

**ENFORCEMENT OF INTERNATIONAL HUMAN
RIGHTS LAW IN DOMESTIC COURTS IN
MOZAMBIQUE AND GHANA**

A DISSERTATION SUBMITTED TO THE CENTRE FOR HUMAN RIGHTS, FACULTY OF
LAW OF THE UNIVERSITY OF PRETORIA, IN PARTIAL FULFILMENT OF THE
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DECLARATION

I, **João Miguel de Brito Pinto Fernandes**, 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.

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DEDICATION

Papa e mana Mita,

A mais bela forma de celebrar este feito convosco é dedicar este trabalho a memória de vocês os dois.

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Thank you God for being always there for me in this long and hard way

Mentioning names is always a hard and ungrateful task, because injustices is always done, but not to mention them is even worst.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CHRC	Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
OAU	Organisation of African Unity
NGOs	Non Governmental Organisations
UDHR	Universal Declaration of Human Rights
UN	United Nations

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CHAPTER ONE: INTRODUCTION

1.1 Background of the study

After the Second World War, the world saw the need to create mechanisms to stop human rights violations. Consequently several international human rights instruments are being created to protect these rights.¹ However, before the 1960s very few African countries had received independence and could not be party to the instruments. Many African countries suffered gross human rights abuses during the colonial rule and saw independence as an end to the human rights violations. After independence several African countries ratified most of the international human rights instruments with the expectation that the human rights violations would come to an end, but the elites who took over power from the colonialists continued violating human rights of the people.

Mozambique received its independence in 1975 and in subsequent years ratified many international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and its second Optional Protocol, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC) and the African Charter on Human and Peoples' Rights (ACHPR), but the human rights record in the country remains very poor.² The 2004 Mozambican constitution provides for the acceptance and application of the Charter of the United Nations and the African Charter.³ The Constitution states that the constitutional precepts related to the fundamental rights should be interpreted and integrated with in harmony with the Universal declaration of Human Rights and the African Charter on Human and Peoples' Rights.⁴ It further provides that international norms after being ratified and publicized in the official journal have in the

¹ C Tomuschat: Human Rights 'Between Idealism and Realism', 2004, p28-34.

² U S Department of State: Country Reports on Human Rights Practices 2004 (Mozambique). available at < <http://www.state.gov/g/drl/rls/hrrpt/2004/41617.htm>> (accessed 15/10/2005).

³ Art 17 Mozambican Constitution, the 'African Charter' mentioned in this Article is interpreted in this paper to mean the Constitutive Act of the African Union.

⁴ Art 43 Mozambican Constitution.

internal order the same status of the normative acts enacted by the National Assembly and the cabinet.⁵

The domestic courts have not been able to enforce international human rights in Mozambique and there are no institutions to address the concerns of victims of human rights abuses. A limited number of NGO's operating in the field of human rights play a role, which is not significant considering the number. Several factors, for example, the lack of knowledge of international human rights instruments by the people in charge of administration of justice such as judges, prosecutors, or even lawyers and legal assistants may explain this. The present paper is an attempt to explore why the international human rights norms are not enforced in the Mozambican legal system; this will be done in a comparison with the situation Ghana.

1.2 Statement of the problem

Mozambique got its independence in 1975 and has had three constitutions, with the 2004 Constitution being the latest. A clause that recognises the automatic application of some international human rights instruments and transformation in ordinary laws for others were enshrined in these three constitutions.⁶ In practical terms this clause has no effect because the courts have not applied these instruments of automatic application neither have they applied the instruments that have been transformed in national laws.

1.3 Objectives of the study

The objective of this study, which is entitled, *enforcement of international human rights law by domestic courts in Mozambique and Ghana*, is to:

- Analyse why international human rights are not enforced by domestic courts in Mozambique,

⁵ As above art 18 (1)(2).

⁶ Art 17 (2): The Republic of Mozambique accepts, observes and applies the principles of the African Charter and the Charter of the United Nations.

- Examine whether international human rights norms are applied in the domestic courts of Ghana,
- Analyse how the system of reception of the international human rights in the Mozambican national legal order affects their enforcement by domestic courts and,
- Analyse ways to improve the enforcement of international human rights by domestic courts in Mozambique making a comparison with Ghana's system of enforcement of international human rights by domestic courts.

1.4 Hypothesis

The research is based on the following hypothesis:

- I. The lack of enforcement of international human rights by domestic courts in Mozambique is essentially due to the lack of knowledge of these instruments by judges and lawyers.
- II. The direct application of international human rights instruments without transformation into ordinary laws in the Mozambican legal system will impact positively on the enforcement of these instruments.
- III. The introduction of human rights training for judges, lawyers, in universities and other higher institutions of learning will have a positive impact on the application of these instruments in Mozambique.

1.5 Significance of the study

This study is significant for the Mozambican society, especially those concerned with human rights. The lesson drawn from this study could provide starting points for reforming and improving the international human rights enforcement by the Mozambican domestic courts and other institutions with mandate to do so.

1.6 Research Questions

In view of the situation described above, these are questions to which this study intends to find answers.

- I. Is it necessary to reform the manner in which international human rights is enforced by the Mozambican domestic courts?
- II. What is the starting point on carrying out a reform on enforcement of international human rights law by Mozambican domestic courts?
- III. How far has international human rights law enforcement by Mozambican domestic courts impacted on the exercise of fundamental rights?

1.7 Literature review

There is a wealth literature discussing different aspects of human rights. Enforcement is one very important aspect of realisation of human rights. This has been done at both the national and international levels. A number of researches have been carried out on the enforcement of human rights by domestic courts, which the researcher believes is a very important aspect in making human rights real. Benedetto Conforti argues that despite the existence of international mechanisms to enforce human rights there is still the need for local courts to enforce human rights.⁷ He argues further that without the enforcement of human rights by the local courts and public organs human rights enforcement will not be efficient.

Benedetto Conforti also gave a special attention to the applicability of human rights conventions by national courts; in this regard he argues that after international conventions are ratified by the state and have acquired formal validity in the state, nothing can prevent the applicability of such norms. Still according to him, it does not happen in practice mainly due to the court's lack of familiarity with such conventions.⁸

⁷ B Conforti: *Enforcing International Human Rights in Domestic Courts*, 1997, p 3.

⁸ As above p 7.

The author agrees with positions advanced by Benedetto Conforti that despite the existence of international human rights mechanisms, there still a need of enforcement by the local courts and public agencies at national level because local courts are in better position to enforce these rights at the national level. Taking into account the fact that most of the norms of the international instruments are transformed into national law which should give more flexibility to apply these norms, if compared with the long process that characterised the international enforcement of such norms using the avenues of international enforcement. The author takes a different view with regard to the position advanced by Conforti that after the internalization of such, there are no obstacles to its enforcement; the author is of the view that there are other obstacles apart from the familiarity with such norms, for example the tendency of courts to protect government interests at the international and national levels.

