

**THE INTERNATIONAL HUMAN RIGHTS LAW AS A SOURCE OF LAW IN THE
BURUNDIAN JUDICIAL SYSTEM**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY
OF PRETORIA, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE OF MASTERS OF LAW (LLM HUMAN RIGHTS AND
DEMOCRATISATION IN AFRICA)**

BY

MICHEL NDAYIKENGURUKIYE

PREPARED UNDER THE SUPERVISION OF

PR. GRACE PATRICK TUMWINE-MUKUBWA

AT THE

FACULTY OF LAW, MAKERERE UNIVERSITY IN KAMPALA, UGANDA

31 OCTOBER 2005

DECLARATION

I, Michel Ndayikengurukiye, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

Student: Michel Ndayikengurukiye

Signature: _____

Date: _____

Supervisor: Pr. Grace Patrick Tumwine-Mukubwa

Signature: _____

Date: _____

DEDICATION

To all the descendents of Rutikubirana family, to the pleasure of some and the memory of the others, particularly to the memory of my lovely father Albert Nteziriba, who inspired me the passion for studies,

To my lovely mother, for all the inestimable affection and tenderness she gave me since I was born,

To all the judges and lawyers whose daily struggle is to ensure that human rights violations are addressed through administration of justice,

I dedicate this dissertation.

ACKNOWLEDGMENT

I could not have achieved the completion of this dissertation without God's love and grace. I am greatly indebted to my supervisor Pr. Grace Patrick Tumwine-Mukubwa for his guidance, and encouragement through this dissertation.

My sincere gratitude to the Centre for Human Rights, University of Pretoria for the opportunity it accorded me to participate in this challenging programme. Many thanks to Mr. Jean Marie Barambona, the then Deputy Dean of the faculty of law, University of Burundi; you infused in me love and interest for human rights. Thanks to you my brothers, Dr. Elias Sentamba and Jean Paul Kazungu, for the tremendous financial support to my family all along my absence from home. The financial assistance of the South African Embassy in Burundi, and particularly of Mrs Zabantu Ngkobo and Mr. Rolf Breggott, is also recognised. Many thanks to the 2005 LLM class that I had the privilege to represent; you are all so dear to me.

Thanks to Mr. Camille Munezero, Legal and Administrative Advisor INTERCONTACT SERVICES s.a, for all your work as my assistant researcher from Burundi and to Prof. Michelo Hansungule for your earlier insights into this paper. I am grateful to Ms. Valerie Dumoulin, *Avocat Sans Frontières Belgique* in Burundi, for the information you shared.

Tarisai Mutangi, for all your input into this paper and for all the worthwhile friendship.

Nadine Bizimana, the patient, courageous and loving woman I had ever seen who afforded to travel by road from Bujumbura to Kigali to meet me while you were eight months pregnant; for the beautiful moments we share, great inspiration and love and for all the care to our little Micha who was born and is growing in my absence.

God bless you all.

LIST OF ABBREVIATIONS

ABP- INFO	Agence Burundaise de Presse
ACHPR	African Charter on Human and Peoples' Rights
CCP	Code of Criminal Procedure
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CNUDH	Centre des Nations Unies pour les Droits de l'Homme
CRC	Convention on the Rights of the Child
EC	European Community
ECJ	European Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	the International Covenant on Economic, Social and Cultural Rights
NGO(s)	Non-Governmental Organisation(s)
PNUD	Programme des Nations Unies pour le Développement
UDHR	Universal Declaration of Human Rights,
UN	United Nations
UNDP	United Nations Development Programme
US	United States
VCLT	Vienna Convention on the Law of Treaties

TABLE OF CASES

Burundian cases

Bazubona Nephtalie v Ministère Public RPA 605/GIT/ RP 805/RUY/ RMP 2569/ND (2001).

Burundi Constitutional Court Decision RCCB 47 (1994).

Burundi Constitutional Court Decision RCCB 48 (1994).

Burundi Constitutional Court Decision RCCB 54 (1995).

Bwampamyé Gaetan v Ministère Public RPC 995 (1998).

Ministère Public v Bakundukize Déogratias and Nikobamyé Léonard RPCC 516/ RMPG 950/ NDA (1999).

Ministère Public v Kanuma Dieudonné and Others RP 13146/ RMP 105260/NGI (2001).

Ministère Public v Minani Jean RPCC 636 / RMPG 1153 (1998).

Ministère Public v N Chantal RP 13684/RMP 108695 (2003).

Ministère Public v Ndayisaba Mathias and Others RPCC 722 BJM (2001).

Ntahimpera Gaspard v Ministère Public RPC 1128 (2002) 5.

Foreign cases

Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi African Commission on Human and Peoples' Rights Comm. Nos. 64/92, 68/92 and 78/92 (1995).

Benin Constitutional Court Decision DCC 02-002 (2002).

Benin Constitutional Court Decision DCC 02-065 (2002).

Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

Case 300/95 *Commission v UK* [1997] ECR I-2649.

Case 79/83 *Dorit Harz v Deutsche Tradaz GmbH* [1984] ECR I-1921.

Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

Ferreira v Levin No 1996 (1) SA 984 (CC).

Gouriet v Union of Post Office Workers (1978) AC 435.

Hoge Raad 16 November 1990 NJ 1992 107.

Kurtz and Letushinsky v Kirschen Supreme Court (1967) 47 ILR 212.

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh High Court of Australia (1995) 128 ALR 353.

Murray v The Charming Betsy 6 US 64 (Cranch) (1804).

Paquete Habana (175 US 677 20 S Ct 290).

Prosecutor v Akayesu ICTR-96-4-T (1998).

S v Makwanyane 1995 (3) SA 391 (CC).

Standard Chartered Bank Zambia Limited v Peter Zulu and 118 others 13 November 1997 No. 59 of 1996 Supreme Court of Zambia.

TABLE OF CONTENTS

DECLARATION.....	ii
DEDICATION.....	iii
ACKNOWLEDGMENT.....	iv
LIST OF ABBREVIATIONS.....	v
TABLE OF CASES.....	vi
CHAPTER 1: INTRODUCTION	1
1.1 Background to the study	1
1.2 Problem statement	1
1.3 Aims and objectives of the study.....	3
1.4 Significance of the study	3
1.5 Hypotheses	4
1.6 Limitations of the study	4
1.7 Literature review.....	5
1.8 Overview of the chapters	5
CHAPTER 2: THE STATUS OF INTERNATIONAL LAW IN THE DOMESTIC LEGAL SYSTEM	7
2.1 Introduction	7
2.2 The monist approach	7
2.2.1 Definition	7
2.2.2 Characteristics	7
A. International law and national law, two components of one single legal order .	8
B. Superiority of international law.....	9
C. Direct incorporation.....	10
2.3 Dualism	12
2.3.1 Definition	12
2.3.2 Characteristics	12
A. Assessing international law and domestic law as two separate legal systems	12
B. Indirect incorporation	13
C. Superiority of domestic law.....	14
2.4 Limitations of the two theories.....	14
2.4.1 Monism.....	15

2.4.2 Dualism	16
2.5 Toward a new conceptualisation of the relations between international law and domestic law	16
2.6 Conclusion	20
CHAPTER 3: THE BURUNDIAN COURTS AND THE ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW.....	21
3.1 Introduction	21
3.2 The role of the Burundian judges	21
3.2.1 Application and interpretation of national norms in accordance with international human rights	22
3.2.2 The role of the Constitutional Court.....	26
3.3 Conclusion	32
CHAPTER 4: THE BURUNDIAN LAWYERS AND THE ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW.....	33
4.1 Introduction	33
4.2 The role of the Burundian lawyers in the interpretation and application of international human rights norms	33
4.3 Consistent practice of <i>pro bono</i> legal assistance	37
4.4 Conclusion	39
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS	41
5.1 Conclusion	41
5.2 Recommendations	42
BIBLIOGRAPHY.....	44

CHAPTER 1: INTRODUCTION

1.1 Background to the study

The enjoyment of all human rights by all persons is the ultimate horizon of democracy. It is generally admitted that democratic societies are less likely to violate human rights.¹ The good human rights records of these societies can be justified, among others, by the promotion of a strong legal culture, which provides procedural avenues for allocating responsibility for human rights violations. Thus, the protection of human rights follows from the functions of law in society, and the nature of human rights claims.

At the national level, human rights are protected by both domestic and international mechanisms. Therefore, the human rights claims should be based on violations of either domestic law or relevant provisions of operational international human rights instruments. However most of the time, this is not the case, especially in Africa. Many African states have ratified several international human rights instruments, but the record of the way the latter are applied in their respective judicial system remains very poor.

This study aims to analyse the case of Burundi, one of these states whose judicial system only rarely applies international human rights instruments in spite of the importance devoted to them by the Constitution. It must be understood that international human rights as a source of law will be referred to, in this study, both as a source of rights and as a source of interpretation of domestic human rights instruments such as the Bill of Rights.

1.2 Problem statement

The 2005 Burundian Constitution (hereinafter referred to as the Constitution or Burundi Constitution) seems to be one of the most generous African constitutions in terms of the Bill of Rights. Indeed, it stipulates that the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights (ACHPR), the Convention on the Elimination of

¹ D Petrova "Strengthening the role of law in building democratic societies: human rights in the administration of justice". The summary of the article is available on the site <<http://www.imadr.org/general/2002/november.seminar.2.html>> accessed 4 April 2005.

all forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC) are integral part of it.² Most of these international instruments were already part of previous constitutions. The conclusion of the Arusha Peace and Reconciliation Agreement for Burundi in August 2000 infused the inclusion of new instruments.³ These are the CEDAW and the CRC. As far as enforcement mechanisms are concerned, it must be understood that the enforcement of all the rights provided by the Constitution will be ensured by the Constitutional Court and by all other courts and relevant institutions legally established.^{3a} This will be in the form of complaints of individuals pertaining to violations of human rights guaranteed by the Constitution.

The existing practice reveals that either the Burundian judiciary or lawyers rarely refer to international law treaties in general and to international human rights in particular. This is true even when the international human rights norm contradicts the national norm.⁴ Will the constitutional innovations in terms of the Bill of Rights impact on the behaviour of the judges? Will the lawyers benefit from these innovations by basing their pleadings on international human rights law? To what extent are Burundian judiciary and legal practitioners conversant in human rights?

The questions posed above can only be sufficiently answered after exploring the major causes of the state of affairs. Indeed the greater the extent to which international norms on human rights are widely known, the greater the possibility of domestic courts applying these norms. This allows courts to play a major role in interpreting and developing international norms and standards, by applying international standards in domestic issues of human rights violations.

This study will discuss the way international human rights law is applied as a source of law in the Burundian judicial system with regard to the existing practice. It will explore how consistent Burundian courts and lawyers apply international human rights law in human rights litigation.

² Art 19.

³ Art 19 reproduces exactly the content of art 3 (1) of Protocol II of the Arusha Peace and Reconciliation Agreement for Burundi (August 2000).

^{3a} Art 60 read together with art 228 para 2 of the Constitution.

1.3 Aims and objectives of the study

This study aims to investigate how international human rights law are implemented in the Burundian judicial system. Its main objectives are:

- a) to analyse whether the judges motivate the judgments that involve human rights violations by international human rights instruments or use the latter as a source of interpretation of national legislation,
- b) to examine how Burundian lawyers use international human rights instruments in human rights litigation as a source of remedy,
- c) to make recommendations that would be useful for a better use of the international human rights instruments in the Burundian judicial system and in any other country where these instruments are not or rarely consistently used.

