of liberalism the question of satisfying social and economic needs arises only after the basic liberal rights have been secured." D. Hollenbach, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition* (New York: Paulist Press, 1979) at 17.

[27]M. Cranston, *What are Human Rights?* (London: The Bodley Head, 1973) at 67.

[28]N. MacCormick, *Legal Right and Social Democracy* (Oxford: Clarendon Press, 1982). Also see W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W.W. Cook, ed., (New Haven, Conn: Yale University Press, 1964) at 6.

[29]M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991) at 20-22.

[30]R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 93.

applied by the courts (as in rights in law). Consequently, for Dworkin, the rights which affect a particular political or judicial decision must be *concrete*. Hence, judges must apply rights which, from the outset, are already concrete and institutional. Dworkin's entire architecture of rights is ultimately reducible to, and justified by, a fundamental right that should be enjoyed by every member of the community. It is a foundational right against the government to be treated as an equal and to be free from discrimination. He proceeds:

> our intuitions about justice presuppose not only that people have rights but that one right among these is fundamental and even axiomatic. This most fundamental of rights is a distinct conception of the *right to equality*, which I call the right to equal concern and respect.[31]

In this regard, fundamental rights have far-reaching implications.[32] They result not only in the respect for the worth of persons but extend to the attainment of equality. This fundamental right is the key to actual claims against the government and the protections that a citizen is entitled to in a democracy. There can be no meaningful right to equality or freedom from government interference if rights are not grounded in law.[33] Fundamental rights also tend to be regarded as an expression of the democratic organization of society, the recognition of equality before the law and the principle of non-discrimination.[34] The meaning that Dworkin intends for his fundamental rights theory is also procedural in nature:

> This is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about *how* these goods and opportunities are to be distributed.[35]

To do service to justice, citizens of democratic communities need their civil rights and liberties rigorously protected. Dworkin suggests that we need rights, as a distinct element in legal theory, especially when a political decision injures some people or if such rights will make the community as a whole better off.[36] In addition, we need rights as a distinct element in political theory whenever we find it important to recognize

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[31] *Ibid.* "Introduction" at xii [emphasis added]. When discussing the rule of law and rights in the context of this quote, one must ask the question "whose intuition?" People's intuitions with regard to the question of rights will vary depending on whether they are government officials, judges, legislators, victims or the socially disadvantaged. The word intuition cannot be used as a blanket term of reference.

[32] A. Sarat and T. Kearns, "Editorial Introduction" in Sarat and Kearns, eds., *Legal Rights: Historical and Philosophical Perspectives* (Ann Arbor: The University of Michigan Press, 1996) at 4.

[33] Dworkin, *supra* note 30 at 267.

[34] D. Lloyd, *The Idea of Law* (London: Penguin Books, 1991) at 142.

[35] Dworkin, *supra* note 30 at 273 [emphasis added].

[36] R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 371.

certain claims of members of a class or group, regardless of the logical character of competing moral and political considerations.

Rights, therefore, have a distinctive character. The idea of rights, not human rights, is fundamentally a legal concept.[37] Rights are normative relations focused around the interests of rights-bearers and rights claimants. Simply put, rights are *grounds*. They are a valid claim upon society to protect, by force of law, the bearer/claimant who possesses them.[38] Accordingly, rights are not merely statements about protections actually provided by law or society for certain interests but, rather, about *grounds* or reasons of a certain sort *for* these protections.[39] Thus, one has a right to Z just in case one's interest in Z is sufficient reason for – that is, constitutes a valid claim upon – society to guarantee or protect one's enjoyment of Z.[40] The interests of rights-bearers are sufficient to *ground* and *justify* their protection. Rights, then, can also be identified with the interests which ought to be protected and the protections that ought to be provided. In speaking of a right to equal opportunity for women, for example, we focus attention on the intended good,[41] an equality of opportunity. Most importantly, however, women's right to equality of opportunity is a ground and a justification for allocating rights to women as a collective and as individuals, based on the disadvantage they experience by virtue of being women. This is to say that equality of opportunity is a fundamental right of every woman.