Morawa and Schreuer⁹ argue that despite the fact that domestic courts are potentially effective in enforcing human rights, there are considerable obstacles to the enforcement of human rights in local courts. They identify these obstacles as including lack of binding force of some international human rights instruments, non-incorporation in domestic law and denial of their self-executing character. As much the author adheres to this view, he has some reserves with regard the point of self executing character of international norms, the author is of the view that to provide the international instrument with self executing character would not give much impact of its applicability in domestic courts because the majority of the constitutions provide for a dualistic approach clause to international law, meaning that even with the self executing character of the norm, parliament in the national governments have to transform it into national law before the judges can apply it in the court in any other case, the judges will not apply the norm, even if self-executing if it goes against the interest of their governments.

According to Alam,¹⁰ there are differences between international and municipal law. These differences have been often over-exaggerated or understood differently from country to country, with the result that there exist widely diverging theoretical approaches towards understanding the relationship between international law and

⁹ A H E Morowa and C Schreuer: *Enforcing International Human Rights in Domestic Courts*, 2003, p 175.

¹⁰ M S Alam: *Enforcement of International Human Rights Law by Domestic Courts*, 2001, p1.

municipal law. This explains why status of international law in domestic legal systems and the role of the national courts to apply international law vary greatly from country to country. Alam further argues that these divergent perceptions of international law tend to weaken the regime of enforcement of international law in state territory, because states believe they have the liberty to apply the norms of international law in state territories the way they like, not the way they ought to. What Alam overlooks is that not all domestic systems are the same, in some systems; international law is part of the domestic law, for example Burundi and The Netherlands.

The author does not agree with the position taken by Alam that the existence of different theoretical approaches tends to weaken the enforcement of international law in domestic courts. In the modern constitutionalism, constitutions provide for the status of international law in the countries and there is no doubt how it applies in the different legal systems, therefore non-applicability of international law in domestic courts has little to do with the divergent theoretical approaches.

Judges in domestic courts are not spared from the criticism of non-applicability of international law in the courts; Karen Knop¹¹ argues that the common view among international lawyers is that judges need to be educated, encouraged, and acculturated to apply international law properly. She further argues that for many international lawyers, it is the ability of the domestic legal system to enforce international law through sanctions, so famously weak or absent in the international legal system that makes domestic courts so useful in the struggle for human rights. As much as the author agrees with her, the rhetoric of enforcement that dominates much of the recent scholarship does not simply promote domestic courts as a strategic choice. It reduces these courts to a simple compliance mechanism for international law, in effect not judges, but police. Karen Knop goes further arguing that without international institutions powerful enough to compel states; compliance is often seen as dependent on the conviction of binding nature of these instruments.

Dirceu Júnior¹² argued that the norms of international law are not efficient *per se*, the efficacy of the complex of norms of international law depends essentially on its

¹¹ K Knop: Here and There 'International Law in Domestic Courts', 2000, p502-504.

¹² D A D Cintra Júnior: O Judiciário e os Tratados Internacionais Sobre Direitos Humanos, 2005, p4.

promotion by the states through the executive, legislative and judiciary powers and also a international system of monitoring that is often made with help of NGO's. He also argues that in countries where the record of human rights is poor, the role of the NGO's is limited because they do not operate freely, affecting the system of monitoring and of compliance of governments with the international norms at the two stages, whether transformed or in the international form, thus the lack of knowledge of international norms in such country is not the main cause of non applicability but the regime in place that do not allow the applicability of international law.

The concept of the efficacy of the norms of international law used by Dirceu can be subject of some interpretations, the author does not agree with his point of view with regard of the efficiency of the norms of international law, the fact that in most of the cases the enforcement of human rights is under conditions of the powers of the executive and the judiciary it does not remove the efficacy of such norms, the norms may still be effective. But the system of enforcement at the national level is the main problem and not the norms *per se*.

The author agrees with Dirceu that NGO's play a role on enforcing human rights, it is true that their roles is limited in some cases, but this is not only because of repression by the national governments but sometimes the NGO's are few in number or almost non existent making their role in the enforcement of human rights limited, and this is the situation in some countries with poor human rights records.

Eyal Benvenisti¹³ takes credit for substantiating on a point most researchers undermine, the governmental interests when applying international law in domestic courts. He argues that national courts are governmental organs and thus required to conform to international norms; failure to do so may impose international responsibility on the state. Thus, for example, when a citizen from a certain community assaults another citizen, in most of the cases he is judged under criminal laws of the country and international human rights norms are rarely or never invoked. But, when a policeman assaults someone the matter is not seen as a violation of a norm of the penal code but norms of international human rights law. This implies that international responsibility to the state and interest from the government; the judges

¹³ E Benvenisti: Judicial Misgivings Regarding the Application of International Law 'An Analysis of Attitudes of National Courts, 1993, p159-161.

limit themselves to applying national laws to avoid penalising the government at the international level.

He poses the question as to whether one can blame the judges for their attitude. Some scholars have maintained that the particular judges should be blamed because they are consistent and careful not to trend on government interests and policies with their decisions. Benvenisti further argues that this consistent attitude is not the product of lack of courage or knowledge, but rather a result of deeper factors discussed below:

It is possible to identify the judicial tendency to defer from the executive in three distinct stages of the application of norms. First, judges tend to interpret narrowly those articles of their national constitutions that import international law into the local legal systems, thereby reducing their own opportunities to interfere with governmental policies in the light of international law. Second, judges tend to interpret international rules so as not to upset their governments' interests, sometimes actually seeking guidance from the executive for interpreting treaties. Third, courts use a variety of avoidance doctrines, either doctrines that were specifically devised for such matters, like the act of state doctrines, or general doctrines like standing and justiciability, in ways that give their own governments, as well as other governments, an effective shield against judicial review under international law.

As much as the author agrees with the position presented by Benvenisti, he finds the position rather presumptuous that the judiciary is always independent of the executive. Though supposedly independent, the judiciary is not in practice in many countries. It is a result of their lack of independence that judges in some cases rule in favour of their governments as opposed to human rights, but it is up to judges to assert their independence from the judiciary therefore, the author agrees with Benvenisti that the judges sometime carry the blame for non application of international law in domestic courts.

1.8 Research methodology

The qualitative approach will be used to gather the data needed to answer the research questions. The type of data needed justifies the use of the qualitative

approach to carry out this research. The research tools in the approach used will consist of interviews to be carried out by the author either telephonic or personal, review of published and unpublished documents, reports, legal documents and government documents.

1.9 Limitation of the study

The research is being carried out in Ghana, which will make it difficult for the researcher to carry out some physical interviews with some people and institutions involved directly or indirectly on the enforcement of international human rights in Mozambique. The lack of availability of information on the topic focusing on Mozambique will affect the discussion of the paper. The limitation in terms of the volume of the work limits the research on the enforcement of international human rights carried out by Mozambican domestic courts after 1975.

1.10 Provisional outline of the chapters

This paper is structured in five chapters. Chapter one is the introductory chapter, it essentially introduces to the topic; discuss the manner in which the research will be carried out; namely the methodological approach used, literature review, objectives of the study and its limitations, last but not least it outlines the research questions and the hypothesis.