1.4 Significance of the study

The international human rights law is a branch of international law that is developing all over the world. The universe is aware of the fact that there are undisputable values common to the whole humanity that need to be protected internationally. However, international protection of human rights is not enough. Since, people enjoy and exercise their rights within their respective states, these rights need to be protected within the state as well. International human rights instruments create obligations on states among which is ensuring respect for human rights in their territories. There are even some current scholars who argue that respect for human rights should be a condition for a state to qualify as such.⁵

Burundi, like many other states, has ratified a good number of these international human rights instruments, and therefore accepted to implement them at the domestic level. However, human rights violations are reported on a daily basis and nothing seems to be done although most of the rights enshrined in the international and regional instruments

⁴ See L M Gakima and J P Ndayiragije *Etude sur l'harmonisation de la législation nationale avec les instruments internationaux ratifiés par le Burundi en matière des droits de l'homme* (2003) 22. Unpublished paper initiated by the UNDP Burundi, Democratic Governance BDI/02/008/01/34.

⁵ As per J Dugard presenting a paper to participants during the International Law course at the University of Pretoria, January 2005.

have got a constitutional value.⁶ There are very few cases of human rights violations that have been brought to court or argued on basis of international human rights instruments, as a source of rights, and hence of remedy or as a source of interpretation of domestic law.

This study entails to discuss the application of international human rights law in the Burundian judicial system. This will give a view on how international and regional human rights instruments are given effect at the domestic level. There is a need to research on the best strategy to ensure that the Burundian courts enforce human rights that are guaranteed by the Constitution. However, the courts cannot rule *ultra petita*. Therefore, claimants for redress of human rights violations should be able to argue their case on basis of constitutional rights to enable the courts to interpret and apply these rights.

1.5 Hypotheses

This study deals with the following contentious hypotheses:

- a) The Burundian judicial system does not consistently enforce the international human rights instruments to which Burundi is party.
- b) Virtually all Burundian lawyers are conversant with the justiciability of international human rights instruments. However, only a negligible portion of the legal fraternity refer to these instruments, albeit, inconsistently.

1.6 Limitations of the study

This study is undertaken in Uganda. This means that possibilities to seek information relating to Burundi are very limited. Although some research will be held in Burundi, time will not be enough for this study to rely exclusively on first hand information. It is also unfortunate that the access to the Burundian jurisprudence is very difficult due to the absence of regular law reports. This will certainly impact on the substantiation of some of the observations pertaining the use of international human rights instruments by the Burundian courts and lawyers.

⁶ n 2 above.

1.7 Literature review

There is an extensive literature on the enforcement of international law in general, and international human rights law in particular, at the domestic level. In this respect, most of the doctrine put emphasis on the relations between the international (human rights) law and domestic law. V H Kelsen is one of the most prominent publicists who have influenced the monist approach of the relations between the international and national law.⁷ He argues that international law and domestic law cohabit in one single legal order and that in case of conflict between an international norm and a domestic one, the former should prevail.⁸ Moreover, the monist theory generally holds that treaties acquire the force of law upon ratification, or at any stage defined by national law, e.g publication or the adoption of legislative act approving the ratification.⁹ On the other hand, H Triepel stated that international law and domestic law belong to two different legal orders. According to him, national and international law are entirely distinct in nature.¹⁰ The municipal legal order can only apply an international norm when the latter has been incorporated into municipal law.¹¹ Although this study will recall these theoretical approaches on the relationship between international and national law, it will mainly focus on how international human rights norms are enforced in the Burundian judicial system. Apart from some sporadic reports on human rights record in general, the doctrine on the enforcement of human rights in Burundi is otherwise very poor.

1.8 Overview of the chapters

Chapter one will set out the content of the research, identify the problem and outline the methodology. Chapter two will focus on the status of international law in domestic legal

⁷ See generally V H Kelsen “Les rapports de systèmes entre droit interne et droit international” (1926) 4 *Recueil des Cours de l’Académie de droit international de La Haye* 227-331 and “La transformation du droit international en droit interne” (1936) *Revue générale de droit international public* 5-49.

⁸ n 7 above.

⁹ C Thomas *et al* “The use of international labour law in domestic courts: Theory, recent jurisprudence, and practical implications” (2004) *Mélanges en l’honneur de Nicolas Valticos* 258.

¹⁰ H Triepel cited by G Slyz “International law in domestic courts” (1995-1996) 28 *New York University Journal of International Law and Politics* 67.

¹¹ n 10 above.

system. It will highlight the theories that have been used to determine the relationship between international and domestic law in general. Chapter three will analyse on basis of some samples of cases how the Burundian Courts interpret and apply international human rights instruments. Chapter four discusses the role played by the Burundian lawyers in the enforcement of these instruments. Chapter five will draw conclusion and recommendations.

CHAPTER 2: THE STATUS OF INTERNATIONAL LAW IN THE DOMESTIC LEGAL SYSTEM

2.1 Introduction

Analysing the status of international law in the domestic legal system would invariably bring to focus the relation between international law and domestic law. There are characteristic differences between them and that is why the status of international law in domestic legal system and the role of national courts to apply international law vary greatly from country to country.¹² This has been the result of the application of the two classic theories of monism and dualism. This chapter will give the content and scope and limitations of both of them and suggest the adoption of an approach that derives from the practice of the courts and the new developments of the international law: the principle of consistent interpretation.

2.2 The monist approach

2.2.1 Definition

Kelsen was primarily the first publicist to defend the monist approach.¹³ This approach is called monist for it emphasises on the conceptual and real unity of the law.¹⁴ According to Dixon, the monist theory supposes that international law and national law are simply two components of a single body of knowledge called 'law'.¹⁵ 'Law' is seen as a single entity of which 'national and international versions are merely particular manifestation'.¹⁶

2.2.2 Characteristics

As it has been conceived, the monist theory on the relations between international and national law is essentially characterised by the unity of the two branches of law, the superiority of the international law on the national law in case of norm conflicts and the direct incorporation of international law into domestic law.

¹² M S Alam "Enforcement of International Human Rights Law by Domestic Courts" available on the site <<http://www.aals.org/international2004/Papers/alam.pdf>> accessed 15 August 2005.

¹³ n 7 above.

¹⁴ See D Anzilotti *Cours de droit international* (1999) 50.

¹⁵ See generally M Dixon *Textbook on international law* (1996) chapter 4.

A. International law and national law, two components of one single legal order

The monist approach has got its roots in the ancient and medieval philosophical conception of the world having a single harmonious and hierarchically organised legal system. In ancient Judaism, the law was one and universal.¹⁷ It was directly communicated to the people by God.¹⁸ God was the source of law and therefore of justice. This idea was also overwhelmingly present in the ancient Greek and Roman philosophy. For Cicero and the stoics, the law represented precepts of reason embedded in nature, the latter being created by God and organised harmoniously according to laws that have universal validity.¹⁹

In the area of human law, both the rules regulating the activities within the communities were expressions of God's will.²⁰ The states were implementing the principles of the law in the norms of *jus gentium*, common to all political entities.²¹ This is traduced by what Gaius wrote in his *Institutes*

All nations, which are governed by statutes and customs, make use partly of law, which is peculiar to the respective nations, and partly of such is common to mankind. Whatever law any nation has established for itself is peculiar to the particular state (*civitas*) and is called civil law (*jus civile*), as being the peculiar law of that state, but law that natural reason has laid down for mankind in general is maintained equally by all men, and is called *jus gentium*, as being the law which all nations use.²²

The process of christianisation of the Roman Empire strengthened the doctrine of legal universalism.²³ This theistic view made no differentiation between legal and moral authority or international and municipal law.

¹⁶ n 15 above.

¹⁷ C J Friedrich *The Philosophy of Law in Historical Perspective* (1963) 8-12.

¹⁸ n 17 above.

¹⁹ (n 17 above) 28-29.

²⁰ H Kelsen *General Theory of Law and State* (1945) 8.

²¹ (n 17 above) 34.

²² S Gaius *Institutes* quoted by R Ludwikowski "Supreme law or basic law? The decline of the concept of constitutional supremacy" (2001) 9 *Cardozo Journal of International Law and Comparative Law* at 256.

²³ The "caesaropapism" doctrine that prevailed during the medieval period had conferred to emperors the role of spiritual and political leaders. They were deemed to be God's regents. See H Magoulias *Byzantine Christianity: Emperor, Church and the West* (1970) 8 cited by Ludwikowsky (n 22 above).

B. Superiority of international law

Since national law and international law are seen to compose one single legal system, there must be a mechanism by which eventual conflicts between a norm of national law and a norm of international law might be resolved. In that case, the monist approach suggests that the international law should prevail. Indeed, according to the same theory, the legal norms are organised according to a unit arranged hierarchically, a pyramid at the top of which figures the international order, which supersedes the domestic legal systems.²⁴ Hence, in many countries, national constitutions specifically provide that the treaties regularly ratified by the state acquire primacy on the national legislation in the domestic legal system. This is the case in most of the new constitutions of states created after the dislocation of the Soviet Union, in Europe in general and in Latin America. Article 4 of the 1994 Moldova Constitution provides that constitutional provisions shall be implemented in accordance with ratified treaties. Moreover the primacy of international law is also reflected in Moldova labour legislation.²⁵ The 2003 Labour Code provides that:

if through international treaties, agreements, conventions or other international acts, to which the Republic of Moldova is a part, are established other provisions, besides the ones contained in the present code, the international norms have a priority.²⁶

There have been many explanations of the primacy of international law.²⁷ For the purposes of this paper, discussion will only be based on one of them, which appears to be more consistent with the practice in many monist countries. The most prominent explanation of the primacy of international law lies with the new developments of human

²⁴ J C G mar "Les trois  tats de la politique linguistique du Qu bec: D'une soci t  traduite   une soci t  d'expression" available on the site <<http://www.cslf.gouv.qc.ca/publications/PubB115/B115P1ch1.html#0>> accessed 23 August 2005. See also B Simma "The Contribution of Alfred Verdross to the Theory of International Law" (1995) 6 *European Journal of International Law* 12.

²⁵ n 9 above 263.

²⁶ Section 13 of the Moldovan 2003 Labour Code quoted by C Thomas *et al* (n 9 above).

²⁷ For a summary of these explanations, see J Matejka "Is the Dualist-Monist controversy in International Law simply a fiction?" (2000) *Mezinarodni pravo verejne* available on the site <<http://mpv.juristic.cz/51001>> accessed 25 August 2005. See also V S Vereshchetin "New Constitutions and the Old Problem of the Relationship between International Law and National Law" (1996) 7 *European Journal of International Law* 2-3.

rights law. The international human rights factor, which came into the picture after the Second World War, played an important role in the penetration of international law into domestic legal orders and national constitutions.²⁸ The relationship between state and individual that traditionally existed in the domain of internal law could no longer be considered as a purely domestic affair.²⁹ International concern for human rights not only gave birth to a number of very important international legal instruments in this field, but has also led to the recognition in several constitutions of their binding force within national legal systems, and even of their supremacy over national laws.³⁰

C. Direct incorporation

For, in a monist framework, international law is not only part of the legal order as municipal law but also superior to it, no theoretical barrier exists to applying international law directly in national courts. The legislature is circumscribed by the requirements of international law in enacting legislation. Similarly, the national law is obliged to take care that international law is faithfully executed within the state and that the national courts give effect to international law in their decision.³¹ In order to identify the conditions of incorporation of international law into domestic law in a given country, one has to examine constitutional texts.

While a great number of national constitutions provide no or sparse guidance on this matter, modern constitutions appear to favour the inclusion of explicit reference to the incorporation and/or status of international law.³² Vereshchetin gives two main reasons that explain this common feature of the new constitutions.³³ According to him, on the one

²⁸ V S Vereshchetin (n 27 above) 3.

