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## Why Redraw the Map of Africa: A Moral and Legal Inquiry

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# WHY REDRAW THE MAP OF AFRICA: A Moral and Legal Inquiry

*Dr. Makau wa Mutua\**

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## INTRODUCTION

The last decade of the twentieth century has seen a sharp increase in the number of new states, many of them a result of the end of the Cold War and the demise of European communism.<sup>1</sup> Not since decolonization have sovereignty and self-determination been such powerful currencies

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1. The break-up of the Soviet Union, for example, created fifteen separate, independent, and sovereign states: Armenia, Azerbaydzhan, Belarus, Estonia, Georgia, Kazakstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tadzhiikistan, Turkmenistan, Ukraine, and Uzbekistan. East Germany was absorbed by West Germany. In a first for post-colonial Africa, Eritrea seceded from Ethiopia and in 1993 became an independent state. Bosnia-Herzegovina, Croatia, Macedonia, Slovenia, and Serbia and Montenegro, or what is sometimes referred to as rump Yugoslavia, have arisen from the disintegration of the former Yugoslavia. For a journalistic account of the recent creation of ministates through the break-up of larger entities, see Russell W. Howe, *Countries are Breaking into Ministates and That's Not Necessarily Bad*, BALTIMORE SUN, Jan. 23, 1994, at E8.

in international discourse.<sup>2</sup> Now the protracted problems of the post-colonial African state have raised anew the meaning of state legitimacy and brought forward disturbing questions about the concepts of territorial sovereignty and statehood.<sup>3</sup> The juridical statehood attained with the decolonization of the colonial state has in the last four decades proven inadequate.<sup>4</sup> It is becoming increasingly apparent that these concepts and principles may have trapped Africa in a detrimental time capsule; they now seem to be straightjackets with timebombs ready to explode. The imposition of the nation-state through colonization balkanized Africa into ahistorical units and forcibly yanked it into the Age of Europe,<sup>5</sup>

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2. Since 1945 the world has witnessed the rejection, normatively and practically, of colonialism and other forms of foreign occupation and control. Self-determination is now firmly established as a right exercisable by peoples under international law. The work of the United Nations in this regard has been instrumental. The United Nations Charter provides, in part, that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on the respect for the principle of equal rights and the self-determination of peoples." U.N. CHARTER art. 1, ¶ 2. The Declaration on the Granting of Independence to Colonial Countries and Peoples provides, in part, that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their own political status." The resolution proclaimed "the necessity of bringing a speedy and unconditional end to colonialism in all its forms and manifestations." *Id.* at 67. This declaration, which became the basis for massive decolonization, starting, in effect, the so-called Independence Decade, was complemented by G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4651 (1961). Common Article One of the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, S. Exec. Doc. D, 95th Cong., 2d Sess. 23 (1978), 99 U.N.T.S. 171, 173, and the International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3, 5, provide that: "All peoples have the right of self-determination. By virtue of that right they freely pursue their economic, social and cultural development."

3. International law, or the rules and principles governing relations between organized political societies, evolved throughout history and predates the domination of the world by European states in the last five centuries. But during that period, a cluster of European states has taken over the formulation of the major doctrines of international law, including the concepts of statehood and sovereignty, and provided them with specific legal meanings in the law of nations. As an example, today, "[u]nder international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1986) [hereinafter RESTATEMENT]; see generally LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 241-308 (3d ed. 1993). Statehood is not possible without the effective control of a specific identifiable territorial area. *Id.* at 246-48.

4. Political independence was not followed by economic independence. A hostile global economy marginalized Africa and contributed to the failure of the post-colonial state. See Thandika Mkandawire, *30 Years of African Independence: the Economic Experience, in 30 YEARS OF INDEPENDENCE IN AFRICA: THE LOST DECADES?* 86, 98-101 (Peter Anyang' Nyong'o ed., 1992) [hereinafter 30 YEARS OF INDEPENDENCE].

5. I use the term "Age of Europe" to denote a historical and philosophical paradigm; that of European hegemony imposed over the globe, particularly the South, over the last five centuries, culminating in the domination of the Americas, Africa, and parts of Asia by Western European norms and forms in the fields of government, religion, society, culture, and the economy.

permanently disfiguring it.<sup>6</sup> Unlike their European counterparts, African states and borders are distinctly artificial and are not “‘the visible expression of the age-long efforts of [the indigenous] peoples to achieve political adjustment between themselves and the physical conditions in which they live.’”<sup>7</sup> Colonization interrupted that historical and evolutionary process. Since then Africa has attempted, often unsuccessfully, to live up to and within these new formulations; all too frequently the consequences have been disastrous.<sup>8</sup>

The problems of the modern African state have been well documented,<sup>9</sup> with some analyses bordering on the apocalyptic.<sup>10</sup> Whatever the

6. Most African states are the products of the competitive subjugation of the continent by Great Britain, France, Germany, Belgium, Portugal, Italy, and Spain between 1875–1900. Of the current states only Botswana, Burundi, Egypt, Ethiopia, Lesotho, Madagascar, Morocco, Rwanda, Swaziland, and Tunisia have any meaningful pre-colonial territorial and political identity. The rest, including these, were either partitioned or bounded by the expediency of colonization. See Crawford Young, *The Heritage of Colonialism, in AFRICA IN WORLD POLITICS* 19 (John W. Harbeson & Donald Rothchild eds., 1991) [hereinafter *AFRICA IN WORLD POLITICS*]. The power to define and exclude territory was not confined to internal map-making. Mazrui points out, for example, that it was “Europeans who decided that the western side of the Red Sea and the Suez Canal was indeed Africa while the eastern side was not.” ALI A. MAZRUI, *THE AFRICANS: A TRIPLE HERITAGE* 101 (1986). He states, matter-of-factly, that “what we regard as Africa today is primarily what Europeans decided was Africa.” *Id.* Even the term “Africa” and its derivatives, such as “African” are not indigenous to the continent; they, like the colonial state, are European impositions.

7. J.C. ANENE, *THE INTERNATIONAL BOUNDARIES OF NIGERIA 1885–1960*, at 3 (1970) (quoting A.E. Moodie, *Fragmented Europe, in THE CHANGING WORLD: STUDIES IN POLITICAL GEOGRAPHY* 37, 54 (W. Gordon East & A.E. Moodie eds., 1956)).

8. Severe cleavages, those which have been a major source of the persistent problem of the African state, are the direct result of the imposition of colonial rule and the modern state. Ethnic rivalries have arisen because previously independent and self-governing ethno-political nations, characterized in almost all cases by cultural, linguistic, and ethnic homogeneity, have been coerced to live together under single states. Religious tensions, and their politicization, are the products of the proselytizing rivalries of Islam and Christianity. As Mazrui aptly notes, “[it] is arguable that Africa did not have religious wars before the arrival of Christianity and Islam.” Ali A. Mazrui, *Africa and Other Civilizations: Conquest & Counterconquest, in AFRICA IN WORLD POLITICS*, *supra* note 6, at 69, 77.

9. For a catalogue of human rights abuses by African governments, see, for example, AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL REPORT 1994* (1994); HUMAN RIGHTS WATCH, *WORLD REPORT 1994* (1993); HUMAN RIGHTS WATCH, *WORLD REPORT 1995* (1994); U.S. DEP’T OF STATE, 104TH CONG., 1ST SESS., *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994: REPORT SUBMITTED TO THE COMM. ON FOREIGN RELATIONS, U.S. SENATE AND THE COMM. ON INT’L RELATIONS, HOUSE OF REPRESENTATIVES* (Joint Comm. Print 1995).

10. One of the most bone-chilling and pessimistic accounts of Africa, present and future, has been offered by Kaplan. Although his horrific analysis of the disintegration, decay, and the inevitable collapse of Africa has been standard diet in the West since the first Christian missionaries landed in Africa, it is done in an idiom so revolting that it is searing in its absolute pessimism. Seen through his eyes, governments implode, disease and environmental degradation take over, and civil and ethnic strife end life on the continent. See Robert D. Kaplan, *The Coming Anarchy*, *ATLANTIC MONTHLY*, Feb. 1994, at 44; see also, Matthew Connelly & Paul Kennedy, *Must It be the Rest Against the West?*, *ATLANTIC MONTHLY*, Dec.

severity of the prediction, it is undeniable that the survival of Africa is seriously threatened by corrupt and inept political elites, unbridled militaries, ethnic rivalries and conflicts, refugee flows, and economic misery. These have become chronic crises from which deliverance seems unlikely. As if to bear out the prophets of doom, the post-colonial state has recently collapsed in Liberia, Rwanda, and Somalia.<sup>11</sup> Others, such as Zaire, Nigeria, Sudan, Mozambique, Angola, Ethiopia, and Kenya maintain a precarious balance on the political precipice. I argue in this Article that the post-colonial state, the uncritical successor of the colonial state, is doomed because it lacks basic moral legitimacy. Its normative and territorial construction on the African colonial state, itself a legal and moral nullity, is the fundamental reason for its failure. I argue that, at independence, the West decolonized the colonial state, not the African peoples subject to it. In other words, the right to self-determination was exercised not by the victims of colonization but their victimizers, the elites who control the international state system. As

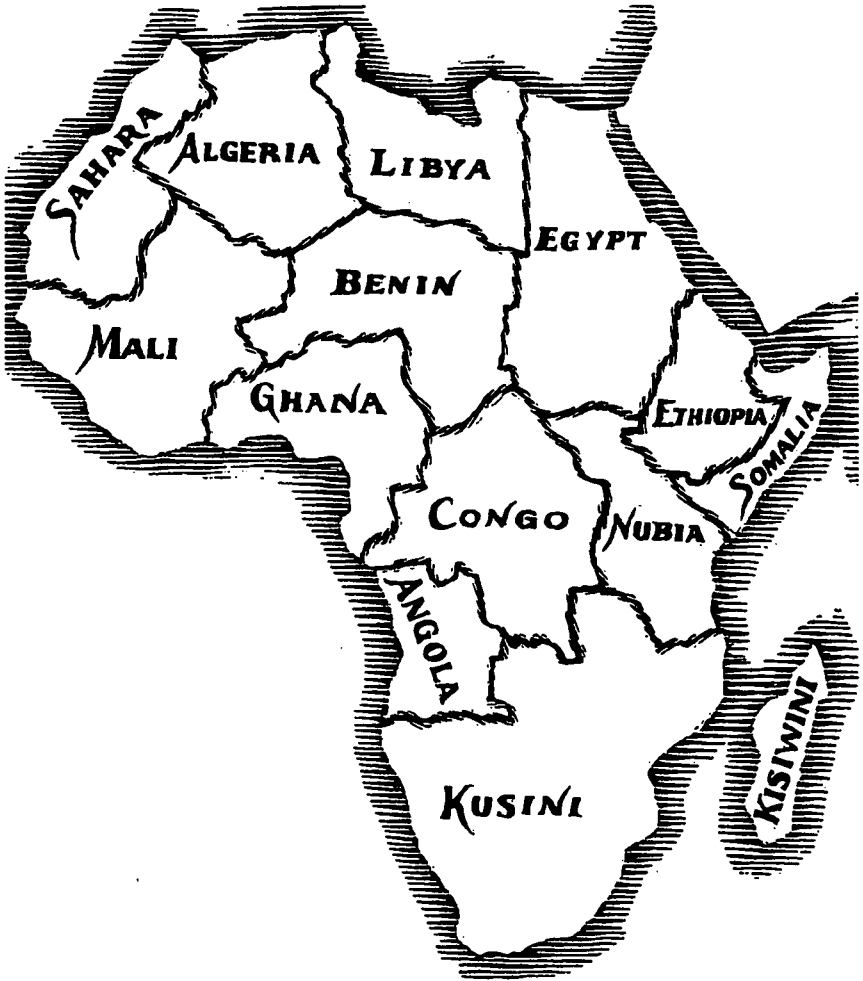
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1994, at 61. (discussing economic and demographic disparities between rich and poor countries); Scott Peterson, *Africa's Hopes Die Amid the Agony of War*, DAILY TELEGRAPH (London), Dec. 29, 1994, at 13, available in NEXIS, World Library, Telegr File (listing recent African tragedies).

11. The failure of the Liberian, Somali, and Rwandese states was spurred partially by the refusal or reluctance of dominant cliques, which are drawn from particular clans or ethnic groups, to allow popular political participation. The Liberian state, formed by the United States and long run according to U.S. interests, collapsed in 1990 after a coup by Samuel Doe, a military dictator supported and armed by the United States for most of his checkered and brutal rule. LAWYERS COMM. FOR HUMAN RIGHTS, *LIBERIA: A PROMISE BETRAYED* 12-17 (1986); HUMAN RIGHTS WATCH & LAWYERS COMM. FOR HUMAN RIGHTS, *THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1988*, at 116-20 (1989). The country has become ungovernable as military factions, drawn from diverse ethnicities, have battled for control. See AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL REPORT 1993*, at 191-93 (1993); U.S. DEP'T OF STATE, 102D CONG., 1ST SESS., *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990: REPORT SUBMITTED TO THE COMM. ON FOREIGN RELATIONS, U.S. SENATE AND THE COMM. ON FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES 192-202* (Joint Comm. Print 1991).

The gross human rights abuses and the intransigence of Mohamed Siad Barre, the late Somali despot, to enter into peace negotiations with rebel forces clamoring for political participation led to the breakup of the state in 1991. A United Nations peacekeeping force left the country in 1995 after its failure to re-establish either civil or viable government. See AFRICA WATCH, *SOMALIA: A GOVERNMENT AT WAR WITH ITS OWN PEOPLE* (1990); AMNESTY INTERNATIONAL, *supra* note 9, 262-64.

Rwanda has been engaged in a quest for more open government ever since its colonization by Belgium. The minority Tutsi population, which has been struggling for a voice in the Hutu-dominated government, finally captured state power in 1994 under the leadership of the Rwanda Patriotic Front (RPF). Hundreds of thousands of Rwandans, mainly Tutsi, were massacred by the retreating Hutu forces. Many more Hutus, by some estimates several million, fled to refugee camps in Zaire and Tanzania. See GENOCIDE IN RWANDA: BACKGROUND AND CURRENT SITUATION (Napoleon Abdulabi ed., 1994); Makau wa Mutua, *U.N. must make Rwanda a priority*, OAKLAND TRIB., May 25, 1994, at A13.



such, dependence continued under the post-colonial state, the instrument of narrow elites and their international backers. I concede that although other reasons, such as external economic factors and cultural disorientation, have contributed to the crisis of the African state, they cannot be divorced from the crisis of internal legitimacy. I contend that foreign imposition of artificial states and their continued entrapment within the concepts of statehood and sovereignty are sure to occasion the extinction of Africa unless those sacred cows are set aside for now to disassemble African states and reconfigure them. I propose that pre-colonial entities within the post-colonial order be allowed to exercise their right to self-determination. Only this radical but necessary step can legitimize the African state and avoid its demise.<sup>12</sup>

Needless to say, my surgical suggestion, that of new cartography,<sup>13</sup> will doubtless be viewed without sympathy by a host of interested parties: elites who control the international state and financial systems, scholars stuck in traditional notions of international law, and states elsewhere. But nowhere is opposition bound to be steeper than within

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12. By redrawing Africa's map, I do not mean just the physical delineation of land mass, although that is a necessary part of the process of recreating the African state. I also mean the reconceptualization of the state and its relationship to the individual and society. Here, one can imagine various constitutional and legal devices, such as constitutionalism or other conceptions of limited government, that are essential for the creation of a democratic state. In addition, any successful rebirth of African statehood must redefine the state's relationship with dominant global forces such as multinational corporations and international finance institutions in such a way that the state recaptures its sovereignty. Finally, such a process must pay attention to African political and cultural heritage if it is to attain any legitimacy with broad sectors of the people.

13. As an example of a new African political map, I have conceived a sketch that could serve as the basis for such a discussion. I offer the map not as a definitive or final solution but merely as a suggested road map and a starting point for more rigorous analyses on what a new map might look like and how it might be put together. Although my map compresses the 50-odd states in Africa today to only 14 larger entities, I want to emphasize that the eventual map should be arrived at through voluntary association and disassociation of pre-colonial entities, taking into account historical circumstances; population density; resources and economic viability; and cultural, ethnic, and geographic variables. In the new map, the Republic of Kusini, Kiswahili for "south" takes in South Africa, Namibia, Zimbabwe, Mozambique, Lesotho, Swaziland, Malawi, and Botswana. The new Egypt combines Egypt and Arabic Sudan while Nubia would bring together southern Sudan, Kenya, Uganda, and Tanzania. Somalia would be beefed up by Djibouti, the Ogaden province of Ethiopia, and Kenya's northern province, all areas inhabited by Somalis. Mali, named for the ancient empire, swallows up Mali, African (black) Mauritania, Senegal, Guinea, Sierra Leone, Liberia, the Gambia, Guinea Bissau and Cape Verde. Congo would combine Zaire, Congo, Burundi, the Central African Republic, and Rwanda while Ghana, another ancient kingdom, would consist of Ghana, Ivory Coast, Togo, Benin, Nigeria, Cameroon, Gabon, Equatorial Guinea, and Sao Tome and Principe. Benin, named for the kingdom, would take in Chad, Burkina Faso, and Niger. Algeria and Angola remain the same but Libya and Tunisia become one. Morocco, Arabic Mauritania, and Western Sahara become Sahara. Finally, Kisiwani combines Madagascar, Mauritius, Seychelles, and the Comoros. For more on the new map, see Makau wa Mutua, *Redrawing the map along African lines*, BOSTON GLOBE, Sept. 22, 1994, at 17 [hereinafter Mutua, *Redrawing the Map*]. The map is reproduced on the previous page.

African states themselves and the ruling cliques who benefit from those states. Until Eritrea's recent success in its secessionist war against Ethiopia, prevailing state ideology in Africa treated as treason any discussion about border changes, separatist movements, or ethnic self-determination within an independent African state. Ironically, it was African elites who sanctified the colonial state by ratifying its borders and forbidding even idle speculation about reconsideration of the issue. Even where European map-makers split one nation in two states, such as the division of the Masai between Kenya and Tanzania, the fate of the people was discussed as though they were two separate and alien entities, in defiance of reality on the ground. Even today, with overwhelming empirical evidence of the failure of the post-colonial state, African elites insist on clinging to this fiction of European creation to the bitter end. Cases in point are the regime of Siad Barre of Somalia, Samuel Doe of Liberia, and Juvenal Habyarimana of Rwanda who, rather than permit independent political activity, instead defied popular demands, leading to the collapse of their states.<sup>14</sup> Similar fate most likely awaits a host of others: Daniel arap Moi of Kenya, Mobutu Sese Seko of Zaire, Meles Zenawi of Ethiopia, and many more.

There are several reasons for this resistance to an imagination of political life without the post-colonial state. The simple explanation is that alienated elites — who have more in common with and harbor aspirations of elites in industrialized countries than with their teeming masses of rural and urban poor — are loathe to give up the privileges which come from control of the state. Since their lavish lifestyle stems from the state as organized, it would be suicidal for the leaders to participate in changing it. Even when the state is not effective — or on the brink of collapse — elites will still defend it. Arguments against dismantling the colonial state range from the “chaos” that would result from removing central authority to the balkanization of Africa into a million ethnic entities. While anti-colonial fervor had a lot to do with pride in the post-colonial state, unless the sobering reality of its failure is appreciated and steps are taken to make a voluntary, consensual map, the partition of Africa into small, Eritrea-like states, or possibly smaller ones, is inevitable. That eventuality will come at a great cost to Africa and it is not in the interest of the continent. That is why I argue in this article for an orderly recreation of the state.

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14. *See supra* note 11.



## I. THE COLONIAL STATE: A MORAL AND LEGAL NULLITY?

The concepts of sovereignty and statehood, as developed and used in traditional international law by a handful of European powers, were historically crafted without pre-colonial Africa in mind.<sup>15</sup> Yet it is precisely these concepts which have been the basis for the creation of scores of modern states in Africa. For many centuries, international law was regarded as the law existing between "civilized" states.<sup>16</sup> Though today it is the main currency regulating international relations, international law or the law of nations is a development out of exclusively European historical circumstances.<sup>17</sup> Similarly, this exclusive body of

15. The underlying concepts of political autonomy and territorial integrity among African political and state formations existed in the pre-colonial era. The inviolability of community territory, the exclusivity of participation in the political and social processes of the community by its members, and the integrity of the community were fiercely protected in the pre-colonial era. Trade relations with other communities took place on these basic premises. Some of the more rigidly stratified and centralized societies had extensive dealings with outsiders. These concepts, though in some respects similar to European notions, arose out of a different historical milieu and were not a result of commercialization and the expansionist ethos of the European state. A form of inter-state discourse, an international law, existed before the colonization of Africa, but it did not exhibit the predatory nature of European "international law," although powerful states conquered weaker entities to consolidate their kingdoms. Elias has noted inter-state relations in Africa and between African and Arab states between 300–1500 A.D. In the 13th century, for example, Mansa Musa, the ruler of the Mandingo kingdom of Mali traded regularly with Arab states. See T.O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* 6–15 (1988).

16. James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT'L L. 93, 98 (1976–77). The British regarded international law as only the province of "Christian nations." *Id.* (quoting 1 HERBERT ARTHUR SMITH, *GREAT BRITAIN AND THE LAW OF NATIONS* 12 (1932)). "Members of the society whose law was international were the European states between whom it evolved from the fifteenth century onwards, and those other States accepted expressly or tacitly by the original members into the Society of Nations; for example the United States and Turkey." *Id.* According to Umozurike, an African professor of international law, a few powerful European states "arrogated to themselves the circle of the civilised world" at the Congress of Vienna in 1815. Turkey was not admitted into this exclusive club until 1856 and Japan only after it defeated China in 1901–02. China was itself admitted thereafter. U.O. UMOZURIKE, *INTRODUCTION TO INTERNATIONAL LAW* 9–10 (1993).