Chapter 2 gives the definitions of the main concepts used in this paper; it goes further in discussing the relationship between national law and international law focusing in the theories of monism and dualism. It also analyses the constitutional provisions dealing with international law in the Mozambican and Ghanaian legal order in the light of the monist and dualist theories.

Chapter 3 discusses the sources of international human rights law and their implications on the enforcement of international human rights law in domestic courts. It goes further by discussing the principles governing domestic applicability of international human rights law and finally discusses the obstacles to the enforcement.

Chapter 4 is the case study of this paper, it analyses how international human rights law is enforced by domestic courts in Mozambique and Ghana and several other

aspects around the judiciary and the international human rights law training. Chapter 5 finally draws conclusions and gives recommendations on what should be done to ensure the enforcement of international human rights law in domestic courts.

CHAPTER TWO: DEFINITION OF THE MAIN CONCEPTS, RELATIONSHIP BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW

2.1 Definition of the concepts

The previous chapter discussed essentially how the research will be conducted and how the paper will be structured. This chapter introduces the concepts of monism and dualism and their implication for the reception of international human rights law into domestic laws. It also analyses the reception of international human rights law into the Mozambican and Ghanaian domestic laws in the light of these conceptions. An outline of several legal definitions to be used through the paper is given at the beginning of the chapter.

The title of the work “*enforcement of international human rights law by domestic courts in Mozambique and Ghana*”, encompasses seven legal concepts, but only some of these concepts will be explained here namely: enforcement, human rights and international human rights law.

Black’s Law Dictionary defines **enforcement** as the act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command.¹⁴ This will be the working definition for the purpose of this work.

Human rights are understood by the study as being those rights, which are inherent to human being. This concept acknowledges that every single human being is entitled to enjoy his or her human rights without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁵

International human rights law is a specific classification of public international law; it is composed of series of international human rights treaties and other instruments

¹⁴ H C Black: Black’s Law Dictionary, 1983.

¹⁵ United Nations: A Basic Handbook for UN staff, 1997, p2.

that emerged since 1945 conferring legal form on inherent human rights.¹⁶ It is also called **post war law**, which emerged in the middle of the 20th century as a response to the atrocities and horrors committed under Nazism during the Second World War¹⁷

It can be argued that international human rights law has its roots in the United Nations Charter (UN Charter) where the term 'human rights' was used.¹⁸ Subsequently, there was a declaration named Universal Declaration of Human Rights (UDHR). The UDHR came about as a Resolution of the United Nations General Assembly.¹⁹ This resolution was designed to give content to the general Charter provisions on human rights; accordingly, it sets out in 30 articles, a substantial scheme defining various human rights. The UDHR although not an international treaty with any judicial binding force for the international community, is nonetheless, one of the main sources for the interpretation of the phrase *human rights* as contained in the UN Charter in several nations.²⁰

Two international human rights instruments with binding character namely, International Covenant on Civil and Political Rights (ICCPR) (including the two Protocols), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were open to ratification. The former as the name says aimed to regulated civil and political, for example right to vote, freedom of expression and freedom of association and the latter

¹⁶ As above, p.3.

¹⁷ F Piovesan: A Constituição Brasileira de 1988 e os Tratados Internacionais de Protecção dos Direitos Humanos, *in* Enciclopédia e Dicionário de Direitos Humanos, available at <<http://www.dhnet.org.br/direitos/militantes/flaviapiovesan/flavia88.html> > (accessed 14/08/05); R Harvey: Children in Armed Conflict 'A Guide to International Humanitarian and Human Rights Law', 2004, p7.

¹⁸ H J Steiner; P Aliston: International Human Rights in Context 'Law Politics and Morals', 2000, p137-140.

¹⁹ United Nations, General Assembly Resolution 217(A), *General Assembly Official Records, 3rd Session, Part I, Resolutions*, p. 71.

²⁰ S Vasciannie: Human Rights in Jamaica 'International and Domestic Obligations', available at <www.undp.org/fojam/stephen%20vasciannie.doc> (accessed 16/10/05); B Simma: The Charter of the United Nations 'A Commentary', 1995, p19-38.

aimed to regulated issues related to the culture and social welfare of the people, for example the right to housing, food and education.²¹

At the same time, there are a number of international treaties that deal with particular human rights concern. For example, the Refugees Convention (1951), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1966), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of the Child (CRC) (1994), all typify the attempt by the United Nations to give particular form, and legal force, to human rights for specified categories of persons, or groups.²²

There are also regional human rights instruments, for example in Africa, there is the African Charter on Human and Peoples' Rights and its Protocol on the Rights of Women in Africa, African Charter on the Rights and Welfare of the Child, stands as the main, but not the only treaty incorporating a range of human rights standards.²³

2.2 Theories of relationship between national law and international law

2.2.1 Concepts of the monist and dualist school

In the analysis of this point, the first question to be answered is; are the international and domestic law of each state two distinct legal systems or are they sources of the same legal systems? This question is answered with the help of the concepts of the monist and dualist schools.

The dualist school also called parallelism school,²⁴ has as the chief exponents Heinrich Tripel and Dionision Anzilotti. According to this school domestic law and

²¹ A F Bayefsky: The UN Human Rights Treaty System in the 21st Century, 2000, p356-378,

²² For a comprehensive list of the main Human Rights treaties see C Heyns: Human Rights Law in Africa, 2004, p48-49, 106 -107.

²³ V O O Nmeielle: The African Human Rights System 'Its laws, Practice, and Institutions', 2001, p379.

²⁴ P A Barreira: Apostila de Direito Internacional Público, 2002, p9.

international law are different legal regimes, independent from each other and should not be confused.²⁵ This school justifies this by arguing that international law depends on the common willingness of several states while the domestic law depends solely on the unilateral willingness of one state.²⁶ Thus, international law creates rights and obligations essentially among sovereign states and a state is responsible to other states for carrying mutual obligations, but each state determines the means and form by which it carries out its obligations.²⁷

Furthermore, when a dualist state's international obligation relates to persons, things or interests within its borders, carrying out these obligations requires incorporating the international norms into domestic law. This is because norms of international law apply within a state only by virtue of their transformation into the state's internal law. They are binding, in other words, as rules of internal law and not international law.²⁸ This school follows that international law instruments ratified by the state concerned cannot in principle be invoked in domestic courts unless it is incorporated into domestic law. This incorporation into domestic law varies from country to country.²⁹ The different manners in which international law is incorporated in the different legal orders will be elucidated in a later discussion with practical examples of some countries.

The monist school emerged in opposition to the dualist school. This school does not accept the existence of two different autonomous juridical systems. For this school, international law and domestic law can in general terms be described as forming one legal system, in other words, this school views international and national law as part of a single legal corpus, with the various national legal systems being derived from the broader framework provided by international law.³⁰

²⁵ M N Shaw: *International Law*, 2003, p100.

²⁶ As n 4 above.

²⁷ L Henkin: *The Constitution and U.S. Sovereignty 'A Century of Chinese Exclusion and its Progeny'*, 100 *Harvard Law Review*, 1986-1987, p853, 864.