²⁹ n 28 above.

³⁰ Paradoxically, however, in the United States, with its long-standing democratic traditions and the constitutional provision about treaties being part of the 'supreme law of the land' (Art. VI of the American Constitution), the courts 'generally avoid the application of international human rights norms...' See A F Bayefsky and J Fitzpatrick "International Human Rights Law in United States Courts: A Comparative Perspective" (1992/1) 14 *Michigan Journal of International Law* 89. As Louis Henkin put it: "A common view seems to be that international human rights are good, but not for us." See L Henkin "A Post-Cold War Human Rights Agenda" (1994/1) 19 *Yale Journal of International Law* 254.

³¹ G Slyz (n 10 above) 67.

³² (n 9 above) 257.

³³ (n 28 above) 1-3.

hand, it has been noticed that after each World War, there has been a wave of inclusion in national constitutions, provisions of international law.³⁴ He keeps on arguing that similarly, the end of the Cold War gave place to constitutions that accord to international law a good status within the domestic legal systems of the former Soviet Union republics.³⁵ On the other hand, he argues that the same scenario is generally observable in states that are recovering from dictatorial regimes, especially with regard to inclusion of international human rights provisions into the national constitutions.³⁶

In African monist countries, the constitutional clauses pertaining to the relationship between international law and domestic law are characteristic of many new constitutional texts. However, the kind of relationship these clauses establish differs. In respect of incorporation of international treaties into the Burundian domestic legal system, Article 292 of the Constitution provides that international treaties can only be binding when they have been regularly ratified. It appears therefore that the incorporation of international law in Burundi is conditioned by the ratification and the reciprocal application of the treaty concerned.

It is however regrettable that in some countries, the applicability of these treaties is subject, in regard to each agreement or treaty, to its application by the other party. Indeed, this condition strongly contradicts the doctrine.³⁷ It is argued that the appreciation of the realisation of this condition belongs to the ministry of foreign affairs.³⁸ The executive here impinges on the judiciary's competence.³⁹ This condition that is contained in the Constitution of the Republic of France⁴⁰ is also present in the constitutions of the Republic of Benin, Democratic Republic of Congo and the Republic of Rwanda.⁴¹

³⁴ (n 28 above) 1.

³⁵ (n 28 above) 2.

³⁶ (n 28 above) 3.

³⁷ See E Mangeot "Etude: Les rapports droit international-droit interne et la publication officielle des engagements internationaux" (décembre 2004) *Revue de l'actualité juridique française* 4.

³⁸ n 37 above.

³⁹ n 37 above.

⁴⁰ See art 55 of the 1958 France Constitution.

⁴¹ See art 147 of the 1990 Benin Constitution, art 193 of the 2003 DRC Constitution, art 190 of the 2003 Rwanda Constitution

2.3 Dualism

2.3.1 Definition

The dualist theory regards international law and the internal law of states as substantially different and wholly separate legal systems.⁴² The fundamental difference between the two legal systems is that the former grew out from custom while the latter was a product of national legislation.⁴³ The dualists claimed even the subjects of both legal systems are different whereas the municipal law regulates the relationship between the state and individuals and between individuals themselves, international law is limited to the regulation of relations between states.⁴⁴ Extreme dualists even argued that international law was not law but only a system of international morality.⁴⁵ Moderate dualists recognised the international law as law but insisted that the process of incorporation required “recognition” of the validity of international norms.⁴⁶ This process transforms the rules of international law into *ipso facto* norms of municipal law.⁴⁷

2.3.2 Characteristics

Contrary to the monist theory where international law forms one single legal system with the domestic law and supersedes the latter, the dualist approach views the domestic law as the one that enjoys primacy over international law. This characteristic is derived from the fact that international law is included in domestic law through the process of indirect incorporation.

A. Assessing international law and domestic law as two separate legal systems

According to Triepel, one of the most prominent dualist scholars of the late-nineteenth and early twentieth century, national and international law are entirely distinct in nature.⁴⁸

⁴² See Slyz (n 10 above).

⁴³ See R Ludwikowski (n 22 above) at 255.

⁴⁴ n 42 above.

⁴⁵ See S McDougal “The impact of International Law Upon National Law: A policy-Oriented Perspective” (1959) 4 *South Dakota Law Review* at 18.

⁴⁶ n 42 above.

⁴⁷ See C M Picciotto *The relation of International Law to the Law of England and the United States* (1915) 10.

⁴⁸ (n 10 above) 70.

Firstly, in particular, they differ in the social relations they govern; national law deals with individuals, while international law regulates the relations between states.⁴⁹ Secondly, Triepel argued that the origins of the two legal systems are different. The source of municipal law is the will of the state itself and the source of international law is the common will of all states.⁵⁰

B. Indirect incorporation

The dualists regard international law and municipal law as separate and municipal law can only apply international law when it has been incorporated into municipal law. Incorporation can result from an act of parliament or other political act, or given effect by the courts.

England is an example of the dualist model of international law. A treaty has no effect in English domestic law, unless it is made part of it.⁵¹ Once a treaty is incorporated into domestic Law, it is fully enforceable in the courts.⁵² But the fact that a treaty is part of the English Law will not necessarily mean that individuals have a cause of action arising from the treaty.⁵³ An unincorporated treaty has no formal standing in English Law. An incorporated treaty becomes part of the law of the land, but it has no special position.⁵⁴ The relationship between incorporated treaties and other legislation is the same as the relationship of two statutes to each other.⁵⁵ Parliament is supreme in the sense that it can pass legislation that is inconsistent with any international treaty obligations which, nevertheless binds the United Kingdom at the international level.⁵⁶ But such conduct violates the principle *pacta sunt servanda* embedded in the Vienna Convention on the Law of Treaties (VCLT), which requires the states to execute in good faith treaties to

⁴⁹ n 48 above.

⁵⁰ n 48 above.

⁵¹ UN Department of Economic and Social Affairs Division for Social Policy and Development "International norms and standards related to disabilities" (2003) available on the site <<http://www.un.org/esa/socdev/enable/comp100.htm>> accessed 26 August 2005.

⁵² n 51 above.

⁵³ n 51 above.

⁵⁴ n 51 above.

⁵⁵ n 51 above.

⁵⁶ n 51 above.

which they are parties.⁵⁷ The logical consequence of this principle is that a state party is not allowed to invoke the provisions of its internal law as justification for its failure to perform a treaty.^{57a}

C. Superiority of domestic law

The requirement of transformation of international law into municipal law makes the latter superior to the former.⁵⁸ If international law conflicts with statute or common law, the latter will prevail. This is due to the fact that it is national law that gives the binding character to international law.⁵⁹ Contrarily to the monist countries where some constitutions can specifically provide that international treaties regularly ratified enjoy primacy over domestic legislation, the dualist constitutions are generally silent on whether domestic legislation is superior to international law. This is obviously due to the conceptual approach of the theory according to which the two legal systems are separate. However, the practice of the courts reveals their preference to domestic law. In *Saloman v Commissioners of the Customs and Excise*,⁶⁰ the court argued, “if the terms of the legislation are clear and unambiguous, they must be given effect, whether or not they carry out... treaty obligations.”⁶¹ In another case, the court stated that in the absence of ambiguity in the provisions of a statute, the European Convention had no place as a guide to their interpretation.⁶²

2.4 Limitations of the two theories

While these theories continue to perform an important predictive function, monism and dualism are no longer expressed in their pure form.

⁵⁷ Art 26 of the 1969 VCLT.

^{57a} Art 27 VCLT.

⁵⁸ See H Kelsen (n 20 above) 382.

⁵⁹ n 58 above.

⁶⁰ See [1976] 2 QB 116 (CA1966) cited by G P Mukubwa “International human rights norms in the domestic arena” (1997) 3 *East African Journal of Peace and Human Rights* 35.

⁶¹ n 60 above.

⁶² See *Chundawadra v Immigration Appeal Tribunal* cited by Mukubwa (n 60 above).

2.4.1 Monism

The practice of the monist states reveals that the monist approach as initially conceived does no longer stand. Although it has been admitted that monist legal systems are characterised by direct incorporation of ratified treaties into domestic law, some monist constitutions subordinate the applicability of ratified treaties to their publication in an official journal. This is the case in France and in Rwanda. Article 55 of the Constitution of France provides that

[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.

The condition of publication is also present in article 190 of the Rwandan Constitution, which provides,

[u]pon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of parties.

According to Mangeot, the wording of article 55 of the Constitution of France most probably denounces the lack of will of the constitution-makers to make clear the relations between international law and domestic law.⁶³ He went on to state that they also avoided to fall in any of the two competing theories, namely monism and dualism.⁶⁴

In addition, in a purely monist system, the relevant actors of a monist state would find it unnecessary to express their reception of international law in statutes and constitutional provisions. Germany, for example, which is highly receptive to international law, is strictly speaking not a monist state because it incorporates customary international law through article 25 of its basic law, which provides;

The general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory.

⁶³ n 37 above 5.

⁶⁴ n 63 above.

2.4.2 Dualism

In a pure dualist system where international law is considered as strictly separate to the national law, it would appear abnormal to include in the constitution a clause that ratified treaties or customary law is the supreme law of the land. The inclusion of a clause that provides that international treaties regularly ratified are superior to the national legislation is also more characteristic to a monist state. However, both types of provisions are present within the Constitution of the United States (US), which is known as a dualist country. Indeed, article VI of the US Constitution makes “all treaties made, or which shall be made, under Authority of the United States... the supreme law of the Land,” and binds every American state regardless of its own constitution or laws.⁶⁵

In addition to that, the dualists are of the view that there must be legislation to translate international obligations of a state into domestic law. They argue that treaties are negotiated by the Executive and that a treaty cannot affect private rights without enabling legislation.⁶⁶ However, on the domestic level, the Executive enjoys also the prerogative of initiating the law-making process, which always ends with the adoption of the law by the legislature and the promulgation by the president. Similarly, as far as international law is concerned, the Executive (the president or his (her) delegate) negotiates a treaty, which is subsequently submitted to the parliament for ratification. The parliament cannot ratify a treaty without scrutinising all its legal implications pertaining to its implementation in domestic law. Therefore, the dualists should consider the act of ratification of a treaty as genuinely enabling the courts to implement the international obligations deriving from that treaty. Individuals must be allowed to enjoy and exercise the rights they genuinely expected to derive from the engagement of their state - manifested through the act of ratification - to comply with international obligations.

2.5 Toward a new conceptualisation of the relations between international law and domestic law

The globalisation of law mooted the classical dispute between the monist and dualist theories. The national, supranational, international, and regional legal structures overlap and penetrate each other, leaving no room for the concept of clear-cut supremacy of one

⁶⁵ See art VI para 2 of the 1787 US Constitution.

⁶⁶ Mukubwa (n 60 above) 34-35.

single set of legal norms over all others.⁶⁷ The death of absolute sovereignty and immunity of a state and the emergence of the supranational organisations guided the states into the web of links and obligations that resulted in a gradual decline of the constitutional supremacy.⁶⁸

In addition, the protection of international human rights contributed to general recognition that there are values that transcend national interests. The notion of the existence of goals and values common to all the peoples, such as the protection of the environment, human rights protection, global security including the ongoing problem of terrorism and many others, grew out of the discussions about new world order and triggered the trend toward the globalisation of the law.⁶⁹ Within this state of affairs, there is a need to adopt a new theory that adequately defines the relations between international law and domestic law and which is more practicable within the domestic arena.

