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International Organizations as Constitution-Shapers

Promoting or Undermining a Transnational Rule of Law?

ANNE PETERS

I Introduction

The United Nations Assistance Mission in Afghanistan (UNAMA) had been mandated by the UN Security Council to "support the efforts of the Government of Afghanistan in fulfilling its commitments to improve governance and the rule of law."[1] In hindsight, after the irregular seizure of power by the Taliban government on August 15, 2021, this reads as being, misguided and naive. After all, the twenty-year-long, UN-led rule-of-law process in Afghanistan, including the adoption of a liberal constitution with intense UN (and US) involvement,[2] seems to have been annihilated.

UNAMA is only one example of the widespread rule-of-law-related activities by a range of international organizations at different places on the globe. This chapter spotlights their recommendations and prescriptions on *constitution-making and reform* – which involve the rule of law as a constitutional principle.[3] The explanation for focusing on constitution-making and reform is that the rule of law seems to be better protected when a given polity possesses a constitution. The UN

[1] S.C. Res. 2543, ¶ 6(h) (Sept. 15, 2020). This Res. is no longer cited in current S.C. Res. 2727 (March 15, 2024).

[2] CONSTITUTION (Jan. 3, 2004) (Afg.). On the UN engagement, see Zaid Al-Ali, *Constitutional Drafting and External Influence*, *in* COMPARATIVE CONSTITUTIONAL LAW 77, 80–82 (Tom Ginsburg & Rosalind Dixon eds., 2011); Tanya Domenica Bosi, *Post-Conflict Reconstruction: The United Nations' Involvement in Afghanistan*, 19 N.Y. L. SCH. J. HUM. RTS. 819 (2003).

[3] This chapter thus zooms in on one form of the "indirect processual links supporting rule-of-law practices within states" discussed by Gregory Shaffer and Wayne Sandholtz in Chapter 1. I use material from Anne Peters, *International Organizations as Constitution-Shapers: Lawful but Sometimes Illegitimate, and Often Futile*, 8 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 61 (2023).

Secretary-General's 2008 Guidance Note on the Rule of Law posits as a "framework for strengthening the rule of law" a "Constitution or equivalent, which, as the highest law of the land," must also possess certain ingredients, ranging from the incorporation of international human rights guarantees to upholding an independent judiciary.[4]

The constitution-shaping activity of international organizations involves other constitutional principles besides the rule of law, notably human rights and democracy.[5] Depending on how it is conceptualized, the rule of law encompasses or complements these ideas.[6] Importantly, UN member states have embraced the rule of law as a lead concept for *both* domestic and international law:[7] the key General Assembly resolution expressly stipulates that "the rule of law applies *to all states* equally *and to international organizations*, including the United Nations and its principal organs."[8] This statement indicates that the rule of law has a transnational or multilevel quality.[9]

The chapter proceeds as follows: Part II gives some examples of how, since 1989, international organizations have sought to shape state constitutions and thereby the domestic rule of law. Part III briefly shows that, for the most part, these activities have not led to better operation of the rule of law on the ground. Next, in Part IV, the main critiques against constitutional assistance and advice by international organizations are listed. My response is that, in order to become more legitimate (which might then also improve effectiveness) constitution-shaping by international organizations needs to absorb postcolonial concerns and must be complemented by a much deeper social agenda with a global ambition (Part V). Thus revamped, international organizations' constitution-shaping role could be reinvigorated so as to sustain the rule of law on the domestic level (Part VI).

[4] UN Secretary-General, *United Nations Approach to Rule of Law Assistance,* Guidance Note of the Secretary General, at 4–5 (Apr. 14, 2008), https://digitallibrary.un.org/record/4024519?v=pdf [hereinafter *UN Approach*] (emphasis added).

[5] On the promotion of democracy by international organizations, see Jon C. Pevehouse, Democracy from Above: Regional Organizations and Democratization 204 (2005); Paul Poast & Johannes Urpelainen, *How International Organizations Support Democratization: Preventing Authoritarian Reversals or Promoting Consolidation?*, 67 World Pols. 72, 107 (2015).

[6] *See* Chapter 1.

[7] G.A. Res. 67/1, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels (Nov. 30, 2012).

[8] *Id.* ¶ 2 (emphasis added).

[9] On the transnational perspective, see Chapter 1 (Part II).

II Constitution-Shaping in Various Guises

1 *Membership Conditions*

Since 1989, organizations such as the European Union (EU), the Council of Europe (CoE), and the North Atlantic Treaty Organization (NATO) have stimulated serious constitutional reforms in those Eastern and Central European states that sought to accede. As a condition for membership, deep rule-of-law-related reforms had to be undertaken.

The most influential organization has probably been the EU. Twelve Central and Eastern European candidate states acceded to the EU in two main waves, in 2004 and 2007.[10] When the first Central Eastern enlargement was under discussion, the European Community, as the organization was then called (under the broader 'roof' of the European Union), did not yet possess substantive accession criteria in its primary law. Rather, the accession criteria were spelled out in the Presidency Conclusions issued at the European Council's Copenhagen meeting in 1993 in which it was stated:

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the *rule of law*, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.[11]

Later, these so-called Copenhagen criteria for accession were written into the 2007 Lisbon version of the Treaty on European Union in Article 49, read in conjunction with the clause on the Union's "values" in Article 2. These "values" include the rule of law.[12] As a result, accession of the new Central and Eastern European states to the EU implied transformations that affected "the very structure of the constitution" of those states.[13]

[10] In 2004, ten states acceded to the EU: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. In 2007, Bulgaria and Romania became EU members.

[11] Council, Conclusions of the Presidency 13 (European Council in Copenhagen, June 21–22, 1993) (emphasis added).

[12] Consider the parallelism between internal and "outbound" principles in Treaty on European Union art. 21, Dec. 13, 2007, 2008 O.J. (C 115) 13.

[13] Luis López Guerra, *The Challenges to Candidate States*, *in* CONSTITUTIONAL IMPLICATIONS OF ACCESSION TO THE EUROPEAN UNION 21, 27 (Eur. Comm'n for Democracy through Law ed., 2002).

Similarly, the CoE requested rule-of-law reforms. The accession standards are laid down in Article 3 of the organization's founding treaty (the Statute of the CoE) and in secondary law. Article 3 requires acceptance of "the principles of the rule of law." In accession practice, this provision has been interpreted as requiring ratification of the European Convention on Human Rights (ECHR) and the establishment of a pluralist parliamentary democracy.[14] Membership is strictly conditioned upon having a liberal and democratic constitution that endorses the trinity of rule of law, human rights, and democracy.[15]

Admission to the World Trade Organization (WTO) also had repercussions for the rule of law. The requirements for WTO membership are laid down in so-called accession protocols, which differ from one candidate state to another. A famous case was China's accession to the WTO in 2001. In its accession protocol, China notably committed itself to transparency and judicial review.[16] Transparency and judicial review are key components of the rule of law. These principles must now be observed by China in trade and economic policy, because the state would otherwise not be fulfilling its treaty obligations.

These examples illustrate how the prospects of accession to various international and regional organizations have functioned as incentives for domestic constitutional reforms, including the improvement of rule-of-law-related institutions.

2 *Conditionalities, Indicators, Benchmarking, Advice*

Further and subsequent to preaccession incentives, the activity of international organizations has the potential to directly or indirectly shape the constitutions of states, which in turn has repercussions on the national

[14] On democracy as the only political model compatible with the ECHR, see Zdanoka v. Latvia, App. No. 58278/00, ¶ 98 (Mar. 16, 2006), https://hudoc.echr.coe.int/?i=001-72794.

[15] On the demands that the CoE, in particular its Parliamentary Assembly, brought to bear on new postcommunist constitutions, see Heinrich Klebes & Despina Chatzivassiliou, *Problèmes d'ordre constitutionnel dans le processus d'adhésion d'États de l'Europe centrale et orientale au Conseil de l'Europe*, 8 Revue universelle des droits de l'homme 269 (1996); Jean-François Flauss, *Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe*, 5 Eur. J. Int'l L. 401 (1994); Heinrich Klebes, *Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe*, 69 St. Louis-Warsaw Transatlantic L.J. 69 (1999).