²⁸ As above; M Akehurst: *A Modern Introduction to International Law*, 1992, p44-45.

²⁹ United Nations: *Human Rights in the Administration of Justice "a Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003, p20-21.

³⁰ I Brownlie: *Principles of Public International Law*, 2002, p33; J G Starke: *Monism and Dualism in the Theory of International Law*, 17 *British Year Book of International Law*, 1936, p 66.

In practical terms this means that no theoretical barriers exist to applying international law directly into domestic courts, for example once a state has ratified any instrument of international law the terms of this instrument automatically becomes part of the domestic law of the state concerned and can be invoked in domestic courts as they are already binding rules of domestic law.³¹ Some scholars make two variables of understanding of the monist concept: first is that it defends the prevalence of domestic law in case of a conflict between domestic law and international law and secondly it defends the prevalence of international law in case of conflict between the two legal orders.³² These theories though used to explain and to analyse the relationship between the two legal orders leaves room for discussion and a third theory attempting to conciliate the monism and dualism emerged.

2.2.2 The concept of conciliation

The third concept that emerged is the conciliatory concept. This concept took aspects from both monist and dualist schools and tried to conciliate them in a unique legal system. This concept was however rejected, because it attempted to make distinctions and categories between international law. There is no reason for such distinctions and categorisation and it cannot be found in international practice.³³

2.2.3 Critique to the concepts of the monist and dualist school

These two concepts have been criticized by some scholars, Slyz; for example criticises these two concepts because they cannot be applied in their pure forms, he argued that in the pure monist system the relevant actors of monist state would find it unnecessary to express their reception of international law in statutes and

³¹ As n 7 above, M F Ariosi : As Relacoes Entre o Direito Internacional e o Direito Interno, available at <http://jus2.uol.com.br/doutrina/texto.asp?id=5940> (accessed 20/09/ 2005).

³² G Slyz : International Law in National Courts, New York University Journal of International Law and Politics, 1995-1996, p258-270.

³³ C G Feldman: La Implementación de Tratados Internacionales de Derechos Humanos por el Paraguay, 1996, p19; C A Mello: Curso de Direito Internacional Público, 2002, p82.

constitutional provisions but the practise is all together different. He also criticises the dualist concept because most countries following the system like South Africa recognise the existence of customary international law and it is applied without resort to codification.³⁴ The author does not find this criticism constructive in the sense that the applicability of those concepts in their pure form in a monist state would create obligation deriving from any international instruments even if the state do not want to be bound by those treaties and in the current world there is no need to created obstacles on applying international human rights instruments even in the dualist states to be applied directly.

According to Feldman, a Paraguayan scholar, the practice today as regards relationships between international law and national law does not leave room for doctrinaire interpretations because the system of incorporation of international law in most of the states is clearly spelt out in their constitution.³⁵ Nádia Araujo, criticises these two theories because they have no practical effects; they are used for academic purposes to explain the relationship between the two legal orders, while the practical effect of the relationship of national and international law relies on the practice of the states but not in the monist and dualist theory.³⁶ In the view of the author, there are several constitutions that leave room regarding to the incorporation of the international law in domestic legal systems for example the Portuguese Constitution does not give provisions as regards to the enforcement of some instruments of international law.³⁷

2.3 Systems of reception and applicability of international law in national legal order

International law is received and applied in national legal order in three different ways as provided for by different national constitutions. For example;

³⁴ As n 14 above.

³⁵ C G Feldman: *La Implementación de Tratados Internacionales de Derechos Humanos por el Paraguay*, 1996, p19; C A Mello: *Curso de Direito Internacional Público*, 2002, p82.

³⁶ A Nádia : *Direito Internacional Privado 'Teoria e Prática Brasileira'*, 2003, p.140.

³⁷ J P S Dias: *Direito Internacional Público 'Súmarios Desenvolvidos'*, 2003, p18.

2.3.1 System of transformation or act of transformation

According to this system, domestic and international law are distinct bodies and in order to be applied or to have any effect in the national legal order of a state international law must be expressly and specifically transformed into domestic law through appropriate constitutional machinery, in most cases an act of parliament. This in effect implies that there is a norm of domestic law that transforms international law into domestic law.³⁸ The transformation system is closely related to the dualist concept; both view international and domestic law as distinct bodies of law.³⁹ This for example, is the approach, which was inherited by Kenya and the majority of other commonwealth countries from the British practice.⁴⁰

2.3.2 System of the general clause of full automatic reception or extreme monism

According to this system international law applies *qua tale* in the national legal order of the states. This means that International law is applicable in the national legal order in its original form as international law. Therefore domestic courts can evoke both national and international law when handling cases. This system is found in the countries that follow monist concept, and international law prevails over domestic law including constitutional norms,⁴¹ a good example is the Netherlands. The Supreme Court of the Netherlands and the other Dutch courts do not apply Acts of Parliament if incompatible with an international treaty. The Dutch Constitution gives primacy to international law and makes universally binding provisions of international

³⁸ As n 37 above p16; O Adede: Domestication of International instruments 'a study for the Kenyan Constitution' available at <<http://www.kenyaconstitution.org/docs/07d017.htm>> (accessed 12/09/2005); R Layton: When and How Can Domestic Judges and Lawyers Use International Law in Dualist Systems 'A training Manual on Human Right' available at <training.itcilo.org/ils/ils_judges/training_activities/2005/A900406/english/participation1.htm> - 30k> (accessed 22/09/05).

³⁹ As n 37 above; J G Starke: Introduction to International Law, 1989, p76.

⁴⁰ O Dede: Domestication International Instruments 'a Study for the Kenyan Constitution, available at <<http://www.kenyaconstitution.org>> (accessed 12/09/05).

⁴¹ F Quadros; A Gonçalves: Manual de Direito Internacional Público, 1998, p 135.

agreements directly applicable in the Netherlands, without the need for Dutch legislation.⁴²

2.3.3 System of the general clause of partial automatic reception or moderate monism

This is a combination of the two systems previously discussed. States that follow this system do not recognize the automatic applicability of the entire international law in their national juridical order, but recognize specific international instruments for automatic application and the other instruments only apply after transformation in domestic law.⁴³ International law in this system is not superior to the constitutional norms of a given legal order in other words the supremacy of the constitutional norms prevails above ordinary and international norms. Countries like South Africa and Mozambique follow this system.⁴⁴

Broadly speaking, all the countries in the world fall under one of these three systems. The next section of this study discusses the authority for treaty making in Mozambique and Ghana, its reception and applicability in the internal legal order and its hierarchy in the legal orders of these two countries.

2.4 Authority for treaty making and its applicability within Mozambican and Ghanaian legal systems

2.4.1 Mozambique

The Mozambican approach to treaty making is constitutional established. The Constitution does not dedicate a specific chapter and a specific governmental organ

⁴² Jurist Legal Intelligence: Constitution, Government and Legislation: available at <<http://www.jurist.law.pitt.edu/world/Netherlands.htm>> (accessed 25/09/2005).

⁴³ J B Gouveia: Manual de Direito Internacional Público, 2004, p220.