Within this regard, attention should be concentrated on the development of what has, in practice, proved to be the most important doctrine used by the courts to grant effect to international law: the principle of consistent interpretation.

According to Betlem and Nollkaemper,

The principle of consistent interpretation refers to the principle that requires the courts to interpret national law in conformity with a rule of international law, with a view to ensuring that rule is given effect.⁷⁰

This principle is currently being applied by the European Community (EC) courts and has proven to be successful as far as the implementation of public international law, and more particularly the EC law is concerned. As Leben points out, “[c]ommunity law is ‘successful international law’ and... is thus a possible horizon of international law, indicating the route that international law must follow if it is to move forward.”⁷¹

⁶⁷ See Ludwikowski (n 22 above) at 254.

⁶⁸ n 67 above.

⁶⁹ See Ludwikowski (n 22 above) at 266.

⁷⁰ G Betlem and A Nollkaemper “Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation” (2003) 14 *European Journal of International Law* 571.

⁷¹ C Leben “Hans Kelsen and the Advancement of International Law” (1998) 9 *European Journal of International Law* 298.

In EC law, the principle of consistent interpretation is, similar to the principle of direct effect,⁷² governed by the EC law, not national law. Community law obliges the national courts to construe their domestic law in conformity with the law of the EC. In the *Von Colson* case, the European Court of Justice (ECJ) held that ‘all Member States’ must interpret national law in light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of [a]rticle 189 of the Treaty establishing the EC (now art 249 (3)).⁷³ The courts must, in so far as they are given discretion to do so according to national law, construe and apply national law, and in particular the implementing legislation, in conformity with the requirements of EC law.⁷⁴ In *Marleasing*⁷⁵ the ECJ elaborated on this issue as follows,

[I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive...⁷⁶

In public international law, one cannot find a comparable authoritative formulation of the principle that, national courts should construe their domestic law in conformity with international law.

⁷² Betlem and Nollkaemper define the principle of direct effect in these terms: “Direct effect... presupposes the existence of rule of national law (written or unwritten) that allows courts to give effect to international law. These can be either general constitutional rules that incorporate the entire body of international law in the national legal order, or specific rules of reference that incorporate particular treaties or other rules of international law.” See Betlem and Nollkaemper (n 70 above) 572. The principle of direct effect is recognised by the 2004 Burundi Constitution. Art 19 grants the UDHR, the two Covenants, the CEDAW, the CRC and the ACHR a constitutional value.

⁷³ Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 para 26. See also Case 79/83 *Dorit Harz v Deutsche Tradaz GmbH* [1984] ECR 1921.

⁷⁴ *Von Kolson* (n 73 above) para 28.

⁷⁵ Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

⁷⁶ (n 75 above) para 8.

However, there seems to be sufficient acceptance of the notion of international law as 'higher law' that must be given effect in the national legal order, and that courts, as state organs, are responsible for the proper application of international law within their jurisdiction.⁷⁷ This proves that the argument that public international law is neutral on the issue of consistent interpretation is too narrow an approach.

Irrespective of the existence of a general yet unarticulated principle requiring consistent interpretation, the difference between controlling EC law on the one hand, and the more neutral position of public international law, on the other, is largely mitigated by that there is currently a widespread practice in courts of many countries, which applies this principle. In the Netherlands, the Supreme Court has long held that unless the legislature has explicitly stated otherwise, any provision of Dutch law must be interpreted so as to avoid a breach of international law.⁷⁸

There are many other states with a similar practice, including dualist states like Australia,⁷⁹ Israel,⁸⁰ South Africa,⁸¹ and the US.⁸² In those states, the practice of

⁷⁷ See General Comment No 9 of the UN Committee on Economic, Social and Cultural Rights on the domestic application of the Covenant (UN Doc A/CONF 39/27) para 15: "It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations. Thus, when a domestic decision maker is faced between an interpretation of domestic law that would place that state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the latter.

⁷⁸ *Hoge Raad* 16 November 1990 NJ 1992 107 para 3.2.3.

⁷⁹ *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* High Court of Australia (1995) 128 ALR 353 para 27.

⁸⁰ *Kurtz and Letushinsky v Kirschen* Supreme Court (1967) 47 ILR 212, at 214-215.

⁸¹ In a case involving death penalty, the Constitutional Court of South Africa ruled "In the context of section 35(1) [of the Constitution], public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]." See *S v Makwanyane* 1995 (3) SA 391 (CC) at 413-14.

consistent interpretation is as much a reality as if it were explicitly required by public international law itself.

Therefore, it is urgent for public international law to develop the practice of consistent interpretation already applied by a certain number of states in a way that allows it to monitor its application within national courts. This approach has the merit to put more emphasis on giving effect to international norms irrespective of being a monist or dualist state.

2.6 Conclusion

From the developments above, it was seen that the status of international law in domestic law differs from country to country according to the relationship between international and national law they have adopted. However, it was also proved that the general current tendency is to recognise the supremacy of the international law in both monist and dualist countries through the application of the principle of consistent interpretation. The following chapter will discuss the way the Burundian courts apply this principle in their judgments while interpreting human rights norms.

⁸² In *Paquete Habana* (175 US 677 20 S Ct 290), the Court reaffirmed the domestic status of customary international law in the United States. Relying on scholarly sources, the Court acknowledged a long-held customary norm against seizing the coastal fishing vessels of a belligerent. The court held that international law is part of the United States law, and must be ascertained and administered and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. See also *Murray v The Charming Betsy* 6 US 64 (Cranch) (1804) 118. The general presumption that Congress intends to comply with international law is powerful enough to influence the interpretation of ambiguous statutes and ambiguous legislative history. See R G Steinhardt "The Role of International Law as a Canon of Domestic Statutory Construction" (1990) 43 *Vanderbilt Law Review* 1103.

CHAPTER 3: THE BURUNDIAN COURTS AND THE ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW

3.1 Introduction

The application of international human rights law by the judges is becoming increasingly important in relation to their work.⁸³ As far as judges are concerned, international human rights law is sometimes being used to interpret domestic legislation in cases before them, or more usually as a source or inspiration to assist the decision-making process and supportive reasoning, or to regard them as expressing principles which can influence the legal understanding.⁸⁴ This chapter will discuss precisely the role of the Burundian judges in the enforcement of international human rights law.

3.2 The role of the Burundian judges

The primary role of a judge has always been to apply the law to any case that is brought before the court. As far as international law in general and international human rights law in particular is concerned, it was seen earlier that there are different mechanisms for its application by the domestic judge. In Burundi, things seem to be much more easier since the only requirement for its enforcement internally is the ratification of the international human rights instrument. Unlike other treaties whose application is subject to reciprocal respect by the other parties, human rights treaties are not characterised by inter-state reciprocity.⁸⁵ State parties agree unconditionally to guarantee rights to individuals.⁸⁶ Moreover, the Burundian judiciary should be even more comfortable while applying international human rights instruments because many of them have got a constitutional value as it was mentioned above.⁸⁷ However in Burundi, the record in relation to the enforcement of international human rights law by the domestic courts is still very poor.

⁸³ R Layton "When and how can domestic judges use international law in dualist systems?" available on the site <http://training.itcilo.org/ils/ils_judges/training_materials/english/Layton.pdf> accessed 10 October 2005.

⁸⁴ n 83 above.

⁸⁵ R Higgins "The role of domestic courts in the enforcement of international human rights: The United Kingdom" in B Conforti and F Francioni *Enforcing international human rights in domestic courts* (1997) 38.

⁸⁶ n 85 above.

⁸⁷ n 2 above.

Two major factors contribute to explain this state of things. The first is that although international human rights are justiciable, yet the Burundian judiciary shows a certain reluctance to apply them as a source of remedy⁸⁸ or a source of interpretation of the domestic norms. As a consequence, the interpretation of some domestic human rights norms was erroneous or inconsistent with the established international jurisprudence. The second reason is that the Constitutional Court, which is supposed to play the most active role to ensure respect of the Constitution including the Bill of Rights, is almost inaccessible to individuals, as it will be explained below.

3.2.1 Application and interpretation of national norms in accordance with international human rights

Burundian judiciary is aware of the fact that constitutional rights are justiciable. There is no case where the judge refuted an argument on the ground that it was based on the violation of an international human rights treaty. However, the Burundian judiciary manifests a clear preference to apply the domestic law even when the litigant invokes an international norm. Three different cases can illustrate this statement.

In *Coup d'Etat du 3 juillet 1993*,⁸⁹ the Constitutional Court, while recognising the justiciability of the rights enshrined in the UDHR and ICCPR and the direct applicability of the two instruments, decided not to push forward the examination of the violation of those instruments.⁹⁰ The Court did not deem it of any relevance since it had already established the unconstitutionality of the law (of amnesty) whose application was discriminatory against the claimants.⁹¹

The attitude of the Burundian judiciary in this case is similar to the one adopted by the First Chamber of the Court of Cassation of France in a case that dealt with the suspension of the visiting rights of a divorced father.⁹² The claimant was contesting a

⁸⁸ In *Gouriet v Union of Post Office Workers* AC 1978 435, Lord Denning stated that a right without remedy is no right at all.

⁸⁹ Burundian Constitutional Court Decision RCCB 54(1995) 9-10. See also Decision RCCB 48 (1994) 5-6.

⁹⁰ n 88 above.

⁹¹ n 2 above.

⁹² See E Decaux "A report on the role of French judges in the enforcement of international human rights" in B Conforti and F Francioni (n 85 above) 117.

decision contrary to article 29 (a) of the CRC.⁹³ In its decision of 9 April 1991, this chamber evaded the question of international law principles contained in article 29 (a) of the CRC, confirming the motivation given by the lower courts, which insisted that the calling in question of the special decision given by the Children's Court was no longer of any relevance, also because the Court for Matrimonial Proceedings had come to the same conclusion.⁹⁴

In deciding to avoid questions of international human rights, the Court missed the opportunity to contribute to the development of human rights jurisprudence. It would have been indeed, an occasion to explain the content and scope of the allegedly violated rights. In the case *Standard Chartered Bank Zambia Limited v Peter Zulu and 118 others*,⁹⁵ the Supreme Court of Zambia held an opinion that is more favourable to the application of international human rights law. The Court affirmed the proposition that although the constitution had attempted to define 'forced labour',⁹⁶ an occasion may arise when the definition may act to cover new situations and it may be necessary or desirable to look at conventions to which Zambia is a member for guidance.⁹⁷ Zambia had ratified the Forced Labour Convention.

It is contended that the Court should systematically scrutinise each argument based on a specific right in order to give it a detailed explanation. This would make international human rights norms more understandable and more likely to be used by both judges and claimants.

In another case involving rape of a young boy of 6 years by his nanny, the Court failed to qualify the crime as rape arguing that only females can be victims of rape.⁹⁸ The Burundian Penal Code certainly does not define in clear terms the crime of rape, but it does not say anything on the sex of the victim.⁹⁹ Article 385 would have sufficed to

⁹³ n 92 above.

⁹⁴ n 92 above.

⁹⁵ *Standard Chartered Bank Zambia Limited v Peter Zulu and 118 others* No. 59 (1996) Supreme Court of Zambia.

⁹⁶ Art 14 (3) Zambia Constitution.

⁹⁷ n 95 above.

⁹⁸ *Ministère Public v N Chantal*, RP 13684/RMP 108695 (2003).

⁹⁹ Art 385 para 1 of the Penal Code does nothing but penalising rape committed with violence or threats either by ruse or abuse of the mental deficiency of the person.

apply because it qualifies as rape the mere fact of sex rapprochement committed on persons under the age of 18.¹⁰⁰ As regards the principle of consistent interpretation, the Court should have borrowed the definition deriving from the international practice to complement the national legislation.¹⁰¹ This definition does not exclude males from being victims of rape.¹⁰² This can also be attributed to the general reliance of the Burundian judges on national law excluding the international law from domestic application.