[16] World Trade Organization, *Accession of the People's Republic of China*, WTO Doc. WT/L/423, at 34 (2001).

rule of law. Rule-of-law promotion by international organizations that calls for constitutional reform often overlaps with other activity that does not directly address or imply specifically *constitutional* law. A famous example is the Venice Commission's *Rule of Law Checklist* of 2016.[17] Also the UN Secretary-General has defined the rule of law in the context of transitional justice.[18]

This chapter leaves aside those rule-of-law activities by international organizations that pertain to specific fields such as fighting impunity. Also, it leaves out the work of universal human rights bodies and regional human courts, although, as part of their human rights monitoring, they occasionally recommend or request not only individual measures toward specific victims or legislative reforms but also *constitutional* reforms to remedy human rights violations. A recent example is the response to the ongoing rule-of-law crisis in Hungary and Poland. Here, European courts have derived the states' obligations to restore an independent judiciary from human rights obligations.[19] Another example of explicit and broad rule-of-law requests by a human rights body is the work of the Inter-American Commission concerning corruption – corruption (the rule of money) being the antithesis of the rule of law.[20]

International financial institutions (IFIs), especially, have exercised pressure to reform state constitutions. Their activity (of both benchmarking[21] and outright conditionalities) has included a focus on explicit requests for rule-of-law-related reforms, which in turn imply constitutional reform. For example, the worldwide governance indicators created by the World Bank and the Brookings Institution have always invoked the rule of law. And the World Bank country policy and institutional assessments (CPIA), which since 2005 have been made public, rate

[17] Eur. Comm'n for Democracy Through Law (Venice Comm'n), Rule of Law Checklist, 106th Sess., Study No. 711/2013, CDL-AD(2016)007-e (2016), www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e.

[18] UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 6, UN Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *The Rule of Law and Transitional Justice*].

[19] Grzęda v. Poland, App. No. 43572/18, ¶ 323 (Mar. 15, 2022), https://hudoc.echr.coe.int/?i=001-216400.

[20] Inter-Am Comm'n H.R., Corruption and Human Rights in the Americas: Inter-American Standards (Dec. 6, 2019).

[21] *E.g.*, World Bank Group's Ease of Doing Business rankings, https://data.worldbank.org/indicator/IC.BUS.EASE.XQ; OECD's FDI Regulatory Restrictiveness Index, www.oecd-ilibrary.org/finance-and-investment/data/oecd-international-direct-investment-statistics/oecd-fdi-regulatory-restrictiveness-index-edition-2021_2a305f32-en.

the recipient countries according to various criteria such as "property rights and rule-based governance" and "transparency, accountability, and corruption in the public sector."[22]

The next most relevant constitutional dimension affected by IFIs' activities concerns the welfare and social provisions of state constitutions. World Bank and IMF policies, programs, and rules of the game, notably the conditionalities, may affect the recipient states' bureaucracy and influence public spending (e.g., on state education).[23] As part of adjustment programs set up by IFIs, states have enacted legal reforms that have negatively affected the enjoyment of constitutionally (and internationally) guaranteed human rights, such as entitlements to pensions protected as property, the right to social security, the right to health, and the right to education. These rights form part of a "thick" and "social" vision of the rule of law.[24]

Another "defender of the rule of law" (to use the word of its former Director and Secretary Thomas Markert) is the Venice Commission.[25] This is a body operating within the framework of the CoE.[26] Since its creation in 1990, the Venice Commission has been heavily involved in constitution-making and constitutional reform, always upon a request from a member state, a body of the CoE such as the Committee of Ministers or the Parliamentary Assembly, or from an international organization such as the EU. The Venice Commission has issued opinions that concern the drafting of entire constitutions or significant parts of them, has provided assistance for constitutional reforms, and has made pronouncements on legislative projects that flesh out constitutional provisions in numerous cases. The Commission notably gives regular advice on the organization of the judiciary and on electoral law. Although the latter group of opinions formally rank as provisions of

[22] World Bank Group, CPIA Africa: Assessing Africa's Policies and Institutions, at 62 (August 2020) ("Cluster D").

[23] Thomas Stubbs et al., *How to Evaluate the Effects of IMF Conditionality: An Extension of Quantitative Approaches and an Empirical Application to Public Education Spending*, 15 Rev. Int'l. Org. 29 (2020).

[24] *Id.*

[25] Thomas Markert, *Die Venedig-Kommission des Europarats: Vom Beratungsgremium zum Akteur der Verteidigung von Rechtsstaat und Demokratie (1990–2022)*, 49 Europäische Grundrechte-Zeitschrift 608 (2022).

[26] Eur. Comm'n for Democracy through Law (Venice Comm'n), CM Res. (2002)3, Revised Statute of the European Commission for Democracy through Law, art. 3(2), CDL (2002) 27 (2002).

ordinary statutory law, they are eminently important for the practical functioning of the rule of law in the states concerned.[27]

Outside Europe, regional organizations have been working to support the establishment, consolidation, and protection of democratic systems of government, and concomitantly the rule of law. The Organization of American States adopted the Inter-American Democratic Charter on the very day of the September 11, 2001 terrorist attacks. Article 2 of the Charter states that "[t]he effective exercise of representative democracy is *the basis for the rule of law* and of the constitutional regimes of the member states of the Organization of American States."[28]

In 2007, the African Union adopted the African Charter on Democracy, Elections and Governance.[29] Under this instrument, which entered into force in 2012, the Peace and Security Council (PSC) of the African Union can suspend governments that have come to power through an unconstitutional change in government. Such suspensions have most recently been put in place against Mali, Guinea, Sudan, and Burkina Faso after military coups in those states.[30]

Given that many other rule-of-law-related activities of international organizations also, to a lesser or greater extent, involve state constitutions, the examples given in this section are incomplete. They must suffice to illustrate the claim that international and regional organizations have a track record of attempting to improve the "domestic" rule of law by shaping the constitutions of their member states. The intensity of their engagement has varied greatly, however, across the different regions of the world.

[27] Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, *in* CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 156, 156–87 (Gregory Shaffer et al. eds., 2019).

[28] Org. of Am. States, Assembly Res. AG/Res. 1 (XXVIII-E/01), Inter-American Democratic Charter (2001) (emphasis added), https://tinyurl.com/yrs26fte.

[29] African Charter on Democracy, Elections and Governance, Jan. 30, 2007, U.N.T.S. No. 55377. By March 3, 2022, thirty-eight of the fifty-five member states of the African Union had ratified, and a further forty-six have signed, the Charter. *See List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance* (Feb. 14, 2022), https://tinyurl.com/ymx34j7v.

[30] *See, e.g.*, Peace and Security Council, African Union, *Communiqué on the Situation in Burkina Faso*, PSC/PR/COMM.1/1062(2022) (Jan. 31, 2022), https://tinyurl.com/5433ky3b. *See generally* Erika de Wet, *The African Union's Struggle Against "Unconstitutional Change of Government": From a Moral Prescription to a Requirement Under International Law?*, 32 EUR. J. INT'L L. 199 (2021).

3 Constitution-Shaping by the United Nations

A special case is UN assistance in constitution-making and constitutional reform processes in the Global South (Africa, Latin America, the Near East, and Asia).[31] Since 1989, albeit with different degrees of intensity, the United Nations has been involved in constitutional processes in at least nine states, ranging from Yemen in 1991[32] to the Central African Republic in 2016.[33] The list includes Cambodia (1993),[34] Guinea-Bissau (substantial constitutional revision in 1996),[35] Afghanistan (2004),[36] Libya (2011),[37] and Côte d'Ivoire (2016).[38] The UN has also participated in the creation of two new states and their constitutions (East Timor (2002) and South Sudan (2011)).

a Constitution-Making as Peacemaking

All these constitution-shaping activities were set in the context of peace processes. The United Nations' involvement was based on the understanding that peacemaking requires (inter alia) the creation of a state constitution which in turn implements the rule of law.[39] In 1992, the UN Secretary-General had already asserted that there was "an *obvious connection* between democratic practices – such as the *rule of law* and transparency in decision-making – and the achievement of true *peace and security* in any new and stable political order." Once such a link is presumed, the United Nations are not only authorized by its membership but even "have an obligation" to provide "technical assistance" and give

[31] On these processes, see Manon Bonnet, *The Legitimacy of Internationally Imposed Constitution-Making in the Context of State Building*, *in* THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS 208, 208–26 (Richard Albert et al. eds., 2019).