⁴⁴ J Dugard: International Law and the South African Constitution available at <www.ejil.org/journal/Vol8/No1/art4.html> - 14k> (accessed 17/09/05) , J Dugard: International Law 'A South African Perspective', 2000, p175.

or institution to deal with the issue of the international law in national legal order. The issue is dealt with in scattered chapters and the competence to deal with matters of international law is constitutionally distributed among the President of the Republic, National Assembly and the Council of Ministers.

Article 161 (b) of the Constitution of Mozambique gives the president powers to make treaties in matters of national defence and public order.⁴⁵ Article 162 further provides that in matters of international relations, the President of the Republic shall have power to make international treaties.⁴⁶ The Presidential power to make treaties is a personal discretion, though the President may seek the advice of parliament.

The second institution dealing with international law is the Council of Ministers; the article 204 (1) (g) under the competences of the Council of Ministers states that the Council of Ministers has power to:⁴⁷

- (g) Prepare the celebration of international treaties and celebrate, ratify, adhere and denounce international agreements in the matters of its governance competence.⁴⁸

The power given to the Council of Ministers to make treaties is limited to matters within its competence.⁴⁹ The Council of Ministers unlike the President of the Republic is given express authority by the Constitution to celebrate or denounce treaties.

The National Assembly is also endowed with powers to deal with matters related to international law; article 179 (2) of the Mozambican Constitution states that: The National Assembly has competence to;

- (a)...
- (e) Approve and denounce treaties that deal with matters within its competence

⁴⁵ Art 161 (b) Mozambican Constitution.

⁴⁶ Art 162 Mozambican Constitution.

⁴⁷ Art 204) (1) (g) Mozambican Constitution.

⁴⁹ The powers of the Constitutional Council in Mozambique includes *inter alia* assure the enjoyment of the rights and freedoms of the citizens, Manage the state sectors especially education and health.

- (t) Ratify and denounce international treaties

The National Assembly unlike the President and Council of Ministers has no power to celebrate and make treaties,⁵⁰ its power is to approve and ratify as well as denounce treaties. It can be understood that the treaties celebrated and made by the Council of Ministers and the President do not need the approval from the National Assembly to be applied in the Mozambican national legal order, the legal basis for this explanation can be read in the article 18 (1)⁵¹

“International treaties and agreements validly approved and ratified shall enjoy the force of law in the Mozambican legal order provided that they have been published in the official gazette and while they are internationally binding upon the Mozambican State”.

The validity and applicability of a treaty in the internal legal order is subject to a publication in the official journal of the Republic of Mozambique and only treaties that create obligations to the state of Mozambique are applied in the Mozambican legal order.

The Constitution of Mozambique is the supreme law of the land. Article 2 (4) of the Constitution provides that constitutional norms prevail over all remaining norms of the Mozambican juridical order. From this article, it is possible to conclude that norms of international law in the Mozambican legal order are not above the Constitution, this fact is further supported and regulated by article 18 (2) of the Constitution, which states that:

“The rules of international law shall enjoy the same legal force as the infra-constitutional legislative acts of the National Assembly and the Government under the Mozambican legal order, with due respect to the respective manner in which they are received”.

Mozambican Constitution makes reference to the fact that the Republic of Mozambique accepts, observes and applies the principles of the African Charter and

⁵⁰ The Constitution uses the terms “Celebrate” and “Make” interchangeably and does not give definition for either of them.

⁵¹ Art 18 (1) Mozambican Constitution.

the Charter of the United Nations. This provision excludes the Mozambican legal order from the transformation system or act of transformation, which denies direct application of all international law in the internal order without transformation to domestic law. In addition, as previously elucidated, there is a requirement of publication of international law before it has effect in the domestic legal order of Mozambique, which excludes it from the extreme monist school.

The Mozambican legal system therefore falls in the general clause of partial automatic reception or moderate monism, the reason being that the African Charter and the UN Charter while ordinary treaties should be transformed into national laws and publicised in the official journal in order to be applied in the national legal order of Mozambique. In the next section a similar analysis on Ghana will be made.

2.4.2 Ghana

The Constitution adopted a different strategy from the Mozambican approach to deal with international law. The Ghanaian Constitution in Chapter 4 provides for the laws of Ghana, any reference to international legal norms is made in this chapter. However, the matters related to the competence of celebrate treaties and international laws are dealt with in the chapter 8. Section 75 of the Ghanaian Constitution states that:

1. The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.
2. A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by
 - (a) Act of Parliament; or
 - (b) A resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.

International law instruments as, the Constitutive Act of the African Union and the United Nations Charter are also mentioned in the directive principle of 'states policy'⁵²

⁵² Section 40 (d)(I) and II).

as guiding principles toward the international relation with other nations.⁵³ The power to execute treaties is exclusively an executive function.

The Ghanaian Constitution does not provide specifically for the hierarchy between national law and the international law unlike the Mozambican Constitution. However, article 2 of the Constitution provides that; "... This Constitution shall be the supreme law of Ghana and any other law inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void." This can be interpreted to extend to international law.

Ghana clearly fits in the transformation system because treaties, agreements and conventions ratified and executed by the President of the Republic must be ratified by an act of Parliament before it can have effect in the domestic legal order in Ghana.

Both the constitution of Mozambique and Ghana are silent on the issue regarding the status of international customary law in the internal legal order of these two countries. Customary international law is a source of international law therefore its applicability in domestic legal order needs to be clarified. It is therefore the duty of the judiciary in Mozambique and Ghana to clarify the status of international law in the two legal orders. South Africa for example regulates customary international law and makes it subordinate to the Constitution and other written laws of South Africa.⁵⁴

The above discussion illustrates how international law is applied in the internal legal order of Ghana and Mozambique, looking at the competence to make treaties, its hierarchy, and the systems of receptions as well as the concepts in the relationship of international and municipal law. In the next chapter, the analysis will be made on the sources of international human rights law, principles governing the applicability of

⁵³ Art 40 of the Ghanaian Constitution states that: in dealing with other nations, the Government shall (d) adhere to the enshrined in or as the case may be, the aims and ideals of (i) the Charter of the United Nations, the Africa Charter.

⁵⁴ The section 232 of the South Africa Constitution states that: Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; As n 44 above, p2-3.

international human rights law in domestic courts and obstacles to enforcing international human rights law in domestic courts.

CHAPTER THREE: INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS

3.1 Sources of international human rights law

In the previous chapter, which was the first stage of the analysis of the enforcement of international human rights by domestic courts in Mozambique and Ghana, an analysis of the national constitutional provisions that determine the status of international law within the national legal system of these countries was made. In this chapter the analysis begins with the identification of the sources of international human rights law and analysis of the impact of these sources on the enforcement of international human rights by domestic courts. The chapter goes further in discussing the principles of applicability of international human rights law in domestic courts and obstacles on the enforcement of international human rights law domestic courts.