In the case of *Bwampamyé*,¹⁰³ the Supreme Court missed a good opportunity to interpret the right to a fair trial as provided by the ICCPR. This was a case of a certain Gaetan Bwampamyé, former headmaster of a para-medical high school accused of incitement to massacre of Tutsis in October 1993 in the Province of Ngozi, in Burundi. The Criminal Chamber of the Court of Appeal of Ngozi therefore sentenced him to death on 25 September 1997.

An appeal against this judgment was made before the Supreme Court for review on the grounds of the unfair trial. The appellant alleged the violation of some basic principles of the criminal procedure, among which the presumption of innocence, the right to legal assistance and the right to adversarial hearing, and invoked a certain number of domestic and international norms violated by the Court of Appeal. Among other international provisions invoked, there are paragraphs (2) and (3) (d) of article 14 of the ICCPR. However, the Supreme Court rejected systematically all these grounds without demonstrating convincingly how unfounded they were.

As for the presumption of innocence, the counsel for appellant pleaded that the Court of Appeal qualified his client as a criminal¹⁰⁴ before he was found guilty. This obviously would have placed the accused person in an inferior position vis-à-vis the prosecution. The Supreme Court held that the appellant was unable to prove this allegation but failed

¹⁰⁰ Art 385 para 2 read together with art 382 of the Penal Code.

¹⁰¹ In *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 596-598, the Tribunal came up with the most complete definition of rape as a crime in international law. It does not specify the sex of the victim.

¹⁰² n 101 above.

¹⁰³ *Bwampamyé Gaëtan v Ministère Public* RPC 995 (1998) 3.

¹⁰⁴ The appellant alleged that to qualify his client, the judge used the word *umubisha* (Kirundi language), which means “a criminal”.

to interpret the content of this constitutional right also embedded in numerous international and regional human rights instruments.¹⁰⁵

As for the right to legal assistance, the Supreme Court argued that the Burundian law does not compel the judge to assign a lawyer to an accused person. It is true that article 73 of the former Code of Criminal Procedure (CCP),¹⁰⁶ which was still in force by then, makes it optional for the judge to appoint a legal counsel to assist an accused person. However, this was a good opportunity for the Supreme Court to interpret this provision in light of article 14 (3) (d) of the ICCPR, which states that

[I]n the determination of any criminal charge against him, everyone shall be entitled ...[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it...

In this regard, the Human Rights Committee, while acknowledging that the judge may have good reasons to render a judgment *in absentia*, states that “strict observance of the rights of the defence is all the more necessary” in this case.¹⁰⁷

This keeps the Burundian judiciary far behind in relation with the principle of consistent interpretation developed earlier. This attitude of the judiciary seems to be normal. Indeed, the principle of consistent interpretation is primarily applied when the rule of international law in question has not been transposed in domestic law.¹⁰⁸ And in the case of Burundi, most of the international human rights instruments usually invoked have been transposed in the national law.¹⁰⁹ However, the principle is not limited to that situation.¹¹⁰ The international human rights instruments require that the result envisaged by them must be attained in law and in fact.¹¹¹ Therefore, judicial interpretation and

¹⁰⁵ Art 40 Burundi Constitution, art 7 (1) b) ACHPR, art 11(1) UDHR, and art 14(2) ICCPR.

¹⁰⁶ Art 73 of the former CCP was reproduced literally by the new CCP in its art 123 para 2.

¹⁰⁷ ICCPR General Comment 13, art 14, U N Doc HRI/GEN/1/Rev1 (1994) para 11.

¹⁰⁸ (n 70 above) 576.

¹⁰⁹ The regional and international human rights instruments that are often invoked before the Burundian courts are the ACHPR, the DUHR and the ICCPR. As mentioned earlier these instruments form an integral part of the 2005 Burundi Constitution.

¹¹⁰ n 108 above.

¹¹¹ n 108 above.

application will often be decisive for the correct transposition of these instruments.¹¹² The intervention of the Courts through the principle of consistent interpretation is even crucial where there is some discrepancy between the wording of the international norm and the implementing legislation.¹¹³ The Burundian courts have to bear in mind that, as far as interpretation of national law is concerned, the current tendency is for the courts to prefer the interpretation that is consistent with international law.¹¹⁴

3.2.2 The role of the Constitutional Court

The development of international human rights law supposes of course the domestic courts apply them as a source of remedy or as a source of interpretation of domestic norms. This statement is reflected in the 2005 Burundian Constitution, which provides that “[t]he judiciary, guarantor of the rights and public liberties ensures respect of these rights and liberties in conditions provided by law”.¹¹⁵ The best way for the judiciary to ensure respect of human rights is to apply them as a source of remedy to a violation or a source of interpretation for further better use and respect. Human rights must then be justiciable for this purpose. The beneficiary of a right should be able to ensure its effectiveness in law.¹¹⁶ The easiest way for an individual to enforce his rights is before his own courts.¹¹⁷

¹¹² See case 300/95, *Commission v UK* [1997] ECR I-2649.

¹¹³ S Prechal *Directives in European Community Law* (1995) 210.

¹¹⁴ See for example section 233 South Africa Constitution read together with sections 35 (1) (3) and 37 (4). See also the spirit of the *Bangalore Principles*. The seventh principle noted and welcomed the "growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether, constitutional, statute or common law - is uncertain or incomplete. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law." See M Kirby "The international law – The impact of national constitutions" Seventh Annual Grotius Lecture, delivered to the Annual Meeting of the American Society of International Law, Washington DC, 29 March 2005, and "The first ten years of the *Bangalore Principles* on the domestic application of international human rights norms" available on the site <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_bang11.htm> accessed 25 October 2005.

¹¹⁵ Art 60 Burundi Constitution.

¹¹⁶ n 85 above.

¹¹⁷ n 85 above.

In the case of Burundi, it is the Constitutional Court that is mostly vested with the role of ensuring respect of the Constitution and therefore constitutional rights, which encompass several international and regional human rights norms. According to the Constitution, the Constitutional Court is competent “to ensure respect of the present constitution, including the charter of fundamental rights, by the state organs and other institutions”¹¹⁸.

The Constitutional Court does not have a long history since it was created for the first time in 1992. Then it was suspended in 1996 when President Buyoya took over power for the second time.¹¹⁹ It was restored in 1998, when political negotiations between the Government and the different rebel armed groups started.¹²⁰

Within its 11 years of experience, the Constitutional Court is rather known for its role in matters regarding the constitutionality of the different political institutions (especially the Executive and the Legislature) than for its activism in human rights protection. Although the procedure before the Court is free,¹²¹ the study of its jurisprudence reveals that individuals have brought very few cases so far.¹²² A certain number of factors contribute to explain this state of affairs.

First, very few people really know the role of the Constitutional Court in the administration of justice. The role of this Court as a guarantor of human rights is diluted

¹¹⁸ See art 228 para 1 Burundi Constitution that deals with the competence of the Constitutional Court.

¹¹⁹ President Pierre Buyoya came into power twice through 2 successful coups d'état. The first one was in 1987. Then he gave it up after he was beaten in the 1993 democratic elections. For the second time, he took advantage of a political disorder, which characterised the Country in June and July 1996 and overthrew President Sylvestre Ntibantunganya who had come into power after political negotiations for power sharing between the two then principal political parties FRODEBU (*Front pour la Démocratie au Burundi*) and UPRONA (*Union pour le Progrès National*). He then suspended the Constitution and thus the Constitutional Court.

¹²⁰ Art 142-149 of the 1998 Transitional Constitutional Act.

¹²¹ See Cour Constitutionnelle du Burundi *Rapport de la Cour Constitutionnelle du Burundi*, (mars 2000) 5.

¹²² During its 11years of activity, the Constitutional Court has already decided 205 cases, among which only 60 cases were brought by individuals or groups of individuals. It is surprising that no case has been brought by human rights NGO. It is also interesting to note that the individuals that have appeared before the Court are not common people. Most of them are well known persons for their political, economic or social influence in the Country.

in a very broad jurisdiction that might confuse the individuals. Indeed, the Constitutional Court at the same time verifies the constitutionality of the presidential and legislative elections as well as the constitutionality of any referendum, ensures the constitutionality of organic laws, general laws, and regulations that are submitted to the Court by government administrators and parliamentarians for review, interprets the constitution, receives the oath of high political authorities including the President of the Republic, the two Vice-Presidents and the members of the Government, etc.¹²³ The Constitutional court of Benin that has such a broad jurisdiction has been criticised as running a plausible risk that a misstep by the Court in one of its competences could severely undermine its authority and legitimacy in other areas.¹²⁴ In addition, unlike in Benin, in Burundi there have been no human rights education programmes intended to create awareness on the role of the Constitutional Court in human rights enforcement. In Benin, as Rotman explains, there have been lots of human rights education programmes aimed at training people to make use of the Constitutional Court in cases involving human rights violations,¹²⁵ as she illustrates,

[t]wo-term Constitutional Court member Glèlè-Ahanhanzo, who also serves as President of the Institute for Human Rights and the Promotion of Democracy, has undertaken one unique education effort by hosting a weekly radio program[me] to teach the public about human rights and discuss decisions of the Constitutional Court. His NGO has published several short books to educate the public on human rights, including one entitled: "The Constitutional Court and Human Rights," which includes a selection of decisions where the Court found the petitioners' constitutionally protected human rights had been violated. The Association of Women Jurists of Benin, an NGO led by current Court member Clotilde Médégan, has as its mission to educate the public on the rights accorded to them by the Beninese [*sic*] Constitution, and the international conventions and charters to which Benin adheres.¹²⁶

Such campaigns of sensitisation on the role of the Constitutional Court in the enforcement of human rights are very important in that they encourage individuals to seek remedy for the violations of their rights. Furthermore, the fact that the judges themselves conduct them inspires even more confidence to potential petitioners.

¹²³ See generally article 228 para 1.

¹²⁴ A Rotman "Benin's Constitutional Court: An Institutional Model for Enforcing Human Rights" (2004) 104 *ExpressO Preprint Series* 17 available on the site <<http://law.bepress.com/expresso/eps/104>> accessed 6 October 2005.

¹²⁵ (n 124 above) 22-23.

¹²⁶ n 125 above.

Second, the rules for individual standing before the Constitutional Court are too restrictive. The individuals as well as NGOs or other juristic persons can only seize the Court to review the constitutionality of laws or regulatory acts.¹²⁷ While acknowledging that the judicial review of laws and regulations is an important guarantee for human rights protection, it is contended that the jurisdiction of the Constitutional Court should not be merely confined to it as far as individual standing is concerned. It is well known that traditionally, a bill of rights regulates the relationship between the individual and the state.¹²⁸ The state is far more powerful than any individual, and is endowed with 'state authority' that gives it a monopoly on the legitimate use of force within its territory, especially in criminal matters.¹²⁹ Its organs and institutions that have gotten the mandate to use this force may abuse it to the detriment of the vulnerable individuals if the latter are not empowered with effective recourse to courts.¹³⁰ Therefore, it is important that individuals should have expansive standing to challenge not only the constitutionality of laws but also the constitutionality of state organs' conduct that infringes or threatens their rights.¹³¹ As judge Chaskalson points it out, in *Ferreira v Levin*,¹³² it is important

[t]hat we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.¹³³

The developing doctrine is also of the view that norms of international law in general and of human rights in particular are most successfully enforced if groups and individuals are given standing before domestic courts to enforce such norms.¹³⁴

¹²⁷ Art 230 para 2 Burundi Constitution.