[32] Constitution of the Republic of Yemen, May 16, 1991.

[33] Constitution of the Central African Republic, March 27, 2016, Decree 160218.

[34] Constitution of the Kingdom of Cambodia, Sept. 21, 1993. On the UN engagement, see Lucy Keller, *UNTAC in Cambodia: From Occupation, Genocide and Civil War to Peace*, 9 MAX PLANCK Y.B. U.N. L. 127 (2005).

[35] Constitution of Guinea-Bissau, Dec. 4, 1996.

[36] Constitution of Afghanistan, Jan. 3, 2004.

[37] An interim constitutional declaration was issued by the National Transitional Council on August 3, 2011. A draft constitution was drawn up in 2017 but never adopted.

[38] CONSTITUTION DE LA RÉPUBLIQUE DE CÔTE D'IVOIRE [CONSTITUTION] Nov. 8, 2016. On UN involvement, see Dorina A. Bekoe, *The United Nations Operation in Côte d'Ivoire: How a Certified Election Still Turned Violent*, 25 INT'L PEACEKEEPING 1, 128 (2018).

[39] The UN Secretary General placed constitutional reform squarely in the context of peace and security in his guidance note *UN Approach*, *supra* note 4, ¶ 65.

"support for the transformation of deficient national structures and capabilities, and for the strengthening of new democratic institutions."[40]

Next, in the 1996 Agenda for Democratization, Secretary-General Boutros Boutros-Ghali stressed a new, constitution-shaping role for peace missions: "The peace-keeping mandates entrusted to the United Nations now often include both the restoration of democracy and the protection of human rights. United Nations departments, agencies and programmes have been called upon to help States draft constitutions . . . ."[41] In 2001, the Secretary-General ascribed even a conflict-preventing role to the rule of law: "An essential aspect of conflict prevention is the strengthening of the *rule of law,* and within that the protection of women's human rights achieved through a focus on gender equality in constitutional, legislative, judicial and electoral reform."[42]

In his annual report for 2005, under the heading "Achieving peace and security," the UN Secretary-General made a point of mentioning rule-of-law promotion as a task of the peace missions:

> The United Nations worked tirelessly around the globe throughout the year to prevent and resolve conflicts and to consolidate peace. . . . Peacekeepers deployed to conflict zones in record numbers and in complex multidimensional operations, working . . . to help war-torn countries, *write constitutions*, hold elections *and strengthen* human rights and *the rule of law*. United Nations agencies, funds and programmes tailored their assistance to the special needs of post-conflict societies.[43]

In his 2006 progress report on conflict prevention, under the heading "Strengthening norms and institutions for peace," the UN Secretary-General mentioned that "the United Nations and its partners offer a variety of important services, at the request of Member States. These include electoral assistance, constitutional assistance, human rights capacity-building," and more. These important services are intended to help individual governments " find their own path to democracy."[44]

[40] UN Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, U.N. Doc. A/47/227-S/2411 (June 17, 1992).

[41] UN Secretary-General, *Supplement to Reports on Democratization*, ¶ 5, U.N. Doc. A/51/761 (1996).

[42] UN Secretary-General, *Prevention of Armed Conflict*, U.N. Doc. A/55/985-S/2001/574, ¶ 132 (June 7, 2001) (emphasis added).

[43] UN Secretary-General, *Report on the Work of the Organization*, U.N. Doc. A/60/1, ¶ 10 (2005) (emphases added).

[44] UN Secretary-General, *Progress Report on the Prevention of Armed Conflict*, U.N. Doc. A/60/891, ¶ 46 (July 18, 2006).

In all instances, the United Nations had established peace missions on the ground, sometimes in collaboration with regional organizations. The transitional processes, including constitution-making, frequently involved those missions. In sum, the UN has consistently depicted its rule-of-law activities as a contribution to peace (broadly conceived) and as being instrumental not only in managing and terminating armed conflict but even preventing such conflict.

b UN Guidance on Constitutional Process and Substance

It took the United Nations several years of action on the ground to develop guidance notes for the processes of constitution-making and for the substance of the new or reformed constitutions. Building on the 2008 guidance note on the UN approach to rule of law assistance,[45] a specific guidance note on constitution-making processes was issued by the UN Secretary-General in 2009. In its own words:

> The note sets out a policy framework for UN assistance to constitution-making processes derived from lessons learned from constitution-making experiences and from UN engagement in these processes. It is *informed by the Guidance Note of the Secretary-General on United Nations Approach to Rule of Law Assistance*. It outlines the components of a constitution-making process and identifies the expertise the UN will require to provide effective assistance.[46]

As far as the constitutional *processes* are concerned, the 2009 note lists the following guiding principles:

1. Seize the opportunity for peacebuilding
2. Encourage compliance with international norms and standards
3. Ensure national ownership
4. Support inclusivity, participation and transparency
5. Mobilize and coordinate a wide range of expertise
6. Promote adequate follow-up.[47]

In contrast to these procedural steps, the 2009 guidance note does not prescribe particular *substance* for the (new or amended) state constitution. The premium placed on "national ownership" gives the target state leeway in that regard. But this leeway is not boundless, because not only

[45] *See supra* note 4.

[46] UN Secretary-General, *United Nations Assistance to Constitution-Making Processes*, Guidance Note of the Secretary General, at 2 (Apr. 2009) (emphasis added), www.refworld.org/policy/legalguidance/unsecgen/2009/en/71419 [hereinafter *UN Assistance*].

[47] *Id.*

the constitutional process but also its substance need to satisfy "compliance with international norms and standards."[48] Moreover, the earlier 2008 guidance note on the UN approach to the rule of law even refers to specific constitutional content: It quite precisely describes the principles and ingredients that a state constitution needs to display in order to conform to the rule-of-law ideal as defined by the UN. They range from the incorporation of international human rights treaties, to nondiscrimination and gender equality, to institutions based on and limited by law, to an impartial judiciary.[49]

c Involvement of the Security Council

The Security Council, in particular, has placed normative demands on states. Security Council resolutions, sometimes adopted under Chapter VII of the UN Charter, have reiterated the principles of constitution-making, both with respect to process and constitutional substance. This activity overlaps with the Security Council's rule-of-law agenda.[50] Importantly, China and Russia – to mention but these two powers with a right of veto – have regularly voted in favor of these resolutions. This practice shows that something like a transnational rule-of-law consensus is still alive – at least when the interests of the two anti-liberal powers, China and Russia, are not directly affected.

With regard to constitutional *process*, the Security Council has restated principles of "national ownership."[51] Frequently, the Security Council has urged free and fair elections as part of a transition and reconciliation process (such as for Cambodia in 1992,[52] East Timor in 2001,[53] Afghanistan in 2005,[54] Libya (most recently in 2020),[55] Yemen,[56] South Sudan,[57] and the Central African Republic (CAR)).[58]

[48] *Id.* at 4.
[49] *UN Approach*, *supra* note 4, at 4–5.
[50] For a comprehensive overview, see NUSCHA WIECZOREK, THE SECURITY COUNCIL'S CONTRIBUTION TO A GLOBAL CONCEPT OF THE RULE OF LAW 137–319 (2020).
[51] S.C. Res. 1996, ¶ 3(c) (July 8, 2011); S.C. Res. 2542, ¶ 1 (Sept. 15, 2020).
[52] S.C. Res. 745, pmbl. ¶ 5 (Feb. 28, 1992).
[53] S.C. Res. 1338, pmbl. ¶ 5 (Jan. 21, 2001).
[54] S.C. Res. 1589, ¶ 3 (Mar., 24, 2005).
[55] S.C. Res. 2009, ¶ 5(c) (Sept. 16, 2011); S.C. Res. 2486, pmbl. ¶ 8, ¶ 1(v) (Sept. 12, 2019); S.C. Res, 2542, ¶ 1(v) (Sept. 15, 2020).
[56] S.C. Res. 2051, ¶ 3(d) (June 12, 2012).
[57] S.C. Res. 1996, ¶ 3(a)(ii) (July 8, 2011) (adopted under Chapter VII).
[58] S.C. Res. 2149, ¶ 30(b)(v) (Apr. 10, 2014) (adopted under Chapter VII).