It is these fundamental rights that create a reason to limit the exercise of law-making power such that legislative and executive acts in violation of rights simply fail to become law. Law-makers cannot make law in violation of fundamental rights and the executive cannot violate rights that have been made *part of* fundamental law. These public officials, including judges, are bound by standards of conventionalism and integrity to provide legal rights and duties. The judiciary, on its part, is limited in terms of its law-making power. According to Dworkin, morally justifiable principles, not "policies," justify judicial decisions. These principles are presuppositions that describe rights and the task of the court is to discover these pre-existing rights of the parties.[42] There is evidence to demonstrate that, often, judges base decisions on policy grounds

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[37]I. Shivji, "Equality, Rights and Authoritarianism in Africa" in N. MacCormick and Z. Bankowski, eds., *Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy* (Aberdeen: Aberdeen University Press, 1989) at 273.

[38]This is the view advanced by John Stuart Mill. See J.S. Mill, in G. Sher, ed., *Utilitarianism* (Indianapolis: Hackett Publishing Co., 1979) at 52.

[39]Bentham, on the other hand, holds a positivist view of rights, believing that one has a right *just in case* that person is the intended beneficiary of a regularly enforced obligation. On this account, to speak of rights is empty, except where there are legally enforceable mechanisms already in place. See H. Hart, "Natural Rights: Bentham and John Stuart Mill" *Essays on Bentham* (Oxford: Clarendon Press, 1982).

[40]See Hohfeld, *supra* note 28

[41]R. Brandt, "The Concept of a Moral Right" (1983) 80 J. Phil. 44 at 48.

[42]Dworkin, *supra* note 30 at 296.

instead of on rights.[43] Obviously, this "rights thesis" highlights the point that a judge, when establishing the rights of the parties, must depart from political considerations and see rights as "trumps" of an individual, in the sense of always having priority over policies.[44] According to this view, policies are not to be weighed and balanced against rights. Rights are pre-existing; hence they have a special place in law,[45] whether or not any statute or precedent has already established them.[46]

Having established an understanding of legal rights, one can now revert to the question of international human rights law. Human rights do not have the same compelling characteristics as legal rights, nor are they as deeply entrenched as the rights established by law. They do not oblige governments to respect them, yet their enforcement is charged on the government:

> [I]t is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[47]

Many governments have ignored the duty to promote and protect all human rights as required by international covenants. In fact, they are the perpetrators of violence against individual human rights. Ironically, it has been suggested that the best method of protecting international human rights law is through national legal systems.[48] If this is true, then within the national systems, there is a need to find a more effective means of enforcing international human rights conventions. The effective locus of enforcement must be the point of intersection between the rule of law and international human rights law.

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[43] *Ibid.* at 297. Dworkin draws the distinction between an argument of principle and an argument of policy. He states:

> The difference between an argument of principle and an argument of policy... is a difference between two kinds of questions that a political institution might put to itself, not a difference in the kinds of facts that can figure in an answer. If an argument is intended to answer the question whether or not some party has a right to a political act or decision, then the argument is an argument of principle, even though the argument is thoroughly consequentialist in its detail.

[44] According to Waldron, a rights theorist is supposed to be the one who can produce the trump card, the peremptory argument stopper. J. Waldron, "A Rights-Based Critique of Constitutional Rights" (1993) 13 Oxf. J. Legal Studies 29.

[45] Postmodern scholars have questioned the foundation of rights with the view that legal rights involve just another language game. See P. Schlag, "Rights in the Postmodern Condition" in Sarat & Kearns, *supra* note 32 at 263; P. Fitzpatrick, *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991), and M. Tushnet "An Essay on Rights" (1984) 62 Texas L. Rev. 1363.

[46] Dworkin, *supra* note 30 at 176.

[47] L. Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at 37.

[48] Leary, *supra* note 21 at 27.