¹²⁸ J De Waal *et al.* *The Bill of Rights Handbook* (2001) 45.

¹²⁹ n 128 above.

¹³⁰ n 128 above.

¹³¹ (n 128 above.) 81-82.

¹³² *Ferreira v Levin* No 1996 (1) SA 984 (CC) para 165.

¹³³ n 132 above.

¹³⁴ Baumgartner, S P "Human rights and civil litigation in the United States courts: The Holocaust-era cases" (2002) 80 *Washington University Law Quarterly* 838. See also W J Aceves, "Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation", 41(2000) *Harvard International Law Journal* 129, 160-71 (using the Pinochet litigation in Spanish and English courts as a case study to show the effectiveness of litigation initiated by private groups in domestic courts to enforce international human rights law).

Refusing standing to individuals to challenge state conduct that violates or threatens rights implies for the case of Burundi that all cases of confessions under coercion or torture, all cases of rape, looting and massacre of civilians perpetrated by the governmental forces during the ongoing civil war will never reach the Constitutional Court, since there is no law or regulation that allows such practices to be challenged on the ground of unconstitutionality.

Furthermore, the standing of individuals before the Constitutional Court should also be extended to challenging private conduct that violates rights. As far as the Burundian Constitutional Court is concerned, no cases involving violations of human rights by private actors have been brought to it so far. However, the Court has the possibility to extend its traditional jurisdiction to unconstitutional private conduct through a broad interpretation of article 228 of the Constitution. This provision allows the Constitutional Court to ensure respect for the Constitution not only by state organs, but also by other institutions.¹³⁵ I contend that in “other institutions”, as opposed to state organs, the constitutional judge should read “private actors” that include all kind of private organisations and companies.¹³⁶ However this interpretation of “other institutions” still excludes unconstitutional individual conduct from the jurisdiction of the Court since the term “institution” can rarely be used to refer to an individual.¹³⁷

The Constitutional Court of Benin has come up with a decision that put aside the question whether private parties (including individual) dispute should become a substantial part of the jurisprudence of the Court.¹³⁸ In Decision DCC 02-065, a citizen invoked his right to a healthy, satisfactory and durable environment under article 27 of the Constitution in a complaint that alleged violations by the Ministry of Public Health, the Environment, and Housing and Urban Development as well as his neighbour, a private citizen. The Court found that the Ministry had not violated the Constitution, noting it had taken all measures within its powers to address the environmental and health hazards

¹³⁵ Emphasis added.

¹³⁶ According to Oxford Advanced Learner's Dictionary (2000), institution means “a large important organi[s]ation that has a particular purpose...”

¹³⁷ A S Hornby *The Oxford Advanced Learner's Dictionary* (2000) says that the term “institution” can, in an informal and humorous way, refer to “a person who is well known because they have been in a particular place or job for a long time.”

¹³⁸ (n 124 above) 20.

caused by the neighbour's henhouse. Nonetheless, the Court concluded that the neighbour had violated the Constitution by installing the henhouse in the particular location in question, and granted the petitioner the right to reparations.¹³⁹ This case should be a good example for the Burundian Constitutional Court to broaden its competence by allowing the individuals to bring cases against other individuals.

Third, the Court does not order any kind of monetary compensation as reparation in the case of violation of the Constitution. While the judgments of the Burundian Constitutional Court are legally binding, the institution is a jurisdiction of attribution, which means the Court's authority is limited to a determination of when the Constitution is violated. This power is identical to that exercised by the Constitutional Court of Benin. What is surprising for the latter is that, contrary to the former, allows individuals who allege violations of human rights to access it immediately and directly.¹⁴⁰

It is one thing for a constitutional court to declare a law contrary to the constitution. It is another thing for a court to hold that a human right constitutionally guaranteed to a citizen has been violated. In the former scenario, the decision brings about immediate change in the form of changed legislation.¹⁴¹ In the latter, the violation has usually already been endured, so absent concrete remedies, the decision only amounts to a moral victory for the citizen.¹⁴² The only human rights decisions where adjudication of constitutionality may result in remedies are those cases in which the abuse was not physical. These cases tend to deal with economic or property rights where the matter under review is whether or not an asset is owed to the citizen. Here, when the Court decides the Constitution has been violated, the offending institution is bound by the decision and presumably must remedy the situation. In a case involving arbitrary nationalisation of a private company in violation of the right to property guaranteed by

¹³⁹ Benin Constitutional Court Decision DCC 02-065 (2002).

¹⁴⁰ Art 121 para 2 Benin Constitution.

¹⁴¹ (n 124 above) 42.

¹⁴² On occasion, the case is filed while the alleged abuse is still underway. See, e.g., Benin Constitutional Court Decision DCC 02-002 (2002), a prison torture case filed while the petitioner was still incarcerated. A delegation from the Court went to the prison where they saw that the prisoner wore leg shackles, and had been wearing them for 14 months. The Court found that despite the precarious security conditions and the "unbearable character of the prisoner", the prison could not justify that someone be in shackles for so long. Presumably, upon being notified of the decision the prison was required to modify the conditions in which the prisoner lived.

the Constitution, the Burundian constitutional Court declared unconstitutional the law – decree that was supporting the nationalisation.¹⁴³

The Court did not specify that the petitioners deserved any kind of reparation, but it is presumable that they took the decision to a competent Court to argue on their right to compensation.

Therefore in total, it is a fact that the Burundian Constitutional Court is constitutionally vested with the role of ensuring respect of the Constitution that includes the Charter of fundamental rights and liberties. However, the enforcement of these rights requires the Court to be well equipped with a jurisdiction to adjudicate on cases of human rights violations, to establish responsibilities and grant adequate reparations. If not, the capacity of the Court to develop the Burundian human rights jurisprudence in accordance with the international human rights law will still be weakened.

3.3 Conclusion

In this Chapter, the issue falling for discussion was mainly, the enforcement of international human rights law by the Burundian courts. It was noted that the Burundian judiciary is reluctant to base judgments on international human rights norms either as source of remedy or source of interpretation of national law. Disappointingly, there is neither a clear rationale behind this practice by the courts, nor did any manifest itself in the course of the analysis. However, apparently, the major drawback is the restrictive jurisdiction accorded to the Constitutional Court thereby making it virtually inaccessible to individuals. This is in light of the fact that individuals often prosecute human rights violation claims that have a direct bearing on the rights and freedoms enshrined in international human rights instruments. Consequently, the Constitutional Court would have an opportunity to establish its jurisprudence based on international human rights law and procedure. Recommendations should, therefore, be channelled towards lobbying for the extension of the Court's competence by amending relevant provisions on standing. This does not, however, precede the need for judicial activism, which is evidently lacking in the system as a whole. The next chapter will discuss the role played by the Burundian lawyers, as essential players in the enforcement of international human rights law by the domestic courts.

¹⁴³ Burundi Constitutional Court Decision RCCB 47 (1994).

CHAPTER 4: THE BURUNDIAN LAWYERS AND THE ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW

4.1 Introduction

The role of lawyers is becoming undoubtedly indispensable in the enforcement of international human rights.¹⁴⁴ In Burundi, the right to defence in criminal matters is now constitutionally guaranteed.¹⁴⁵ But the international human rights law is also developing through systematic use by the lawyers to found causes of actions, or more usually, to support argument on behalf of a client in relation to a cause of action in a domestic court.¹⁴⁶

This chapter will scrutinise the role already played by Burundian lawyers in the enforcement of international human rights law by domestic courts. It will also provide the Burundian lawyers with some basic legal principles and reasoning to enable increased use of international human rights law in domestic courts. These principles include the adoption of a human rights perspective to their litigations and the consistent practice of the *pro bono* legal assistance.

4.2 The role of the Burundian lawyers in the interpretation and application of international human rights norms

In numerous jurisdictions, the principle that proscribes the judge from ruling *ultra petita* is rigorously observed. This implies that the judge, while deciding a case, cannot go beyond the arguments or authorities adduced in that case.¹⁴⁷ Therefore, the lawyer is required to argue the case by demonstrating clearly how the law invoked applies to the facts presented to the court. This principle applies in the same way when the case requires the application of an international human rights provision. The lawyer must bring this provision to the attention of the court and prove how it applies to the facts. This requires the lawyer to be human rights sensitive. However, even when the lawyer fails to

¹⁴⁴ Centre des Nations Unies pour les Droits de l'Homme au Burundi (CNUDH) *Rapport du Séminaire de formation aux droits de l'homme et au rôle du Pouvoir Judiciaire dans une société démocratique* (1994) 12.

¹⁴⁵ Art 39 para 3 Burundi Constitution.

¹⁴⁶ R Layton (n 83 above).

¹⁴⁷ R Layton (n 83 above) 20.

invoke a relevant international human rights provision, judicial activism requires that the court, as the highest guardian of human rights and freedoms, should bring it to the attention of the parties and request for a full address of that point of law. Alternatively, the court may have to categorically raise the point of law in the judgment demonstrating displeasure as to why the parties did not raise it.

In Burundi, most of the regional and international human rights instruments were ratified in late 1980s and in early 1990s with the shaking trend of democratisation in Africa.¹⁴⁸ This means that the history of their application by the Burundian courts is only 15 years old. However, it is erroneous to think that the ratification was enough for the courts to start giving them effect domestically. Indeed, before mid 1990s, human rights, as an independent subject, were not on the curriculum of the faculty of law of the University of Burundi.¹⁴⁹ To date, human rights is still an optional subject that counts only for 2 credits.¹⁵⁰ As a consequence, most of the courts are not yet familiar with human rights and few lawyers use them in their litigations.

As will be explained below, the current jurisprudence demonstrates little interest of the Burundian lawyers to recourse to international human rights instruments while substantiating their cases. If the international human rights law is to be enforced by the courts in Burundi, the lawyers must adopt a consistent human rights perspective, where applicable, in litigation be it civil or criminal. However, due to lack of access to the Burundian jurisprudence in civil matters for the reasons explained in the first chapter of this study, the following developments will only analyse the extend to which Burundian lawyers have been adopting a human rights perspective in criminal litigation.

The criminal litigation is certainly the one that raises grievous human rights violations since its outcome is always likely to undermine life and liberty of individuals.¹⁵¹ That explains why the international community made the right to be assisted by a legal

¹⁴⁸ The ACHPR was ratified in 1989, the ICCPR and ICESCR, in 1990, the CEDAW in 1992, the CAT in 1993, and the CRC in 1990.

¹⁴⁹ Information given by Mr. Déo Ntahnkiriye, current Deputy Dean of the faculty of law at the University of Burundi.

¹⁵⁰ n 149 above.

¹⁵¹ L Nzeyimana "L'organisation du pouvoir judiciaire et le rôle du Barreau (Cas du Burundi)" (1994) unpublished paper presented in a workshop organised by the United Nations Centre for Human Rights in Burundi, Bujumbura, 16 November 1994.

counsel of one's choice in criminal matters absolute.¹⁵² The ICCPR also set down a certain number of guarantees that should be provided by the states to ensure fair trials to their populations in the administration of justice.¹⁵³ The role of the lawyers is thus, not only the one of assisting their clients to have their rights respected, but also the one of assisting the courts to implement the state's international obligations on its territory. Put clearly, the role of the lawyers is to assist the state in the application and interpretation of the international human rights instruments in which these principles are embedded, by its own courts.

The Burundian lawyers are certainly aware of the existence of these international human rights instruments. It is also without doubt that they know that most of them are incorporated in the Constitution. However, the practice reveals that the legal discussion of the norms that are entrenched in these instruments in the courts is rare and inconsistent. In addition, very few international human rights instruments are invoked.