17. Oppenheim, one of the most distinguished writers on the subject, states that international law "is in its origin essentially a product of Christian civilisation" which arose in the second half of the Middle Ages. 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 4 (Arnold D. McNair ed., 4th ed. 1928). Working from natural law, seventeenth century writers such as Hugo Grotius constructed a body of rules on "religious, moral, rational, and historical" bases; these rules are now the foundation of modern international law. *Id.* at 19. Pomeroy, another writer, traces international law to Christian morality and to God's endowment of man with "universal conscience and intellect" to "discern and approve great and abstract principles of right, truth, and justice" from which "a perfect system of positive law" could be built to rid society of evil. Termed *jus gentium* by their authors, the Roman jurists, these rules initially governed only relations between Roman citizens and foreigners; today they inform many international law principles. JOHN NORTON POMEROY, *LECTURES ON INTERNATIONAL LAW IN TIME OF PEACE* 4–5 (Theodore Salisbury Woolsey ed., 1886).

According to Oppenheim, a number of factors paved the way for the development of the law of nations: the increase in sea trade and the need for maritime law; the need for protec-

law has identified the sources from which it may be derived as custom, treaty, general principles of law common to all major legal systems, and the judicial decisions and the teachings of highly regarded publicists from different countries.<sup>18</sup>

Given this history, the legality of the colonial state can be assessed from both inside and outside the discourse and paradigm of international law. From the inside, a critical evaluation of colonization could indicate whether it was a violation of the European norms and practice of the rules of extant inter-state discourse. Whatever the case, the outcome has a bearing on the legality of the colonial state itself. Legality could also be assessed from the exterior, looking at colonization from the vantage point of the colonized, in the seat of those subjected to European imperial rule and expansionism. The question of the legality and legitimacy of the colonial state is critical because it deeply implicates the moral and legal character of its successor, the post-colonial state. In revisiting the nature of the colonial and the post-colonial state, I do not question, or intend to undermine, the principle of decolonization as a norm or practice of international law, a trajectory implied by some recent writers.<sup>19</sup>

tion of inter-state trade; the development of the art of diplomacy or the exchange of delegations; need to craft rules governing warfare because of the permanence of the standing army and the ravages of the Thirty Years' War; and the end, because of Renaissance and Reformation, of the spiritual leadership of the Pope over Europe and his right to act as the arbiter of inter-state conflicts, especially those between Protestant and Catholic states. OPPENHEIM, *supra*, at 63-66.

18. Article 38 of the Statute of the International Court of Justice, the premier authority on the sources of international law, provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38.

The Restatement also provides an almost identical list of the sources of international law. RESTATEMENT, *supra* note 3, § 102. Oppenheim, an earlier writer, regarded custom and treaties the "two exclusive sources of the Law of Nations." OPPENHEIM, *supra* note 17, at 27. Pomeroy, an even more ancient writer, adds to these "divine law:" the principles of morality as "revealed" in "God's written word" or in the "consciousness of mankind," and reason. POMEROY, *supra* note 16, at 25.

19. Mazrui, the acclaimed Kenyan academic, recently argued for the recolonization of Africa because of the "successive collapse of the state in one African country after another."

But I make the argument that decolonization was not the same thing as liberation. My purpose is to attempt the discovery of formulae through which the complete independence, sovereignty, and the viability and prosperity of African political societies could be secured.

### A. *The Criteria for Statehood: A Recipe for Colonization*

I need not emphasize the point that although African states, like states elsewhere, subscribe to international law, none of them were involved in its making prior to decolonization. The only possible exceptions are Ethiopia and Liberia. Ethiopia, an ancient African kingdom, was recognized as a sovereign and independent power by Europeans and Americans in the nineteenth century.<sup>20</sup> Liberia enjoyed recognition from European imperial powers because of its special relationship to the United States.<sup>21</sup> The two were the only African states to engage in

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Ali Mazrui, *The Message of Rwanda: Recolonize Africa?*, NEW PERSP. Q., Fall 1994, at 18. Recolonization under the banner of humanitarianism, he proposed, could arrest the spread of the cancer of chaos seen in Somalia. To distinguish his version of colonization from that of the European powers, Mazrui envisioned an African Security Council composed of five pivotal African states — Egypt, Ethiopia, Zaire, South Africa, and Nigeria — coordinating with the United Nations to reestablish peace and order. *Id.* at 18–20; Ali Mazrui, *Maybe the Time has Come to Recolonize Africa*, HOUSTON CHRON., Aug. 3, 1994, at A27. Mazrui had warned earlier that a new trusteeship system, a disguised recolonization, was being tried under the pretext of peacekeeping in Somalia and Liberia. He urged Africans to create their own mechanisms, a Pax Africana, to restore order to troubled countries on the continent. Tsegaye Tadesse, *Beware Recolonisation, Academic Tells Africa*, REUTER LIBR. REP., May 20, 1993, available in LEXIS, News Library, Wires File. At least one notable American commentator has made a direct appeal to Europeans to retake Africa to save it from itself. William Pfaff, *Africa Needs Europe to Get Involved Again in a Different Spirit*, INT'L HERALD TRIB., Aug. 15, 1994 [hereinafter Pfaff, *Africa Needs Europe*]. Pfaff implies in the article that Europeans may have departed too soon without properly “civilizing” Africa. *Id.* The not-too-subtle suggestion is that decolonization was a mistake. See also William Pfaff, *A New Colonialism?*, 74 FOREIGN AFF. Jan.–Feb. 1995, at 2–6 [hereinafter Pfaff, *A New Colonialism*]. Pfaff’s position, which is patently racist, is inexplicable because he does not explain why he thinks that Europeans, who are responsible for the African crisis, would be better “recolonizers,” or why and whether they would want to re-occupy Africa.

20. The only African state to escape colonization and the Scramble for Africa, although it was briefly occupied by Italy from 1936–41, was Ethiopia. France, Great Britain, and Italy recognized Ethiopian sovereignty between 1898 and 1907, and made agreements to that effect. See IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPAEDIA* 775 (1979) [hereinafter BROWNLIE, *AFRICAN BOUNDARIES*]. It is important to note, though, that some colonial states had diplomatic and commercial intercourse with European states. For example, in 1514, the Oba [king] of Benin sent envoys to Portugal to procure arms. ELIAS, *supra* note 15, at 11.

21. Liberia owes its existence to American whites who formed the American Colonization Society whose purpose was to repatriate freed African slaves to Africa. With the encouragement of President James Monroe, for whom Monrovia, the capital of Liberia was named, a group of freedmen and whites landed in the territory in 1822 and took over land for settlement from local peoples. Their community, ruled first by whites on behalf of the Colonization Society and later by freedmen, declared itself the independent Republic of Liberia in 1847. The colonists in effect subjected the entire native population, which constitut-

international relations or to participate or be present at fora in which international law was being developed.

In this segment, I briefly outline the exclusivity of the process of the development of the law relating to statehood to lay the basis for a demonstration of how those norms were conveniently manipulated and violated by their authors in the "Scramble for Africa." The discussion about the criteria for the determination of statehood and the rights and duties attached to sovereignty illustrates how a few select nations, primarily because of superior military power, held the monopoly over which peoples and societies could retain control over their affairs.

In the seventeenth century, when modern colonialism became a practice of European states, international law governed only relations between "civilized" European nations. These states were defined by the basic attributes of formal juridical equality, independence and sovereignty, a fixed locality or territory, and a political society organized into a government.<sup>22</sup> A state proper was not possible without a people, country, government, and a sovereign or supreme authority.<sup>23</sup> States are different from governments; the latter, whose life is limited, govern the former, whose lifespan is perpetual.<sup>24</sup> During the nineteenth century, however, how an entity became a state was a "matter of no importance;" recognition, a "juristic baptism," was the only agency of admission into "civilized" society, a rite of passage that triggered duties and rights under international law.<sup>25</sup> The mode of acquisition of territory or their relations with others before entities were recognized as states were irrelevant.<sup>26</sup> The law of the jungle, or survival of the fittest, was the basis on which international recognition was achieved.

The criteria for the existence of statehood, and its critical relationship to the act of recognition, has been developed on this basis in current international law. When questions arise, as they often do, about

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ed 97% of Liberian citizens, to its rulership. See SANFORD J. UNGAR, *AFRICA: THE PEOPLE AND POLITICS OF AN EMERGING CONTINENT* 89-93 (1985).

22. POMEROY, *supra* note 17, at 48-51.

23. OPPENHEIM, *supra* note 17, at 135. Such states were proper international persons. The capacity of an entity to enter into relations with other states, and to possess rights and duties, is an important attribute of statehood as well. See HENKIN, *supra* note 3, at 228-29. For Friedmann, states are "the repositories of legitimated authority over peoples and territory." WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 213 (1964).

24. While an independent government is a requirement of statehood, governments and regimes come and go and the international community has to decide whether a particular government is the government for the state in question. See HENKIN, *supra* note 3, at 230.

25. Crawford, *supra* note 16, at 98.

26. *Id.* at 99.

whether an entity is a state,<sup>27</sup> two contradictory theories of recognition almost always come into focus. In early international law certain European states, the "original members" of the family of nations because they made the law through custom and treaties, did not need recognition to become states. The same was true of states that these original members had recognized. For new states recognition was mandatory.<sup>28</sup> Thus a "State is, and becomes, an International Person through recognition only and exclusively."<sup>29</sup> This view, named the constitutive theory, asserted that only the act of recognition could confer international personality on an entity purporting to be a state; the act of recognition by other states effectively "constituted" or "created" the new state.<sup>30</sup> Without recognition, an entity could not enjoy the rights of sovereignty and was therefore vulnerable to foreign occupation.<sup>31</sup>

In contrast, the declaratory theory holds that the existence of a state depended primarily on whether facts showed that an entity met the criteria for statehood set out under international law. Thus, a state could exist without recognition; recognition only and merely serves to "declare" that a state existed.<sup>32</sup> The basic function of recognition was to "acknowledge the fact of the state's political existence and to declare the recognizing state's willingness to treat the entity as an international

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27. Questions of statehood or whether an entity is a state arise in one of the following circumstances: secession, or an attempt thereof, from and by part of a territory of an existing state; situations in which foreign control is exercised over the policies or affairs of a state entity through treaty, unilateral imposition, or delegated authority; where two or more states form a political union but retain considerable autonomy; where constituent units of federated states claim attributes of statehood; in cases where territorial or non-territorial communities with a special international status through a treaty or customary law claim statehood. See HENKIN, *supra* note 3, at 229-30. Most claims of statehood by colonial entities would be covered under the second category, that of the foreign control over the affairs of another state through unilateral imposition.

28. OPPENHEIM, *supra* note 17, at 143.

29. *Id.*

30. HENKIN, *supra* note 3, at 231. Though Oppenheim, a leading proponent of the constitutive theory, conceded that recognition was different from statehood, he nevertheless inextricably linked them. He argued that recognition was necessary to confer rights and duties and the ability to enter into relations with other states. OPPENHEIM, *supra* note 17, at 142-45. Lauterpacht, another prominent proponent of this view, argued that the "full international personality of rising communities" cannot be "automatic"; that someone, in this case existing states since there is no permanent international body set up for that purpose, must perform the task of determining if an entity is an international personality. See H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 55 (1947).

31. See generally OPPENHEIM, *supra* note 17, at 448-57.

32. See HENKIN, *supra* note 3, at 231. Within the declaratory theory, according to Crawford, "recognition of new States is a political act which is in principle independent of the existence of the new State as a full subject of international law." Crawford, *supra* note 16, at 103.

person, with the rights and obligations of a state.”<sup>33</sup> Many entities, including pre-colonial societies in Africa, should have been left alone on the basis of this theory.<sup>34</sup> Although there is no duty to recognize under international law, state practice now favors the requirement that an entity be treated as a state if it attains the qualifications of statehood, unless it has done so in violation of international law.<sup>35</sup> In state practice, judicial authority, and legal opinion, the declaratory theory has prevailed over the constitutive theory.<sup>36</sup>

These criteria of statehood,<sup>37</sup> particularly as applied at an earlier period, were crafted to preserve the sovereignty of European states — and the few others they blessed — and to regulate intercourse among them. The constitutive theory of recognition could be an especially convenient tool for interference in the affairs of other political societies. By the same token, the declaratory theory could be a basis for an argument for the illegality of colonization, since an entity need not have been recognized to become a state. By arrogating to themselves the right to determine, by recognition, when an entity could be considered a state, European powers apparently left an opening for the legalization of colonization or the takeover of entities they coveted. Territories which they did not recognize as states or those which had not been admitted into the family of nations could be coerced into surrendering part or all of their autonomy. Several questions are raised by this view, including the validity of the universalization by Europeans of their particular norms on the conditions which a political society had to fulfill to earn the right to be left alone. Why, for example, did other peoples and societies have to lose their independence and their right to self-determination simply because they did not meet the requirements for statehood as developed in Europe? As the experience of colonization in Africa will demonstrate, it mattered little even when pre-colonial societies met

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33. HENKIN, *supra* note 3, at 231.

34. For example, a British expedition captured the ancient state of Benin in 1897 although Benin had diplomatic contact with Portugal as early as 1514. ELIAS, *supra* note 14, at 11–13.

35. RESTATEMENT, *supra* note 3, at § 202.

36. For example, the authoritative Institut de Droit International stated in 1936 that: “[T]he existence of a new state with all the legal consequences attaching to this existence is not affected by the refusal of recognition by one or more states.” INSTITUT DE DROIT INTERNATIONAL, 2 ANNUAIRE DE L’INSTITUT DE DROIT INT’L 300 (1936). Other international instruments and institutions concur. *E.g.*, Inter-American Convention on Rights and Duties, Dec. 26, 1933, art. 3, 49 Stat. 3097, 3100; Charter of the Organization of American States, Apr. 30, 1948, art. 3, 119 U.N.T.S. 3, 52, *amended* by Protocol of Amendment, 21 U.S.T. 607; HENKIN, *supra* note 3, at 231.

37. See *supra* notes 22–23 and accompanying text.

the criteria for statehood, as many did; all but Liberia and Ethiopia became possessions of European states.

### B. Colonization: Problems of Law, Morality, and Process

There is no disagreement over the motives for the colonization of Africa; commentators agree on its economic basis.<sup>38</sup> The first serious contacts between Europe and Africa involved the capture of African slaves for the newly-discovered Americas. Portugal, and later other European powers including the British and the French, captured and transported for sale millions of Africans into the New World.<sup>39</sup> But European occupationist designs over the continent did not mature until the mid-1800s. The tremendous growth of western European capitalism and the need for markets and materials for industry gave urgency to imperialism.<sup>40</sup> The scramble began with the sudden French invasion of Algeria in 1830, the British takeover of Egypt and the Suez Canal, King Leopold's seizure of large tracts in central Africa, and Germany's ambi-

38. According to a reputable Africanist,

Africa, in the rhetorical metaphor of imperial jingoism, was a ripe melon awaiting carving in the late nineteenth century. Those who scrambled fastest won the largest slices and the right to consume at their leisure the sweet, succulent flesh. Stragglers snatched only small servings or tasteless portions; Italians, for example, found only deserts on their plates.

Young, *supra* note 6, at 19; see generally ROLAND OLIVER, *THE AFRICAN EXPERIENCE* (1991). For a detailed and historical account of the detrimental effects of European penetration of Africa, see WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1981).

39. Portugal was the oldest established power in Africa and had for many centuries been a slave-trader. S.E. CROWE, *THE BERLIN WEST AFRICAN CONFERENCE* 11 (1970). For a fuller account of the European trade in African slaves, see generally BASIL DAVIDSON, *AFRICA IN HISTORY* (1991) [hereinafter DAVIDSON, *HISTORY*].

40. JACK WODDIS, *AN INTRODUCTION TO NEO-COLONIALISM* 13-14 (1967). Colonialists, such as Cecil Rhodes, for whom the defunct Rhodesia was named, encouraged European states to "underwrite imperial enterprise beyond the seas." DAVIDSON, *HISTORY*, *supra* note 39, at 283. He justified colonization in this classic passage:

I was in the East End of London [a working class quarter] yesterday and attended a meeting of the unemployed. I listened to the wild speeches, which were just a cry for 'bread,' bread,' bread,' and on my way home I pondered over the scene and I became more and more convinced of the importance of imperialism . . . My cherished idea as a solution to the social problem, i.e., in order to save the 40,000,000 inhabitants of the United Kingdom from a bloody civil war, we colonial statesmen must acquire new lands to settle the surplus population, to provide new markets for the goods produced in the factories and mines. *The Empire, as I have always said, is a bread and butter question. If you want to avoid civil war, you must become imperialists.*

*Die Neue Zeit*, XVI, 1, at 304 quoted in V.I. LENIN, *IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM* 96-97 (1947) (emphasis added).

tion to acquire colonies of its own.<sup>41</sup> The Berlin colonial conference, labelled the West African Conference and disguised as a forum for the liberalization and internationalization of trade in Africa, purported to legalize the partition and subordination of the continent to European states.<sup>42</sup> Needless to say, none of the African peoples or political entities who were the subject of the conference were invited to provide their view of the legality of colonization or, put differently, the loss of sovereignty over their societies. The Europeans felt that they knew what was best for the natives.<sup>43</sup> The orderly division of Africa was meant to defuse colonial tensions and avoid the risk of war among the conferees.

Morally, the justification for colonization was steeped in European racism, a continuing theme in African-European or black-white relations over the centuries, started in the fifteenth century with arrival of European explorers, Christian missionaries, and slave traders in Africa in the fifteenth century.<sup>44</sup> In the early nineteenth century, an intellectual discourse about the "natural" and "inherent superiority of 'white' peoples over 'black' peoples" gained popularity and acceptance.<sup>45</sup> According to Davidson:

41. DAVIDSON, *HISTORY*, *supra* note 39, at 283–84.

42. *See generally* CROWE, *supra* note 39. The 1885 conference was attended by the United States and all powers in Europe except Switzerland, for a total of 14 states. *Id.* at 5. At the end of the conference, the powers present signed a treaty, the General Act of the Conference of Berlin, Feb. 26, 1885, giving legal effect to claims of different powers and recognizing their territories in Africa. The Act also set out the conditions for effective occupation and the procedures to be followed in the event of future acquisitions or possession of territories on the continent. *Id.* at 190.

43. The only non-white state at the conference was China. ELIAS, *supra* note 15, at 20.

44. Some missionaries, for example, believed in the innate inferiority of Africans. For example, one missionary to the Bantu people wrote that

the mere possession on the part of the Bantu [the African peoples of east and southern Africa] of nothing but an oral tradition of culture creates a chasm of difference between the Native "mind" and that of civilized man, and of itself would account for a lack of balance and proportion in the triple psychological function of feeling, thinking and acting, implying that thinking is the weakest of the three and that feeling is the most dominant.

DENYS SHROPSHIRE, *THE CHURCH AND PRIMITIVE PEOPLES* xix (1938). Elsewhere, he notes that Africans, a "primitive people," have not developed a "sovereignty of reason." *Id.* at xiii. Another asserted that the mission to Africa was the "least that we [Europeans] can do to strive to raise him [the African] in the scale of mankind." A.H. BARROW, *FIFTY YEARS IN WEST AFRICA* 29 (1900). Davidson calls racism the moral justification for colonialism and defines it as "the conscious and systematic weapon of domination, of exploitation, which first saw its demonic rise with the onset of the trans-Atlantic trade in African captives sold into slavery, and which, later, led on to the imperialist colonialism of our yesterdays." BASIL DAVIDSON, *AFRICAN CIVILIZATION REVISITED* 3 (1991) [hereinafter DAVIDSON, *CIVILIZATION*].

45. This doctrine of white superiority was at odds with previous European scholarship. That

scholarship knew that the foundations of European civilization derived from classical Greek civilization. That scholarship further accepted what the Greeks had laid down as patently obvious: that classical Greek civilization derived, in its religion, its philosophy, its mathematics and much else, from the ancient civilizations of Africa,



The advocates of this discourse — Hegel [German philosopher Georg Hegel] most typically, but duly followed by a host of 'justifiers' — declared that Africa had no history prior to direct contact with Europe. Therefore the Africans, having made no history of their own, had clearly made no development of their own. Therefore they were not properly human, and could not be left to themselves but must be 'led' towards civilization by other peoples: that is, by the peoples of Europe, especially of western Europe, and most particularly of Britain and France.<sup>46</sup>

Combined with the insular development of international law as the exclusive domain of Christian nations, such discourse served as fodder for states ready to expand for economic reasons; it certainly added to the zealotry for colonization.<sup>47</sup> Early international legal doctrine itself appeared to sanction colonization, the acquisition of territory by a recognized state and the imposition of its sovereignty over such territory.<sup>48</sup> Such taking could occur as occupation,<sup>49</sup> subjugation,<sup>50</sup> or cession.<sup>51</sup> In reality, the colonization of Africa utilized any of the three methods, or a combination thereof, although according to international law at the time only occupation was purportedly legal, since no recognized states existed in Africa. Even within European idiom, occupation raises problems of its own because many of the entities colonized through it met

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above all from Egypt of the Pharaohs. To those "founding fathers" in classical Greece, any notion that Africans were inferior, morally or intellectually, would have seemed merely silly.

DAVIDSON, HISTORY, *supra* note 39, at xxii-xxiii. For a careful, historical, and analytic exploration of the African origins of classical civilizations, see MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION (1987).

46. DAVIDSON, HISTORY, *supra* note 39, at xxii.

47. *Id.*

48. See generally POMEROY, *supra* note 17, at 95-114; OPPENHEIM, *supra* note 17, at 436-70.

49. Occupation occurred when a recognized state acquired territory which was uninhabited, referred to as *terra nullius*, or inhabited by a people or an entity that international law did not consider a state. Only a state could occupy territory. This is known as an "original" mode of the acquisition of territory. Possession and effective administration of such territory, which was considered no-man's land, made occupation real and were essential to it. See OPPENHEIM, *supra* note 17, at 448-57.

50. Subjugation arose through the conquest of enemy territory in war and its subsequent annexation by the conquering state. This conquest "disappeared" the vanquished state; but title did not vest in the conqueror until annexation was effected. If the conquering state made the conquered state give up only part of its territory in a "treaty of peace", then acquisition was by cession, not subjugation. *Id.* at 461-67.