The Rule of Law and International Human Rights Law

For either rights in law or international human rights to be enforceable, there must be a pre-existing condition of the rule of law.[49] To this end, it has been concluded that "no mechanisms for the adequate enforcement of human rights *other than governmental ones*" exist.[50] Hence:

> The task international *lawyers*, as well as *politicians*, are confronted with is to look for *tools and incentives to induce states* to come in line with their international obligations to implement human rights. It is *not the sovereign state* as such that is a barrier to the enforcement of human rights. It is the *"bad state"* that presents the problem.[51]

This proposition is indeed a valuable one, if only because it sustains the argument that the rule of law is a necessary condition for the successful implementation of international human rights laws within the domestic practices of member states. The fact that the task of "inducing states" is assigned to "lawyers" and "politicians" shows that the effective implementation of international law lies within the law *and* the government. On the other hand, human rights advocates, with all due regard and respect for their functions, goals and objectives, may not have a similar entrenched impact on the enforcement of international human rights law. Human rights advocates may criticize a government for its human rights practices, as they often do but a criticized government can always fall back on the doctrine of sovereignty to protect itself from the outside world.[52] Therefore, the nature of the laws and the legal system, and especially, the nature of the political activities of the government in place within that member state, must be such as to hold international human rights laws in high

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[49]It has been suggested that the enforcement of international human rights is possible only if the member-state deploys some financial resources. See P. LaRose-Edwards, "Human Rights Cost Money" (paper presented at the NGO Conference on Empowering People: Civil and Associations and Democratic Development in Sub-Saharan Africa, Arusha, 12-16 August 1991). I argue that the protection of human rights goes beyond mere access to material resources to a more entrenched respect for its values – respect for the rule of law. In any event, it is difficult to establish a correlation between a state's level of resources and its commitment to respect human rights. K. Pritchard, "Human Rights and Development: Theory and Data" in D.P. Forsythe, ed., *Human Rights and Development: International Views* (New York: St. Martin's Press, 1989) at 329.

There have been other proposed methods of implementing international human rights provisions such as the establishment of inspectorates to visit places of detention, organs (such as the ombudsman, human rights commissions and constitutional courts) to review human rights legislation, legislation which will give effect to many of the rights to which the state has committed itself (that is, a legislation with implementing mandate). McBride, *supra* note 13 at 132.

The rule of law argument advanced in this paper is stronger than the "cash, institutions and personnel" argument because the latter is a piece-meal solution.

[50]J. Delbrueck, "International Protection of Human Rights and State Sovereignty" in Snyder & Sathirathai, eds., *supra* note 8 at 168 [emphasis added].

[51]*Ibid.* at 269 [emphasis added].

[52]African dictatorships have been able to survive despite international condemnation. The regimes of Idi Amin in Uganda and Sani Abacha of Nigeria are common examples. See S. Decalo, *Psychoses of Power: African Personal Dictatorships* (Boulder, Colorado: Westview Press, 1989).

regard by making provisions for their effective enforcement. If "good" government or a "good" state is instrumental for the enforcement of internationally protected rights, then the rule of law is necessary too because it results from a "good" government.[53] Laws are established by the legislature, and rights are carved out of laws by the judiciary. Rights can therefore be realized or made accessible by and through the courts of law. For such rights to be ascertained in a free, fair and objective manner, the judiciary must be separate from the government. In turn, a good government will impair as little as possible the ability of the judiciary to operate in a free and fair manner.[54] Thus, the nature of the relationship between the government and the judiciary within the domestic context is crucial for the enforcement of international human rights law.

The purpose of government in any political order is to ensure the rights and freedoms of its citizens, especially the most vulnerable. Although government is essential to organized society, its powers must be restricted if people in society are to enjoy freedom from oppression. Discrimination is the by-product of unlimited government, and as Woodrow Wilson pointed out, "the history of liberty is the history of limitations upon the powers of government."[55] This means that liberty ultimately results when government's power is limited.

An effective means of limiting this governmental power has been through the doctrine of the separation of powers. This doctrine provides that governmental power should be entrusted to three separate bodies, the executive, the judiciary and the legislature[56] so as to prevent the arbitrary actions of one, the executive, over the other, the judiciary. Referring to the United States Constitution of 1787, Justice Brandeis declared in *Myers* v. *United States* that:

> The doctrine of the separation of powers was adopted ... not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was to save the people from autocracy.[57]

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[53]J. Delbrueck, "International Protection of Human Rights and State Sovereignty" in Snyder & Sathirathai, eds., *supra* note 8 at 168.

[54]Even when a "little impediment" should occur from the government, the impediment should be in accordance with the principles of fairness, justice, impartiality, freedom and democracy.

[55]F.R. Strong, *Judicial Function in Constitutional Limitation of Governmental Power* (North Carolina: Carolina Academic Press, 1997) at 3.