As Heyns and Viljoen point out in the case of Senegal, “[a] search of the [Burundian jurisprudence] is complicated by the fact that judicial decisions ... are not reported on a regular basis.”¹⁵⁴ A study of the jurisprudence of the highest courts as far as criminal issues are concerned¹⁵⁵ reveals that the lawyers rarely base their pleadings on international human rights norms. In *Ministère Public v Minani Jean*,¹⁵⁶ the prosecutor was alleging that the defendant confessed before the police that he had committed the murder he was accused of.¹⁵⁷ Counsel for the defendant pleaded not guilty and refuted the argument of the prosecutor by stating that his client had confessed under torture.¹⁵⁸ Although Burundi is party to the CAT since 1990, the defendant's Counsel did not invoke this instrument. The Court merely accepted the material proof brought by the

¹⁵² See art 14 (3) (d) ICCPR and art 7 (c) ACHPR.

¹⁵³ See generally art 14 (3) ICCPR.

¹⁵⁴ C Heyns and F Viljoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 524.

¹⁵⁵ These are the 3 courts of appeal and the Supreme Court.

¹⁵⁶ *Ministère Public v Minani Jean* RPCC 636 / RMPG 1153 (1998).

¹⁵⁷ (n 156 above) 2.

¹⁵⁸ (n 156 above) 3.

delegates of Amnesty International¹⁵⁹ but did not ask the lawyer which was the applicable law in such a circumstance. This would have given to the Court the opportunity to interpret and apply this instrument. In another case, a suspect was tortured to death by the police in order to obtain a confession.¹⁶⁰ The prosecutor¹⁶¹ who was charging the police officer based arguments on the Penal Code, which merely penalises torture without defining the concept itself.¹⁶² He failed to invoke the CAT and by the same token deprived the Court of the opportunity to interpret and apply the Convention. The same reluctance of lawyers to invoke the CAT appears in the cases *Ministère Public v Ndayisaba Mathias and Others*,¹⁶³ *Bazubona Nephtalie v Ministère Public*,¹⁶⁴ and *Ministère Public v Kanuma Dieudonné and Others*.¹⁶⁵

The CAT is not the only international instrument that seems not to attract the Burundian lawyers in criminal litigations. Even the ICCPR, the UDHR and the ACHPR are not consistently referred to. While it is well known that the violation of rules of the criminal procedure results in violation of the basic principles of a fair trial set down by the ICCPR and the ACHPR,¹⁶⁶ few Burundian lawyers use these instruments to plead their cases. In the case *Ntahimpera Gaspard v Ministère Public*¹⁶⁷, Fabien Segatwa, the well known Burundian lawyer for his involvement in the assistance of the accused of 1993 massacres, referred to the ICCPR and to the UDHR to prove the violation of the right to defence of his client. No mention was made of the ACHPR.¹⁶⁸

Moreover, many other violations of basic principles of criminal procedure were pointed out without reference to any international human rights instrument. These principles

¹⁵⁹ The delegates of Amnesty International had gotten the occasion to visit the place where the accused was detained and took pictures from which acts of torture could be easily detected. See *Ministère Public v Minani Jean* (n 156 above).

¹⁶⁰ *Ministère Public v Bakundukize Déogratias and Nikobamye Léonard* RPCC 516/ RMPG 950/ NDA (1999).

¹⁶¹ In the civil law system, the prosecutor stands for a lawyer whose role is to defend public interest.

¹⁶² See article 171 para 5 1981 Penal Code.

¹⁶³ *Ministère Public v Ndayisaba Mathias and Others* RPCC 722 BJM (2001).

¹⁶⁴ *Bazubona Nephtalie v Ministère Public* RPA 605/GIT/ RP 805/RUY/ RMP 2569/ND (2001).

¹⁶⁵ *Ministère Public v Kanuma Dieudonné and Others* RP 13146/ RMP 105260/NGI (2001).

¹⁶⁶ See generally art 14 ICCPR and art 7 ACHPR.

¹⁶⁷ *Ntahimpera Gaspard v Ministère Public* RPC 1128 (2002) 5.

¹⁶⁸ Art 7 (c) ACHPR guarantees the right to defence.

included the right to be informed immediately of the reasons for arrest or detention¹⁶⁹ and the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power and to trial within a reasonable time or to release.¹⁷⁰ Therefore one can simply conclude that the Burundian lawyers generally do not give an international perspective to their litigation as far as human rights are concerned. Even those who demonstrate some interest for international human rights law do not refer to them consistently. As it was said earlier, this attitude is very detrimental to the enforcement of international human rights by the Burundian courts.

4.3 Consistent practice of *pro bono* legal assistance

Lawyers constitute one of the fundamental pillars for maintaining the rule of law in a democratic society and ensuring the efficient protection of human rights.¹⁷¹ As stated in the Basic Principles on the Role of Lawyers:

adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.¹⁷²

In the context of Burundi, legal advice and assistance is important in police stations and prisons, which are full of thousands of suspects and prisoners, most of them detained for lengthy periods of time in inhumane conditions.¹⁷³ As it was reported by Mr. Okola, independent expert on the situation of human rights in Burundi,

¹⁶⁹ Art 9 (2) of the ICCPR.

¹⁷⁰ This principle is underpinned by the right to personal liberty provided for in art 3 of the UDHR, art 9 of the ICCPR and art 6 of the ACHPR and which was declared fundamental by the African Commission on Human and People's Rights in *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* Comm. Nos. 64/92, 68/92, and 78/92 (1995).

¹⁷¹ UNHCHR "International human rights law and the role of the legal professions: a general introduction" available on the site <http://www.unhchr.ch/pdf/CHAPTER_1.pdf> accessed 18 August 2005.

¹⁷² See para 9 of the preamble Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹⁷³ A Okola "Report on the situation of human rights in Burundi" UNGA A/60/354 (September 2005) para 41.

[P]eople are still being detained beyond the time limits established under the Code of Criminal Procedure. Many detainees are reported to have spent several years in detention, sometimes up to nine years, without sentence.¹⁷⁴

In the case of *Ntahimpera Gaspard* referred to above for example, the appellant was detained for 4 years and 3 months.¹⁷⁵ Yet it was noted by the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa,

prolonged incarceration of suspects and prisoners without providing access to legal aid or to the courts violates basic principles of international law and human rights, and ... legal aid to suspects and prisoners has the potential to reduce the length of time suspects are held in police stations, congestion in the courts, and prison populations, thereby improving conditions of confinement and reducing the costs of criminal justice administration and incarceration.¹⁷⁶

Legal assistance is so important that the international community decided to impose an obligation on states to assign a lawyer to any accused person who requires to be assisted.¹⁷⁷ However, as pointed out by Nzeyimana, a member of the Burundian Bar Association, the implementation of this principle in Burundi, as well as in many African countries, is problematic.¹⁷⁸ He singled out 4 major factors, which undermine this implementation.¹⁷⁹

These are the norms of organisation of the Bar, which did not guarantee the independence of the lawyers,¹⁸⁰ insufficiency of human resources,¹⁸¹ small income of the population, and the problem of guarantees of protection and independence of the lawyers.

¹⁷⁴ n 173 above.

¹⁷⁵ *Ntahimpera Gaspard v Ministère Public* (n 158 above).

¹⁷⁶ See para 5 of the preamble The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (November 2004).

¹⁷⁷ See art 14 (3) (d) ICCPR and art 7 (c) ACHPR.

¹⁷⁸ n 151 above.

¹⁷⁹ n 151 above.

¹⁸⁰ Until 2002, when a new law on the status of lawyers was adopted, the Judiciary was still responsible for admissions to the Bar and for disciplinary measures within the Bar.

¹⁸¹ L Nzeyimana held that at the moment he wrote the above-mentioned paper, there were only 22 lawyers all over the country which was counting around 6 millions of people. See n 151 above.

Although most of these problems have been resolved by the new law on the status of lawyers,¹⁸² poverty is still a problem that seriously undermines the access to legal assistance. The government lacks enough resources to assign lawyers to accused persons, particularly in the current context where the Country is recovering from a 12-year civil war. Therefore, the principle of *pro bono* legal assistance should be encouraged by the Bar itself in order to assist the government in the implementation of its international obligations in regard to legal assistance in criminal matters.¹⁸³ The other non-state actors should also get involved in supporting the Bar to discharge this noble duty with less expenses. In this regard, acknowledgment should be made of the role played so far by *Avocats Sans Frontières* (Lawyers Without Borders), a Belgian NGO that has just created 3 centres of free legal assistance throughout the Country.¹⁸⁴ These centres provide assistance for both criminal and civil litigation that raise human rights issues. They are indeed open to any victim of torture, sexual violence and to all the victims or accused of the interethnic massacres of October 1993. Other beneficiaries are all vulnerable persons including widows and orphans having land problems or in case of disproportion of force between parties.¹⁸⁵

4.4 Conclusion

The vitality of the role of Burundian lawyers in the enforcement of international human rights at the domestic level has been demonstrated. It was observed that indeed the lawyers not only have the duty to defend interests of their clients before courts, but also to assist the latter to find the law applicable to specific cases. It was also mentioned that the Burundian judge can never rule on a point of law unless it has been brought in

¹⁸² Loi N°1/014 du 29 novembre 2002 portant réforme du statut de la profession d'avocat.

¹⁸³ Art 55 of the new law on the status of lawyers provides that the judge who has reasons to believe that one party to the trial lacks enough resources to ensure his (her) defence can assign him (her) *de facto* one of the lawyers present to the Court's hearings or invite the President of the Bar Association to find him (her) another lawyer. The lawyer appointed in this case is obliged to assist the person save in case he (she) demonstrates to the Judge or the President of the Bar who appointed him (her) that he (she) is unavailable.

¹⁸⁴ These centres are operational in 3 provinces located in 3 different regions: Bujumbura Province (West), Gitega Province (Centre) and Ngozi Province (North). They officially opened respectively on 10 October, 9 September and 12 September 2005. See Agence Burundaise de Presse (ABP-INFO) No 3724 "Une ONG vient d'ouvrir la "Boutique Juridique" au Burundi" (14 October 2005).

¹⁸⁵ ABP- INFO No 3724 (n 184 above).

argument by the parties. Therefore, the lesser the Burundian lawyers invoke international human norms in their litigation, the lesser their application and interpretation by the courts.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The enforcement of international human rights instruments in the domestic judicial system requires that the domestic legislation allow the courts to apply them. In the case of Burundi, it was seen that most of the international human rights instruments are part of the Constitution. Moreover, even those, which have not yet been integrated in the Constitution, are justiciable as far as they have been ratified. This means that a claimant can directly invoke them before the national courts to seek reparation for human rights violated. However, the practice of the Burundian courts reveals reluctance to base their judgments on international human rights norms even when the claimants has invoked them.

This attitude is contrary to the principle of consistent interpretation that requires the domestic courts to consistently interpret the national norms in accordance with the international law. In addition, human rights can never be given effect if they just remain confined in the texts that are never applied by the courts.

The Constitutional Court whose jurisdiction is to ensure respect of the Constitution including the Charter of fundamental rights is still almost inaccessible to individuals and groups of persons. Indeed, the competence of this Court entitles it to only adjudicate on cases brought by individuals or groups of individuals only for control of constitutionality of laws. The current jurisprudence does not show any attempt by this Court to extend its jurisdiction to cases of human rights violations that are perpetrated by both state organs and individual conduct. The direct consequence of this is that the only kind of remedy to seek before this Court is the declaration of violation amounting in the moral victory of the victim. While it is known that the right to effective remedy encompasses the right to be granted monetary compensation for the suffering caused by the violation of one's rights, it is surprising that a court whose mandate is to ensure respect for human rights does not order monetary compensation. This limitation is also detrimental to the enforcement of the international human rights instruments since few individuals will be motivated to bring cases before this Court.