51. Cession was the acquisition of territory in a bilateral arrangement, where the parties, who both had to be states, lost or gained territory by agreement or acquiescence through war. *Id.* at 440-47.

the criteria for statehood.<sup>52</sup> Most African societies were organized in ethno-political states, some highly centralized, others less so.<sup>53</sup>

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52. While it is beyond the scope of this article to explore at length the history and evolution of state formation in Africa, it is necessary for me to outline in a preliminary manner the broad sketches of African political societies from a historical view in order to lay to rest the mistaken and deliberately distorted view that African history started with its colonization by Europeans. Apart from the Egyptian and Ethiopian civilizations, which the West acknowledges but denies their black African origin, other parts of the continent have long histories of developed state-societies. In West Africa, the Soninke kingdom has been traced to 300 A.D., as were the Tekrur and Mandingo kingdoms in Senegal and Mali, respectively. Between the ninth and sixteenth centuries, writers and travellers documented the sophisticated states and kingdoms of ancient Ghana, Mali, Songhay, Benin, and others. Many of these states engaged in inter-state relations, including commerce, sometimes with traders from the Middle East. See DAVIDSON, *CIVILIZATION*, *supra* note 44, at 77–124. In East Africa, by the nineteenth century, established states had arisen in southern Uganda, with the Buganda, Bunyoro, and Ankole kingdoms as the most prominent. Others rose in northwestern Tanzania, Rwanda, Burundi, and among the Hehe and Nyamwezi in Tanzania. In central and southern Africa, the Luba/Lunda and Kongo states in Angola-Zaire, the Mwanamutapa kingdom in Zimbabwe, and the Swazi, Tswana, Zulu, and Sotho states can be traced from anywhere around the fifteenth century; all predated the Scramble for Africa. For general information on early African civilizations, see OLIVER, *supra* note 38, at 145–58; DAVIDSON, *HISTORY*, *supra* note 38, at 141–83. See also BASIL DAVIDSON, *THE LOST CITIES OF AFRICA* (1987) [hereinafter DAVIDSON, *LOST CITIES*]; CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987); T. OLAWALE ELIAS, *GOVERNMENT AND POLITICS IN AFRICA* 1–12 (2d ed. 1963). Oliver notes that though “[n]ot all of the Africans tried to found states,” many “lived, apparently from quite early in the Iron Age [around the ninth century], in states, and these states were invariably in some sense hereditary monarchies.” OLIVER, *supra*, at 145.

Politically, they were organized in clans or lineages under one ruler or a council of elders and jealously guarded their independence and sovereignty but engaged in inter-state relations with their neighbors. State-societies therefore had a permanent population, sovereign authority and government, engaged in inter-state relations, and had a fixed territory. As noted by Brownlie:

From the seventeenth century onwards societies became more organized. Agricultural peoples certainly had a conception of territory and legitimate holding. Even pastoral peoples have a conception of territory in the form of grazing grounds. Records exist of a frontier dispute in the early nineteenth century between Sokoto and Matsina in West Africa.

BROWNIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 8. He adds that the absence of administration in “any very organized and centralized form, cannot rule out concepts of territory, of legitimacy related to space, and consequently of frontiers.” *Id.*

53. The requirements for an entity to meet the criteria for statehood were: sovereign government, defined territory with a permanent population under its control, and a capacity to engage in formal relations with other entities. See *supra* notes 22–23 and accompanying text. These criteria were met by many African entities which fell to colonization. Pre-colonial Africa consisted of two categories of societies. The first group consists of those states with centralized authority, administrative machinery, and other standing state institutions such as the Zulu, Ashanti, and Buganda. The second is those with less intrusive government organs, such as the Akamba and the Kikuyu of Kenya, whose common cultural, ethnic, and linguistic homogeneity gave them fundamental cohesion. For analyses of the organization of pre-colonial state-societies, see generally ERIC O. AYISI, *AN INTRODUCTION TO THE STUDY OF AFRICAN POLITICAL CULTURE* (1972); *AFRICAN POLITICAL SYSTEMS* (M. Fortes & E.E. Evans-Pritchard eds., 5th ed. 1940); JOSEPH MUTHIANI, *AKAMBA FROM WITHIN* (1973); JOMO KENYATTA, *FACING MOUNT KENYA* (vintage ed. 1965); Kwasi Wiredu, *An Akan Perspective on Human Rights*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES* (Abdunabi Ahmed An-Na'im & Francis M. Deng eds., 1990).

Without much knowledge about the continent, early European jurists and publicists had decided that much of Africa was a no-man's land that could be brought under legal occupation. Territories inhabited by "persons who are not recognized as belonging to the great family of states to whom the international law applies," or "savage, barbarous tribes" belonged as of right upon discovery to the "civilized and Christian nation."<sup>54</sup> Oppenheim distinguished the protectorates of non-Christian nations, such as Tunisia, Madagascar, Morocco, and Zanzibar, from the "so-called protectorates over African tribes;" the latter were not states and could be legally occupied in spite of "treaties" of protection with local rulers.<sup>55</sup> As weak states, the former had a higher status even though they did not belong to the family of nations; sovereignty over them could only be acquired through cession or conquest but not occupation, although the end result was the same, the loss of sovereignty and the brutal exploitation of human and natural resources.<sup>56</sup>

In addition to this arbitrary and convenient development of norms and their selective application, the actualization of colonization itself raised more legal and moral problems. The Berlin colonial conference, for instance, only retroactively "ratified" and allocated existing "spheres of influence,"<sup>57</sup> in effect an attempt to seek legal shelter for an illegality already committed.<sup>58</sup> Whereas the Protocols and the General Act of the Conference of Berlin may have amicably settled imperialist rivalries, and set out in detail the rules allocating and governing African territories, they did nothing to legalize colonialist occupation. The view of colonized peoples, whose legality could not be validly questioned by the imperialists, nullified the purported legality of colonialism. Rules of "international law" exclusively crafted and employed by Europeans to

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54. POMEROY, *supra* note 17, at 96. He argues that it "seems to be a law of Providence that the peoples who are unfitted to develop the resources of the earth shall give way to those that have the stronger race life, the most enduring persistence, the energy which transforms the forest and the wilderness into the farm, the village, and the city." *Id.* at 96-97.

55. OPPENHEIM, *supra* note 17, at 192-93.

56. *Id.* at 192-93, 436-70.

57. According to Oppenheim, the concept of the "sphere of influence" grew out of "the tendency of every colonising State to extend its occupation constantly and gradually into the interior, or 'hinterland' of an occupied territory" in Africa. It described a "territory exclusively reserved for future occupation by a Power which ha[d] effectively occupied adjoining territories" and helped prevent conflict with other powers interested in extending their sovereignty over that or other territories in the area. Treaties between European powers were concluded after the Berlin conference to firm up these claims; Great Britain, for example, made such treaties with Portugal in 1890, with Italy in 1891, with Germany in 1886 and 1890, and with France in 1898. OPPENHEIM, *supra* note 17, at 455.

58. DAVIDSON, HISTORY, *supra* note 38, at 284. Davidson notes that an "effective agreement on partition had in fact long preceded" the conference. *Id.*

extend their domination of other parts of the world could not have any legality in Africa, particularly if the effect of their application meant the loss of sovereignty. A Lagos paper captured the African interpretation of the legality of the Act of Berlin in sharp condemnatory language: "[t]he world has, perhaps, never witnessed a robbery on so large a scale. Africa is helpless to prevent it . . . It is on the cards that this 'Christian' business can only end, at no distant date, in the annihilation of the natives."<sup>59</sup>

Wars of conquest and fraudulent treaties with African rulers and societies were the agencies for the effective imposition of European sovereignty. Occupation met with "tough resistance" almost everywhere as wars of "invasion or pacification" were "dark with slaughter and destruction."<sup>60</sup> German brutality and the killings of thousands of Africans in its efforts to establish control over the Herero of present-day Namibia and the Hehe of Tanzania were not isolated incidents.<sup>61</sup> Even when conquests of such severity were not undertaken, effective colonial rule was imposed by "treaties of protection" between African rulers and European powers, usually after a war, through coercion, intimidation, deceit, or any combination thereof.<sup>62</sup> King Dosunmù of Lagos, for

59. U.O. Umozurike, *International Law and Colonialism in Africa*, 3 E. AFR. L. REV. 47, 50 (1970) (quoting LAGOS OBSERVER, Feb. 19, 1885) (ellipsis in original). Even a colonizer later confessed to the illegality of colonialism. Sir Alan Burns, the former Governor of Nigeria, stated: "[n]o European nation had the right to assume sovereignty over the inhabitants of any part of Africa, and the claims put forward by the various Governments at the Berlin Conference in 1885 took little account of the rights of the people who lived in the territories claimed." See HISTORY OF NIGERIA 277 (4th ed. 1948), quoted in ELIAS, *supra* note 15, at 18.

60. DAVIDSON, HISTORY, *supra* note 39, at 284–85. King Leopold of Belgium and his agents of the "strangely named Congo Free State" caused untold death and destruction. This story was repeated often. *Id.*

Like the British in the lands behind Lagos and the Gold Coast, the French encountered strong peoples who were proud of their independence, and were ready to fight for it. Their resistance failed in the end because they possessed inferior equipment and military organization. . . . Yet it needed nearly twenty years of warfare for the French to make good their claim to the lands of ancient Ghana, Mali and Songhay.

*Id.*

61. Local resistance to German colonialism was effective among the Hehe and related peoples first beginning in the late nineteenth century and later in 1905 with the Maji Maji uprising. As a result, the "whole region was laid waste by colonial soldiery, who burned villages, destroyed standing crops and confiscated livestock." OLIVER, *supra* note 38, at 198. In addition to the massacres, the ensuing famine claimed an estimated 200,000 lives. In Namibia, then South West Africa, three quarters of the Herero population was exterminated by German repression between 1905–07. See *id.* Of an estimated 80,000 Hereros, only about 15,000 survived the genocide. RUTH FIRST, SOUTH WEST AFRICA 28 (1963), quoted in Umozurike, *supra* note 59, at 50.

62. See generally Umozurike, *supra* note 58.

instance, was attacked by the British when he refused to surrender sovereignty over his whole territory. After the war, he signed a treaty, stating:

I Docemo, do, with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the Port and the Island of Lagos, with all the rights, profits, territories and appurtenances whatsoever thereunto belonging, and as well the profits and revenue and the direct, full and absolute dominion and sovereignty of the said port, island, and premises, with all the royalties thereof, freely, fully, entirely, and absolutely.<sup>63</sup>

The absolutist language of the "treaty," its one-sided capitulation by Dosunmu, and the complete, unconscionable "renunciation" over the sovereignty of his people, territory, and resources is of such absurdity that, if taken seriously, it would make a mockery of the notion of a treaty and the concept of freedom of contract. The attitude of Europeans, such as Lord Lugard, the notorious colonialist, was revealing of the lack of seriousness with which they took the "treaties" with Africans. He described the conclusion of one "treaty" with a "savage chief" whom he promised British "protection," purportedly without loss of sovereignty, in such pejorative and mocking language that it seemed clear that he could not have thought of the agreement in contractual terms, but rather as a necessary nuisance to secure a sphere of influence.<sup>64</sup> Treaties were written by Europeans in their own technical language,<sup>65</sup> granting them

63. See U.O. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* 40 (1979) [hereinafter UMOZURIKE, *INTERNATIONAL LAW*]. Another account of "treaty-making" read:

Sir Frederick Lugard of Northern Nigeria preceded negotiations with short military actions in order to place himself in a position of strength. Consul Ralph Moor of the Niger Coast Protective moved up and down the Cross River with troops shelling and destroying villages before settling down to make 'treaties of friendship' with the frightened people.

Ukpabi, *Military Considerations in African Foreign Policies*, 6 *TRANSITION* 31, 33-40 (1967), quoted in CHRISTOPHER QUAYE, *LIBERATION STRUGGLES IN INTERNATIONAL LAW* 325 (1991).

64. F. Lugard, *Treaty-making Africa*, 2 *GEOGRAPHICAL J.* 53 (1893), quoted in Umozurike, *supra* note 59, at 52. Lugard wrote of the treaty-making ceremony in the most demeaning language: "seated cross-legged on a mat opposite to each other on the ground, you should picture a savage chief in his best turn-out which consists probably of his weapons of war, different chalk colourings on his face, a piece of skin of a leopard, wild cat, sheep, ox. . . ." After an exchange of "promises" in which the African ruler "welcomed" the British, and Lugard undertook not to "eat up his [the African ruler's] land" or oust him, Lugard then "put down on paper what was the pith of the contract between us; that is treaty as I consider it." *Id.*

65. The treaties were written in the idiom of jurisprudence prevalent in Europe at the time, one of the many indications of their one-sided nature.

sovereignty over the territory.<sup>66</sup> The exchange was a mockery: Lugard spoke of a "valuable concession purchased by the present of an old pair of boots."<sup>67</sup> Many Africans who signed the treaties of "protection" mistakenly thought the stranger would respect their sovereignty if they showed him hospitality. King Jaja of Opobo, a Nigerian Ibo, found to his dismay that the meaning of "protection" could be elusive. He was denied trading rights even after assurances that "protection" would leave his country still under his government.<sup>68</sup>

It is difficult, if not impossible, to sustain the legality of the "treaties of protection" even under extant European law at the time. Treaty law was clear about who could enter into a treaty and what conditions gave it binding authority. Only states had treaty-making power by virtue of their sovereignty.<sup>69</sup> A treaty had to have the mutual consent of the contracting parties and that consent had to be real and given under absolute freedom for the treaty's validity,<sup>70</sup> provided that defeat in war and the subsequent cession of territory under duress did not invalidate a treaty.<sup>71</sup> Even if consent was real among the parties, a treaty was not binding if the "consent was given in error, or under a delusion produced by a fraud."<sup>72</sup> Invalidity extended to treaties obtained by intimidation.<sup>73</sup> Many of the treaties of protection were obtained by intimidation, fraud, mistake or error because the parties misunderstood each other, or without real or mutual consent.<sup>74</sup> In addition, the treaties were invalid because European law did not recognize African political entities as states, with treaty-making power, and the rulers of those entities as heads of

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66. Umozurike, *supra* note 59, at 52. One of the most effective methods of colonization, despite the long-enduring resistance by Africans, was the "process of infiltration, steadily advanced until the stage of 'effective occupation' could be reached, behind the screen of 'treaties of protection'. These were 'signed' with one or another European power by chiefs who could seldom or never have understood the intention of their new 'protectors'." DAVIDSON, *HISTORY*, *supra* note 39, at 286.

67. Umozurike, *supra* note 59, at 53.

68. *Id.* at 53. It was devious and ironic that to obtain the treaty of protection one European power would threaten Africans with colonization by another European power even though the spheres of influence had been settled at the Berlin conference.

69. Such power was exercised by heads of state or their personally appointed representatives. OPPENHEIM, *supra* note 17, at 705-06.

70. *Id.* at 710-11.

71. Pomeroy argued that although consent had to be freely given and mutual, the one exception where a treaty was nevertheless valid arose when a state "surrenders some right, perhaps cedes territory." POMEROY, *supra* note 17, at 340.

72. OPPENHEIM, *supra* note 17, at 712.

73. *Id.* at 711.

74. See Umozurike, *supra* note 59, at 52.

state; they were mere "chiefs" of "tribes."<sup>75</sup> Such treaties would certainly be illegal if judged by the principles of current treaty law which is based on the Vienna Convention on the Law of Treaties.<sup>76</sup> One African scholar has argued that these principles, which existed then, invalidated the "treaties."<sup>77</sup>

### C. *The Contrived State: The Drawing of a New Map*

The process of drawing new frontiers and the effective occupation of the territories started in earnest as soon as spheres of influence were delimited among European powers. While the last two decades of the nineteenth century were used to conquer and establish presence, the first two of the twentieth century were decades of "pacification" and the imposition of colonial rule through the colonial state. The new states were usually created by amalgamating, by force or "treaty of protection," numerous pre-existing African traditional states or ethno-political communities. The new territories were an actualization of the "spheres of influence." The loss of sovereignty by pre-colonial states was therefore followed by their combination into single, unitary states.<sup>78</sup> Thousands of independent pre-colonial states were compressed into some forty new states.<sup>79</sup>

The typical example of Kenya and Uganda will suffice to demonstrate the callous and arbitrary process of boundary delimitation. The area today known as Kenya was declared a British sphere of influence in 1886 and declared the East African Protectorate in 1896; it was annexed and became the Kenya Colony in 1920.<sup>80</sup> Although the area now called Uganda also became a British sphere of influence in 1886 and was named the Uganda Protectorate in 1894, even then its bound-

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75. OPPENHEIM, *supra* note 17, at 193.

76. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27, *reprinted in* 63 AM. J. INT'L L. 875 (1969). Among other things, the Convention calls for treaties to respect the following principles: free consent, good faith, *pacta sunt servanda*, self-determination and equal rights, prohibition of the threat of the use of force, and non-interference in the domestic affairs of other states.

77. Umozurike argues that the Vienna Convention did not "create but merely re-affirmed these principles for they were in existence when the treaties were concluded with African Kings." Umozurike, *supra* note 59, at 52.

78. Only ten pre-colonial states retained a semblance of their pre-colonial territorial integrity. *See supra* note 6.

79. For a comprehensive and detailed account of the creation of the boundaries of the current African states, including the agreements between imperial powers and other evidence of bargaining among them, see generally BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20. This complete account provides the agreements and other evidence of boundary creation for all African countries.

80. *Id.* at 775.

aries remained uncertain because the British could not immediately determine the status of the kingdoms of Buganda, Toro, and Ankole.<sup>81</sup> Later, these pre-colonial states lost their sovereignty as they became part of the new Ugandan state. Between 1900–1902, the British even contemplated combining Kenya and Uganda into one protectorate.<sup>82</sup> In 1902, a large tract of eastern Uganda, consisting of its “Eastern Province, the southern part of the Elgon district of central Uganda and the southern portion of Rudolf Province” was transferred and became the Kisumu and Naivasha provinces of Kenya.<sup>83</sup>

Little consideration was given to pre-colonial inter-state relations or other relationships between different traditional states. In the majority of cases, the map-makers proceeded as though Africa was a blank slate, uninhabited.<sup>84</sup> The observations of imperial statesmen were very telling about how they perceived their cartography. As noted by Anene, “[t]he manner in which the boundaries were made was often a subject for after-dinner jokes among European statesmen.”<sup>85</sup> In 1890, for example, Lord Salisbury, the British Prime Minister, remarked at a dinner at Mansion House following the conclusion of the Anglo-French Convention which established spheres of influence in West Africa, that “[w]e have been engaged in drawing lines upon maps where no white man’s foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.”<sup>86</sup>

81. KENNETH INGHAM, *THE MAKING OF MODERN UGANDA* 41–85 (1958).

82. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 941.

83. *Id.* at 942. These transfers survived independence but became the subject of tension in 1976 when Idi Amin, then Ugandan president, laid claim on them. *Id.*

84. At the Berlin Conference, Africa was “regarded as *terra nullius*, subject to the possession of the European power exercising effective authority. They never took into account that there were people of vastly different backgrounds and cultures living on the continent.” Chris M. Peter, *The Proposed African Court of Justice — Jurisprudential, Procedural, Enforcement Problems and Beyond*, 1 E. AFR. J. PEACE & HUM. RTS. 117, 124–25 (1993) (footnotes omitted). The International Court of Justice in the Western Sahara case said that the colonization of Africa was not “occupation” in the technical sense; the “treaties” with African rulers indicated that the continent was not considered *terra nullius* proper. Western Sahara (Advisory Opinion), 1975 I.C.J. 12 (Oct. 16), at 39.

85. ANENE, *supra* note 7, at 3.

86. *Id.* Anene quotes another senior British official who was involved in creating the boundary between Nigeria and Cameroon, saying that:

In those days we just took a blue pencil and a rule, and we put it down at Old Calabar, and drew that line to Yola . . . I recollect thinking when I was sitting having an audience with the Emir [of Yola], surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.

*Id.* at 2–3 (quoting *The Geographical Journal*, vol. xxviii, Proceedings, March 9, 1914).



Divisions were driven by pressures of competition between European powers, their trading companies, and in many instances the influence of Christian denominations.<sup>87</sup> Sometimes, states or entities with a history of tension and war between them were lumped into the same state.<sup>88</sup> In other cases, the new frontiers split ethnic and linguistic groups from their political societies and located them in different states.<sup>89</sup> Famous examples are those of the Masai, who were divided between Kenya and Tanzania,<sup>90</sup> and the Ewe in Togo and Ghana.<sup>91</sup> An irony of the arbitrary borders was the "unity" of African pre-colonial states imposed under the roof of the colonial state but also the "disunity" created by the colonial policy of divide and rule.<sup>92</sup> According to Brownlie:

Boundary making in the period of European expansion in Africa took place in circumstances which generally militated against reference to tribal or ethnological considerations. Political bargaining involved the construction of parcels of territory upon broad principles evidenced graphically by liberal resort to straight lines and general features such as drainage basins and watersheds. Within a framework of overall political bargaining, the accidents of prior exploration and military penetration were often to determine delimitation as between Britain, France and Germany. Thus the map of West Africa was drawn. In any case lines were commonly drawn on maps at a stage when there was no very great knowledge of the region concerned. The boundaries which emerged were

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87. The Buganda kingdom, for example, faced competition from both the British and German commercial companies which attempted to secure a "treaty of protection" for different countries.

The Anglican missionaries at the capital advised their followers to sign the British treaty, while the French White Fathers favored the German one. In the event, the issue was settled in Europe by the Anglo-German agreement of 1890, but not before the representative of the British company, Frederick Lugard, had used his Swahili soldiers and single Maxim gun to support the Protestant party against the Catholic one.

OLIVER, *supra* note 38, at 179-80.