[56]E. Friedrich, "Separation of Powers" (1934) 13 Ency. Soc. Sci. 663 at 665. Berman has argued that the rule of law transcends the structure of power. That it is based on the principle of human and individual rights, or democratic values which originated from the theory of natural law and divine justice. See H.J. Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 292-294.

[57]Cited in Strong, *supra* note 56 at 3.

This doctrine is the core of the rule of law. It has been effectively captured in the following paragraph:

> the rule of law, the principle which requires that there should be laws which lay down what the state may or may not do and by which one can test whether any power which it claims, or any particular exercise of such power, is legitimate; *and a system of courts independent of every other institution of the state, including the legislators and the executive, which interprets and applies those laws.* The total independence of the judiciary from everyone else is central to the entire concept of the rule of law, for the whole point about a law is that it must be upheld impartially and that one must therefore be a judge in a cause in which he has any personal interest, or if he is open to illegitimate pressures either overtly or behind the scenes from the friends of either of the parties – especially if one of them is the state, through its public authorities and its officials and agents.[58]

In the design of the separation of powers, the judiciary has a central role. The role is two-fold; first, that of statutory interpretation to determine legislative purpose and, second, the rational use of discretion in the administration of just law. Either way, court adjudication is final and not subject to reconsideration either by the executive or the legislature, even in decisions that are controversial.[59] To allow otherwise would be to violate the independence of the judiciary and the rule of law.[60]

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[58]P. Sieghart, *International Human Rights Law*, cited in Lord Elwyn-Jones, "Judicial Independence and Human Rights" in R. Blackburn and J. Taylor, eds., *Human Rights for the 1990s: Legal Political and Ethical Issues* (London: Mansell, 1991) at 44 [emphasis added].

[59]An issue which has been subject to much debate is whether judicial discretion gives the judge too much power. It is argued that judicial review of legislative and executive action will give the judge control of the ring to define what is lawful. Strong, "The Menacing Spectre of Judicial Supremacy," *supra* note 56 at 152. Also, M. Freeman, "Standards of Adjudication: Judicial Law-Making and Prospective Overruling" (1973) 26 Common Law Report 166 at 204; G.L. Davies, "The Judiciary: Maintaining the Balance" in P.D. Finn, *Essays on Law and Government: Principles and Values* (Melbourne: The Law Book Company Limited, 1995) at 279 and 285-9. In the *Dolphin* case, [1986] 2 S.C.R. 573, 33 D.L R. 4th at 174, the Supreme Court arguably went beyond this threat of excessive judicial power, by ruling that the *Canadian Charter* applies only to relationships between the government and private persons and not between private persons. In so ruling, the court decided, as well, that the courts are not part of the state apparatus for the purposes of section 32 and 33 of the *Charter*. For a critique of the court ruling in *Dolphin*, see B. Slattery, "The Charter's Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987) 32 McGill L.J. 905 at 923. The *Dolphin* decision was severely criticized because judicial decisions and orders would have been exempt from the application of the *Charter*. Much of the controversy over the dominant position of the judge stems from judicial application of section 1 of the *Charter*, the limitations clause. The question is, how does the court determine what is a "reasonable limit"? See B. Slattery, "A Theory of the Charter" (1987) 25 Osgoode Hall L.J. 701 at 702-703. See also D. Beatty, "Constitutional Conceits: The Coercive Authority of the Courts" (1987) 37 U.T.L.J. 183 at 188.

[60]Strong, *supra* note 56.

Dicey, who wrote that the reverence for the supremacy of the law is the cause and the effect of reverence for judges,[61] sees the rule of law as bolstering the authority of the courts. In the words of one commentator:

> Dicey was encouraged to provide the common law courts with a principle which would at once consolidate and legitimize the superior position of the courts and the common law in the face of governments that might seek to challenge them. In this way the rights of the individual could be protected, the state could be pre-empted in its attempt to create new instrumentalities of power by which it might extend its authority, and the courts – thus preserved – could set about exercising their influences over opinion so as to retard and even prompt a retreat of the forces of collectivism.[62]