Many more Security Council resolutions imply the need to organize elections or a referendum, such as in Somalia in 2012, where the UN mission was tasked with giving strategic policy advice on peacebuilding and state-building, including a "referendum on the constitution; and preparations for elections."[59] This is not a phenomenon of the past but is ongoing. The Security Council asked the Integration Peacebuilding Office in Guinea-Bissau and the special representative to "support, through good offices," democratic elections in Guinea-Bissau in 2019.[60] In the same year, the Security Council asked the UN Secretary-General to establish in Haiti a UN office whose key tasks was to include assisting the government to "plan and execute free, fair, and transparent elections."[61]

The Security Council has also – and this is related to the democratic principle – encouraged "inclusive" and participatory processes of constitution-making and constitutional reform (for South Sudan in 2011,[62] Libya in 2011,[63] Yemen in 2012,[64] and Guinea-Bissau in 2019[65]). It also asked for transparent procedure (for example, in Yemen[66]). Finally, the Security Council has frequently and explicitly voiced its expectation that women participate in the constitutional process, such as in South Sudan 2011,[67] the Central African Republic

[59] S.C. Res. 2102, ¶ 2(b)(iii) (May 2, 2013).
[60] S.C. Res. 2458, ¶ 5(b) (Feb. 28, 2019).
[61] S.C. Res. 2476, ¶ 1(b)(i) (June 25, 2019).
[62] S.C. Res. 1996, ¶ 3 (July 8, 2011) (adopted under Chapter VII) (Security Council "authorizes UNMISS [United Nations Mission in the Republic of Sudan] to perform the following tasks; (a) . . . (ii) Promoting popular participation in political processes, including through advising and supporting the Government of the Republic of South Sudan on an inclusive constitutional process . . .").
[63] S.C. Res. 2009, ¶ 5 (Sept. 16, 2011) (adopted under Chapter VII) (Security Council "[e]ncourages the National Transitional Council to implement its plans to . . . (c) ensure a consultative, inclusive political process with a view to agreement on a constitution and the holding of free and fair elections").
[64] S.C. Res. 2051, ¶ 5 (June 12, 2012) (not adopted under Chapter VII) (Security Council "[e]mphasizes the importance of conducting a fully-inclusive, participatory, transparent and meaningful National Dialogue Conference including with the youth and women's groups and calls upon all stakeholders in Yemen to participate actively and constructively in this process").
[65] S.C. Res. 2458, ¶ 5(d) (Feb. 28, 2019) (not adopted under Chapter VII) (Security Council requests United Nations Integration Peacebuilding Office in Guinea-Bissau (UNIOGBIS) to "[s]upport, through good offices the electoral process to ensure *inclusive, free and credible legislative elections*" (emphasis added)).
[66] S.C. Res. 2051, ¶ 5.
[67] S.C. Res. 1996, ¶ 3 (authorising UNMISS to ensure the participation of women in decision-making forums).

in 2014,[68] Guinea-Bissau in 2019,[69] Haiti in 2019,[70] and Libya in 2020.[71]

Another set of Security Council propositions concerns the *substance* of the constitution. The normative advice covers all three limbs of constitutionalism's trinity. First of all, the Security Council inevitably required the new constitution to be built on the *rule of law*, as it did for Afghanistan in 2011,[72] Somalia in 2013,[73] and Mali in 2013.[74] With regard to the constitution of Guinea-Bissau, the Security Council asked for the separation of powers and access to the judiciary (2019).[75] Second, the Security Council has often suggested that the new constitution must be democratic, such as in East Timor in 2001,[76] Afghanistan in

[68] S.C. Res. 2149, ¶ 30 (Apr. 10, 2014) (mandating the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) to "devise, facilitate and provide technical assistance to the electoral process . . . for the holding of free, fair, transparent and inclusive elections, including the full and effective participation of women at all levels").

[69] S.C. Res. 2458, ¶ 6(d) (Feb. 28, 2019) (not adopted under Chapter VII) (UNIOGBIS's work to include "[p]roviding support to the Government of Guinea-Bissau . . . to ensure the involvement, representation and participation of women at all levels").

[70] S.C. Res. 2476, ¶ 3 (June 25, 2019) (not under Chapter VII) ("requests that BINUH . . . assist the Government of Haiti in ensuring the full, meaningful, and effective participation and involvement and representation of women at all levels").

[71] S.C. Res. 2542, (Sept. 15, 2020) ("Urging the parties to ensure the full, equal, effective and meaningful participation of women in all activities and decision-making relating to democratic transition . . ." (pmbl. ¶ 9); and "Requests UNSMIL [United Nations Support Mission in Libya] . . . to assist the GNA [Government of National Accord] in ensuring the full, effective and meaningful participation and leadership of women in the democratic transition, reconciliation efforts . . ." (operative ¶ 8)).

[72] S.C. Res. 1974, ¶¶ 24, 31–32 (Mar. 22, 2011) (not under Chapter VII) (reiterating the importance of ensuring the rule of law throughout the country.).

[73] S.C. Res. 2102, ¶ 2 (May 2, 2013) (not under Chapter VII) ("Decides that the mandate of UNSOM [UN Assistance Mission in Somalia] shall be as follows: . . . (b) To support the Federal Government of Somalia, and AMISOM [African Union Mission in Somalia] as appropriate, by providing strategic policy advice on peacebuilding and statebuilding, including on: . . . (ii) security sector reform, rule of law . . .").

[74] S.C. Res. 2100, ¶ 16 (April 25, 2013) ("Decides that the mandate of MINUSMA shall be . . . (a) . . . (iii) To support national and international efforts towards rebuilding the Malian security sector . . . as well as the rule of law and justice sectors . . .").

[75] S.C. Res. 2458, ¶ 25 (Feb. 28, 2019) (not under Chapter VII) ("Calls upon the authorities of Guinea-Bissau to continue to actively reform and strengthen the judicial system, while ensuring the separation of powers and access to justice for all citizens").

[76] S.C. Res. 1338, pmbl. (Jan. 31, 2001) (not adopted under Chapter VII) ("Expressing support for the steps taken by [the UN Transitional Administration in East Timor] to strengthen the involvement and direct participation of the East Timorese people in the administration of their territory").

2005,[77] Libya in 2011,[78] South Sudan in 2011,[79] and Mali in 2013.[80] Third, human rights protection has been explicitly required, as for Afghanistan.[81] Finally, the Security Council recommended a federal system for Somalia in 2013.[82]

The Security Council's intense engagement with the rule of law (broadly conceived) is tempered by the fact that of the resolutions mentioned only four were adopted under Chapter VII.[83] Of those, to the best of my knowledge, only Resolution 2149 (2014), on technical assistance to elections in the Central African Republic, employs mandatory language.[84]

[77] S.C. Res. 1589 (Mar. 24, 2005) (not adopted under Chapter VII) ("pledging its continued support thereafter for the Government and people of Afghanistan as they rebuild their country, strengthen the foundations of a constitutional democracy . . ." (pmbl. ¶ 5); and "Welcomes the international efforts to assist in setting up the new Afghan Parliament and ensure its efficient functioning, which will be critical to the political future of Afghanistan and the steps towards a free and *democratic Afghanistan*" (operative ¶ 5) (emphasis added)).

[78] S.C. Res. 2009, ¶ 5 (Sept. 16, 2011) (adopted under Chapter VII) "Encourages the National Transitional Council to implement its plans to . . . (c) ensure a consultative, inclusive political process with a view to agreement on a constitution and the holding of free and fair elections").