There is no universal document that determines and enumerates the formal sources of international human rights law that is accepted by the entire international community.⁵⁵ The legal text that is close to a generally accepted source in this respect is the statute of the International Court of Justice (ICJ statute). Article 38 of the ICJ statute lists the sources of international law as: treaties, international custom, and general principles of law, judicial decision and doctrine.⁵⁶

3.1.1 Treaties

A treaty is defined as a binding agreement under international law concluded by subjects of international law, namely states and international organizations. Treaties are also called, international agreements, protocols, covenants, conventions, exchanges of letters, and exchange of notes.⁵⁷ The emphasis in this study is given to human rights treaties, an important aspect of which is its enforcement and applicability in the internal legal order.

⁵⁵ J Miranda: Curso de Direito Internacional Público, 2002, p136.

⁵⁶ Statute of International Court of Justice art 38.

⁵⁷ Online Dictionary Labortalk.com available at <<http://encyclopedia.laborlawtalk.com/Treaty>> (accessed 10/10/05).

The Vienna principles of interpretation of treaties do not provide specific guidelines on the question of execution of treaties. Thus, when a human rights treaty is silent on the question of execution an interpretation by the national courts will determine whether or not any given treaty is directly applicable, or 'self-executing', in the internal legal system without an implementing legislation. National courts are facing a task of developing their own rules and practice shows a tendency to regard treaties as non-self-executing, and thus refrain from applying them in the absence of implementing legislation.⁵⁸

3.1.2 International custom

Customary international law consists of rules of law derived from the consistent conduct of States acting out of belief that the law required them to act that way. It follows that customary international law can be discerned by a widespread repetition by States of similar international acts over time (state practice); acts that occur out of sense of obligation (*opinio juris*); acts that are taken by a significant number of states and are not rejected by a significant number of States.⁵⁹ It is especially rare for a national court to invoke customary international law against its own executive.⁶⁰ The fact that the courts will refrain from applying customary international law against their own executive, could mean non enforcement of international human rights by

⁵⁸ As n 13 above.

⁵⁹ S Rosenne: *Practice and Methods of International Law*, 1984, p55; P Alston: *The European Union and Human Rights*, 2003, p325; *International Customary Law at Wikipedia the Free Encyclopedia* available at <http://en.wikipedia.org/wiki/Customary_international_law> (accessed 22/09/05).

⁶⁰ A Cassese: *Modern Constitutions and International Law*, 1985, p439 "Even in the most internationally minded Western or socialist countries, domestic courts often place such an interpretation on international customary rules as to fit their municipal standards or accommodate them to national interests"; L Henkin: *International Law as Law in the United States*, 1984, p1555 - 1566 (referring to US courts) 'Courts are often reluctant to conclude that a principle has become customary international law'. Trimble cited in I Brownlie: *System of the Law of Nations 'State Responsibility'* 1983, p 144. observes that 'after surveying the entire case-law of American courts on this issue, that there is 'a clear trend away from judicial determination of legal rules and a movement toward judicial deference to political branch direction'.

domestic courts and therefore less remedies available for those whose rights are violated.

3.1.3 International decisions

Often, national courts may be requested to implement recommendations of international commissions established under treaties that have direct effect in the domestic legal system. When such recommendations are incompatible with domestic policies, especially when these recommendations are made without the consent of the national governments, courts would occasionally dodge the conflict of interest by interpreting the international decision as not intended to have immediate effect. Thus, the Belgian Court of Cassation, despite its generally positive attitude towards international obligations, avoided the implementation of the judgment of the European Court of Human Rights in the *Marckx case*,⁶¹ by declaring that it was not 'sufficiently precise and complete to have direct effect,' and therefore implementation was only possible through legislation. Such decisions are sometimes avoided through interpretation or by invoking domestic principles in order to protect governmental interests leaving the people whose rights were violated without means of redress.

The availability of the sources of international human rights law per se do not guarantee the enforcement of rights enshrined there in. The enforcement of international human rights is weakened as a result of the problems surrounding the sources as discussed above. An important landmark regarding the application of international human rights law in domestic courts was with the Declaration of Bangalore Principles on the Application of International Human Rights by Domestic Courts.

⁶¹ Marckx case on 13 June 1979 (Series A. no 39,) European Court of Justice available at <<http://www.menneskeret.dk/menneskeretieuropa/konventionen/baggrund/domme/ref00000119/>> (Accessed 12/05/05).

3.1.4 Writing of eminent jurists

Judicial writings may play a role in settling disputes. However, the qualifications of publicists are not defined in the ICJ statute.⁶² The impact of academic writings on the enforcement of international human rights in domestic courts is limited in the sense that they can only be taken into account when there is the will to do so by the judges and states.⁶³

3.2 Domestic Application of international human rights law

3.2.1 Principles governing domestic applicability of international human rights law

The basic principle governing domestic application of international human rights treaties is that when states ratify an international treaty, they are deemed to submit themselves to a legal order in which they, for the common good, assume various obligations. Such obligations are not only in relation to other states, as many people would naturally think but towards all individuals within their jurisdiction.⁶⁴ These treaties vest rights in individuals, yet those individuals often have no recourse to justice when their rights are abused, since they cannot rely on treaties in national courts.

An international human rights treaty creates obligations on state parties in relation to respect of human rights of its nationals. One of the most effective ways to enforce these treaties is to incorporate them into the national legal system and make them available to all citizens. In practical terms there are very few countries that fulfil their obligations towards individuals within their jurisdictions. Countries following the monist system are more close to such achievement as compared to countries that follow the dualist system, for example The Netherlands and Burundi. The application

⁶² R Wallace; N Holliday; A Gearey: International Protection of Human Rights, 2005. p17.

⁶³ O Davies: Human Rights and Poverty Reduction 'Realities, Controversies and Strategies', 2005, p1.

⁶⁴ Strategies for Enforcing Economic Social Rights Through Domestic Legal System, University of Minnesota Human Rights Resources Center available at <www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm> (accessed 21/09/05).

of international human rights law in national courts in dualist countries is lamentably weak.⁶⁵

The concern for the application of international human rights law by domestic courts especially in the common law countries brought several judges in a judicial colloquium in Bangalore, India in 1988. The outcome of the meeting was a declaration on the domestic application of international human rights norms known as the 'Bangalore Principles on the Domestic Application of the International Human Rights Norms'. The basic idea behind the Bangalore Principles was that international human rights law should be used as a guide to judges. Especially, in cases concerning human rights and fundamental freedoms for the purpose of deciding cases where the domestic law leaves a gap, the application of such principles should take into account the national laws and traditions.

Similar initiative took place in the Gambia in 1992, at a seminar on the national implementation of the African Charter on Human and Peoples' Rights. The main outcomes of the seminar were as follows; state parties to the ACHPR shall accord the ACHPR a definitive legal status in their national legal systems, The ACHPR is a treaty within the definition of the Vienna Convention on the Law of Treaties. It enshrines the fundamental principle *pacta sunt servanda* and an obligation is imposed on parties thereto not to invoke their municipal laws as an excuse for failure to perform an obligation imposed by the ACHPR. The automatic incorporation of the ACHPR into the internal legal system of the parties thereto could be advantageous to the state parties to the ACHPR in the sense of sparing them the difficulties of reviewing their present legislation so as to conform to the ACHPR.⁶⁶

⁶⁵ Enforcing International Human Rights Standards in Domestic Legal Systems available at <<http://fxi.org.za/archives/Medialaw/legal.htm>> (accessed 20/08/05).