This comment suggests that the independence of judicial authority is a true source of rights. In an address to Canadian judges, Chief Justice Antonio Lamer reiterated that the right of access to a judicial officer, independent of the other branches of government, was the most important right to be guaranteed.[63] In this connection, the role of the courts is essential in upholding basic international human rights law. The judiciary authorizes and ensures the distribution of rights. If the judiciary is independent and the judge is faithful to basic principles of legality, he or she will have legitimate and readily available legal means to protect and uphold rights and to safeguard citizens from the whims and caprices of the powerful.[64]

Independent domestic courts provide a forum to challenge state actions that violate international norms. Judicial independence and international human rights intersect in two main ways; first, international declarations take the form of legal prohibitions upon state power and constraints upon future legislators and, second, the institutional autonomy of law imposes respect for human rights upon the state provided that such a state is subject to the rule of law.[65]

It has been a decade since an international attempt was made to reconcile judicial independence and international human rights law. The "Bangalore Principles"[66] resulted from the February, 1988 Judicial Colloquium on International Human Rights Laws, held in Bangalore, India. This Colloquium pulled together judges from Commonwealth countries and the United States for the purpose of developing human

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[61]K. Mason, "The Rule of Law" in Finn, *supra* note 60 at 125.

[62]B.J. Hibbitts, "The Politics of Principle: Albert Venn Dicey and the Rule of Law" (1994) 23 Anglo-American L. Rev. 1 at 22.

[63]Chief Justice A. Lamer, "Address to the Provincial and Territorial Court Judges of Canada, Quebec City" (1991) 65 Aust. L.J. 3 at 4.

[64]See B.F.C. Hsu and P.W. Baker, "The Spirit of the Common Law in Hong Kong: The Transition to 1997" (1990) 24 U.B.C.L. Rev. 307 at 341.

[65]C. Douzinas, "Justice and Human Rights in Postmodernity" in Gearty and Tomkins, *supra* note 25 at 128.

[66]Reported in (1988) 62 American L.J. 531. Also see (1988) 14 Commonwealth L. Bull. 1194.

rights jurisprudence from provisions contained in human rights instruments. The Bangalore Principles were guidelines for judges to be more responsive to international human rights laws when deciding cases within their domestic jurisdictions.[67] The essence of the Bangalore Principles is that:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into basic law.[68]

The ideas expressed in the Bangalore Principles have now been adopted by the "Harare Declaration on Human Rights"[69] and have also been reaffirmed by the "Banjul Affirmation."[70] All of these declarations noted the fundamental importance of complete judicial independence in determining rights and obligations by due process of law and in enforcing international human rights law within the domestic arena. Hence, each domestic judge has an opportunity to contribute to the implementation of international human rights laws. An independent judge has particularly enhanced opportunities to do so. The judiciary has no special weapon for defending basic rights other than that guaranteed by its independence. In order to ensure a more successful enforcement of international human rights norms, more effort should be made towards improving the rule of law in the member-state. It is through respect for the rule of law that governments will be able to commit themselves to the values entrenched in international human rights principles.

Illustrating the Analysis: A Cameroon Case-Study

There is a relationship between treaty-based statute and domestic statute for the purpose of successfully implementing international laws within the domestic arena. What should be the nature of that relationship? Should international norms be constitutionally protected? Should they be protected in the form of statute? Should they be incorporated into domestic judge-made laws?

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[67]In keeping with this comparative jurisprudential approach, the role of the Canadian judge in expounding and applying the *Canadian Charter of Rights and Freedoms*, for example, could serve as a relevant experience to foreign judges. The complete independence of the Canadian judiciary allows the Canadian judge to interpret basic rights entrenched in section 15 of the *Charter* broadly but within the limits of judicial legality. The *Charter* allows judges the bold step of invalidating legislative and executive acts in order to protect a vision of the rights and freedoms which are guaranteed therein. Because these rights guarantees are part of overriding laws they must be respected by government officials when officially enforced by the judge. No longer can government policy decisions which discriminate against citizens be allowed to persist.

[68]See *Section 7* of the said "Principles," *supra* note 67.

[69]Harare is the Capital of Zimbabwe, Southern Africa. The Declaration was reported in the Commonwealth Secretariat, Legal Division, *Developing Human Rights Jurisprudence* (London: Commonwealth Secretariat, 1989) at 9.