88. The Akamba, Kikuyu, and the Masai, three groups which fought each other from time to time, were all bunched into the new state of Kenya. See CHARLES W. HOBLEY, *ETHNOLOGY OF THE A-KAMBA AND OTHER EAST AFRICA TRIBES* 43-48 (1910). Examples abound elsewhere in Africa.

89. See Kenneth M. Barbour, *A Geographical Analysis of Boundaries in Inter-Tropical Africa*, in *ESSAYS ON AFRICAN POPULATION* 303 (Kenneth M. Barbour & R.M. Protero eds., 1961).

90. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 938.

91. *Id.* at 277.

92. See MAZRUI, *supra* note 6, at 108. Divide and rule was the strategy of favoring one group over another to heighten ethnic animosities with the intention of making the task of colonial administration more difficult to challenge. *Id.*

generally based upon geographical features, especially rivers and watersheds, and astronomical or geometrical lines.<sup>93</sup>

The newly contrived state represented, for many Africans, the physical symbol of the loss of independence and sovereignty over their societies. The manner in which it was created, after long periods of resistance, the way in which it was governed, and the purpose for which it brought into existence, namely the exploitation of both natural and human resources, were a grim reminder of the luxuries of self-governance. Colonial policies were harsh and brutally implemented.<sup>94</sup> Such practices did little to endear Africans to the state or develop a loyalty towards it.

#### D. *The Validation of the Colonial State in International Law*

The first major attempt to validate<sup>95</sup> and essentialize<sup>96</sup> the colonial state occurred at the start of the League of Nations.<sup>97</sup> The League Covenant provided for the Mandate System to deal with the colonies of those defeated in the war: Germany and Turkey.<sup>98</sup> The Mandate System purported to commit the international community to the development

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93. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 6. Brownlie also notes that in some cases, the map-makers included ethnology and traditional political societies as one of the factors. In creating Nigeria, for example, the traditional boundaries were followed in the north and west to make administration easier. The same was true of Burundi, Rwanda, most of North Africa, parts of Kenya, and so on. *Id.* at 6-7. While keeping pre-colonial administrative units together may have made for easier colonization, it did not solve the problem of loss of sovereignty and the coercion of different pre-colonial states under one, unitary colonial state.

94. In the Congo, for example, Africans were forced by the Belgians to collect rubber in the wild. Those who failed or resisted the task were visited with punitive expeditions in which thousands were brutally murdered. See Umozurike, *supra* note 59, at 51.

95. By "validate" I do not mean legalize; rather, I refer to the recognition, at the first major international meeting after the Berlin Conference, of the fact of colonial states as entities with rights and responsibilities under the metropolitan powers. The processes of colonization, the creation of new states, and the implication of the permanence of the new entities, even where they were carved up haphazardly, were given *de facto* recognition.

96. I use this term only to denote the view adopted by imperial and major powers within the League of Nations [hereinafter League] to present colonization as an essential duty of the West to "civilize" and bring to "political maturity" colonial peoples.

97. The Covenant of the League of Nations addressed matters relating to colonies and other territories under certain League members. LEAGUE OF NATIONS COVENANT arts. 22, 23.

98. *Id.* art. 22. The Mandate System was established by the Allied and Associated Powers under article 22 to address the fate of 15 mandated territories in all. In 1919 at the Paris Peace Conference, President Woodrow Wilson of the United States denied that its "purpose was merely to divide up the spoils" but to serve peoples from underdeveloped areas and to prevent an occurrence of the abuses committed by Germans in their colonies. See RAY S. BAKER, *WOODROW WILSON AND WORLD SETTLEMENT* 262 (1923).

and the welfare of colonial peoples.<sup>99</sup> It grouped the colonies into three categories, depending on their levels of development.<sup>100</sup> The likelihood of independence appeared to be a central criteria for categorization.<sup>101</sup> The League outlawed the annexation of territory and required the mandatory powers to work to improve the lives of the colonies as wards of civilization.<sup>102</sup> Among other things, the Mandate System was hypocritical in its exclusion of the colonies of the victors from scrutiny.<sup>103</sup> It was little more than a charade to justify the dispossession of Germany and Turkey of their territories.

The League of Nations Covenant did not outlaw colonialism or any of its creations. It in fact provided a firm basis for the acceptance of the new global map. It strengthened the extant law on colonial dependencies: although they possessed some of the qualities of international persons, and had such capacity, the "parent" or imperial powers re-

99. LEAGUE OF NATIONS COVENANT art. 22, para. 6. The paternalistic and racist views of the West were stunning. It provided, in part, that

[t]o those colonies and territories which as a consequence of the late war [1914-1918] have ceased to be under the sovereignty of the states which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in the Covenant.

*Id.*

100. *Id.* art. 22, para. 3. "The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances." *Id.*

101. In Type A Mandates Iraq and Palestine went to Britain and Syria and Lebanon to France; in Type B, British Cameroons, British Togoland, and Tanganyika were given to Britain while French Cameroons and French Togoland went to France, and Ruanda Urundi to Belgium; in Type C Mandates, South West Africa was given to the Union of South Africa, Samoa to New Zealand, Nauru to the British Empire, other Pacific Islands south of the Equator to Australia, and Pacific Islands north of the Equator to Japan. OPPENHEIM, *supra* note 16, at 207-09. For Type A Mandates, the obligation of the administering powers was to provide aid and advice on government matters until they could become fully independent. LEAGUE OF NATIONS COVENANT art. 22, para. 4. For Type B, the powers were required to administer them under "conditions which will guarantee freedom of conscience or religion, subject only to the maintenance of public order and morals, [and] the prohibition of abuses such as the slave trade." *Id.* art. 22, para. 5. Type C Mandates were to be governed in accordance with the laws of the mandatory powers. *Id.* art. 22, para. 6. Most of the Type A Mandates gained their independence before the end of the League of Nations.

102. The mandatory powers were required to submit annual reports to the League Council "in reference to the territory committed to its charge." LEAGUE OF NATIONS COVENANT art. 22, para. 7.

103. Although in reality it mattered little whether a colony was mandated or not — as exploitation and brutalities were common in either case — the victors by not "regulating" the governance of their colonies allowed themselves license to behave as they wished. See Umozurike, *supra* note 59, at 56.

mained ultimately responsible for their affairs.<sup>104</sup> The post-1945 period, and especially the norms, rules, and positions adopted by the United Nations and its agencies,<sup>105</sup> seem to confirm this assertion. The difference, of course, is that the U.N. expressly called for decolonization and spent considerable energy advancing the achievement of that goal. It established mechanisms for international accountability over the colonies.<sup>106</sup> In particular, the U.N. Trusteeship System departed from the League tradition and brought all colonies and other dependent territories under the tutelage of the West.<sup>107</sup> Although the Charter of the United Nations did not explicitly mention colonialism, it contradicts it by supporting self-determination<sup>108</sup> and affirming fundamental human rights.<sup>109</sup>

Two leading views on the legality of colonialism under the U.N. Charter have been articulated.<sup>110</sup> The first view argues that the Charter of the United Nations "expressly recognizes the legitimacy of colonialism in Chapter XI."<sup>111</sup> Similarly, others argue less credibly that the duty to account to the United Nations on the administration of colonies is a recognition of the legitimacy of colonialism.<sup>112</sup> The second view, popu-

104. Colonies were not regarded as states although some of them, such as India, were allowed to conclude treaties, a function ordinarily reserved for independent and sovereign states. See HENKIN, *supra* note 3, at 274.

105. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, Dec. 14, 1960, 15 U.N. GAOR Supp. No. 16, 66, U.N. Doc. A/4684 (1960); G.A. Res. 1654 (XVI), Nov. 27, 1961, 16 U.N. GAOR Supp. No. 17, 65, U.N. Doc. A/5100 (1961) (establishing a 17-member body to oversee the implementation of resolution 1514).

106. U.N. CHARTER art. 86 (establishing the Trusteeship Council, the body responsible for overseeing the administration of colonies and other dependent territories).

107. *Id.* arts. 75-91 (imposing duties on all administering powers, not just over the territories of the vanquished but on all powers to promote self-government and independence). The Trusteeship Council was empowered to monitor and regulate the administration of colonies.

108. *Id.* art. 1, ¶ 2 and art. 55 (implicitly recognizing the right to self-determination). The traditional and classic exercise of the legal right to self-determination involves the international recognition of the right of the inhabitants or peoples of a colony or dependency to freely choose their independence or association with another state.

109. *Id.* art. 55.

110. For a brief review of the two opposing views, see QUAYE, *supra* note 63, at 108-09. Quaye supports the former.

111. Thomas Moodie Kuhn, *Terrorism in International Law* 82 (Jan. 1980) (unpublished L.L.D. dissertation, University of South Africa). He argues that, as a basis for his position, the Charter does not permit the use of force to end colonialism. *Id.*

112. C.J.R. Dugard, *The Organization of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT'L & COMP. L.Q. 157, 172 n.86 (1967). He writes that "[t]he Charter of the United Nations, as framed in 1945, implicitly recognised the legitimacy of colonialism" because it imposed on administering powers the duty of accountability to the United Nations for the administration of the colonies. *Id.* at 172-73.

lar in the former colonies, is that the Charter illegalizes colonialism.<sup>113</sup> It is perhaps more plausible to argue that the U.N. Charter is evasive on the legality of colonialism. Although it provided for the administration and the preparation of the colonies for self-government and independence, regulation does not amount to legalization.<sup>114</sup>

Significantly, the Charter did not challenge the validity of the colonial state as an entity; there is no suggestion anywhere that the colonial state is a nullity or that sovereignty should be returned to pre-colonial states and peoples in the process of preparing them for independence. The Charter in fact does the exact opposite: it recognizes the right to political self-determination only for those territorial units that are "internationally determined," of which the colonies are the classic example.<sup>115</sup> The United Nations and international law have defined the "self" who possesses the right of self-determination as the peoples bounded by a territorial unit within a colonial state. Thus the criteria for "peoplehood" include "commonality of interests, group identity, distinctiveness, and a territorial link."<sup>116</sup> This definition would seem to encompass pre-colonial groups and state-societies such as the Akamba of Kenya or the Sukuma of Tanzania as well as collections of such groups under the rubric of the colonial state as Mozambiquans or Ugandans. It is only the latter, not the former, who can exercise the right to self-determination.

113. During a debate in the Security Council on the Portuguese colonies, a Brazilian delegate stated that "[n]o one doubts that the Charter in its Chap. XI put an end to the so-called legitimacy of colonialism." *Id.* at 172 n.86 (quoting U.N. SCOR, 18th Sess., 1043d mtg. at para. 4, U.N. Doc. S/PV 1043).

India made the same argument in 1961 to justify its invasion of the Portuguese state of Goa which it sought to bring under its sovereignty. The Indian delegate to the Security Council argued it was of no consequence that Portugal had occupied Goa for 450 years. He went on to state that Portugal "ha[d] no sovereign right over this territory. There is no legal frontier — there can be no legal frontier — between India and Goa. And since the whole occupation is illegal as an issue — it started in an illegal manner, it continues to be illegal today and it is even more illegal in the light of resolution 1514." U.N. SCOR, 16th Sess., 987th mtg. at 27, U.N. Doc. S/PV 987 (1961).

114. U.N. CHARTER arts. 73–91 (providing for manner of administration of colonies and for independence).

115. See U.N. CHARTER art. 73.

116. See Richard N. Kiwanuka, *The Meaning of 'People' in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L L. 80, 87–88 (1988). In a report to the United Nations, Aureliu Cristescu defined "people" for the purposes of self-determination as a social entity with a clear identity and its own set of characteristics. It must be connected to a territory, and is not to be confused with ethnic, religious or linguistic minorities. AURELIU CRISTESCU, *THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS DOCUMENTS*, ¶ 279, U.N. Doc. E/CN.4/Sub.2/404/Rev.1, U.N. Sales No. E.80.XIV.3 (1981), quoted in Kiwanuka, *supra*, at 87.

Until the secession of Eritrea,<sup>117</sup> the general practice of the Organization of African Unity (OAU), like the United Nations, was to equate political self-determination with independence from colonial or minority regime situations. It was not extended to sectors of the population within an independent or in non-racist regime cases, previously the condition in Namibia, South Africa, and Zimbabwe.<sup>118</sup> Such groups or sectors, even though they belonged to different pre-colonial states and ethnicities, were seen and treated as having the same destiny, and becoming independent within the same state, regardless of their will. For instance, self-determination for Kenyan peoples was not viewed as a right that different ethnic groups could exercise separately, an event that could have occasioned the dismemberment of the country. Kiwanuka argues that international law would have denied the Amazulu, Amaxhosa, Basotho, and other South African groups the right to pursue their own genuine, sovereign independence from the Apartheid regime.<sup>119</sup> The reasoning was:

That people would be seceding from a future state. International law already treats the right to self-determination as tied to the specific geographically defined territory. Further subdivisions would not be consistent with that position. Moreover, a people wishing to go its separate way, as, say, in South Africa, would have to renounce the authority of the liberation movement representing it. In our example, this would be the African National Congress or the Pan Africanist Congress, both of which are recognized by the OAU. That organization would be most unlikely to support any such secessionist aspirations.<sup>120</sup>

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117. Following a long and bloody secessionist struggle against Ethiopia, Eritrea became an independent state in 1993 after its military defeat of Ethiopia in 1991. It was the first country to break away from an independent African state. Edmond Keller, *Remaking the Eritrean State*, in *COLLAPSED STATES* 130-34 (I. William Zartman ed., 1995).

118. See generally David A. Ijalaye, *Was 'Biafra At Any Time a State in International Law?*, 65 *AM. J. INT'L L.* 551 (1971). One view, which seems predominant, is that with the end of majority rule in South Africa, Namibia, and Zimbabwe, only Western Sahara is a proper subject of self-determination. See Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to territorial Separation*, 16 *VA. J. INT'L L.* 779 (1976). Eritreans persisted and eventually became a separate state with the military defeat of Ethiopia. See *supra* note 117. In addition, the problem of the southern Sudan could trigger separate statehood the denial of the right by international law notwithstanding.

119. Kiwanuka, *supra* note 116, at 90. Kiwanuka does not mean the pseudo-independence the Apartheid regime purported to give under the Bantustan policy; rather, he asks whether it would have been allowed for the different nationalities to pursue sovereign independence from South Africa and become sovereign states. *Id.* at 89-90. For a discussion of the Bantustan policy, see Henry J. Richardson, III, *Self-Determination, International Law and the South African Bantustan Policy*, 17 *COLUM. J. TRANSNAT'L L.* 185 (1978).

120. Kiwanuka, *supra* note 116, at 90.

International law only seemed to contemplate the right of the territorial unit as a whole to choose to become free as one entity or to associate with another state; the birth of many new states from one territorial unit, based on pre-colonial political identities, seems to be out of the question.<sup>121</sup> In other words, self-determination is linked to the administrative units established by the imperial powers. Such linkage validates the colonial state, retroactively ratifies colonial borders, and sanctions the denial of sovereignty to pre-colonial state-societies.<sup>122</sup> This contrived state is beset by a multitude of problems, many of them a result of the nature of its conception and creation.

## II. FALSE STATEHOOD AND THE CRISIS OF THE POST-COLONIAL STATE

In 1884–1885, the European imperial powers met in Berlin and without the consent or the participation of the African people, demarcated the Continent of Africa into colonies or spheres of influence. In many cases, kingdoms or tribes were split with such reckless abandon that they came under two or three European imperial powers. This event was the genesis of many present-day conflicts and virtually insoluble problems in the African Continent.<sup>123</sup>

The proposition that colonization is largely responsible for Africa's economic, political, and social problems is not new.<sup>124</sup> The performance of the post-colonial state since independence has been abysmal, if not catastrophic.<sup>125</sup> Military coups and one-party dictatorships characterized

121. This thinking appears to be partly the basis for the decision by the U.N. to extend to liberation movements recognized by the OAU, engaged in the pursuit of self-determination and international recognition. Such movements — examples were the African National Congress (ANC) of South Africa and the South West African Peoples Organization (SWAPO) — could sit in the General Assembly as observers and participate in other U.N. agencies. G.A. Res. 3280, U.N. GAOR, 29th Sess., Supp. No. 31, at 5, U.N. Doc. A/9631 (1974); G.A. Res. 31/30, U.N. GAOR, 31st Sess., Supp. No. 39, at 118, U.N. Doc. A/31/39 (1976).

122. This is similar to the principle of *uti possidetis juris*, adopted in Latin America, that the successor states of the Spanish empire would stay within the parcels of territory that represented the administrative units of the empire. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 137–38 (1973); 2 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1068 (1963).

123. ELIAS, *supra* note 15, at viii.

124. For analyses linking the crises of the post-colonial state to colonization, see Ali Mazrui, *The African State as a Political Refugee: Institutional Collapse and Human Displacement*, INT'L J. REFUGEE L., Special Issue July 1995, at 21. [hereinafter Mazrui, *State as Refugee*]; KWAME NKUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM* (1965).

125. The performance of the post-colonial state has been so poor that the period of independence has been referred to as the "lost decades." See generally 30 YEARS OF INDEPEN-

most of the first two decades of independence from colonial rule.<sup>126</sup> The result of this failure is the délégitimation, assuming that the overthrow of direct colonial occupation or decolonization gave it a measure of goodwill, of the post-colonial state before its legitimation. According to Bratton, in the process of state formation the apparatus of governance of the post-colonial state "has begun to crumble before it has been fully consolidated."<sup>127</sup> The failure of the post-colonial state,<sup>128</sup> from Liberia to Mozambique, and Rwanda to Somalia,<sup>129</sup> has driven Mazrui to meta-

DENCE, *supra* note 4. Africa's Gross Domestic Product (GDP) fell from 3.3% in the 1960s to 2.2% in the 1980s. Other statistics are equally alarming. Two thirds of the rural population lives below the poverty line and civil wars, famine, and natural disasters have claimed millions and displaced many more. The continent has reached the state of "development breakdown." See generally N. Bourénane, *Prospects for Africa for an Alternative Approach to the Dominant Afro-pessimism*, in 30 YEARS OF INDEPENDENCE, *supra* note 4, at 47-61. For more on economic problems, see AFRICA'S RECOVERY IN THE 1990s (Giovanni Cornia et al. eds., 1992).

126. The Togolese army staged the first military coup in Black Africa in the early 1960s. This phenomenon, one of the many driven partly by the search of the post-colonial state for a political culture, national identity, and community among the citizenry, became so widespread that by the 1980s half of the continent was ruled either by a military dictatorship or a military-civilian composition. Rare was the state spared rule by soldiers. As noted by Mowoe, the soldiers in a standard pattern would "inveigh against the total corruption of the charlatans who, in their greed and avarice, had brought the state to near-bankruptcy and imminent collapse. Their actions are thus explained as having been made necessary because of a palpable desire to save the nation and lead its citizens to the millennium." Isaac J. Mowoe, *Soldiers and Politics*, in THE PERFORMANCE OF SOLDIERS AS GOVERNORS 1, 11 (Isaac J. Mowoe ed., 1980). In reality, ideological differences within ruling elites, failure of economic policies, super-power manipulation, and corruption by civilians — in a word, the fragility of the state — contributed to the rise of the soldier as governor. See *id.* at 11-14. Ironically, the performance of the military was quite often worse. Idi Amin's overthrow of the government of Milton Obote in 1971, for example, ushered in almost a decade of such gross and unequalled brutality that it became a synonym for human rights violations. See generally TONY AVIRGAN & MARTHA HONEY, *WAR IN UGANDA* (1982). Elsewhere, military rulers in Sudan, Liberia, and Zaire crippled the state as a result of excessive despotism. See MICHAEL CLOUGH, *FREE AT LAST: U.S. POLICY TOWARD AFRICA AND THE END OF THE COLD WAR* 76-100 (1992).

127. Michael Bratton, *Beyond the State: Civil Society and Associational Life in Africa*, 41 *WORLD POL.* 407, 409 (1989). He adds that

[t]here is a crisis of political authority that is just as severe as the well-known crisis of economic production. These two crises are intimately interrelated, each being both a cause and an effect on the other. We are currently witnessing in Africa a self-perpetuating cycle of change, in which weak states engender anemic economies whose poor performance in turn further undermines the capacity of the state apparatus.

*Id.* For more analyses of the problems of the post-colonial state, see Thomas M. Callaghy, *The State as Lame Leviathan: the Patrimonial Administrative State in Africa*, in THE AFRICAN STATE IN TRANSITION 87, 87-116 (Zaki Ergas ed., 1987); Robert H. Jackson & Carl G. Rosberg, *Why Africa's Weak States Persist*, 35 *WORLD POL.* 1 (1982).

128. For a more recent discussion on collapsed states, see generally COLLAPSED STATES, *supra* note 117.

129. For a more detailed discussion of the circumstances that led to the implosion of the Somali state, see THE SOMALI CHALLENGE: FROM CATASTROPHE TO RENEWAL (Ahmed I. Samatar ed., 1994).



phorically refer to it as a "political refugee."<sup>130</sup> Such a state cannot perform the six crucial functions of statehood: exercise sovereign control over territory; have sovereign oversight and supervision of the nation's resources; exercise the effective and rational collection of revenue; maintain adequate national infrastructure, such as roads and telephone systems; have the capacity to govern and to maintain law and order.<sup>131</sup>

The contrived and artificial citizenry of the African state is at the center of this crisis. Although the struggle against colonial rule within the boundary of the colonial state created unity among different communities, it was insufficient to form a national identity.<sup>132</sup> The development of authoritarianism in the emergent state, typified by ethnic-based favoritism for jobs, services, and other state-controlled resources, was inevitably a natural process; the new rulers saw their power as an instrument for personal gain with the assistance and participation of elites from their own group.<sup>133</sup> The process of nation-building has been hindered by the inability of the post-colonial state to wrest the loyalties of citizens from pre-colonial structures and formations, most notably the ethno-political society.<sup>134</sup>

Some writers have questioned whether African states are nation-states.<sup>135</sup> Ethnicity and sub-nationalism have been correctly identified as

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130. Mazrui, *State as Refugee*, *supra* note 124, at 21. He notes that the African state could even become a literal refugee if the remnants of the Hutu-state in Rwanda were to be granted institutional asylum as a government-in-exile next door [Zaire]. *Id.* at 22.