⁶⁶ Conclusion and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights, a copy of the document contained the conclusions and recommendations can be obtained at the African Commission on Human and Peoples' Rights, also available at <www.chr.up.ac.za/hr_docs/african/docs/other/other10.doc> (Accessed 11/10/05).

These two important initiatives on the enforcement of international human rights law in domestic courts though not binding, have shown positive effects in some countries, especially in the commonwealth countries all over the world. There is already a wealth of jurisprudence where international human rights law was applied in domestic courts, below; are some examples:

In *Reena Bajracharya and Others v. The HMG*,⁶⁷ the Supreme Court of the Kingdom of Nepal emphasized the importance of international instruments, particularly the Convention on the Political Rights of Women 1952, Universal Declaration of Human Rights 1948, and CEDAW. The Court also accepted that international instruments supersede the municipal law by virtue of Section 9 of Nepal Treaty Act, 1990. In this case, crewmembers of a company had challenged an early retirement age, which applied only to female crewmembers. The equality clause of the Constitution was invoked along with the provisions of CEDAW, as being superior to national law. As a result, the court quashed the early retirement age of female crewmembers.

African countries have also contributed to the jurisprudence of applicability of international law in domestic courts. Some African countries have incorporated the African Charter on Human and peoples' Rights into domestic law, which facilitates its enforcement by domestic courts. In Nigeria for example, the African Charter was incorporated through the African Charter (Ratification and Enforcement) Act cap 10, Laws of Federation of Nigeria, 1990. It has now become routinely for Nigerian lawyers to invoke provision of the African Charter on Human and Peoples' Rights supporting human rights actions before domestic courts. For example in the case of:

General Sani Abacha & Others v. Chief Gani Fawehinmi,⁶⁸ per Ogundare JSC:

⁶⁷ *Reena Bajracharya and Others v. The HMG* Supreme Court of the Kingdom of Nepal, 2054, Writ No. 2812 available at <http://www.interights.org/doc/WS2_Phuyal_final.doc> (accessed 11/10/05).

⁶⁸ (2000) S C of Nigeria.

The Organization of the African Unity of which Nigeria is a member, on 19 January 1981 adopted the African Charter on Human and Peoples' Rights, providing for rights and obligations between member states (for example art 23) and between citizens and member states (for example art 19). Nigeria adopted the treaty in 1983 when the National Assembly enacted the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 (now Cap 10 Laws of Federation of Nigeria, 1990). By cap 10, the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens of members states of the Organization of the African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in the Constitution. See Chapter IV of the 1979 and 1999 Constitutions

No doubt Cap 10 is a statute with international flavour. Being so, therefore, I would think that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with the lordships of the Court below that the Charter possesses a greater vigour and strength than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr Adegboruwa, learned counsel for the respondent. Nor can its international flavour prevent the National Assembly, or the Federal Military Government before it removes it from our body of municipal laws by simply repealing Cap 10. Nor also is validity of another statute be necessarily affected by the mere fact that it violates the African Charter or any other treaty⁶⁹

⁶⁹ Y A George: The African Charter on Human and Peoples' Rights and Domestic Laws, available at <<http://academic.udayton.edu/race/06hrights/GeoRegions/Africa/Africa03.htm>> (accessed 20/09/05),

There are several other examples of progressive judicial rulings where the decisions were made taking into account international human rights instruments. On the other hand there are also several judicial rulings that are conservative with regard to the applicability of international human rights instruments, thus reducing the availability of remedies for those whose rights are violated. Such aspects or obstacles that hinder the enforcement of international human rights law in the national legal system will be illustrated and discussed in the next section.

3.3 Obstacles to enforcing international human rights law in domestic courts

International human rights law places the primary responsibility to implement action and protection of human rights on states. States are obliged to respect, protect and fulfil human rights. When state actors commit acts that are harmful to human rights, states are obliged under international law to take action to prevent and stop the violations and to provide victims with appropriate remedies and relief. States therefore, have a duty to ensure that all the actors of the society respect human rights.⁷⁰ The state must create the legal and institutional framework to enforce this obligation. However, there are several obstacles identified that hinder the enforcement of human rights in domestic courts. These obstacles though some were mentioned previously, are discussed in detail below.

3.3.1 Self contained regimes

Some international human rights instruments especially treaty-based instruments have their own enforcement mechanisms; at the first sight they give the impression that they would be easily enforced. However, there are drawbacks on the enforcement mechanisms contained in these types of instruments, for example only remedies provided for in these treaties are available for the person seeking redress. These remedies are in most cases recommendations, not binding on state parties, who can choose not to enforce them.

⁷⁰ R O Keohane: Compliance With International Commitments 'Politics within a Framework Law, 86 American Society of International Law, 1992, p176.

In other words, human rights treaties establish self-contained regimes that exclude the applicability of remedies available to an injured party under general international law.⁷¹ Thus, a claim to the effect that a state had breached an obligation under the ICCPR could be declared inadmissible on the grounds that only ICCPR procedures can be followed to redress the alleged breach. If the offending State had accepted neither the right of inter-state complaint under Article 41 nor the right of individual complaint under the Optional Protocol, this would then be the end of the matter.

The other example of a self-contained regime is the European Convention on Human Rights, the article 62 of the ECHR states that:

“The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention”.

From this article, it is concluded that the European Convention is a self-contained regime because individuals outside Council of Europe nations cannot use the enumerated rights to seek redress in states that are not treaty members.⁷²

3.3.2 Protection of governmental interests

In some developing countries the independence of the judiciary though guaranteed by national constitutions is questionable.⁷³ In a number of occasions when the states

⁷¹ C R Kelly: The Value Vacuum ‘Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop, 22 Michigan Journal of International Law, 2001, p673.

⁷² B R Hofstötter: The Problem of Non-Compliant National Courts in European Community Law, 2005, p9.

⁷³ M Bussani; U Mattei: Making Other Path Efficient ‘Economic Analysis and Tort Law in Less Developed Countries’, 1995, available at <http://www.jus.unitn.it/cardoza/Review//Matei1htm> (accessed 24/09/05); M Nguyen: The Question of Failed States ‘Australia and the Notion of State Failure’, 2005, p6; D C Prefontaine; Q C J Lee: The Rule of Law and the Independence of the Judiciary, 2004, p8.

agents violate international human rights norms or national norms protecting human rights with national and international negative consequences for the government, there is a tendency to protect the government by the judiciary. Benvenist describes such tendency in the following ways;⁷⁴ narrow interpretation of constitutional provisions that imply applicability of international human rights law in domestic courts. In this way, the judges reduce the opportunity of the courts to apply international human rights and to interfere with government policies in the light of international law. Judges have further tended to interpret international rules so as not to upset their governments.⁷⁵ Therefore the enforcement of international human rights law depends on the political system in place in a given country.⁷⁶

3.3.3 Lack of legal knowledge of international human rights law

Lack of legal knowledge of international human rights law instruments whether by judges or lawyers is one of the biggest obstacles in applying international human rights law. Judges and lawyers in dualist countries are less likely to apply international human rights law provisions as compared to their monist counterparts. This is partly because judges and lawyers are not familiar with such instruments and the delay in incorporation into national laws contributes to this lack of knowledge of international instruments.⁷⁷

3.3.4 Lack of binding character of some international human rights instruments

Some international human rights instruments for example declarations create moral obligations on states but are not binding on them. The enforcement of such instruments is therefore dependent on the political will of the states and may not be

⁷⁴ As n 13 Above, B Conforti: The Activities of national Courts and the International Relations of their State, 65 Yearbook of the Institute of International Law, 1993 Part I, p. 428.