[79] S.C. Res. 1996, ¶ 3 (July 8, 2011) (adopted under Chapter VII) ("Decides that the mandate of UNMISS shall be to consolidate peace and security, and to help establish the conditions for development in the Republic of South Sudan, with a view to strengthening the capacity of the Government of the Republic of South Sudan to govern effectively and *democratically* and . . . authorizes UNMISS to perform the following tasks; (a) . . . (ii) Promoting popular participation in political processes, including through advising and supporting the Government of the Republic of South Sudan on an inclusive constitutional process; the holding of elections in accordance with the constitution; . . ." (emphasis added)).

[80] S.C. Res. 2100, pmbl. (April 25, 2013) ("Stressing the need to work expeditiously toward the restoration of democratic governance and constitutional order, including through the holding of free, fair, transparent and inclusive presidential and legislative elections").

[81] S.C. Res. 1589, ¶ 10 (March 24, 2005) (not adopted under Chapter VII) ("Calls for full respect for human rights and international humanitarian law throughout Afghanistan and, in this regard, requests UNAMA, with the support of the Office of the United Nations High Commissioner for Human Rights, to continue to assist in the full implementation of the human rights provisions of the new Afghan constitution").

[82] S.C. Res. 2102, ¶ 2 (May 2, 2013) (not adopted under Chapter VII) ("Decides that the mandate of UNSOM shall be as follows: . . . (b) To support the Federal Government of Somalia, and AMISOM as appropriate, by providing strategic policy advice on peacebuilding and statebuilding, including on: . . . (iii) the development of a federal system; the constitutional review process and subsequent referendum on the constitution; and preparations for elections in 2016").

[83] S.C. Res. 1996 (July 8, 2011) (on South Sudan); S.C. Res. 2009 (Sept. 16, 2011) (on Libya); S.C. Res. 2100 (Apr. 25, 2013) (on Mali); S.C. Res. 2149 (Apr. 10, 2014) (on the Central African Republic).

[84] S.C. Res. 2149, ¶ 30 (Apr. 10, 2014) ("Decides that the mandate of MINUSCA *shall* initially focus on the following priority tasks . . ." (emphasis added)).

The other resolutions, even if the resolutions as such were based on Chapter VII, couch the principles on process and substance of constitution-making in soft language, often placed in the resolutions' preambles. Most resolutions were based on Chapter VI. These, like the majority of the Chapter VII resolutions, merely "stress" the importance of constitutional principles, and they "encourage", "support", and "assist" the states concerned, but do not "request" or "impose" anything.

III Have International Constitution-Shaping Efforts Led to Domestic Rule-of-Law Improvements?

Part II has shown that the rule of law has been espoused and disseminated through the constitution-shaping activities of international organizations in all regions of the world. The rule of law has thereby become part and parcel of the web of international norms and standards that forms a benchmark for state constitutions. It has become a global principle of constitutionalism, or a principle of transnational ordering – at least on paper. However, the real effects of international organizations' constitution-shaping so that the rule of law benefits people on the ground are very difficult to measure.[85] The situation is further obscured by the continued tendency of recipient states to point to international organizations as convenient scapegoats in order to hide their own policy choices. The question of effects and limits can therefore not be answered in a definitive way. We can only take snapshots.

1 Universal Organizations

With regard to international financial institutions, their impact on recipient states' tax revenues, public sector wages, and the like has been corroborated by recent studies.[86] This impact partly concerns the states' constitutions and the domestic rule of law. However, it has mostly been evaluated as being negative for the concerned populations.[87]

The effects of accession to the WTO on the Chinese constitution and rule of law have been variously assessed. Eight years after accession,

[85] On the challenge of measurement, see Chapter 1 (Part III.2).

[86] Bernhard Reinsberg et al., *The World System and the Hollowing Out of State Capacity: How Structural Adjustment Programs Affect Bureaucratic Quality in Developing Countries*, 124 AM. J. SOCIO. 1222 (2019); André Broome et al., *Bad Science: International Organizations and the Indirect Power of Global Benchmarking*, 24 EUR. J. INT'L REL. 514, 514 (2018).

[87] *See* Part IV.

Esther Lam found that the WTO requirements formed an important model for further changes in non-WTO-related areas "such as uniformity of laws and legal administration, non-discrimination, transparency, and impartial mechanisms for challenging government decisions and actions."[88] Lam also claimed that "[a]lthough the enforcement of laws remains weak, legal rules are assuming an unprecedented level of prescriptive power in post-WTO accession China."[89] According to Lam, the result was, inter alia, "legal guarantees to individual freedom of actions and the right to trade, and it [the enhanced role of law] restricts political power from arbitrarily encroaching onto spheres where law does not prescribe it to do so."[90] In contrast, more recent studies have downplayed or denied the impact of WTO membership on China's rule of law.[91]

2 *European Organizations*

The constitution-shaping by the two European regional organizations – the EU and the CoE – has only in part produced deep and lasting effects. Political scientists found that the EU's political accession conditionalities had a "tremendous impact" on what they called the "Europeanization" of Central and Eastern Europe.[92] It has also been said that "[h]uman rights, liberal democracy, and the rule of law are the fundamental rules of legitimate statehood in the European Union."[93]

However, the EU's preaccession "pull" toward the rule of law is by no means guaranteed. Since Croatia's accession to the EU in 2013, other Eastern European states (Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia) have not moved closer to accession. Montenegro and Serbia have been conducting accession talks since 2012 and 2014, respectively, but the prospect of accession does not

[88] Esther Lam , China and the WTO: A Long March Towards the Rule of Law 115 (2009).
[89] *Id.* at 149.
[90] *Id.*
[91] Liao Li & Yu Minyou, *Impact of the WTO on China's Rule of Law in Trade: Twentieth Anniversary of the WTO*, 49 J. World Trade 837 (2015); Nga Kit Tang, *The WTO's Impact on China: A Battle of Administrative Review Settings Between Internal and External Regulatory Frameworks*, 10 Vienna J. on Int'l Const. L. 251 (2016); Henry Gao, *The WTO's Transparency Obligations and China*, 12 J. Comp. L. 329 (2017).
[92] Frank Schimmelfennig & Ulrich Sedelmeier, *Conclusions: The Impact of the EU on the Accession Countries*, *in* The Europeanization of Central and Eastern Europe 210, 226 (Frank Schimmelfennig & Ulrich Sedelmeier eds., 2005).
[93] Frank Schimmelfennig et al., *The Impact of EU Political Conditionality*, *in* The Europeanization of Central and Eastern Europe, *supra* note 92, at 29, 29.

seem to have initiated a further dynamic of constitutional reform in those states.

With regard to the actual constitutional reforms triggered by accession to the EU, Anneli Albi found that the constitutional amendments in Central and Eastern European countries "remained relatively minimal" – often contrary to initial enthusiast rhetoric.[94] From the outset, "international socialization" through the EU (and the CoE) did not work in those states that had been clearly antiliberal, such as Belarus, Ukraine, Serbia, or Russia.[95] For those states that had already been on the path to liberalism before the accession to the CoE (Estonia, the Czech Republic, Hungary, Latvia, Lithuania, Poland, and Slovenia), it first looked as if the liberal constitutional principles required by both organizations for membership would work well. But thirty years later, some of these states have turned away from the international standards and are becoming illiberal democracies, such as Hungary and Poland.

Current events in the EU seem to confirm that once a state has been admitted to the international organization, there is no longer any leverage to press for reforms, as the carrot of membership that was the incentive for reform has gone. This then leads to a loss of effectiveness of any further constitutional intervention. Whether new tools such as the EU's so-called rule-of-law mechanism can bring illiberal member states back in line and up to constitutionalist standards is unknown for the time being.[96]

For the CoE, it is obvious that the actual application and implementation of these imperative constitutional principles on the ground have been only weakly monitored. Russia, which was excluded from the Council in March 2022, is an example – the organization had arguably not properly responded to Russia's continual disregard of the rule of law until it turned into extreme violation when Russia invaded Ukraine in February 2022.

[94] Anneli Albi, EU Enlargement and the Constitutions of Central and Eastern Europe 111 (2005).