131. *Id.* at 23. He argues that it is wrong to limit the assessment of state failure to the sixth function, namely the maintenance of law and order. The other indices are warning signs of impending failure. *Id.*

132. Peter Anyang' Nyong'o, *Political Instability and the Prospects for Democracy in Africa*, 13 AFR. DEV. 72 (1988).

133. The process of the collapse of national coalitions that brought about decolonization "involved the incorporation of 'kith and kin' into ruling oligarchies and the exclusion of other groups from enjoying the prerogatives of power. This generated problems of ethnicity, clanism, regionalism, religious bigotry, etc." Jibrin Ibrahim, *Political Exclusion, Democratization and Dynamics of Ethnicity in Niger*, 41 AFR. TODAY 15, 15 (1994).

134. Busia convincingly argues that in pre-colonial Africa "primary loyalties were centered on lineage and tribe." These communities were held together because they "inhabited a common territory; its members shared a tradition, real or fictitious, of common descent; and they were held together by a common language and a common culture." This "tribal solidarity of the past invades the present. It sets problems of political organization for the new States of Africa. It has been a source of tensions and instability. It has led to civil war in the Congo. Nigeria tried to contain its tribal tensions in a federation. . . ." K.A. BUSIA, AFRICA IN SEARCH OF DEMOCRACY 30-31 (1967).

135. Hansen argues that African states are states hoping to become nation-states. Ethnic cleavages are the biggest drawback to the development of a nation. Art Hansen, *African Refugees: Defining and Defending Their Human Rights*, in HUMAN RIGHTS AND GOVERNANCE IN AFRICA 139-67 (Ronald Cohen et al. eds., 1993).

some of the most inflammatory elements in nation-building.<sup>136</sup> Hansen has identified the crisis of the African state in its failure to transform the colonial state.<sup>137</sup> He argues that though formally independent, African states are still conceptually colonial entities, heavily reliant on the structures of the colonial state.<sup>138</sup> There is little doubt that the only significant change at independence was not the restructuring of the state but the changing of the guard, the replacement of white by black faces in the state house.<sup>139</sup> It fell on the new rulers to bring legitimacy to the colonial state, now labeled the post-colonial, black-ruled state. As Hansen points out, that challenge was enormous:

The term "nation" refers to a group that shares a common history and identity and is aware of that; they are a people, not just a population. Using that definition, ethnic groups (once called tribes) in Africa are also nations. None of the new African states were originally nation-states because none of them were nations as well as states. Each of the new states contains more than one nation. In their border areas, many new states contain parts of nations because the European-inspired borders cut across existing national territories. Thus one of the major tasks confronting the leaders of

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136. Mowoe, *supra* note 126, at 1; P. Anyang' Nyong'o, *The One-Party State and Its Apologists*, in 30 YEARS OF INDEPENDENCE, *supra* note 4, at 1. Anyang' Nyong'o discusses and attempts to demystify the argument that the one-party state was the only logical response to problems of ethnicity, development, and the construction of new nations from the colonial state.

137. Hansen, *supra* note 135, at 161. In a powerful passage, he traces the refugee crisis in Africa to the post-colonial states, the

direct and uncritical successors of the colonies. Both colony and state are forms introduced by the Europeans. The colonies and the shapes of colonial territories that were created by European powers reflect variable penetration by outsiders into the interior, thwarted and achieved ambitions, and (often intentional) ignorance of preexisting tribal territories. When African states gained their "independence," leaders of these new states assumed the boundaries and internal structures of the colonies, sometimes with minor cosmetic changes in names (Northern Rhodesia became Zambia; the Gold Coast became Ghana, etc.). *Though they were African themselves, the leaders ignored African identities, territories, and boundaries in favor of European-defined ones.*

*Id.* (emphasis added).

138. *Id.* This point was underscored by Nkrumah in his discussion of neo-colonialism. Though possessing the trappings of international sovereignty, the post-colonial state's economic system and political policy are directed from the outside. See generally NKUMAH, *supra* note 124.

139. Irele has observed that the authoritarianism of the colonial state "was codified in the colonial legal arsenal with an array of laws that prohibited assembly, restricted movement, proscribed 'sedition', and so on. (After independence, these laws survived in nearly every African state and proved to be convenient repressive tools in the hands of the successor governments.)" Abiola Irele, *The Crisis of Legitimacy in Africa*, DISSENT, Summer 1992, at 296, 298.

new African states was creating nations. *This task was often referred to as creating a national consciousness, but that was misleading. There was no nation to become conscious of; the nation had to be created concurrently with a consciousness.*<sup>140</sup>

Some scholars have argued that it is an illusion to refer to "the state" in sub-Saharan Africa.<sup>141</sup> According to this view, many post-colonial states in Africa lack an independent political organization with enough authority and power to govern a people and territory; in other words, they lack the "essential requirements of empirical statehood."<sup>142</sup> Neither the governors nor the governed exhibit the consciousness of civic responsibility:

Citizenship means little, and carries few substantial rights or duties compared with membership in a family, clan, religious sect or ethnic community. Often the "government" cannot govern itself, and its officials may in fact be freelancers, charging what amounts to a private fee for their services. The language of the state may be little more than a facade for the advancement of personal or factional interests by people who are only nominally judges, soldiers, bureaucrats, policemen or members of some other official category. In short, many states in sub-Saharan Africa are far from credible realities.<sup>143</sup>

Jackson makes the argument, consequently, that the survival of the post-colonial states since independence has not been contingent on internal legitimacy among the populace, for that was non-existent; rather, he argues, their endurance in that period has been due primarily to their external or international legitimacy.<sup>144</sup> This legitimacy resulted

140. Hansen, *supra* note 135, at 161-62 (emphasis added).

141. Robert H. Jackson, *Juridical Statehood in Sub-Saharan Africa*, 46 J. INT'L AFF. 1 (1992) [hereinafter *Juridical Statehood*]. For similar analyses, see also ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* (1990); ROBERT H. JACKSON & CARL G. ROSBERG, *PERSONAL RULE IN BLACK AFRICA* (1982).

142. *Juridical Statehood*, *supra* note 141, at 1. He calls them "ramshackle regimes" whose writ barely extends throughout the country and where it does so, only irregularly. *Id.*

143. *Id.*

144. *Id.* Clough argues that the rights and privileges enjoyed by African states were established by imperial powers at the Paris Peace Conference in 1919 and the San Francisco Conference in 1945. CLOUGH, *supra* note 126, at 112-13. After independence, he adds, "African states have been nourished by international agencies and financial institutions and protected by one or another of the great powers." *Id.*

A crucial factor in the maintenance of the post-colonial state has been the alliance of the political elites with multinational corporations. In 1976, a study of the Kenyan economy revealed, for example, that half of the capital of the country's main industrial and tourist firms was foreign-owned, with many of their boards under the chair of local elites. Rafael

from the right of self-determination granted to the colonial state and fortified by the logic of the cold war.<sup>145</sup> The ethnic plurality,<sup>146</sup> and, in some cases, the duality of the state,<sup>147</sup> have finally caught up with post-colonial Africa. Absent cold war or neo-colonial international guarantees to client states, the colonial state is nothing if not a house of cards.<sup>148</sup> Its ethnic configuration, an integral legacy of colonization, is a major factor in its failure.<sup>149</sup> Rwanda and Burundi are the two most glaring examples: the Hutu-Tutsi cleavage has repeatedly caused the visitation of untold suffering on members of one group by the other.<sup>150</sup>

The use of ethnicity to manipulate electoral processes demonstrates its destructive influence within the post-colonial state. Although it is noble, it seems ultimately futile to resist the suggestion that the colonial state and its successor have failed to inspire loyalty and forge a nation-

Kaplinsky, *Capitalist Accumulation in the Periphery — the Kenyan Case Re-examined*, 17 REV. AFR. POL. ECON. 83, 97 (1980). As the elites benefit from their alliance with international capital, and become more isolated from the people; tensions rise and the state has to rely on its security forces to contain discontent and popular challenge to its policies. See COLIN LEYS, *UNDERDEVELOPMENT IN KENYA: THE POLITICAL ECONOMY OF NEO-COLONIALISM 1964–1971*, at 207 (1975). Financial, military, and development assistance from the West fostered the survival of the weak but authoritarian post-colonial state. JENNIFER A. WIDNER, *THE RISE OF A PARTY-STATE IN KENYA 14–17* (1992).

145. *Juridical Statehood*, *supra* note 141, at 2. Jackson adds that, although international law denied "international status to the vast majority of traditional African political systems" and "helped justify colonialism," it ironically is responsible for the creation and protection of the post-colonial state, an entity that hardly meets the criteria for statehood. *Id.*

146. Many of the colonial states were ethnically plural. Even Somalia, created out of combining British with Italian Somaliland, was a plural society in spite of its deceptive cultural homogeneity. Hussein M. Adam, *Somalia: A Terrible Beauty Being Born?*, in *COLLAPSED STATES*, *supra* note 117, at 69–70. Its competing clans, used so effectively by Siad Barre, the soldier who ruled from 1969 to 1991, were instrumental in his despotic rule and the subsequent collapse of the state. Muxamed D. Afrax, *The Mirror of Culture: Somali Dissolution Seen Through Oral Expression*, in *THE SOMALI CHALLENGE*, *supra* note 129, at 236; Adam, *supra*, at 71–72.

147. The dual states of Rwanda and Burundi contain the combustible Hutu/Tutsi mix, a combination fanned into hatred by Belgian colonialism. ARNOLD RIVKIN, *NATION-BUILDING IN AFRICA 189–93* (1969). Mazrui has written that "Rwanda's and Burundi's tragedies are a combination of ethnic duality, population density, geographic intermingling and the legacies of colonial and pre-colonial relationships." Mazrui, *State as Refugee*, *supra* note 124.

148. During the Cold War, many an African regime was kept alive by either the East or the West. The military and economic support of Mengistu Haile Mariam's Ethiopia and the MPLA government in Angola by the Soviet Union, and American support for Mobutu Sese Seko of Zaire, Samuel Doe of Liberia, and Siad Barre of Somalia was critical in avoiding state collapse. See Keller, *supra* note 117, at 128; UNGAR, *supra* note 21, at 87–120 & 359–72. In Zaire, for example, economic decline and Katangese sub-nationalism led to armed rebellions in 1977 and 1978. On both occasions, Mobutu relied on the military intervention of the United States, France, Belgium, and Morocco, another Western client-state, to prevent the collapse of his government. Makau wa Mutua, *Zaire: Decline of the Despot?*, 36 AFR. REP., Nov.–Dec. 1991, at 13, 17 [hereinafter Mutua, *Zaire*].

149. See generally Mazrui, *State as Refugee*, *supra* note 124.

150. See *supra* note 147.

alistic identity among the elites as well as the popular citizenry. Citizens as a whole lack an "instinctual and nationalistic bond" to the state; hence those who become rulers pillage it in league with members of their ethnic group and resort to massive human rights violations to repress those they have excluded.<sup>151</sup> Even Kenya, one of the most "successful" post-colonial states, is a good example of the inability of elites to develop and pursue a national as opposed to ethnic interest. After independence from Britain in 1963, the anti-colonial coalition of the major ethnic groups collapsed in 1966, ostensibly over ideological differences.<sup>152</sup> In 1975, Kikuyus organized to block Daniel arap Moi, a Kalenjin, from assuming the office of the president upon Kenyatta's death.<sup>153</sup> However, the timing of Kenyatta's death and squabbles within the political elite allowed Moi to assume the presidency. Moi has continued Kenyatta's legacy: he forced Kikuyus out and replaced them with Kalenjins who now hold key positions in the civil service and the armed forces.<sup>154</sup> Ethnicity has become such a powerful currency in Kenyan politics<sup>155</sup> that in 1992, in the first contested election in over two decades, the parliamentary and presidential vote were split along ethnic

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151. Mutua, *Redrawing the Map*, *supra* note 13, at 17.

152. The Kenya African National Union (KANU), the nationalist party which led Kenya to juridical independence, enjoyed the widespread support of the Kikuyu, Luo, and Akamba, the country's main ethnic groups. Until 1964 when they merged, it was opposed by the Kenya African Democratic Union (KADU), ostensibly a champion of smaller groups but in reality a front for British settler and commercial interests. Kenyatta, the country's first president, a Kikuyu and the leader of the KANU anti-colonial coalition picked Oginga Odinga, a Luo, as his vice president. The coalition collapsed in 1966 when Odinga left the government to form the left-wing Kenya Peoples Union (KPU). Many prominent Luo members of parliament left with him. In 1969, Kenyatta banned the KPU following an anti-government demonstration in Kisumu, Odinga's ancestral home, in which the security forces shot and killed at least ten people. He detained Odinga and many of his Luo colleagues, an event that continues to stigmatize the Luo as an anti-government group to date, even though Daniel arap Moi, the current president, is a Kalenjin. For a discussion of the Kikuyu-Luo/Kenyatta-Odinga schism, see generally LEYS, *supra* note 144. See also DAVID GILLIES & MAKAU WA MUTUA, *A LONG ROAD TO UHURU: HUMAN RIGHTS AND POLITICAL PARTICIPATION IN KENYA* 10-12 (1993).

153. WIDNER, *supra* note 144, at 112-18. Moi was then the vice-president and Kenyatta's health was failing because of old age. Members of the Kikuyu, Embu, and Meru Association (GEMA), a shadow government that masqueraded as a cultural organization, were determined to retain the presidency within their group. *Id.*

154. *Id.*

155. Initially, Moi resisted the pressure to abolish the one-party state and allow open political competition by arguing that such a process would lead to ethnic conflict and chaos. Apparently to make good on this promise, Kenya's security forces were implicated in killings of members of opposition groups resident in the Rift Valley, an area claimed by Moi's group, the Kalenjins. Joel D. Barkan, *Kenya: Lessons from a Flawed Election*, 4 J. DEMOCRACY 85, 88 (1993). See also J. Brian Atwood, *Kenya's Rigged Election*, CHRISTIAN SCI. MONITOR, Sept. 2, 1992, at 19. By some estimates as many as 1,500 Kenyans had been killed in this ethnic slaughter by 1993. Many more were turned into internal refugees. See AFRICA WATCH, *DIVIDE AND RULE: STATE-SPONSORED ETHNIC VIOLENCE IN KENYA* 1 (1993).

lines.<sup>156</sup> These voting patterns are a bad omen for the future of democracy and may become a cyclical problem in virtually every election.

These difficulties indicate that decolonization was not the same thing as liberation. It is important to reconsider whether the decolonization of the colonial state, as a territorial unit, amounted to the liberation of the different peoples within those borders and structures. The colonial state may be no more than a jail; such an entity cannot win the loyalty of its intimates. As noted by Jackson:

Most sub-Saharan colonies resembled the old Austro-Hungarian Empire, which consisted of many distinctive subject peoples within a single state framework. While that empire was broken up into smaller nation-states to liberate its peoples, this rarely happened in sub-Saharan Africa. Unlike the nationalities of East Central Europe, those of sub-Saharan Africa were absolutely denied any right of self-determination. Instead, like the Kurds of the Middle East or certain nationalities of Yugoslavia, they were consigned to the numerous ranks of peoples who are unrecognized internationally. Ironically, the sole accepted definition of the right of self-determination was the former colonial jurisdiction.<sup>157</sup>

The illegitimacy and failure of the post-colonial state raises serious questions about the future of political organization in Africa, its sovereignty and independence from control and exploitation by outsiders; and challenges its peoples to design formulae to halt the onset of chaos and massive suffering, conditions which are inevitable if the pathology of the state is not addressed. As Mazrui has aptly noted, perhaps real decolonization is not winning formal independence but the collapse and

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156. NATIONAL ELECTIONS MONITORING UNIT, *THE MULTI-PARTY GENERAL ELECTIONS IN KENYA: 29 DECEMBER, 1992* (1993). All the major political parties, including KANU, the ruling party, drew their support along ethnic lines. The Forum for the Restoration of Democracy-Asili (FORD-A), led by Kenneth Matiba, a Kikuyu, was heavily supported in Central and Nairobi provinces, two regions with large Kikuyu populations; the Forum for the Restoration of Democracy-Kenya (FORD-K), led by Oginga Odinga, a Luo, drew most its support from the Luo-dominated Nyanza province; and the Democratic Party (DP), led by Mwai Kibaki, another Kikuyu, got most its support from Central and parts of Eastern province, areas inhabited by the Kikuyu, Akamba, Meru, and Embu, a coalition of culturally and linguistically related peoples. KANU had its base in the Rift Valley, Moi home region. *Id.* As noted by Barkan, support for the parties in the 1992 presidential and parliamentary elections was highly concentrated in the ethnic heartlands of each of the four parties. In the Kikuyu-dominated Central province, for example, Moi managed only a bare 2% of the vote. For an analysis of the place and the role of ethnicity in Kenya's electoral politics and the 1992 elections, see Barkan, *supra* note 155, at 97.

157. *Juridical Statehood*, *supra* note 141, at 4-5. He notes further that, in some cases, decolonization handed over former colonies to "favored" and unrepresentative elites from ethnic groups who were discriminatory and ruled over other groups in "a quasi-colonial manner." *Id.* at 5.

eventual disintegration of the colonial state and its structures.<sup>158</sup> The colonial order need not, however, be "washed clean with buckets of blood;"<sup>159</sup> there is an urgency for Africans to fashion a solution to avoid that horrifying eventuality. I suggest that in principle sovereignty be returned to pre-colonial entities who should then "trade it in" for consensual map-making to voluntarily create larger democratic entities.

### III. THE NATIONAL QUESTION AND SELF-DETERMINATION: PROSPECTS FOR ALTERNATIVE FORMULAE

The invention of the African state by colonialism and the subsequent misapplication of the right to self-determination are the root causes of the crisis of the post-colonial state.<sup>160</sup> The denial of the right to self-determination<sup>161</sup> is one of the fundamental reasons for the failure of the state to develop into a cohesive, effective, and functional entity.<sup>162</sup>

158. Mazrui, *State as Refugee*, *supra* note 124, at 22.

159. *Id.* at 23. There is no guarantee that the "buckets of blood" will clean the slate. What becomes of Somalia, Liberia, and Rwanda after their current convulsions is not predictable.

160. As I have argued elsewhere in this article, the abolition of sovereign pre-colonial states and societies and their coercion into single states created entities to which Africans are not loyal. The granting of the right to self-determination to these colonial territorial entities robbed pre-colonial entities the chance to separately exercise that right. The result has been the plundering of the state as different groups and elites within those states seek to manipulate the state to their advantage at the exclusion of other groups. In other words, the group that controls the state for that moment attempts or purports to use it as the vehicle for the realization of the right to self-determination, a practice that inevitably invites conflict because most African states are multicultural entities.

161. Self-determination, as a right exercisable by a people or peoples, arises from the idea that the state must be based on the consent of the governed. People exercise the right by choosing, freely, to associate in an entity organized to rule itself. When people make this choice they express their consent to be so governed. See HAROLD S. JOHNSON, *SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS* 25-30 (1967). See also Abdullahi Ahmed An-Na'im, *The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-determination*, in *STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY* 101, 103 (Issa G. Shivji ed., 1991) [hereinafter *STATE AND CONSTITUTIONALISM*]. Conversely, the right to self-determination can be exercised by disassociation. A people may decide to break away from an existing entity and form its own state as was recently the case with the republics of the former Soviet Union or Yugoslavia. The recognition of the right to self-determination is the acceptance by the international community that a people — whether cultural, linguistic, racial, religious, or territorial — should have the right to identify with each other and to organize politically to determine their fate. See generally An-Na'im, *supra*, at 108-11.

162. See Chris C. Mojekwu, *International Human Rights: the African Perspective*, in *INTERNATIONAL HUMAN RIGHTS: CONTEMPORARY ISSUES* 85, 90 (Jack L. Nelson & Vera M. Green eds., 1980). Mojekwu argues, and I agree with him, that the results of the denial of the right to self-determination to "various peoples and ethnic nations" of Africa are "vividly portrayed in the minority separatist movements which in extreme cases have led to civil wars" in the classic examples of Sudan, Nigeria, Zaire, and Angola. *Id.* Mojekwu correctly argues that the West and the United Nations practiced a double standard in granting the right to self-determination. He argues that whereas the West allowed self-determination for the peoples of

Political elites have made a number of attempts, some cynical,<sup>163</sup> others less so, to address the “multi-national” character of the post-colonial state.<sup>164</sup> The one promising device employed by new states to confront the problem of multi-ethnicity and self-determination was federalism.<sup>165</sup>

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the Austro-Hungarian, German, Turkish, and former Russian empires of eastern and south eastern Europe, it denied the peoples and ethnic groups of Africa the “freedom to choose” and the “right” to determine their fate by lumping them together within the administrative units of the European colonial territories. *Id.* at 89–90.

163. See, e.g., Anyang’ Nyong’o, *supra* note 136, at 3. After independence, many African elites employed the device of the one-party state as a tool for “nation-building.” The arguments for the one-party state project have been succinctly summarized by Anyang’ Nyong’o as follows:

- the single party would promote national unity;
- people’s efforts would be directed towards nation building and not wasted on politics;
- since people were generally agreed that the government was to engage itself in development, party politics was not necessary;
- whatever differences would emerge, these could be freely discussed under the single party regime as democracy and human rights would be practised.

*Id.* (emphases omitted). One-party states, however, universally dismally failed on all these counts. The predominant model throughout the post-independence era until the late 1980s, when it was overwhelmed by demands for democratization, the one-party state acted as a bandit, robber, and terrorist. As stated by Anyang’ Nyong’o,

[n]o one party regime in Africa can boast of democratic practice nor of a good record on human rights. Sekou Toure’s Guinea had its own Gulag Archipelagos; Mobutu’s [Sese Seko] Zaire excelled in repression as a policy of maintaining a kleptocratic regime in power; Banda’s [Hastings Kamuzu] Malawi has been the best run police state in Africa.