[70]Banjul is the Capital of Gambia. The Declaration was reported in (1990) 5 Interights Bull. 3 at 39.

Different countries take different approaches to the domestic incorporation of international human rights law. In Cameroon, for example, international human rights laws and agreements are constitutionally protected. The Cameroon Constitution[71] specifically provides that duly approved or ratified international human rights laws and agreements are to be upheld and respected in Cameroon and, once approved and ratified, those laws prevail over domestic laws. The Preamble and s.45 of the Cameroon Constitution stipulate, respectively, that:

> We the people of Cameroon,
>
> Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter or United Nations and the African Charter on Human and People's Rights, *and all duly ratified international conventions* relating thereto.[72]
>
> S.45: Duly *approved or ratified* treaties and international agreements shall, following their publication, *override national laws*, provided the other party implements the said treaty or agreement.[73]

Based on this constitutional incorporation of international human rights laws, it can be said that there exists a constitutional basis for upholding international human rights norms in Cameroon. Since international law is recognized by the Constitution as part of the law of the land, the assumption can be made that international human rights laws must be "ascertained and administered in Cameroon courts of justice of appropriate jurisdiction."[74] By explicitly instituting all ratified conventions in the Constitution, Cameroon adopts ratified international conventions as part of the laws of the country. Hence:

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[71]Established by Law No. 96-06 of January 18, 1996 (Yaounde: The Secretariat General of the Presidency of the Republic, 1996). Officially promulgated on January 18, 1996 [hereinafter, *Cameroon Constitution*].

[72]*Cameroon Constitution* at 4 [emphasis added].

[73]See Part VI, "Treaties and International Agreements," of the *Cameroon Constitution* [emphasis added].

[74]Such a statement was first made by Justice Gray of the United States in *The Paquete Habana* [1900], 175 U.S. 677 at 700. He asserted that:

> International law is part of our law, and *must* be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for the determination.

Justice Gray also affirmed in *Hilton* v. *Guyot* [1895] 159 U.S. 113 at 163 that:

> International law in its widest and most comprehensive sense...is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

It is in this spirit that the constitutional entrenchment of international law in Cameroon is viewed.

> [because the] constitution declares a treaty to be the law of the land, [i]t is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.[75]

This constitutional incorporation of international laws has profound consequences for constitutional rights and the separation and balance of powers between the executive and the judiciary. In effect, because international human rights laws are constitutionally viewed as the law in Cameroon, the judiciary has the power to take judicial notice of and, thus, to identify and clarify international human rights laws to rights claimants. Put differently, the identification, clarification and application of extant laws is precisely and necessarily part of the function of Cameroon judges. In light of this judicial duty, based as it is on the Constitution, a court which refuses to apply international law denies its own validity.

Ratifying an international convention and constitutionally entrenching the convention as part of domestic law do not guarantee that the convention will, in fact, be upheld. The case of *Mukong* v. *Cameroon,*[76] decided upon by the Human Rights Committee of the United Nations confirms this assertion. The case highlights three important issues. First, it addresses some of the inherent difficulties experienced by the Cameroon judiciary, such as the difficulties they experience in making decisions independent of the government's influence. Second, it questions the basis for the constitutional entrenchment of international human rights laws in Cameroon, when the enforcement of the entrenched norms has not been fulfilled. Third, it suggests that in the absence of the rule of law, even constitutionally protected international human rights laws and decisions do not bear any domestic significance.

The facts of *Mukong* v. *Cameroon* were as follows. Mukong brought an action before the Human Rights Committee under the Optional Protocol[77] to the *International Covenant on Civil and Political Rights*.[78] He claimed that on several occasions he had

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[75]F. Kratochwil, "The Role of Domestic Courts as Agencies of the International Legal Order" in Falk, Kratochwil & Mendlovitz, eds., *International Law*, *supra* note 9 at 254. He wrote on the American experience.

[76]Human Rights Committee, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991 of August 10, 1994. For the case brief, see (1996) 1 Southern African Media Law Briefing. This case was the first ever brought against Cameroon under the Optional Protocol to the *International Covenant on Civil and Political Rights*.

[77]Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966. Entry into force, 23 March 1976 in accordance with article 9. The Optional Protocol allows individuals who feel violated by state parties to bring their claims before the Human Rights Committee.