[95] Frank Schimmelfennig, *Strategic Calculation and International Socialisation: Membership Initiatives, Party Constellations, and Sustained Compliance in Central and Eastern Europe*, 59 Int'l Org. 827 (2005).

[96] *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report: The Rule of Law Situation in the European Union, COM (2022) 500 (July 13, 2022).

All this suggests that the European organizations' impact on strengthening the rule of law in accession candidates and member states has been uneven.

3 *UN Impact on Constitutions in the Global South*

The lack of effectiveness of rule-of-law building through constitutional assistance is especially palpable in the Global South. Once the constitution is made, with international assistance and following international standards, it needs to be put to work by domestic actors. But this generally does not function well. The lofty constitutional principles adopted under the influence of the United Nations or other foreign actors have frequently not been translated into concrete rules that are followed by state officials.

Take the constitutions of Cambodia (1993, as amended up to 2008), South Sudan (2011), and the Central African Republic (2016), to name but three constitutions that were recently adopted with UN and other international actors' assistance. They all contain catalogues of fundamental rights that on the whole faithfully mirror international human rights standards and are complemented by features specific to each region.[97] However, constitutional rights are hardly applied on the ground due to a lack of infrastructure, impunity of violators, dictatorship (as in Cambodia), and armed conflict (as in the Central African Republic).[98] In extreme cases, constitutional rights exist only on paper. In all cases, a gap of greater or lesser glaringness persists between the constitutional document and its effects on the political, legal, and administrative practice of public institutions.[99]

4 *Observations*

In conclusion, both in Europe and in the Global South, the external constitutional assistance lent by international organizations has

[97] Constitution of the Kingdom of Cambodia art. 31-50; Constitution of Southern Sudan art. 9-34; Constitution of Central African Republic, art. 1-23.

[98] Human Rights Watch, World Report 2021: Events of 2020, at 129, 149, 611 (2021).

[99] Cheryl Saunders, *Global Constitutionalism: Myth and Reality*, *in* The Frontiers of Public Law 19, 28–29 (Jason N. E. Varuhas & Shona Wilson Stark eds., 2020).

produced only moderate positive effects – if any at all – for the functioning of the rule of law.

Already in 2011, a consultative process on rule-of-law assistance organised by the UN found that rule-of-law assistance was "too often executed in an ad hoc manner, designed without proper consultations with national stakeholders, and absent exacting standards of evaluation." It inquired how "rule of law assistance can be better channelled to deliver results."[100]

Probably, the advising and accompanying organizations would need to pay much more attention to the matter of practical application and transposition of constitutional and rule-of-law principles into (ordinary) domestic law. It has been asserted that in recent instances of UN constitutional assistance, the question of implementation was barely touched on at the stage of constitutional negotiations.[101]

However, implementation depends first of all on the states themselves. A chief reason for the constitutions having little impact is probably the fragility of the institutions in the states concerned. Many factors contributing to this fragility are (and properly so) beyond the reach of the international organizations.

Also, it is unlikely (although – as a counterfactual – not verifiable by empirical investigation) that the constitutions would work better in practice had they been adopted without any external assistance. It must remain a matter of speculation whether purely home-grown constitutions in those countries would be (or have been) more socially acceptable because of a stronger sense of ownership and because of a better fit to local norms. Social acceptance normally leads to better compliance. But the price to pay might be deficiencies in substance and an even larger distance from the constitutional ideal of the rule of law.

IV Critiques

"[O]n the whole," external influence (including, but not limited to, that of international organizations) on constitution-making and -shaping processes is said to have been "enormously useful in the development of constitutional law in countless countries in recent decades."[102] At the same time, the sentiment lingers that international organizations' various

[100] United Nations and the Rule of Law, New Voices: National Perspectives on Rule of Law Assistance, 5 (Apr. 6, 2011), https://tinyurl.com/bddx666b.
[101] Al-Ali, *supra* note 2, at 84.
[102] *Id.* at 77.

techniques of cajoling, persuading, and motivating states to adopt constitutions that embody the rule of law constitute an unlawful intervention into the domestic affairs of the receiving states, a risk of infringement of state sovereignty and national self-determination, or simply unfairness and normative inappropriateness due inter alia to selectivity and hypocrisy. Accordingly, constitution-shaping and other forms of rule-of-law promotion by various international organizations have been denounced as an illegitimate exercise;[103] they have been condemned as "evangelization,"[104] "meddling,"[105] and legal imperialism.[106]

In the context of the reception of European human rights standards disseminated by the EU and the CoE in Central and Eastern European states, Romanian scholar Alexandra Iancu, already in 2014, diagnosed a prevailing "double standard sentiment" that held a "backlash potential."[107] This potential seems now to have become fully realized.[108] All international organizations, and especially IFIs, have come under heavy fire for pursuing neoliberal policies that manifest the preferences and interests of the states of the North at the expense of the Global South.[109]

Vijayashri Sripati criticizes especially the United Nations' constitutional assistance from the perspective of Third World Approaches to International Law (TWAIL).[110] She perceives a historical continuity in constitutional assistance from colonialism to the post-1945 involvement of the UN Trusteeship Council in nonsovereign territories and to the revival of constitutional assistance after 1989, offered to formally sovereign states.[111] Sripati's key claim is that a kind of internationalization of state constitutions has been brought about through the combined

[103] *Cf.* Mark Brown, *"An Unqualified Human Good"? On Rule of Law, Globalization, and Imperialism*, 43 L. & Soc. Inquiry 1391 (2018).
[104] Vijayashri Sripati, Constitution-Making Under UN Auspices 12 (2020).
[105] Bonnet, *supra* note 31, at 225.
[106] Brown, *supra* note 103.
[107] Alexandra Iancu, *"Europeanization" versus "New Localism" in Shaping Fundamental Rights: "Free Speech" Definitions, Limitations, and Deadlocks in New Democracies*, *in* Europeanization and Judicial Culture in Contemporary Democracies 148, 155 (Manuel Gutan & Bianca Selejan Gutan eds., 2014).
[108] *See* Chapters 1 and 7.
[109] Ngaire Woods, The Globalizers: The IMF, the World Bank and Their Borrowers (2006); Jean Ziegler, Les nouveaux maîtres du monde: Et ceux qui leur résistent (2002); Broome et al., *supra* note 86, at 514.
[110] Sripati, *supra* note 104.
[111] Sripati sees this sequence interrupted only by a short period of rejection of UN assistance by the newly independent states in the 1960s. *Id.* at 153.

interventions of the United Nations and international financial institutions (World Bank and International Monetary Fund) against the background of poverty and high indebtedness of the receiving states. According to Sripati, the underlying political and economic agenda is to create a constitutional environment that is favorable to the West (and to investors). Ultimately, Sripati claims, "powerful Western states create within developing states constitutional regimes that have the effect of throwing open the latter's resources for the transnational capitalist class (TCC), that is, the banks, investors, corporations, and geopolitical/imperialist strategists."[112] The reproach is that the international organizations themselves are captured by global capitalist interests. Moreover, this strategy of "creating within developing states a constitutional environment that is not inimical to the West, but officially explaining it as being intended to modernize the former – is reminiscent of the imperial civilizing mission."[113] The receiving states are, once again, "entrapped in an imperial relationship, although this time they are ostensibly sovereign."[114] The constitutional assistance extended by the United Nations, in tandem with the Bretton Woods institutions, is thus a form of "legal imperialism."[115]

Another source of illegitimacy concerning the constitutional interventions of international organizations might be the *cultural inaptness and lack of local roots* of the rule of law and other constitutional principles. The shallowness of the normative consensus on constitutional substance might also explain the deficient implementation of constitutional law in receiving countries. With regard to human rights, it has been argued that domestic and external actors have often agreed only on a narrow set of rights, leaving out other matters. Inaptness might also arise in relation to further constitutional features such as the separation of powers or the independence of the judiciary.