The role of the Burundian lawyers in the enforcement of the international human rights by the domestic courts is also crucial. Indeed, as Nzeyimana points out, law has its own

terminology that is not understandable by the common people.¹⁸⁶ He went on to state that the Burundian judicial procedures are too complex, that only specialists of law can have good command of them.¹⁸⁷ However, the role of lawyers is not only limited to the defence of individual interest in litigation, but also to assist the courts in the administration of justice by showing to the courts which laws are infringed and which ones have to be applied. Therefore, there is no doubt that the more the Burundian lawyers will adopt a consistent international human rights perspective in all their litigation, the more the courts will apply and interpret them.

5.2 Recommendations

If international human rights law is to be given effect in the Burundian judicial system, the national legislation needs to conform as much as possible with the international human rights instruments to which Burundi is a party. This would remedy, in part, the reluctance of the courts to apply international human rights norms. In any case, the Burundian judges should always adopt a sense of scrutiny of every international human rights norm brought before them by a claimant. In this regard, reference should always be made to the jurisprudence of the human rights treaty bodies, which have the required expertise as far as interpretation of these norms is concerned.

The Constitutional Court should adopt a broad interpretation of its jurisdiction in order to allow itself to adjudicate on cases of state organs and individual conduct that infringes the human rights provisions of the Constitution. Such a competence would permit the Constitutional Court to order effective remedy including monetary compensation to victims of human rights violations and encourage the individuals to bring cases before it.

The lawyers should adopt an international human rights perspective in litigation. The Burundian Bar Association, the Government as well as all the non-state actors involved in human rights protection should promote the practice of *pro bono* legal assistance. Otherwise the enjoyment of human rights will only be guaranteed to individuals who can

¹⁸⁶ n 151 above.

¹⁸⁷ n 151 above.

afford to pay legal services, which are very expensive in a country where most of people are living under the poverty datum line.¹⁸⁸

The Government as well as non-state actors should also undertake human rights education campaigns intended to create awareness of human rights enforcement mechanisms amongst the population, particularly the grassroots.

The international human rights law should be taught in all the faculties of law as a compulsory subject and not as an optional one.

The Government and non-state actors should also establish programmes of continuous trainings of the judiciary and the lawyers on their role in human rights enforcement. Indeed, although some human rights NGOs tried to organise seminars and conferences in this regard, this is not enough. The Burundian judges need to learn from other countries' practice as far as international human rights enforcement is concerned. Therefore, the Government should plan to send continuously the members of the Judiciary to attend international trainings on domestic adjudication on international human rights law.

Word count: 15487

¹⁸⁸ The 2004 United Nations for Development Programme (UNDP Burundi) report on the realisation of the Millennium Goals states that the number of persons living the poverty datum line increased considerably moving from 33 % in 1990 to 67% in 2001. See Programme des Nations Unies pour le Développement (PNUD Burundi) "Rapport d'Avancement: Objectifs du Millénaire pour le Développement" (2004) 8, available on the site <<http://www.bi.undp.org/rapports/omd2004.pdf>> accessed 25 October 2005.

BIBLIOGRAPHY

1. Books

Anzilotti, D (1999) *Cours de droit international* Paris: Panthéon-Assas.

De Waal, J *et al.* (2001) *The Bill of Rights Handbook* Juta & Co: Kenwyn.

Dixon, M (1996) *Textbook on international law* Clarendon Press: New York: Oxford University Press.

Friedrich, C J (1963) *The Philosophy of Law in Historical Perspective* New York: Atherton Press.

Heyns, C and Viljoen, F (2002) *The Impact of the United Nations Human Rights Treaties on the Domestic Level* The Hague: Kluwer Law International.

Hornby A S (2000) *Oxford Advanced Learner's Dictionary* London: Oxford University Press.

Kelsen, H (1945) *General Theory of Law and State* Cambridge: Harvard University Press.

Magoulias, H (1970) *Byzantine Christianity: Emperor, Church and the West* Chicago: Rand McNally.

Picciotto, C M (1915) *The relation of International Law to the Law of England and the United States* New York: McBride, Nast & Company.

Prechal, S (1995) *Directives in European Community Law: A Study of Directives and Their Enforcement in National Courts* Oxford: Clarendon Press.

2. Chapters in Books

Decaux, E "A report on the role of French judges in the enforcement of international human rights" in B Conforti and F Francioni (eds) (1997) *Enforcing international human rights in domestic courts* .

Higgins, R “The role of domestic courts in the enforcement of international human rights: The United Kingdom” in B Conforti and F Francioni (eds) (1997) *Enforcing international human rights in domestic courts*.

3. General Comments

General Comment No 9 of the UN Committee on Economic, Social and Cultural Rights on the domestic application of the Covenant (UN Doc A/CONF 39/27).

ICCPR General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14): 13/04/84.

4. Journal Articles

Aceves, W J “Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation” (2000) 41 *Harvard International Law Journal* 129.

Baumgartner, S P “Human rights and civil litigation in the United States courts: The Holocaust-era cases” (2002) 80 *Washington University Law Quarterly* 835.

Bayefsky, A F and Fitzpatrick, J “International Human Rights Law in United States Courts: A Comparative Perspective” (1992/1) 14 *Michigan Journal of International Law* 1.

Betlem, G and Nollkaemper, A “Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation” (2003) 14 *European Journal of International Law* 569.

Henkin, L “A Post-Cold War Human Rights Agenda” (1994/1) 19 *Yale Journal of International Law* 254.

Kelsen, V H “La transformation du droit international en droit interne” (1936) *Revue générale de droit international public* 5.

Kelsen, V H “Les rapports de systèmes entre droit interne et droit international” (1926) 4 *Recueil des Cours de l’Académie de droit international de La Haye* 231.

Leben, C “Hans Kelsen and the Advancement of International Law” (1998) 9 *European Journal of International Law* 287.

Ludwikowski, R “Supreme law or basic law? The decline of the concept of constitutional supremacy” (2001) 9 *Cardozo Journal of International and Comparative Law* 253.

Mangeot, E “Etude: Les rapports droit international-droit interne et la publication officielle des engagements internationaux” (décembre 2004) *Revue de l'actualité juridique française* 1.

McDougal, S “The impact of International Law Upon National Law: A policy-Oriented Perspective” (1959) 4 *South Dakota Law Review* 25.

Mukubwa, G P “International human rights norms in the domestic arena” (1997) 3 *East African Journal of Peace and Human Rights* 32.

Simma, B “The Contribution of Alfred Verdross to the Theory of International Law” (1995) 6 *European Journal of International Law* 1.

Slyz, G “International law in domestic courts” (1995-1996) 28 *New York University Journal of International Law and Politics* 65.

Steinhardt, R G “The Role of International Law as a Canon of Domestic Statutory Construction” (1990) 43 *Vanderbilt Law Review* 1103.

Thomas, C *et al* “The use of international labour law in domestic courts: Theory, recent jurisprudence, and practical implications” (2004) *Mélanges en l'honneur de Nicolas Valticos* 249.

Vereshchetin, V S “New Constitutions and the Old Problem of the Relationship between International Law and National Law” (1996) 7 *European Journal of International Law* 29.

5. Legislation

Burundian legislation

Burundi Constitution (2005).

Burundi Code of Criminal Procedure (1999).

Burundi Penal Code (1981).

Burundi Transitional Constitutional Act (1998).

Loi N°1/014 du 29 novembre 2002 portant réforme du statut de la profession d'avocat.

Foreign legislation

Benin Constitution (1990).

DRC Constitution (2003).

France Constitution (1958).

Germany Constitution (1949).

Rwanda Constitution (2003).

South Africa Constitution (1996).

US Constitution (1787).

Zambia Constitution (1996).

International and regional legislation

African Charter on Human and Peoples' Rights (1981).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

International Covenant on Civil and Political Rights (1966).

Treaty establishing the European Community (2002).

Universal Declaration of Human Rights (1948).

Vienna Convention on the Law of Treaties (1969).

6. Internet Sources

Alam, M S “Enforcement of International Human Rights Law by Domestic Courts” <<http://www.aals.org/international2004/Papers/alam.pdf>> accessed 15 August 2005.

Gémar, J C “Les trois états de la politique linguistique du Québec: D'une société traduite à une société d'expression” <<http://www.cslf.gouv.qc.ca/publications/PubB115/B115P1ch1.html#0>> accessed 23 August 2005.

Kirby, M “The first ten years of the *Bangalore Principles* on the domestic application of international human rights norms” <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_bang11.htm> accessed 25 October 2005.

Layton, R “When and how can domestic judges use international law in dualist systems?” <http://training.itcilo.org/ils/ils_judges/training_materials/english/Layton.pdf> accessed 10 October 2005.

Matejka, J “Is the Dualist-Monist controversy in International Law simply a fiction?” (2000) *Mezinarodni pravo vereine* <<http://mpv.juristic.cz/51001>> accessed 25 August 2005.

Petrova, D “Strengthening the role of law in building democratic societies: human rights in the administration of justice”. <<http://ww.imadr.org/general/2002/november.seminar.2html>> accessed 4 April 2005.

Programme des Nations Unies pour le Développement (PNUD Burundi) “Rapport d'Avancement: Objectifs du Millénaire pour le Développement” (2004) 8, <<http://www.bi.undp.org/rapports/omd2004.pdf>> accessed 25 October 2005.

Rotman, A “Benin’s Constitutional Court: An Institutional Model for Enforcing Human Rights” (2004) 104 *ExpressO Preprint Series* <<http://law.bepress.com/expresso/eps/104>> accessed 6 October 2005.

UN Department of Economic and Social Affairs Division for Social Policy and Development “International norms and standards related to disabilities” (2003) <<http://www.un.org/esa/socdev/enable/comp100.htm>> accessed 26 August 2005.

UNHCHR “International human rights law and the role of the legal professions: a general introduction” <http://www.unhchr.ch/pdf/CHAPTER_1.pdf> accessed 18 August 2005.

7. Newspapers articles

“Une ONG vient d’ouvrir la “Boutique Juridique” au Burundi” ABP- INFO No 3724 (14 October 2005).

8. Other Materials

Arusha Peace and Reconciliation Agreement for Burundi (August 2000).

Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Okola, A “Report on the situation of human rights in Burundi” UNGA A/60/354 (September 2005).

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (November 2004).

9. Unpublished documents

CNUDH Burundi *Rapport du Séminaire de formation aux droits de l’homme et au rôle du Pouvoir Judiciaire dans une société démocratique* (1994).

Cour Constitutionnelle du Burundi *Rapport de la Cour Constitutionnelle du Burundi*, (mars 2000).

Gakima, L M and Ndayiragije, J P Etude sur l’harmonisation de la législation nationale avec les instruments internationaux ratifiés par le Burundi en matière des droits de l’homme (2003) 22. Unpublished paper initiated by the UNDP Burundi, Democratic Governance BDI/02/008/01/34.

Kirby, M “The international law – The impact of national constitutions” Seventh Annual Grotius Lecture, delivered to the Annual Meeting of the American Society of International Law, Washington DC, 29 March 2005.

Nzeyimana, L “L’organisation du pouvoir judiciaire et le rôle du Barreau (Cas du Burundi)” (1994) unpublished paper presented in a workshop organised by the United Nations Centre for Human Rights in Burundi, Bujumbura, 16 November 1994.