[78]Adopted & opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 Dec 1966; Entry into force 23 March 1976 in accordance with article 49 [hereinafter, *ICCPR*]. Article 49 states that:

> (1) the present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument

been a victim of violations by the Cameroon government in breach of a number of provisions of the *ICCPR*.[79] Mukong was an author, journalist, writer and long time advocate of multi-party democracy in Cameroon. He was arrested and jailed in Yaounde in June 1988 for criticizing the president and government of Cameroon in an interview he gave to the British Broadcasting Corporation (BBC). He claimed that while in jail, he was subjected to cruel and inhuman treatment of the following nature: that there were no sanitary facilities in the cell; that the authorities refused to feed him; that he was not allowed to wear clothes; that he was forced to sleep on the concrete floor; that he was detained with common criminals and that his friends and family were not informed of his detention. He stated further that due to the cell conditions, he subsequently fell ill with a chest infection and was thereafter allowed to wear clothes and use an old carton as a sleeping mat. In 1989, he was released because his charge of subversion was withdrawn upon the recommendation of the Assistant Minister of Defence, a high officer of the very government from which the judiciary was, in theory, independent.[80]

Mukong was re-arrested in February 1990 and detained for six weeks in the police cell in Douala, Cameroon's economic capital. He was not allowed to see either his lawyer or his friends and family. Locked in a cell, with temperatures above 40°C, he claimed to have been subjected to mental torture and intimidation.[81] He contended that he had exhausted all possible remedies and should be deemed to have complied with Article 5 (2)(b) of the Optional Protocol.[82] He further stated that the peaceful public expression of his opinion was considered a crime and that there was no procedure under domestic law to challenge a law as being incompatible with international human rights standards. In addition, he claimed that fundamental rights guaranteed in the Cameroon Constitution were not enforced and that the military jurisdiction under which he was placed in 1989 could not be challenged. Consequently, his application to the Supreme Court of Cameroon for the writ of *habeas corpus* was rejected because the writ of *habeas corpus* did not apply to charges to be determined by the military court. Hence,

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of accession.

(2) For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

[79]The Optional Protocol, which was entered into force by Cameroon on September 27, 1984.

[80]Legally, the intervention of a government official in judicial proceedings is highly irregular.

[81]Prior to these two periods of detention, Mukong had been imprisoned on four separate occasions between 1970 and 1976 when Amnesty International adopted him as a prisoner of conscience. His book about his experiences, entitled *Prisoner Without a Crime*, was published in October 1984 and was banned in Cameroon in November 1985. See (1996) 1 Southern African Media Law Briefing. The ban on the book has since been removed.

[82]This provision states that the individual can file a claim under the Optional Protocol if that individual has exhausted all domestic remedies. This shall not be the rule where the applications of the remedies is unreasonably prolonged.

Mukong claimed, if he could not challenge his detention by writ of *habeas corpus* then no other remedies were available to him. He suggested to the Committee that any further pursuit of domestic remedies would be ineffective and if such proceedings were initiated, he would be subjected to further harassment.

He complained that, on account of his treatment in 1989 and 1990, the Cameroon government had violated Article 7 of the *ICCPR*.[83] He also claimed that Article 9[84] had been violated because he had not been served with a warrant of arrest on both occasions and that the charges had been brought months later. He charged, further, that the state party had violated Article 14 (1) and (3)[85] because they had failed to give him details

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[83]Article 7 stipulates that:

No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[84]Article 9 states:

(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

[85]Article 14 provides:

(1) All persons shall be equal before courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and public may be excluded from all or part of the trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with a counsel of his own choosing;

(c) To be tried without undue delay;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in

of the charges against him or adequate time to prepare his defence and that the military court was neither independent nor impartial because it was subject to the influence of high-level government officials.[86] Another argument he made was that the state had acted contrary to Article 19[87] by suppressing his opposition activities and banning his book *Prisoner Without a Crime.* Finally, he alleged that Article 12(4) of the *ICCPR*[88] had been violated because he had been prevented from returning to Cameroon.