Alexandra Iancu, who examined the Europeanization of human rights protection in the Eastern and Central European countries in the post-accession period, painted a gloomy picture of "limited substantial transformations,"[116] "shallow Europeanization,"[117] and "post-accession decline ... reversing or distorting the very essence of newly created

[112] *Id.* at 8, also 202.
[113] *Id.* at 4.
[114] *Id.* at 185.
[115] *Id.* at 221.
[116] Iancu, *supra* note 107, at 149.
[117] *Id.*

institutions."[118] She pointed out that the Europeanization process "failed in producing the cultural background of the law providing the proper meaning of new provisions."[119] She also deplored that European norms had been imposed "with no reference to value-systems, traditions, or practices" in the region of Central and Eastern Europe.[120] This situation, she wrote, is "conducive to a polarization of the national legal culture and a legalistic Babel in which each side selectively quotes European standards or the ECHR jurisprudence."[121]

Another set of critiques against constitution-shaping by international organizations points out that it has neglected the necessities of *economic development* in the target countries. It highlights that the institutions which must implement the rule of law (a functioning administration, courts, democratic electoral system, and so on) expend resources that should first be used for the economic development of a state. A related point is that the *actual enjoyment* of the supposed benefits of the rule of law (ranging from the exercise of political and civil rights to informed participation in elections) presupposes a certain level of economic development and material security for the population. According to the critique, these material factors are neglected or even worsened by the international organizations.

V Responses

The critical assessment of international organizations' constitution-shaping is timely and necessary. However, it needs to be nuanced. An accusation that all constitution-shaping exercises serve only the global capitalist class yet again presents a master narrative explaining the world. Ultimately, it is as simplistic as the story of the selfless and humanitarian promotion of the rule of law for the benefit of the local population that it seeks to dispel.

1 Respecting State Sovereignty

Constitutional assistance by international organizations would violate the principle of non-intervention if the organizations intruded upon the *domaine réservé* of the target state and, additionally, the means of

[118] *Id.*
[119] *Id.* at 150 (internal references omitted).
[120] *Id.* at 151.
[121] *Id.* at 176–77.

interference amounted to "coercion." However, the rule of law no longer pertains to the *domaine réservé*. Rather, like human rights and democracy, it has become a familiar topos in international legal discourse – not the least through the constitutional assistance of international organizations. The approval and continuity of such practices has created a loop by which these issues (respect for the rule of law, human rights, and democratic processes) have been lifted out of the *domaine réservé* of states – they have been transnationalized.[122] Although somewhat circular, this process now means that the constitutional assistance afforded by international organizations can no longer be categorically dismissed as unlawful intervention. Rather, the practice has created the space for examining the extent to which the objectives of constitutional assistance justify the *means* employed by the organizations, and whether the means–ends relationship is proportionate.

The second prong of a prohibited intervention (coercion) is not an all-or-nothing concept. Only when interference in state affairs reaches a certain intensity or "magnitude"[123] will it leave the realm of lawful pressure and cross the threshold of "coercion."[124] This threshold is defined by relying on reasonableness[125] or through balancing: the interference amounts to an unlawful intervention when either the means or the ends are per se unlawful, or when means and ends in combination become unlawful, notably because the means–ends relationship is not appropriate (i.e., disproportionate).[126] Factors to take into account are the depth of the interference with interests of the target state, the breadth (effects on third states), the duration of the measure, and the objectives of the interference.[127] It is often stated that the aim of bringing about a regime change is "the most coercive form of political interference."[128] The adoption of a new constitution, especially when combined with elections, can be seen as a regime change, and therefore could be accused of having crossed the red line to become unjustified intervention.

[122] *See* Chapter 1 (Part II).
[123] Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345, 348 (2009).
[124] Florian Kriener, Intervention, Prohibition of, in: Max Planck Encyclopedia of International Law, Anne Peters and Rüdiger Wolfrum (eds), OUP 2024, paras 20, 49–50.
[125] Jamnejad & Wood, *supra* note 123, at 348.
[126] MARCO ATHEN, DER TATBESTAND DES VÖLKERRECHTLICHEN INTERVENTIONSVERBOTS 236–37 (2017).
[127] *Id.* at 284–85.
[128] Jamnejad & Wood, *supra* note 123, at 368.

However, in formal terms, constitutional assistance by international organizations is generally not coercively imposed. Constitution-making assistance has been offered only on request. For example, the 2009 UN guidance note on constitution-making emphasizes that UN assistance will be offered only "when requested by national authorities." In line with this, UN bodies should "recognize constitution-making as a sovereign national process, which, to be legitimate and successful, must be nationally owned and led."[129]

Coercion may nevertheless be present informally, due to economic dependency. The formal voluntariness of consenting to constitutional assistance, and especially to austerity programs with constitutional repercussions, might only be a sham. With regard to UN assistance, Vijayashri Sripati has argued that receiving states consent only "technically speaking" to the adoption of a new constitution. In reality, they are faced with no choice because they are "groaning under mountains of debt."[130] Their consent is therefore, according to Sripati, "utterly compromised."[131]

In a similar way, the acceptance of pre- or postaccession conditions for membership of a given organization, and the signing of memorandums with international financial institutions might be made de facto inevitable by economic and political circumstances. Formally, states *apply* to the World Bank for project financing, and they *ask* the international monetary fund for a credit. States *wish* to join the EU – they could also stay out. However, strong factual constraints push the states to apply "voluntarily."

Do these constraints lead to "imposition" by the international organizations? I submit that this is not the case as long as the pressure does not amount to coercion or military threat. Relevant legal thresholds have been developed in practice and in scholarship regarding "coercion," not only for the definition of "intervention,"[132] but also in the context of the conclusion of treaties (Articles 51 and 52 of the Vienna Convention on the Law of Treaties)[133] and the use of force prohibited by Article 2(4) of

[129] *UN Assistance*, *supra* note 46, at 2.
[130] Sripati, *supra* note 104, at 442.
[131] *Id.*
[132] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 250 (June 27).
[133] *See* UN Conference on the Law of Treaties, *Final Act of the United Nations Conference on the Law of Treaties*, at 285, UN Doc. A/CONF.39/26 (1969).

the UN Charter. Although the thresholds differ in detail, they all convey the legal message that constraints resulting from an unfavorable economic and political position, weak bargaining power, and even a situation perceived by a state as leaving it with no choice do not undermine the state's "free" decision. These thresholds and delimitations can also be applied to situations where constitutional assistance is invited. It is "free" and "voluntary" in the eyes of international law as long as the inviting state has not been pressured by military threats.

However, this answer of international law is formalistic and reflects the interests of the most powerful states of the North. Therefore, the assessment of lawfulness does not obviate the need to examine the broader issues of legitimacy.

2 *Respecting Local Rule-of-Law Cultures*

The critiques mentioned above suggest that when constitutional assistance is provided by international organizations care needs to be taken to avoid legal imperialism, double standards, capitalist capture, and cultural imposition. At this point, we need to distinguish between radical repudiation of the rule of law as such and the less profound problem of a lack of culture-specific adaptations. While a radical repudiation of the rule of law is nowhere to be found, assistance that is applied schematically and without adequate consideration of the need for local adaptations in the rule of law seem to be real issues.

As far as UN activity is concerned, after some years of experimenting with transitional justice, the UN Secretary-General admitted: "Unfortunately, the international community has not always provided rule of law assistance that is appropriate to the country context. Too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions . . . ."[134] He continued that "we have learned" that the transitional justice processes need to be based on a thorough analysis of the local situation, based preferably on "expertise resident in the country," and that the processes must be based on "active and meaningful participation of national stakeholders . . . while leaving process leadership and decision-making to the national stakeholders."[135] "Pre-packaged solutions are ill-advised. Instead, experiences from other places should simply be used as a starting point for local

[134] *The Rule of Law and Transitional Justice*, *supra* note 18, ¶ 15.
[135] *Id.*

debates and decisions."[136] Although these "lessons learned" pertained to transitional justice processes, they would seem equally to apply *mutatis mutandis* to constitutional assistance.

Because law is a product of culture and society, difficulties arising from deep differences in legal culture (and culture more generally) are serious. The identification of the problem, the "lesson" drawn, is only the first analytical step, and in no way guarantees that a remedy is at all possible. We need to acknowledge that the rule of law is so abstract that it cannot "deliver" anything in and of itself.[137] The tension between the vagueness of the rule of law and the fact that it is contingent on concrete and context-dependent, bottom-up action on the ground remains irresolvable.