*Id.*

164. Virtually all African states are multi-national; they are a collection of many pre-colonial nations. As noted by An-Na’im,

if we define a “nation” simply as a people of common ethnicity and culture, the term nation state is somewhat a misnomer because it is very rare for the population of a nation state to consist of a single nation. In the vast majority of cases, and universally throughout Africa, the population of the nation state consists of several “nations.”

Ahmed An-Na’im, *supra* note 161, at 101. But pre-colonial African societies “grouped themselves generally into kinship communities of cultural-nations based on common cultures, language, customs, and religion.” Mojekwu, *supra* note 162, at 87. The colonial state was created by “abolishing” pre-colonial state-societies and combining them into one unit. *Id.* at 88.

165. A “federal government” is defined as “the system of government administered in a nation formed by the union or confederation of several independent states.” BLACK’S LAW DICTIONARY 611 (6th ed. 1990). In this form of government,

the allied states form a union . . . — not, indeed, to such an extent as to destroy their separate organization or deprive them of *quasi* sovereignty with respect to the administration of their purely local concerns, but so that the central power is erected into a true national government, possessing sovereignty both external and internal, — while the administration of national affairs is directed, and its effects felt, not by the separate states deliberating as units, but by the people of all, in their collective capacity as citizens of the nation.



This *ex post facto* attempt to save the post-colonial state from the threat of self-determination reveals the two contradictory faces of the African state: the unavoidable fact that every "nation" within the nation state is a "state in embryo,"<sup>166</sup> an entity entitled to exercise its right to self-determination, on the one hand, and the nation-state as an entity determined to unite and assimilate into a single culture all nations within it and therefore negate the multi-culturalism of the state, on the other.<sup>167</sup> Those who see the African post-colonial nation state as the sole basis for political organization on the continent argue that these two opposing faces can be reconciled if the right to self-determination is seen as "exercisable within, as well as through, the nation state."<sup>168</sup>

Africa's experience with federalism has, however, proven a disappointment in so far as it has been unable to give political viability to the post-colonial state. In post-colonial Africa, federalism has been attempted in Kenya, Uganda, Zaire, and Nigeria; in each case, it was motivated by different reasons.<sup>169</sup> Though unpopular with those who controlled the

*Id.* A federal government is distinguished from a confederation in that the latter "denotes a league or permanent alliance between several states, each of which is fully sovereign and independent . . . though yielding to the central authority a controlling power for a few limited purposes, such as external and diplomatic relations." *Id.*

166. Ahmed An-Na'im, *supra* note 161, at 103.

167. Many African states have sought to stamp out expressions of ethnicity in cases where ruling elites are threatened by the harnessing of cultural nationalism. A few examples, drawn from Schatzberg will suffice. Zaire, for instance, forbid the "open discussion of ethnic identity" and "outlawed ethnic associations" although Mobutu Sese Seko relied heavily on his ethnic group to retain power. MICHAEL G. SCHATZBERG, *THE DIALECTICS OF OPPRESSION IN ZAIRE* 25 (1988); Mutua, *Zaire*, *supra* note 148, at 14, 17. The Central African Republic, Sierra Leone, and Ghana all attempted to criminalize and prohibit the use of ethnic terms and identities at one point. Even Siad Barre in Somalia abolished the use of clan identity. SCHATZBERG, *supra*, at 25. Schatzberg notes that "[g]iven the artificial and culturally plural nature of most African countries, it is not surprising African leaders almost universally embrace ideologies of nationalism and nation-building." *Id.* Paradoxically, the state also uses ethnicity for educational and occupational purposes but does so on a regional or geographic basis to maintain the facade of the "allegiance to the mystique of the national State." *Id.* at 25 (quoting MWABILA MALELA, *TRAVAIL ET TRAVAILLEURS AU ZAIRE: ESSAI SUR LA CONSCIENCE OUVRIERE DU PROLETARIAT URBAIN DE LUBUMBASHI* 106 (1979)).

168. Ahmed An-Na'im, *supra* note 161, at 103. Although An-Na'im acknowledges, rather reluctantly, that nations may be justified to break away from the nation state and establish their own nation states, he asserts that the "'nations' or peoples constituting the Nation of the nation state need not challenge and overthrow the Nation and its state in order to satisfy their right to self-determination." *Id.* at 103-04. This, he argues, can be done through various constitutional devices, including autonomy regimes for aggrieved groups and minorities. *Id.* at 105.

169. Benjamin Neuberger, *Federalism in Africa: Experience and Prospects*, in *FEDERALISM AND POLITICAL INTEGRATION* 171, 172-75 (Daniel J. Elazar ed., 1979). The founding fathers of nationalism in Africa, such as Kwame Nkrumah, Milton Obote, Jomo Kenyatta, and Patrice Lumumba, saw federalism as an external plot by Western countries to weaken the newly independent African states by further balkanization. They argued that federalism was inefficient, an invitation to "tribalism," and a waste of resources. It would prevent effective

state, federalism offered a middle course between separatists and the advocates of strong unitary central states.<sup>170</sup> A brief survey of each of these cases is necessary to demonstrate why federalism failed to take root in Africa.

In Kenya, the genesis of a federal structure of government grew out of the fears of ethnic groups such as the Luhya and the Kalenjin that the control of a unitary state by the Kikuyu-Luo alliance would deny them their share of the spoils of independence.<sup>171</sup> KADU, the proponent of federalism, equated regional autonomy with self-determination and access to land.<sup>172</sup> In 1963, the British forced the "Majimbo Constitu-

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decision-making and rapid nation-building. British support for such arrangements did nothing to allay the fears of the nationalists. *See id.* at 180-82.

170. Neuberger notes that "federalism had an appeal in the late 1950s and early 1960s as a middle-of-the-road approach between the poles of unitarist centralism and outright secession. Intra-state federalism was seen as the only way to accommodate tribal and linguistic diversity within one political system. Federalism within the state was the outcome of devolution, and thus its function was more to mediate between the ethnic groups than to integrate them into one uniform whole." *Id.* at 173 (footnotes omitted).

171. KANU and KADU, the two main political parties that vied for the leadership of Kenya at independence, represented the political and economic interests of the elites of particular ethnic communities. A major bone of contention was who would control the distribution of land within the White Highlands, formerly reserved for white settlers, and the Rift Valley, Kenya's breadbasket. Both the Kalenjin and the Luhya, who formed KADU, and the Kikuyu and Luo, who led KANU, adopted positions which would enhance their chances of seizing or retaining control over these fertile lands. A federal structure of government would protect the interests of the weaker KADU and vest it with power over land distribution. *See WIDNER, supra* note 144, at 53-54. But British settler and commercial interests were also supportive of federalism because they stood to lose access to land and other resources if all state power vested in the "radical" KANU, the party that led the struggle for independence. In the event, the British government itself, under whose direction the independence negotiations were conducted, favored a federal structure, in part to protect the interests of its subjects and curb KANU's "nationalist" fervor which could have threatened its interests in the newly independent state. For British support for the formation of KADU, *see id.* at 216. Neuberger notes that KANU accepted federalism because the British made it a condition for independence. Neuberger, *supra* note 169, at 175.

172. Peter Okondo, a Luhya and one of KADU's leaders, argued in 1962 that individual liberty and the freedom of thought and choice could only be protected under a federal constitution. He posited that the unitary state favored by KANU would "destroy liberty by simply imprisoning the opposition and tampering with the courts." Peter J.H. Okondo, *Prospects of Federalism in East Africa*, in *FEDERALISM AND THE NEW NATIONS OF AFRICA* 29, 34 (David P. Currie ed., 1964). The differences between KANU and KADU were entrenched. "KADU had differed with KANU most significantly in its stance on regional autonomy and its definition of regional boundaries. Its organizers argued for a federal system with regional legislatures that could each decide how to regulate access to land. They further argued for regional jurisdictions that would effectively preclude a significant Kikuyu voice in the division of the White Highlands." WIDNER, *supra* note 144, at 54. It is interesting that Julius Kiano, a well-educated Kikuyu and a leading voice within KANU, acknowledged Okondo's argument that KADU's position was driven by "fear[s] of domination by numerically strong ethnic groups such as the Kikuyu." J.G. Kiano, *The Emergent East African Federation*, in *FEDERALISM AND THE NEW NATIONS OF AFRICA, supra*, at 39, 74. Kiano's unconvincing response to this fear was that "no single tribe will have the power to threaten such domination" in the proposed federation of Kenya, Uganda, and Tanganyika. *Id.*

tion," which provided for a quasi-federal structure, as the condition for independence and the assumption of state power by KANU.<sup>173</sup> Neuberger has summed up Kenya's experience with federalism as follows:

In Kenya the quasi-federal "Majimbo Constitution," which divided the country into Regions with their Regional Assemblies, Regional Civil Service and regional powers, was designed to protect the small backward ethnic groups from the Kikuyu-Luo alliance. It had strong support in KADU, which represented the Coastal, Baluhya and Kalenjin tribes. One of its leaders, Masinde Muliro, saw in federalism the ideal solution for Africa — because it provides for "free association" and prevents "imposed unity." The dominant Kenya African National Union (KANU) opposed federalism, which it regarded as a colonial device to strengthen those tribes which did not participate in the anticolonial national movement, and to weaken the position of the "radical" Kikuyu. *KANU accepted the "Majimbo Constitution" because that was the British condition for independence. It very soon eroded and then abolished the federal system, and imposed a unitary regime strongly dominated by the Kikuyu bureaucracy.*<sup>174</sup>

Uganda's experimentation with federalism was equally short-lived. The pre-colonial kingdom of Buganda, one of the most established states at the time, as well the smaller states of Bunyoro and Ankole, were granted a type of federal status by the British under the independence constitution.<sup>175</sup> Less powerful groups, such as the Acholi and Lango of northern Uganda, organized under Milton Obote and the Uganda People's Congress (UPC), opposed federalism because they resented the

173. Majimbo, the Kiswahili plural for province, connotes the federal character of the 1963 Kenya Constitution under which Kenya became independent. For discussions on the constitutional and legal changes in early independent Kenya, see Y.P. GHAI & J.P.W.B. MCAUSLAN, *PUBLIC LAW AND POLITICAL CHANGE IN KENYA* (1970).

174. Neuberger, *supra* note 169, at 175 (emphasis added) (footnote omitted). Upon becoming a republic in 1964, one of KANU's first actions was the abolition of the quasi-federal system. KENYA CONST. (Constitution Act, 1964) art. 1, *reprinted in* 1 *ASIAN-AFRICAN LEGAL CONSULTIVE COMMITTEE, CONSTITUTIONS OF AFRICAN STATES* 606-720 (1972); *see generally* GHAI & MCAUSLAN, *supra* note 173.

175. UGANDA CONST. OF 1962 § 2(2). Within the federal structure, the kingdoms of Buganda, Bunyoro, and Ankole retained substantial regional autonomy; they kept their governments, "lukikos" or parliaments, and their civil services. Neuberger, *supra* note 166, at 175. Buganda, by far the most populous and powerful of all groups in Uganda, was a dominant force politically. In 1959, it constituted 16.3% of the population of Ugandan Africans. Nelson Kasfir, *Cultural Sub-Nationalism in Uganda*, in *THE POLITICS OF CULTURAL SUB-NATIONALISM IN AFRICA* 51, 82 (Victor A. Olorunsola ed., 1972).

commanding position that the Buganda kingdom continued to enjoy.<sup>176</sup> In the end, the UPC was forced to accept a federal system to avoid the secession of Buganda.<sup>177</sup> In 1966, barely four years after independence, Obote violently destroyed the Buganda Kingdom, abolished the federal structure, and concentrated power in his hands.<sup>178</sup> An African state had failed, once again, to reconcile demands for internal self-determination with federalism.

In Zaire, formerly the Belgian Congo, the irreconcilable tensions between separatists, unitarists, and federalists coupled with external interference almost resulted in the collapse of the state soon after independence in 1960.<sup>179</sup> Patrice Lumumba and his party, the nationalist Mouvement National Congolais (MNC), scored a narrow victory over Joseph Kasavubu's Alliances des Bakongo (ABAKO), a party of the historic Kongo people.<sup>180</sup> Lumumba advocated a strong unitary state while Kasavubu and Moïse Tshombe, the Katangese leader, called for either federalism or secession.<sup>181</sup> Failure to agree on the form of government led in 1960 to a constitutional crisis, a mutiny, a Belgian-led effort for the secession of Katanga, and the murder of Lumumba in which Mobutu Sese Seko, then the army chief of staff, and the Central Intelligence Agency were implicated.<sup>182</sup> After a prolonged period of political chaos and instability, Mobutu formally took power in a military coup in 1965, banned all political activity, and created a highly abusive police state with all power concentrated in his hands.<sup>183</sup>

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176. The northern Acholi and Lango are classified as Nilotes as opposed to the Buganda and other southern peoples who are Bantu. In 1959, the Bantu constituted 65.7% of the population while the Nilotes, the second largest group, only amounted to 14.5%. Kasfir, *supra* note 175, at 83.

177. RIVKIN, *supra* note 147, at 89.

178. Kasfir, *supra* note 175, at 112–13. The 1966 Uganda Constitution eliminated the autonomous powers of districts and federal states, merged the office of the President with that of the Prime Minister, stripped Buganda of any special privileges, and authorized the President to legislate when the parliament was not sitting. On May 20, 1966, the Baganda rejected the new constitution and ordered the central government to leave Buganda. On May 24, the government captured the *Lubiri* (Kabaka's palace) following a fierce battle. Kabaka Mutesa II fled to England where he died in 1969. *See id.*

179. *See generally* KWAME NKUMAH, CHALLENGE OF THE CONGO (1967).

180. Neuberger, *supra* note 169, at 176.

181. *Id.* at 175–76.

182. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, ZAIRE: REPRESSION AS POLICY 15–17 (1990) [hereinafter ZAIRE REPRESSION]; Stephen Weissman, *The CIA and U.S. Policy in Zaire and Angola, in AMERICAN POLICY IN SOUTHERN AFRICA* 381 (René Lemarchand ed., 1978).

183. *See* ZAIRE REPRESSION, *supra* note 182, at 17.

Apart from these experiments, federalism has also been tried, without success, in Ethiopia,<sup>184</sup> the Cameroons,<sup>185</sup> and the Mali Federation.<sup>186</sup> In 1964, Tanganyika and Zanzibar formed Tanzania, a federal republic, although it preferred to be called a "United Republic."<sup>187</sup> Since then the "union" has been under constant threat from Zanzibari separatists.<sup>188</sup> But the most enduring, though deeply troubled and largely unsuccessful attempt at federalism has been in Nigeria. Federalism found widespread support among Nigeria's diverse ethnic and religious communities because many saw it as the only viable option if the country was to attain independence as a single unit.<sup>189</sup> The northern Hausa-Fulani region, the eastern Ibo-dominated area, and the western Yoruba region all supported some form of a federal arrangement,<sup>190</sup> a structure which favored the populous and large but backward north. The south, made up of Ibos and Yorubas, pushed for the creation of many ethnic-linguistic states to counterbalance the predominance of the north.<sup>191</sup> The inability of the federal state to create this balance brought Nigeria to the brink of disintegration in 1966.

The South's impatience with the reluctance of the north to federalize fully and share power, political dissension and electoral violence in the west, and official corruption all combined to cause fundamental fissures in the new federal state.<sup>192</sup> In January 1966, Eastern, mainly Ibo, army

184. Eritrea, historically, geographically, and culturally part of Ethiopia, is a creation of Italian colonialism. Established by Italians in 1889 as they sought to take over Ethiopia, it was taken over by the British after the war from 1941 to 1952 when it was joined with Ethiopia through a federation engineered by the United Nations. G.A. Res. 390 (V), U.N. GAOR, 5th Sess., U.N. Doc. A/1605 (1950). In 1962 Haile Selassie annexed Eritrea outright, making it a part of the unitary state of Ethiopia. See also Ashmelash Beyene, *The Nationality Question, Secession and Constitutionalism: The Case of Ethiopia*, in STATE AND CONSTITUTIONALISM, *supra* note 161, at 129; see generally JAMES FIREBRACE, NEVER KNEEL DOWN (1984). That annexation ended in 1991 with the defeat of Ethiopia in the war of secession.

185. The two halves of Cameroon, one colonized by the French, the other by the British, were federated into the Federal Republic of Cameroon. See RIVKIN, *supra* note 147, at 97-99.

186. The Mali Federation sought to bring together Senegal and Mali or the French Soudan. See Neuberger, *supra* note 169, at 177.

187. *Id.*

188. In 1990, for example, the government of Tanzania carried out a severe crackdown of separatist elements on the Zanzibari island of Pemba who were actively agitating for a referendum on the union. HOUSE COMM. ON FOREIGN AFFAIRS, SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991 409 (1992). See also Issa G. Shivji, *State and Constitutionalism: A New Democratic Perspective*, in STATE AND CONSTITUTIONALISM, *supra* note 161, at 27, 34.

189. RIVKIN, *supra* note 147, at 100.

190. Neuberger, *supra* note 169, at 174.

191. *Id.*

192. RIVKIN, *supra* note 147, at 107-08.

officers took advantage of this crisis to stage the country's first coup d'état in which northern leaders were killed.<sup>193</sup> This ended the country's experiment with democracy. Major General Aguiyi Ironsi, an easterner and the head of the National Military Government, issued a decree replacing the federal structure with a unitary one.<sup>194</sup> Many northerners protested the coup and the decree, leading to riots in which many Ibos were massacred in the north.<sup>195</sup> In another coup on July 29, 1966, Ironsi was abducted on a tour of the north and killed by northerners along with the Ibo officers accompanying him.<sup>196</sup> The leader of the coup, Lieutenant Colonel Yakubu Gowon, a northerner, immediately rescinded the decree abolishing federalism, although this act did not stop the mass slaughter and expulsion of Ibos from the north.<sup>197</sup> Fearful of northern domination and the pogroms, the easterners, under Lieutenant Odumwengu Ojukwu, the Military Governor of Eastern Nigeria, declared the secession of the region as the Republic of Biafra on May 30, 1967.<sup>198</sup> Although Biafra was defeated and returned to Nigeria, the country remains precariously perched on the precipice, unable to create a democratic, internally legitimate state out of the federal system. Competing religious, regional, and ethnic interests threaten Nigeria's survival as a state to this day.

If Nigeria is taken as the most "successful" example of federalism in Africa, the device appears to be doomed as a means for satisfying demands for self-determination within the post-colonial state. In Africa where, with the exception of large urban centers, ethnicity usually corresponds to ancestral land, federalism may have seemed like the magic solution for resolving or containing within the post-colonial state the desires of pre-colonial entities for independence and self-governance. Instead, federalism collapsed or failed to function effectively wherever it was attempted. These failures occurred not because rulers thought that the unitary, non-federal, state was better but because the practice of it could not ensure equity, liberty, and prosperity, conditions that would

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193. Victor A. Olorunsola, *Nigeria, in THE POLITICS OF CULTURAL SUB-NATIONALISM IN AFRICA*, *supra* note 175, at 5, 32.

194. UMA O. ELEAZU, *FEDERALISM AND NATION-BUILDING* 6 (1977); Decree No. 39, May 24, 1966, *Nigerian Official Gazette*, Supp. A153, *cited in* Olorunsola, *supra* note 193, at 46.

195. Olorunsola, *supra* note 193, at 33.

196. *Id.* at 34.

197. *Id.*

198. RIVKIN, *supra* note 147, at 110. Federal troops were rushed in to crush the rebellion but a prolonged war in which thousands were killed only came to an end on January 12, 1970. *See* Ijalaye, *supra* note 118, at 551.

only have been possible under a democratic regime.<sup>199</sup> Since the post-colonial state failed to internalize democracy, it could not be expected to be the fair arbiter of competing ethnic-based claims. Furthermore, the trauma inflicted on African peoples by the post-colonial state has been so disorienting that their loss of faith in it is irretrievable. The cynical manipulation of ethnic identities aside, federalism was not viable in Kenya, Uganda, or Zaire because the post-colonial state did not offer a forum for mediating the fears of groups subject to it. Those in power, usually drawn from one group, saw federalism as an attempt to weaken their grip<sup>200</sup> while those vying for power, drawn from other groups, saw it as an "equalizer," a tool to prevent domination and retain autonomy over their own affairs. In any case, groups saw the struggle to control the state as a zero-sum game in which all the spoils belonged to the victor. This view has some truth, as each group saw the capture of state power as the only vehicle for the realization of the right to self-determination for its people, at the exclusion, and often the expense, of other groups. Local, as opposed to European, colonialism has often been the result of such exclusionary practices.

The recent attempt at federalism in Ethiopia and calls for it in South Africa<sup>201</sup> may lead to a revival of the federalist argument although none

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199. The success of the multinational post-colonial state would require the democratic treatment of all nations within it as well as an end to the oppression of such nations by dominant ruling elites. Achievement of these conditions appears impossible because of the uneven regional development within the colonial and the post-colonial state. As an artificial and imposed creation, the state has largely served only the interests of the international system and those of local elites. As such, it not only failed to forge a "national identity" among the populace but also completely alienated them through exploitation and the use of force. Illegitimacy and alienation are so deeply ingrained that successful nation-building within the post-colonial state is a virtual impossibility at this point. Although Shivji, for example, holds out hope for federalism and democracy in the context of the post-colonial state, he does not, short of rehearsing abstract constitutional devices, say how or why the African masses and their elites would pull the post-colonial state back from the brink. See generally Shivji, *supra* note 188.

200. The exception is northern Nigeria which, because of its numerical superiority, favored federalism because it would give it influence and control over the more "modern" south. See Neuberger, *supra* note 169, at 174; see also notes 189-98 and accompanying text.