Cameroon, the State Party, refuted all of the claims brought before the Human Rights Committee by Mr. Mukong. The Human Rights Committee, acting under Article 5(4) of the Optional Protocol[89] to the *ICCPR* held that there had been violations by the Cameroon government of Articles 7, 9(1) and 19 of the Covenant. The Committee decided that, under Article 2(3)(a)[90] of the Covenant, the State Party was under an obligation to provide Mr. Albert Womah Mukong with an effective remedy, to grant him appropriate compensation for the treatment he had been subjected to, to investigate all allegations of ill-treatment in detention, to respect his rights under Article 19 and to ensure that similar violations would not occur in the future. The Human Rights Committee gave the State Party a period of ninety days to provide it with information on the relevant steps taken. To the time of writing, the Cameroon government has taken no steps to honour the decision of the Human Rights Committee.[91]

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court;

(g) Not to be compelled to testify against himself or to confess guilt.

[86]Judges in the military court are military officers and subject to the authority of the President, himself the commander-in-chief of the armed forces.

[87]Article 19 stipulates that:

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be only as are provided by law and are necessary:

(a) For respect of the rights of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals. [Translation in original.]

[88]Article 12(4) states that: No one shall be arbitrarily deprived of the right to enter his own country.

[89]*Supra*, note 78. Article 5(4) of the Optional Protocol stipulates that "the Committee shall forward its views to the State Party concerned and the individual."

[90]Article 2(3)a stipulates that: each State Party to the Present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation may have been committed by persons acting in an official capacity.

[91]Some human rights advocates are nonetheless optimistic that, regardless of whether Mr. Mukong receives compensation, he will not only have scored a victory but his case will have set a precedent on important new principles for other governments around the world to follow.

In the case of *Embga Mekongo Louis* v. *Cameroon*,[92] the Cameroon government also reacted with apathy to the Human Rights Committee's decision. In this case, Mr Mekongo, a Cameroon citizen, complained before the Human Rights Committee that he had been the victim of false imprisonment and miscarriage of justice, for which he claimed damages to the amount of US$105 million. The Commission found that the author had in fact been denied due process of law, contrary to Article 7 of the *African Charter of Rights and Freedoms* and had suffered as a result.[93] Unable to determine the amount of damages, the Committee recommended that the quantum should be determined under the law of Cameroon.[94] The Cameroon judiciary has yet to entertain or give judicial hearing to Mr. Mekongo's case for the purpose of determining the damages prescribed by the Committee.

The *Mukong* and *Mekongo* cases show the price that political dissidents in Cameroon pay for the government's intolerance of their activities. More importantly, these cases bring the credibility and effectiveness of the Cameroon judiciary to the forefront. It is impossible for rights to survive in an atmosphere of oppression and victimization of political opponents, in an atmosphere where the role of the judiciary in condemning the oppressors is reduced to a passive one. In this context of political oppression and governmental intimidation of the judiciary, international human rights decisions cannot be given free and objective judicial review. This is why the rule of law and judicial independence are necessary. Only with those institutions in place can international norms, even those constitutionally entrenched by a domestic government, be given due recognition and effect. Given the extremely political nature of the Mukong and Mekongo cases, the Cameroonian judiciary was constrained in its decision-making; the judges would be putting their careers on the line if they took a decision that went against the government. If, on the other hand, the Cameroonian judiciary was truly independent, then it could take the initiative and the necessary steps to ensure that international decisions such as those rendered in Mukong and Mekengo are implemented effectively against the government. It is in this context that international human rights laws must go hand in hand with the rule of law.

Conclusion

The theoretical basis of this paper has been to show that the successful implementation of international human rights conventions is possible, in part, through the existence of the rule of law within the member-state to which the conventions apply. Most human rights abuses are perpetuated by government officials. It is therefore crucial to have an independent judiciary to address and redress citizens' complains against the

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[92](1996) 3 Int'l. H.R. Report at 124.

[93]*Ibid.*

[94]*Ibid.*

government. The judiciary serves as an intermediary between a powerful government and vulnerable citizens. Its role in enforcing just laws, drawn from domestic legislation and international conventions is crucial to the protection of the human rights of citizens. Governments must respect not only the human rights of citizens but the judicial authority which is necessary for the protection and promotion of those rights. This is the foundation of the rule of law – the ability of the government to separate itself from the judiciary and allow judges to protect the human rights of citizens that are guaranteed in international conventions and decisions.