The next big problem is the rule of law's Eurocentric and colonial baggage. In order to overcome this, the international organizations need to take up the ideas flowing from non-European constitutionalist thought.[138] For example, the Latin American concept of a "social rule of law" could be inspiring.[139]

3 *A More "Social" Rule of Law*

The aforementioned idea of a "social rule of law" underlines the spreading insight that the neoliberal constitutional frame that has been pursued by a number of international organizations is not enough. A key problem in constitution-shaping has been the neglect of the social dimension of constitutionalism, in line with an exclusively formal conception of the rule of law. However, this neoliberal tilt – especially when it comes to

[136] *Id.* ¶ 16.

[137] Brian Tamanaha, *The Failures of Law and Development*, 44 Cornell Int'l L.J. 209, 237, 246–47 (2011).

[138] *See generally* Roberto Gargarella, Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution 4–7 (2013); Berihun Gebeye, A Theory of African Constitutionalism 1–3 (2021); Daniel Bonilla Maldonado, *Introduction*, *in* Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia 1, 31 (2013); The Global South and Comparative Constitutional Law (Philipp Dann, Michael Riegner & Maxim Bönnemann eds., 2020).

[139] This principle coevolved at the beginning of the twentieth century with the German principle of the *Sozialstaat*. *See, e.g.*, Carlos Andrés Pérez-Garzón, *Unveiling the Meaning of Social Justice in Colombia*, 10 Mexican L. Rev. 27, 39–40 (2018).

IFIs – is not inevitable and not historically entrenched.[140] The IFIs' policies could change (and are arguably in the process of doing so).[141] In the face of rising material inequality in wealth and income that is exploited by populist and authoritarian leaders, it is no longer sufficient to wait for the developmental benefits of a formal and "thin" rule of law.

International organizations – at least since the 1990s – have insisted on the *positive* feedback loop (as opposed to antagonism) between economic/social development and constitutionalism/rule of law.[142] This can be seen from the World Summit Outcome Document of 2005 stating that "rule of law at the national and international levels [is] essential for sustained economic growth, sustainable development and the eradication of poverty and hunger."[143] Accordingly, the UN General Assembly Agenda 2030 (adopted in 2015) deals with development but embraces a strong rule-of-law component: "The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), *on effective rule of law* and good governance at all levels and on transparent, effective and accountable institutions."[144]

This passage and Sustainable Development Goal 16 advocating for rule of law were controversial and one of the "hotly debated topics" in the process of adopting Agenda 2030.[145] The outcome has been called a "sea change"[146] in the area of law and development. Goal 16 seeks to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels." More specifically, subgoal 16.3 seeks to "promote the rule of law at the national and international levels and ensure

[140] *See generally* ERIC HELLEINER, FORGOTTEN FOUNDATIONS OF BRETTON WOODS: INTERNATIONAL DEVELOPMENT AND THE MAKING OF THE POSTWAR ORDER 258 (2014).

[141] Anne Peters, *Constitutional Theories of International Organizations: Beyond the West*, 20 CHINESE J. INT'L L. 649, 697 (2022).

[142] The World Bank shuns the expression "rule of law" in order to avoid any interference in the political affairs of any member, which is prohibited by Article IV, section 10, of the Articles of Agreement. Instead, the Bank coined the term "good governance," which inter alia covers the rule of law. Edith Brown Weiss & Ahila Sornarajah, *Good Governance*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 3, 14 (Anne Peters & Rüdiger Wolfrum eds., 2021).

[143] G.A. Res. 60/1, ¶ 11 (Sept. 16, 2005).

[144] G.A. Res. 70/1, Declaration ¶ 35 (Sept. 25, 2015) (emphasis added).

[145] Irene Khan, *Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development*, 7 WORLD BANK LEGAL REV. 221, 221 (2016).

[146] *Id.* at 238.

equal access to justice for all." A Washington-based think tank has written: "Global declarations and persuasive research demonstrate that there is a connection between the rule of law and sustainable development. Some have questioned both the strength and the causal direction of this connection. But the correlation between a society's adherence to the rule of law and its progress toward stability and development is beyond question."[147]

Contrary to what the think-tank wrote, the alleged correlation between the rule of law and economic growth does continue to be questioned.[148] Skeptics are probably right in asking for incremental improvement of developmental governance capabilities on a small scale (by experimentation and trial and error), taking into full account the political, economic, and institutional conditions in each country.[149]

A different story is that the fixation on economic growth is not sustainable and might need to be complemented or replaced by more ecology- and climate-friendly strategies of development such as "degrowth." In the end, the economic problems point to the limits of the law as a factor of order, less powerful than economic factors. A moderate capacity to shape reality attaches to the law in general, to constitutional law in particular, and to the rule of law as a principle, too.

VI Conclusions

The current backlash against the "international liberal order" with the rule of law at its core[150] must be taken seriously. In this constellation, international organizations' constitution-shaping requires "[a]n effort for 'being earnest'" imposing "the need to recognize the political dimension of this agenda *and its limits*."[151] This remark by Valentina Volpe on democracy-promotion applies equally to rule-of-law promotion by international organizations.

[147] James Michel, The Rule of Law and Sustainable Development 2 (Ctr. for Strategic & Int'l Stud. Rep., 2020).

[148] Mushtaq Khan, *Beyond Good Governance: An Agenda for Developmental Governance*, *in* Is Good Governance Good for Development? 151 (Jomo Kwame Sundaram & Anis Chowdhury eds., 2012).

[149] *Id.* at 179.

[150] *See* David A. Lake, Lisa L. Martin & Thomas Risse, *Challenges to the Liberal Order: Reflections on International Organization*, 75 Int'l Org. 225, 225 (2021).

[151] Valentina Volpe, *The Importance of Being Earnest: The United Nations and Democracy-Promotion*, *in* Mentoring Comparative Lawyers: Methods, Times, and Places 219, 232 (Francesca Fiorentini & Marta Infantino eds., 2020) (emphasis added).

It is, at this juncture, not sufficient to point to the fact that the rule-of-law standards used by international organizations as benchmarks derive their legitimacy from state consent and ultimately from state sovereignty. Indeed, the international organizations' constitutional assistance has not been formally imposed or coerced. However, once a state has decided to take advice, the "national owners" must then comply with the international standards.[152] This pathway often fuels a sentiment of loss of control that risks backfiring. Therefore, the international organizations' constitution-shaping activity must pay attention to deeper issues of legitimacy, and must interrogate also the substance and scope of the transnationalized rule of law *à fond*.

One possible strategy would be to cut back the work of international organizations to the so-called "classic" interstate principles, such as territorial integrity and military security, and leave aside all work on the rule of law (including democracy and human rights). However, this option is not viable, as the Russian invasion of Ukraine shows. Had the rule of law (including protection of fundamental rights, free elections, and proper dealing with crimes of the past) been guaranteed in Russia, that state would most likely not have engaged in a blatant violation of international law. A transnational rule of law, cutting across the "levels" of governance (entailing both domestic and international law), thus remains a *necessary* legal principle in order to safeguard international peace and security in their most basic form. For this reason, the constitution-shaping rule-of-law agenda pursued by international organizations should not be abandoned.

However, it needs to be revamped. For the constitution-shaping (and probably all other forms of rule-of-law assistance) to become more legitimate, all international organizations (and their member states) need to avoid the pitfalls of lopsided political human-rightism, abandon double standards, and pursue a much deeper global social agenda. Only then will respect for the rule of law (including access to justice) help with realizing development objectives. Only then will international organizations be able to respond to the current postcolonial sensibility and convince non-Western participants in the transnational ordering process that, indeed, "international law can be transformed into a means by which the marginalized may be empowered" and that "law can play its ideal role in limiting and resisting power."[153]

[152] Saunders, *supra* note 99, at 31.

[153] Antony Anghie, Imperialism, Sovereignty and the Making of International Law 318 (2005).