201. Whatever one thinks of Mangosuthu Buthelezi, the self-anointed leader of the Zulu nation, South Africa's most populous group, it became clear in the period leading to the country's first democratic vote in 1994 that his manipulation of Zulu history in aid of claims for autonomy and personal power could not be ignored. Although the South African Interim Constitution attempted to accommodate traditional authorities in the post-Apartheid political arrangement, Buthelezi has been pressing for a federal system. For the role granted to traditional authorities, see Republic of South Africa, Constitution of the Republic South Africa Bill, Chapter 11 (1994). Recently, Buthelezi has reiterated his demands:

[w]e left no stone unturned in our fight for a constitutional settlement which would reflect the complexities of our society along the lines of federalism and pluralism. Our diverse society may not survive under a unitary government. The very nature of South Africa requires different governments for different regions with full political autonomous powers.

Mangosuthu Buthelezi, *A Crossroad in South African History and Western Policies Towards South Africa*, 2 BROWN J. WORLD AFF. 231, 236 (1994). Even if the South African govern-

of these cases look promising thus far. The Transitional Government of Ethiopia (TGE),<sup>202</sup> the entity that overthrew Mengistu Haile Mariam's Dergue in 1991, was based on an interim constitution that provided to all nations, nationalities, and peoples the "right to self-determination of independence."<sup>203</sup> This provision was the natural outcome of the repression of Tigrayans, Eritreans, and Oromos by the regimes of Haile Selassie and Mengistu Haile Mariam. For these groups, the discourse of self-determination — including secession from Amhara-controlled Ethiopia — had become standard fare.<sup>204</sup> In apparent recognition of this history of animosity between groups, the newly adopted constitution creates a federal system with nine federal states, each dominated by a single ethnic group.<sup>205</sup> The constitution affirms the right of nationalities to establish their own federal states.<sup>206</sup> All major opposition groups have either been excluded from the political process or have refused to participate due to the belief that the Tigrayan-controlled TGE is not genuine about its claims of federalism and democratization.<sup>207</sup> In all likelihood, this latest attempt at federalism is also doomed.

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ment relents on this issue, it is unlikely that a fully fledged federal system would be tried because of its failure elsewhere on the continent and its association with the racist policy of homelands under Apartheid.

202. In May 1991, the combined forces of the Tigreyan Peoples Democratic Front (TPLF) and the Eritrean Peoples Liberation Front (EPLF), overthrew the government of Mengistu Haile Mariam which had itself overthrown Emperor Haile Selassie in 1974. EPLF, which for years had fought for separate statehood, immediately established a separate entity in Eritrea and in 1993 became a sovereign state. In July 1991, the National Conference chaired by Meles Zenawi, head of TPLF, adopted the Transitional Charter, an interim constitution, to govern the country until a government was popularly elected. See INTERNATIONAL HUMAN RIGHTS LAW GROUP, ETHIOPIA IN TRANSITION: A REPORT ON THE JUDICIARY AND THE LEGAL PROFESSION 1 (1994). On December 8, 1994 the Constituent Assembly adopted a new constitution for Ethiopia. *Constituent Assembly Ratifies New Constitution*, 3 NEWS FROM ETHIOPIA, Dec. 26, 1994, at 1 [hereinafter NEWS FROM ETHIOPIA].

203. ETH. CONST. (Transitional Period Charter of Ethiopia, 1991), art. 2(c), reprinted in TECOLA W. HAGOS, DEMOCRATIZATION? ETHIOPIA (1991-1994): A PERSONAL VIEW app. VII, at 318 (1995).

204. Ethiopia's three largest nationalities are the Oromos, the Amhara, and Tigrayans, who together constitute 67% of the population. Of these the Oromos are the largest and the Tigrayan the smallest. See Beyene, *supra* note 184, at 130.

205. See NEWS FROM ETHIOPIA, *supra* note 201, at 2.

206. ETH. CONST., *supra* note 203, art. 47. Although the government claims that it has granted ethnic groups limited autonomy as well as the right to secede from Ethiopia, in reality the system has created an arrangement similar to the British colonial policy of "indirect rule" where collaborators enforced the harsh policies of an authoritarian state. See Makau wa Mutua, *The Regionalization Controversy*, AFR. REP., Sept.-Oct. 1993, at 30, 31; see generally INTERNATIONAL HUMAN RIGHTS LAW GROUP, *supra* note 202.

207. The TGE has excluded all independent groups from the transitional process and engaged in massive human rights violations to retain political power. As a consequence, opposition groups have refused to recognize the Tigrayan-controlled TGE and called for international mediation. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1995 16-21 (1995); See also Makau wa Mutua, *The Anointed Leadership*, AFR. REP., Nov.-Dec. 1994, at 31-34.



Other autonomy regimes for minorities within the post-colonial state in Africa may not fare any better. Two other types of autonomy regimes identified by Steiner offer little hope. The first is power-sharing regimes in which a state's population is carved up in "ethnic terms to assure one or several ethnic groups of a particular form of participation in governance or economic opportunities."<sup>208</sup> An example would be the entitlement for members of group X to elect a stated percentage of members of the national parliament. Finally, the constitution could provide that a certain group be governed by personal law unique to it, such as a Hindu minority in Kenya.<sup>209</sup> Although the first model has not been tried, it is unlikely to succeed because in the winner-take-all politics of the post-colonial state, it may consign a numerically small group to the fringes of society. The second model may be irrelevant because it is unlikely to result in political power, the variable that is the basis for self-determination.

What these examples demonstrate is the inability of the post-colonial state to act as the forum on which claims and demands for self-determination can be exercised by pre-colonial entities or nations within the nation state.

#### IV. NEW MAP-MAKING: QUESTIONS OF LAW AND POLITICS

The post-colonial state is, in concept and substance, the colonial state in another guise. Just as the colonial state was created by foreigners to benefit them, its existence over the last four decades was guaranteed by those same foreigners because it served the cruel logic of the Cold War.<sup>210</sup> In other words, since their creation in the late nineteenth

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208. See Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1541 (1991).

209. *Id.*

210. For most of the Cold War era, African states were aligned either with the West (France, Britain or the United States) or the Soviet Union, powers that continually sought to marginalize each other in African capitals. As a general rule, the conduct of an African state towards its own citizens did not affect the level of support from the superpowers as long as the government maintained a clientelist posture. Examples abound on the continent. The French interventionism in virtually all its pro-Western former colonies is a classic case. As aptly noted by Young, the "political, cultural, economic, and military connection Paris has maintained with the erstwhile *bloc africain de l'empire* [seventeen sub-Saharan states] has been frequently tutelary, often intrusive, and sometimes overtly interventionist." Young, *supra* note 6, at 27. Except in a few places such as Kenya, British influence largely diminished after independence. *Id.* at 26-27. In contrast, American involvement increased, particularly in the Horn of Africa, and in Angola, Zaire, and South Africa, mainly to counter Soviet penetration. For accounts of U.S. involvement in southern Africa, see JOHN STOCKWELL, *IN SEARCH OF ENEMIES: A CIA STORY* (1978); CHESTER A. CROCKER, *HIGH NOON IN SOUTHERN AFRICA:*

century, African states have been outposts of the world powers, decolonization notwithstanding. Even in cases of extreme distress, they were not allowed to fail.<sup>211</sup> External border challenges were illegitimized by the major powers to maintain the inherited state system.<sup>212</sup> The end of the Cold War, however, resulted in the flight of Western collaborators, and for the first time in history the pirates<sup>213</sup> in power were left exposed. In the aftermath, the fragility of the post-colonial state has been unmasked by its failure and, in several instances, collapse.

There is a clear need to confront the nature of the African state urgently, demystify it, and address the problem of legitimacy pressing it. While alienation of the African state from its citizens is not merely the function of the loss of sovereignty over pre-colonial structures — it is also a crisis of cultural<sup>214</sup> and philosophical identity<sup>215</sup> — the two phenomena are linked like Siamese twins. I believe that the crisis in Africa

MAKING PEACE IN A TOUGH NEIGHBORHOOD (1992). Soviet bloc support for its clients in Africa was no less spirited.

211. For an example, after the overthrow of Emperor Haile Selassie of Ethiopia in 1974, the unwelcome Americans traded places with the Soviets in Somalia, ensuring that each state had a patron. UNGAR, *supra* note 21, at 365–67. France went even further. It had troops permanently stationed in Djibouti, the Central African Republic, Gabon, Ivory Coast, and Senegal; a rapid deployment force specifically designed for Africa was always on alert in France. Young, *supra* note 6, at 28. As Clough notes, the “main effect of international involvement in Africa in the postindependence era has been to assist African rulers to consolidate their power and insulate themselves from the demands and pressures of civil society.” CLOUGH, *supra* note 126, at 113.

212. Jeffrey Herbst, *Challenges to Africa's Boundaries in the New World Order*, 46 J. INT'L AFF. 17, 19 (1992). Herbst notes that the patronage of the major powers during the Cold War saved a number of client states from collapse. “Thus, Zaire won crucial aid from the United States in turning back the Shaba rebellions [1977 and 1978], Chad relied on France to retain its territorial integrity in the face of Libyan aggression, and Ethiopia was given critical military support by the Soviet Union in order to resist Somalia's irredentist claims.” *Id.*

213. Davidson uses the term “pirates” to describe the alienated, kleptocratic ruling elites, from Samuel Doe of Liberia to Mobutu Sese Seko of Zaire. See BASIL DAVIDSON, *THE BLACK MAN'S BURDEN* 243–65 (1992).

214. Davidson's description of the pathology of the abusive and despotic elite is partially rooted in the cultural disconnection of post-colonial rulers. Describing rulers such as Samuel Doe [ruler of Liberia before his murder by rebel forces in 1990], Davidson notes that although such men are “children of their ancestral cultures,” they are also “the product of an alienation which rejects those cultures, denies them moral force, and overrides their imperatives of custom and constraint.” DAVIDSON, *supra* note 213, at 246. Pre-colonial cultures “possessed rules and regulations for the containment and the repression of abusive violence; and these were the rules and regulations, before the scourge of the slave trade and colonialism that followed it, that enabled them to evolve their sense and value of community.” *Id.* at 247.

215. Writing on the problem of political legitimacy, Irele has noted “[c]olonialism was a transformative trauma, signaling a moment of profound historical discontinuity for Africans. In all spheres of life a new paradigm was imposed. . . . The nation-state was its political and territorial expression.” Irele, *supra* note 139, at 299.

can only be addressed through a dual but simultaneous process of new map-making together with norm re-examination and reformulation, which will reconnect the continent to many of the pre-colonial ideals of community and social organization as well as democratization. It will not suffice to democratize the post-colonial state; as a fundamentally undemocratic entity in concept and reality, it is incapable of genuine democratization. Africa's political map must first be unscrambled and the post-colonial state disassembled before the continent can move forward. Put differently, the form and physical substance of the colonial state must be completely dismantled; otherwise, its tightening noose will strangle the entire continent. Instead of false decolonization, whose purpose has been to preserve European Africa,<sup>216</sup> new map-making would, as a first step, liberate the peoples of Africa by theoretically returning sovereignty to their pre-colonial political identities and asking them to consensually and voluntarily create new, democratic, larger political entities. For this purpose, a new map of Africa must be drawn.

There is little doubt that the call for a new map to abolish the colonial state would be greeted by ruling elites with hostility, if not worse. The continent's post-colonial elites have a long history of sensitivity to any suggestion that the question of colonial boundaries be opened. The Charter of the Organization of African Unity, adopted in 1963, validated the colonial state as the basic unit for self-determination.<sup>217</sup> Even before the ink on the Charter was dry, the OAU was faced with a number of border disputes. In 1964, fighting broke out between Somalia and Ethiopia over the disputed Ogaden region of Ethiopia, home to ethnic Somalis.<sup>218</sup> A similar dispute between Kenya and Somalia broke out over Kenya's northeastern province, also inhabited by Somalis.<sup>219</sup> In both instances, Somalia was driven by a desire to unite all Somalis under one state.<sup>220</sup> Although the Somali-Kenya-Ethiopia border

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216. I use the term "European Africa" to denote the alienation of post-colonial Africa from Africans. For a discussion of the state in Africa as an exploitative, oppressive instrumentality, see SCHATZBERG, *supra* note 167, at 11-29.

217. CHARTER OF THE ORGANIZATION OF AFRICAN UNITY arts. II-III. Article II commits the organization "to defend their [African states] sovereignty, their territorial integrity and independence." *Id.* art. II, ¶ 1(c). Article III requires OAU member states to "solemnly affirm and declare their adherence to" the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence." *Id.* art. III, ¶ 3.

218. SAADIA TOUVAL, *THE BOUNDARY POLITICS OF INDEPENDENT AFRICA* 216 (1972).

219. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 889.

220. TOUVAL, *supra* note 218, at 212-45.

disputes were irredentist or ethnic, that was the exception, not the rule.<sup>221</sup> Morocco and Algeria were also embroiled in another boundary dispute.<sup>222</sup>

Against this backdrop, the OAU summit of the Heads of State and Government met in Cairo, Egypt in July 1964 to address the problem of borders.<sup>223</sup> It adopted a key historical resolution which affirmed the borders existing at independence,<sup>224</sup> with the exception of Somalia and Morocco;<sup>225</sup> it in effect legitimized the status quo of colonial boundaries.<sup>226</sup> According to one view, the object of the resolution "was realistic enough: decolonization was not to be the occasion for *new* sources of doubt and controversy."<sup>227</sup> An elaboration of this view emphasizes stability and order:

The policy behind the resolution is clear enough. If the colonial alignments were discarded, alternative alignments would have to be agreed upon. Such a process of redefinition would create confusion and threats to the peace. Even if the principles on which revision was to be based were agreed upon, there would be considerable

221. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 12. Border disputes in post-colonial Africa have rarely been triggered by ethnic considerations. The dispute between Tanzania and Malawi at Lake Nyasa was a result of the struggle over the lake and its resources, especially water. *Id.* at 965. The war between Tanzania and Uganda in 1979, which resulted in Idi Amin's ouster from power, was precipitated by Amin's purported annexation of his border region with Tanzania. *Id.* at 1015. Amin's claim was a cynical ploy intended to reunite his army against an external enemy and "divert attention from his internal troubles and cover up the massacre of dissident troops." AVIRGAN & HONEY, *supra* note 126, at 51.

222. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 55-83.

223. TOUVAL, *supra* note 218, at 86.

224. *Id.* at 86-88.

225. *Id.* Morocco and Somalia were involved in border disputes with Algeria and Kenya and Ethiopia, respectively. They argued that the resolution should only apply to future disputes. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 11.

226. Border Disputes Among African States, *reprinted in* BASIC DOCUMENTS ON AFRICAN AFFAIRS 360-61 (Ian Brownlie ed., 1971) [hereinafter Brownlie, BASIC DOCUMENTS]. The Cairo OAU resolution on border disputes was prefaced with several warnings: "border problems constitute a grave and permanent factor of dissension"; and the "existence of extra-African manoeuvres aiming at dividing African states." It stated that "the borders of African States, on the day of their independence, constitute a tangible reality." *Id.* In the resolution, the Assembly of Heads of State and Government:

1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in Article III, paragraph 3 of the Charter of the Organization of African Unity [respect for sovereignty and territorial integrity];

2. Solemnly declares that all Member States pledge themselves to respect the frontiers existing on their achievement of national independence.

*Id.*; see also Peter, *supra* note 84, at 125 n.27 referring to OAU Doc. AHG/Res. 16(1).

227. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 11. The resolution, adds Brownlie, was "aimed at prevention of irredentist policies and the fostering of separatist movements." *Id.*

difficulty in applying the principles to the ethnic and tribal complexities of African societies.<sup>228</sup>

Writing about Nigeria, Anene agrees with this view on the basis that "it is utterly unrealistic to suggest revisions" of international boundaries because "[n]o one can sanely contemplate mass population transfers."<sup>229</sup>

While there is obvious truth to this position, there was another sinister motive for the Cairo resolution: post-colonial ruling elites and the Cold War system stood to lose power, access to resources, and the ability to manipulate in the small and shallow pond of the post-colonial state. Although the commitment by the African elite to colonial state system is paradoxical, if not ironic, the convergence of the interests of local rulers<sup>230</sup> and their international patrons<sup>231</sup> completely overwhelmed any meaningful discussion about the need for African unity within larger entities.<sup>232</sup> Some of the states, however, preferred confederations while the Francophone countries, perhaps due in no small measure to their linkage to France, favored "gradualism" and "solidarity" to political integration.<sup>233</sup>

Without a doubt, the one successful enterprise of the post-colonial system in Africa has been the endurance of colonial boundaries. This has been accomplished by the development of two related concepts: the elimination of the concept of self-determination with respect to independent states, which avoids and delegitimizes separatist movements, and the application of the principle of self-determination only to colonial or racist minority regime situations. Beginning in 1957, the colonial state was so secured over the entire Cold War period that any boundary changes were consensual.<sup>234</sup> In the period between 1957 and 1990 only

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228. *Id.*

229. ANENE, *supra* note 7, at 290-91.

230. Boundary changes threaten every ruling elite in Africa. There is no guarantee that cliques would stay in power if new border configurations were implemented. *See* Herbst, *supra* note 212, at 19.

231. *Id.* at 20. Herbst has written that

the interests of African leaders and those of the great powers were almost identical on the issue of boundary stability. Africans and the global community provided not only the arms but also a legal framework, in the form of international sovereignty, to justify African leaders taking almost any step to crush local rebellions.

*Id.*

232. Kwame Nkrumah, for one, expounded political unification of Africa. *See* KWAME NKRUMAH, *AFRICA MUST UNITE* (1970).

233. BROWNLIE, *AFRICAN BOUNDARIES*, *supra* note 20, at 10.

234. Herbst, *supra* note 212, at 18.

military insurgency in independent Africa was successful.<sup>235</sup> But in the last several years, a number of governments and states have been allowed to fail.<sup>236</sup>

In real terms, the end of the Cold War means that African states now have to fend for themselves, a task for which they are ill-prepared in their current configuration. Local pressures for democratization and better livelihood have intensified at a time when the patrons are becoming isolationist, pulling away from their traditional support of the state.<sup>237</sup> New experiments with democracy may turn sour before they start in earnest. With economic decline at record levels, this confluence of factors could not have materialized at a worse time. The moral and legal illegitimacy of the colonial state have finally caught up with the continent. Either colonial Africa must be unscrambled or the failure of the state will usher in anarchy.<sup>238</sup>

The inability of the post-colonial state to serve citizens has diminished its sovereignty in the eyes of African masses. Instead, the state is now under attack from another norm, that of the right to self-determination, meaning the right of a people to democratic government. Social and ethnic groups are beginning to question why loyalty should be owed to a bankrupt, abusive, and illegitimate entity. In 1968, when Tanzania recognized Biafra as an independent sovereign state, it argued that since Nigeria had failed the Ibos, they owed it no loyalty.<sup>239</sup>

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235. While military coups were common, armed insurrections have not been supported by the international system. The exception was the 1986 military victory by Yoweri Museveni over the Obote regime after a long and costly civil war. *Id.* at 21. The secessionist struggle in Eritrea only succeeded after the end of the Cold War and the inability of the Soviets to continue supporting Mengistu Haile Mariam. A similar struggle in southern Sudan has not received international legitimacy.

236. *Id.* The failure of governments in Liberia, Somalia, Ethiopia, Rwanda, and Chad would have been very unlikely during the cold war. *Id.*

237. For example, the U.N. mission to Somalia, justified by the Bush Administration on humanitarian grounds, ended in March 1995, without establishing a government. The mission, launched in 1992 after the collapse of the Somali state, was initially meant to halt starvation but eventually turned into a peace-keeping/making mission. Clashes between Somali groups and the mission, and its inability to restore government hastened donor fatigue and the withdrawal. *Lessons From Somalia*, BOSTON GLOBE, Mar. 2, 1995, at 10.

238. For a disturbing analysis of the crisis of the state and the great potential for its collapse, see Aristide Zolberg, *The Specter of Anarchy*, DISSENT, Summer 1992, at 303.

239. After the massacre of some 30,000 Ibos in two pogroms, Biafra sought to secede from Nigeria, an event that precipitated a bloody war that ended in Biafra's defeat in 1970. See Ijalaye, *supra* note 118. Tanzania stated that "[w]hen the state ceases to stand for the honour, the protection, and the well being of all its citizens, then it is no longer the instrument of those it has rejected. In such a case, the people have the right to create another instrument for their protection — in other words, to create another state." The Tanzania Government's Statement on the Recognition of Biafra, Apr. 13, 1968, in FOREIGN POLICY OF TANZANIA 1961-1981: A READER 275, 278 (K. Mathews & S. Mushi eds., 1981).

Today, the relationship between the post-colonial state and the citizenry is reminiscent of that Nigerian tragedy. As demands for internal self-determination soar, sovereignty diminishes, and the commitment of the average African to colonial borders weakens.<sup>240</sup> The distress of the state has broken what Mazrui calls the "[t]hree post-colonial taboos."<sup>241</sup> These are: the taboo of recolonization, with the U.N. tutelage of Somalia to reinvent its self-government; the taboo of sanctioned secession, with the creation of sovereign Eritrea; and the taboo of "retribalization," with the creation of a "federal" system in Ethiopia based on ethnicity.<sup>242</sup> Mazrui posits that external recolonization may be tried under the banner of humanitarianism, as the cases of Somalia and Liberia suggest.<sup>243</sup> Otherwise, failed states may be taken over in a new trusteeship system dominated by stable states in Africa and Asia.<sup>244</sup> He indicates that the rise of ethnic consciousness and the "politicised tribal identity" in the context of multipartyism is another reason for the review of another scared cow, a taboo, that of addressing ethnicity with federalism.<sup>245</sup> Significantly, Mazrui sees the "decolonization" of colonial boundaries as inevitable:

Over the next century the outlines of most of present-day African states will change in one of two main ways. One will be ethnic self-determination, which will create smaller states, comparable to the separation of Eritrea from Ethiopia. The other will be regional integration, towards larger political communities and economic unions.<sup>246</sup>

If African peoples and governments, including the OAU, do not move quickly to liberate the post-colonial state by creating new consensual political entities to replace the colonial state, Mazrui's prediction of the continent's break-up of the colonial state into ministates will probably come true. Without a peaceful formula for self-determination of pre-colonial peoples and societies, such a prediction will probably come at great cost to human life. But it is not inevitable that the eventual decolonization and liberation of Africa will be fed on yet more African blood. As Davidson so correctly writes:

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240. See Herbst, *supra* note 212, at 24-25.

241. Ali Mazrui, *The Bondage of Boundaries*, *ECONOMIST*, Sept. 11, 1993, § 2, at 28.

242. *Id.*

243. Mazrui, *supra* note 241, at 28.

244. *Id.* Mazrui muses that a stable Ethiopia may be asked to administer Somalia and Djibouti. *Id.*

245. *Id.*

246. *Id.*

What the analysis then goes on to demand, all things being so, is the invention of a state appropriate to a postimperialist future. To those who prudently reply that it can't be done, the answer will be that it can certainly be thought of. Cases spring to mind. It was already beginning to be thought of, even during the dreadful 1980s, in the projects of the sixteen-country Economic Community of West African States, and potentially again, in those of the nine-country Southern African Development Coordination Conference launched a little later. Each set of projects has supposed a gradual dismantlement of the nation-statist legacy derived from imperialism, and the introduction of participatory structures within a wide regionalist framework.<sup>247</sup>

#### V. REGIONAL INTEGRATION: ANOTHER DEAD END

Davidson's cautious optimism<sup>248</sup> in the notion of regional integration as a hopeful sign for new conceptions about a viable state, one that repudiates the self-destructive impulses of the post-colonial state, is a deterrent against easy refuge in regionalism as a panacea for Africa's political and economic crises. Like the post-colonial state itself, theories of regional integration originated in the West and have been imported into Africa and other regions of the South.<sup>249</sup> Though their foreign origin certainly does not invalidate their applicability to Africa, Gambari warns that an evaluation of such "received theories" is necessary to determine their relevance.<sup>250</sup> This assertion is particularly true for Africa because of its weak states and underdeveloped economies, two conditions that militate against traditional conceptions of regional integration.

The two traditional theories of regional integration, which I state here very simply, will suffice to demonstrate the difficulties of their application in the underdeveloped states of Africa. The first, the functionalist theory of integration, is a development of nineteenth century Europe and is based on the assertion that "the development of international economic and social cooperation is a major prerequisite for the

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247. DAVIDSON, *supra* note 213, at 321-22.

248. *Id.*

249. See IBRAHIM A. GAMBARI, POLITICAL AND COMPARATIVE DIMENSIONS OF REGIONAL INTEGRATION: THE CASE OF ECOWAS 2 (1991). Gambari locates the "intellectual origins" of the integration schemes in the creation of particular European entities such as the European Coal and Steel Community and the establishment of the European Economic Community through the Treaty of Rome. *Id.*

250. *Id.*



ultimate solution of political conflicts and elimination of war."<sup>251</sup> Functionalism stems from the basic assumption that war is caused by three factors: (1) poverty or economic misery, social injustice, hatred, and discrimination; (2) the institutional inadequacy of the state system, which is inefficient and cannot adequately solve economic and social problems because it imposes separateness through sovereignty and prevents other authorities from solving these problems; and, (3) thoughts and feelings fostered by the state.<sup>252</sup> Functionalism, therefore, seeks to overcome these factors by creating horizontal links and avoiding the vertical divisions of nation states. It focuses attention upon areas of common interest and away from the conflictual character of the state.<sup>253</sup>

The second theory, known as the customs union theory, is premised on the creation of arrangements for the gradual removal of "discriminations that may exist in trade and general economic relationships across national boundaries."<sup>254</sup> It assumes that increased free trade among nations promotes the more efficient use of resources within the customs union that, in turn, produces prosperity. Like functionalism, the customs union theory seeks to intensify inter-state contact in the economic sphere through a supranational body. They both assume a developed market economy with a healthy industrial base. Though seemingly anti-statist, both theories are in fact only realizable where states are legitimate, stable, and willing to transfer a fraction of their sovereignty to the new organization.

Gambari makes the argument, which this author agrees with, that traditional integration theories are of little relevance to Africa because they assume conditions that do not exist. He writes that:

in assessing the relevance of the conventional notions of integration to the less developed countries, we may immediately observe that the conditions favorable to trade creation are the very opposite to those found in these countries. For example, intra-group trade is a minor proportion of the total trade between member states and the rest of the world. . . . Most developing countries are primary producers and their products are competitive rather than complementary. Moreover, developing countries are heavily dependent on the export of their primary products, while they import intermedi-

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251. INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 379 (4th ed. 1971).

252. *Id.* at 381-82.

253. *Id.* at 382.

254. GAMBARI, *supra* note 249, at 4.

ate manufactures which, insofar as they are produced at all in the region, are produced in very limited quantities and varieties.<sup>255</sup>

The attack on these theories has also been driven by fears that regionalism, at least in its traditional variant, would diminish state sovereignty and curb the ability of ruling elites to control and harness resources to their advantage. That opposition is usually, though not always, veiled in nationalist jargon. Since ruling elites equate their control of the state with national development, any attempt to reduce the authority of the state is suspect. As Gambari again puts it:

Neither the intellectual origin nor the principal goal of functionalism (in its original or revised form) has much relevance to integration efforts in the Third World. The role of the sovereign state is recognized in all integration efforts in developing countries. Moreover, the principal motivation for integration efforts by these countries is not the issue of war and security but rather the pursuit of wealth and enhanced national prosperity.<sup>256</sup>

Gambari is right in his identification of incompatibility between traditional integration theories and developing countries. However, he mistakenly assigns patriotism and conceptions of a national interest to the reluctance of African elites to apply those theories in their efforts at regional integration. His assertion that “[w]hat the policymakers in these regions [South] really want is an escape from or, at least, a change in the present dependency relationships between their countries and the industrial North”<sup>257</sup> gives too much credit to rulers whose survival was made possible by that dependency throughout the entire Cold War period.<sup>258</sup> This is not to say that all African leaders have been cynical charlatans or that none of them have attempted to wrest free of the control of the industrial North and its institutions of financial hegemony. Some, such as the late Kwame Nkrumah of Ghana, believed firmly that only continental political and economic unity would rescue Africa from

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255. *Id.* at 7–8.

256. *Id.* at 3.

257. *Id.* at 13–14.

258. Many leaders in the so-called Third World, from Latin America to Asia and Africa, owed their existence to financial and military support of either the Soviet or the American bloc. Leaders such as Mobutu Sese Seko of Zaire, for example, came to power with the assistance of the American CIA. Governments in Chile, Guatemala, El Salvador, and elsewhere in Africa and the Middle East were little more than outposts for superpower interests. It is difficult to see how such rulers or regimes would earnestly have wanted to end their dependent relationship with the North.

centuries of foreign occupation, control, and exploitation.<sup>259</sup> Yet although quite a number of leaders held similar views, and felt humiliated by their client relationships with former colonial powers, they came to rely on that patronage as the only defense against an alienated and impoverished populace. Nevertheless many of them joined South-South forums where obligatory denunciations of one or other superpower were commonplace.<sup>260</sup> The OAU was the classic example of such a forum.<sup>261</sup> While the traditional conceptual designs of regional integration were ill-suited to Africa, the admission must be made that the continent also lacked the leadership necessary for the creation of viable processes and institutions for integration.

The examples of two significant regional integration efforts illustrate the inability of that vehicle to give legitimacy to the post-colonial state and demonstrate the failure of the concept in the context of the existing state system. The most advanced of these regional integration efforts in Africa and possibly throughout the South was the East African Community (EAC), the regional organization linking Kenya, Uganda, and Tanzania.<sup>262</sup> Started in 1948 as the East African High Commission by Britain, the colonial power over the three states, the organization was intended to harness the region's resources for the benefit of the white settler minority in Kenya and the British economy.<sup>263</sup> Built around a customs union, free trade in local produce, and a common currency, the High Commission sought the creation of a regional economy dominated

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259. KWAME NKRUMAH 116-17 (Panaf Books ed. 1974).

260. As correctly put by Onwuka and Sesay, "[t]he established African response to colonialism and underdevelopment has been advocacy of nationalism at the state level, Pan-Africanism at the continental level and nonalignment at the Third World level." *THE FUTURE OF REGIONALISM IN AFRICA* 12 (Ralph I. Onwuka & Amadu Sesay eds., 1985). But even as the leaders advocated these noble ideals, they ran highly despotic police states and showed little regard for the welfare and fundamental rights of those whom they governed. It is difficult not to see their pious expressions of nationalism and patriotism as self-serving.

261. *Id.* at 6. The OAU has long been viewed by Africans as a club of dictators and, with the exception of support for anti-colonial struggles on the continent, has throughout its existence pursued a very narrow agenda. As Onwuka and Sesay note, the OAU was "established to reflect and advance the interests of national leaderships on the continent" and "seeks to achieve cooperation without further reducing sovereignty and to minimise conflict without resolving fundamental issues." *Id.*

262. See GAMBARI, *supra* note 249, at 68; see generally JOSEPH S. NYE, JR., *PAN AFRICANISM AND EAST AFRICAN INTEGRATION* (1965).

263. In colonial jargon, Kenya was a colony, a status that made it the first among subordinates, while Uganda and Tanganyika were protectorate and trust territory, respectively. This distinction meant that the economies of the last two were subjected to the interests of the white settlers in Kenya. This arrangement resulted in "colonial non-industrialization, the discouragement of an indigenous entrepreneurial class in East Africa, especially in Uganda and Tanganyika, and the organization of sub-regional infrastructures which conspicuously favored Kenya." GAMBARI, *supra* note 249, at 69.

by the settlers in Kenya and organized for their benefit. This imbalance of resources and uneven development came back to haunt the post-independence EAC.

The divergent interests of nationalists in each of the three countries<sup>264</sup> and Tanganyika's independence in 1961 frustrated any attempts to transform the High Commission into a federation which would have become independent as one entity. Ultimately, the High Commission was transformed into the East African Common Services Organization (EASCO) with the agreement that inequalities between the three states would be reduced. EASCO supposedly "produced the functional advantages of federalism without involving commitment to federalism as a principle or programme."<sup>265</sup> Although the leaders of the three (now independent) east African states met in 1963 and dedicated themselves to a political federation, that vision died for good by the end of the year as the states struggled over the "degree of centralization to be built into the new federation," the desire by Uganda "to preserve its fragile internal unity," and its "fear of Kenyan control over regional institutions."<sup>266</sup> To avoid the collapse of EASCO, the three leaders met in 1964-65 and concluded the Kampala/Mbale Agreements under which "measures were to be taken designed to locate the expansion of existing industrial capacity in Uganda and Tanzania but not in Kenya, and to allocate new industries more equitably in the three territories."<sup>267</sup> These agreements failed partially because Kenya refused to ratify them. But unwilling to terminate the common market in spite of these differences, the states agreed to the Treaty for East African Cooperation in 1967, thereby giving birth to the EAC.<sup>268</sup>

The treaty sought to create a customs union, increase intra-regional trade, establish a common tariff, and set up a system for the transfer of taxes.<sup>269</sup> In addition, the EAC would administer joint services in railways, harbors, a regional airline [East African Airways], and posts and

264. Although Julius Nyerere of Tanzania favored an East African federation, independence leaders in Kenya and Uganda preferred independence for their territories as sovereign states. See D. Wadada Nabudere, *The Role of Tanzania in Regional Integration in East Africa — Old and New Patterns*, in *FOREIGN POLICY OF TANZANIA*, *supra* note 239, at 126-32.

265. Brownlie, *BASIC DOCUMENTS*, *supra* note 226, at 63.

266. See Allen L. Springer, *Community Chronology*, in *INTEGRATION AND DISINTEGRATION IN EAST AFRICA* 9, 16-17 (Christian P. Potholm & Richard A. Fredland eds., 1980).

267. GAMBARI, *supra* note 249, at 72.

268. Treaty for East African Co-operation, June 6, 1967, Kenya-Uganda-Tanz., 6 I.L.M. 932.

269. *Id.* art. 20.

telecommunications.<sup>270</sup> A regional bank, the East African Development Bank, was established to balance the distribution of industrial development in favor of Uganda and Tanzania.<sup>271</sup>

In 1976, in spite of this new elaborate scheme, the EAC collapsed, barely a decade after its creation. Several reasons have been advanced for the failure; most result from the clear advantages enjoyed by Kenya over the others and the pressures exerted on the organization by ruling elites whose interests were divergent from it. Gambari has noted that:

There were four main reasons for the collapse of the East African community: the continuation of a pattern of industrial production which reinforced a lopsided distribution of costs and benefits; different patterns of ideological leaning, political system, and socioeconomic orientation among member states; the treaty itself as a problem area; and finally, nationalism, nationalistic pressures, and interstate conflicts.<sup>272</sup>

In addition to these problems, other questions put more burdens on the EAC: the military coup in Uganda which brought the vicious Idi Amin to power; Tanzania's support for anti-Amin forces; Amin's claims to part of Kenya's territory; Kenya's collaboration with Israeli command forces in the Entebbe raid; Tanzania's support for liberation struggles in southern Africa and Kenya's ambivalence to it; the global recession and inflation; and, divide-and-penetrate strategies by international business sealed the fate of the EAC.<sup>273</sup>

The Economic Community of West African States (ECOWAS) has not fared any better although, unlike its east African counterpart, it is still in existence. Founded in Nigeria in 1975 by fifteen states<sup>274</sup> in the region, ECOWAS represented one of the more ambitious attempts at regional economic cooperation. Patterned after the Treaty of Rome, the Treaty of the Economic Community of West African States seeks to "promote cooperation and development in all fields of economic activity"<sup>275</sup> including industry, commerce, monetary policy, and agriculture. It explicitly provides for the elimination of tariff and tariff barriers or the

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270. *Id.* arts. 71-79.

271. Treaty for East African Co-operation, *supra* note 268, art. 22 & Annex VI; GAMBARI, *supra* note 249, at 72-73.

272. *Id.* at 74-75.

273. *Id.* at 78-79; see generally Nabudere, *supra* note 264.

274. These are: Benin, Gambia, Ghana, Guinea-Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo, and Upper Volta [now Burkina Faso]. Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975, 10 U.N.T.S. 40.

275. *Id.* art. 2, para. 1.

creation of a customs union and the establishment of a common external tariff.<sup>276</sup> Like the EAC, the ECOWAS is inspired in large part by functionalism.

There is little doubt that ECOWAS owes its origin to the regional interests of Nigeria, the most dominant state in West Africa as well as the most populous black country on earth.<sup>277</sup> Due largely to its increased oil wealth in the late 1960s and early 1970s, Nigeria became more interested in playing a key role in the region. In addition to providing a market for the goods of an increasingly industrializing Nigeria, a regional arrangement would make it more difficult for neighboring states to interfere in its internal affairs, as two had done during the brutal 1967–70 civil war.<sup>278</sup> Over the next two decades, this domination by one country meant that the fortunes of ECOWAS would decline as Nigeria was plunged into deeper political and economic crises.

The performance of ECOWAS has been extremely disappointing; it has failed in virtually all its initial objectives.<sup>279</sup> It has not made any progress in its central objective: economic integration and policy harmonization. The harmonization of industrial and fiscal policies, the creation of a customs union, tariff coordination, and the establishment of external tariffs remain a dream.<sup>280</sup> Reasons for these failures include protective national structures which were not created with the needs of a regional market in mind, non-payment of membership contributions, the existence of smaller sub-regional groupings, the inability of ruling elites to subordinate their interests to those of ECOWAS, French opposition and the control over its satellites, particularly Senegal and the Ivory Coast,

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276. *Id.* art. 2, paras. 2(a)–(c).

277. UKA EZENWE, *ECOWAS AND THE ECONOMIC INTEGRATION OF WEST AFRICA* 15 (1983). In 1979, the population of Nigeria was put at over 82 million. *Id.* It is estimated today that out of a population of 150 million in the region, more than 100 million are Nigerian. See GAMBARI, *supra* note 249, at 46; S.K.B. Asante, *Regional Economic Cooperation and Integration: the Experience of ECOWAS*, in *REGIONAL INTEGRATION IN AFRICA* 99, 103 (Anyang' Nyong'o ed., 1990).

278. Of the five states that recognized Biafra, two, Gabon and the Ivory Coast, were West African. The others were Zambia, Tanzania, and Haiti. Ijalaye, *supra* note 118, at 553–54.

279. The one qualified “success” by ECOWAS has been its persistence through its force, the Economic Community of West African States Monitoring Group (ECOMOG), to restore the collapsed Liberian state. Although it has not succeeded in ending the civil war and reuniting the country, it has held together and spearheaded a number of ceasefires and plans for the return of civil order. It is a remarkable achievement for an organization composed of states which are at risk of collapse themselves. For a discussion of the Liberian crisis and the role of ECOWAS, see Martin Lowenkopf, *Liberia: Putting the State Back Together*, in *COLLAPSED STATES*, *supra* note 117, at 91.

280. See Asante, *supra* note 277, at 111.

and Nigeria's economic and political woes.<sup>281</sup> But perhaps no other reasons have been more destructive to integration than the instability, including the collapse or failure of states in the region. While Liberia has completely collapsed, Sierra Leone, Togo, Cameroon, Nigeria, Gambia, and Burkina Faso have been in gradual decay for decades. Others, such as Ghana, Benin, Mali, Guinea Bissau, Guinea, Niger, and Ghana are attempting to restore a measure of stability or reform after decades of brutal despotic rule during which the functions of statehood went unattended.

In eastern and southern Africa, two additional efforts at regional cooperation have borne little fruit. The Preferential Trade Area (PTA) for east and southern Africa is merely a forum for annual meetings in which resolutions expressing hopes for future integration are passed. The Southern Africa Development Council (SADC) holds out more hope although the resolution of internal conflicts in Mozambique and Angola and the legitimization of other regimes in the region are necessary prerequisites for integration.<sup>282</sup> The fundamental fact is that regional integration has not worked in Africa because such an arrangement assumes viable, legitimate, and functioning states, entities in which ruling elites see a good greater than their own immediate control of the state. It is unfair to expect collapsing or failing states to have such transcendent interests. Although Senghor blames "nationalism" and the recent acquisition of sovereignty for the failure of regionalism, he nevertheless makes the same point when he writes that:

functionalism prescribes that in the process of integration "sovereign rights" are transferred from the state to the functional organizations. Loyalties are transferred to these organizations because they better satisfy individual needs. However, the reality is that because most African countries acquired international sovereignty only recently, political leaderships jealously guard their sovereignty and are unwilling to reduce the power and authority of the state. Instead, the common thrust of government action is towards promoting national integration and consolidating national political independence.<sup>283</sup>

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281. See GAMBARI, *supra* note 249, at 32-48; Asante, *supra* note 277, at 108-25.

282. Ibbo Mandaza, *SADCC: Problems of Regional, Political and Economic Cooperation in Southern Africa*, in REGIONAL INTEGRATION IN AFRICA, *supra* note 277, at 141, 147; see generally Herman J. Cohen, *Can Southern Africa Become an Integrated Community?*, 2 BROWN J. WORLD AFF. 189 (1995).

283. Jeggan C. Senghor, *Theoretical Foundations for Regional Integration in Africa: An Overview*, in REGIONAL INTEGRATION IN AFRICA, *supra* note 277, at 23, 25.

If history had not shown otherwise, it might be possible to believe that ruling elites mean well when they jealously hold on to power; these were the same justifications advanced for one-party states and the endless cycle of military coups. The inability of the post-colonial state to gain legitimacy and forge a nation reproduces an alienated elite whose vision cannot see beyond the next day in office let alone across the region. As an instrument for breathing new life into the state, regionalism is a dead end because it requires live states to operationalize.

### CONCLUSION

Those who imposed the colonial state on Africa believed that they were civilization's gift to the rest of humanity. Like the colonial state, their views are not dead.<sup>284</sup> Some have even suggested that Europe should recolonize Africa,<sup>285</sup> reasoning which assumes that it was a mistake to decolonize Africa.<sup>286</sup> Such views do not recognize that Europe's involvement in Africa has brought nothing but misery. Perhaps the withdrawal of the West from Africa, though detrimental to the colonial state, may provide an opportunity for Africans to squarely face their problems for the first time in several centuries. In that re-examination of the continent, Africa would do well to abandon the principle of *uti possidetis juris*, the device that falsely linked the decolonization of the colonial state to the liberation of African peoples. It is a straight-jacket which continues to deny freedom to millions of Africans. While its rejection plunges Africa into an uncertain future, it ensures that creative thinking at least begins to explore bold solutions to the crisis.

It would be irresponsible to assume that the direction proposed in this article could not lead Africa down a more treacherous path in which power-mongers and cynical ethnic chauvinists would senselessly tear society apart in pursuit of self-aggrandizement. That possibility, which would be a real setback to pan-Africanism, exists. But it is far more damning to sit and wait for disaster to strike, precipitating the crises that have been witnessed in Somalia, Liberia, and Rwanda. That is why orderly formulae for re-making the continent's political map must be worked out soon. Otherwise the post-colonial state, itself already a

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284. See, e.g., Richard Dowden, *A Map does not a Nation Make*, INDEPENDENT, Jan. 9, 1995, at 15. Dowden crudely dismisses the suggestion that because the colonial state is the primary reason for the continent's troubles that the map of Africa should be redrawn to address this problem. He decries the rise of ethnic consciousness which he sees as a return to Africa's chaotic past. He laments the failure of the colonial state. *Id.*

285. Pfaff, *Africa Needs Europe*, *supra* note 19.

286. Pfaff, *A New Colonialism*, *supra* note 19.



terrorist organization masquerading as the repository of popular will, will fragment into pieces and provide devious outsiders with more opportunities to literally pick Africa apart. Among the problems that will have to be addressed by Africans as they ponder this proposal are the criteria for determining the "self" who would possess the right to self-determination and how the will of that self would be determined. Identifying these criteria will be especially difficult because the colonial state substantially changed social relations and created new alliances and interests not in existence in the pre-colonial era. All these variables will have to be taken into account as new fora for expressing popular will, such as plebiscites and referenda, are explored as possible avenues for determining a new African political map.