⁷⁵ H G Schermes: The Role of Domestic Courts in Effectuating International Law, 3 Leiden Journal of International Law, 1990, p77-79, E Benvenisti The Activities of national Courts and the International Relations of their State, 1994, p6-7.

⁷⁶ M Shapiro: Courts 'A Comparative and Political Analysis', 1981p. 17-28.

of much help to a litigant seeking redress. In addition, some of the instruments do not have an enforcement mechanism and the national courts may use this gap as an excuse not to enforce the instrument at all.

The theoretical aspects of the enforcement of international human rights have been discussed in this chapter and in the previous chapters. The next chapter will apply this analysis to the Mozambique and Ghana situation.

⁷⁷ C Thomas; M Oelz; X Beaudonnet; The Use of International Labour Law in Domestic Courts "Theory, Recent Jurisprudence and Practical Implications".2004, p254; A Cassese: Modern Constitutions and International Law, 1985, p331.

CHAPTER FOUR: ENFORCING INTERNATIONAL HUMAN RIGHTS LAW IN THE MOZAMBICAN AND GHANAIAN DOMESTIC COURTS

This chapter is the case study of Mozambique and Ghana regarding the enforcement of international human rights in domestic courts. The analysis will include a discussion of the attitude of the judiciary in enforcing international human rights law in domestic courts; it will also extend to other aspects with direct influence on enforcement of these rights such as the status of ratification of international human rights instruments, judicial and legal training on human rights as well as approaches to the international human rights law enshrined in the constitutions of these countries. The analysis will start with the discussion of the human rights legal training in Mozambique, an issue that the author believes to be the main reason that hinders the enforcement of international human rights law in domestic courts.

4.1 Mozambique

4.1.1 International Human rights education and the legal profession in Mozambique

Legal training in international human rights law in Mozambique is associated with training offered at university level. However, there are also initiatives from some NGOs to disseminate international human rights law amongst the Mozambican population; secondary schools are usually targeted.⁷⁸ Several institutions of higher education have human rights related subjects in their curricula, for example the Catholic University of Mozambique, Academy for Police Sciences and Higher Institute Polytechnic.⁷⁹ At the Higher Institute Polytechnic, human rights is taught as an elective course and it is done in form of seminars for those who want a specialization in the area of Political – Juridical Science.⁸⁰ The teaching of human

⁷⁸ There are some secondary schools in Mozambique that systematic teaches to their students the contents of the Universal Declaration of Human Rights, NGOs also offer human rights seminar at the secondary schools.

⁷⁹ L Amaral: *in* Human Rights Law in Africa, 2004, C Heynes (ed), p1338-1343, Vol. II.

⁸⁰ The syllabus of the international human rights law seminars at the ISPU is available at <<http://www.ispu.ac.mz/formacao/licenciatura.htm>> (accessed 17/10/05).

rights in institutions of learning creates awareness and it is a positive step towards the enforcement of international human rights law in domestic courts.

The human rights subjects were only recently introduced in the curricula of these institutions and perhaps for this reason there are several aspects that should be improved in the syllabus of those courses taking into account that they are taught vaguely, leaving behind several aspects. In an interview with a Mozambican academic⁸¹ several problems were identified as affecting enforcement of international human rights at the domestic level both in the judiciary and in human rights training. It is his view that the human rights syllabus of the teaching institutions though well designed remains a problem because of techniques and pedagogic methods used to teach international human rights law. This, he said, was as a result of the background of lectures who lack knowledge of these international human rights instruments as well as national legislation related to human rights. This is partly due to the fact that most of these instruments are still in the Official Journal of the Republic of Mozambique and very few people outside Maputo have access to it.

Recently a Bar Association was created in Mozambique, individuals that hold the licentiate degree can enrol for the Bar and they are attached to a senior lawyer for two years. During the Bar the junior lawyers are expected to get practical knowledge in the legal field. It is hoped that the human rights gap left by the higher institutions of learning can be filled during this Bar training. The senior lawyers in Mozambique do not evoke international human rights in court thereby leaving the gap created by the higher institutions of learning unfulfilled. As noted by an academic and human rights activists, the non-applicability of international human rights is due to limited knowledge by lawyers of these instruments.⁸²

⁸¹ Dr. Carlos Serra Junior is a lecturer at the Law and Judicial Training Centre (Centro de Formação Jurídica e Judiciária) and at the Eduardo Mondlane University (Date of the interview 18/10/05).

⁸² Dr. Luis Edgar is a Lecturer at the Catholic University of Mozambique (Date of Interview 16/10/05).

4.2 Status of ratification of main international human rights instruments, its impact in domestic courts and Mozambique's international human rights obligation in general

Mozambique is a state party to the, the International Covenant on Civil and Political Rights and its Second Optional Protocol,⁸³ the International Convention on the Elimination of All Forms of Racial Discrimination,⁸⁴ the Convention on the Elimination of All Forms of Discrimination against Women,⁸⁵ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ,⁸⁶ and the Convention on the Rights of the Child.⁸⁷ At the regional level Mozambique is a state party to the African Charter on Human and Peoples' Rights and its Protocol on the Rights of Women in Africa, African Charter on the Rights and Welfare of the Child.

4.2.1 Obligations under the U.N. Charter and the African Charter

As a party to the U.N. Charter, Mozambique has accepted a broad set of propositions concerning human rights. More specifically, Article 1(3) of the Charter, which indicates that one of the purposes of the United Nations, is to:

“Achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.

⁸³ Mozambique ratified the treaty in 1993 and its second optional protocol as well in 1993

⁸⁴ Treaty ratified by Mozambique in 1983

⁸⁵ Treaty ratified by Mozambique in 1997

⁸⁶ Treaty ratified by Mozambique in 1999

⁸⁷ Treaty ratified by Mozambique in 1983

This is further reinforced by Article 55 of the Charter, which enjoins the United Nations to promote:

- (a) Higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) Solutions of international economic, social, health, and related problems; and
- (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

Article 56 obligates States that are members of the U.N. to take joint and separate action in co-operation with the United Nations to achieve the human rights and other objectives set out in Article 55. The Charter provisions therefore binds Mozambique to a general set of propositions, which does indicate exactly what is contemplated as a "human right" in these provisions.

The term "African Charter" as used in the Mozambican Constitution refers to the Constitutive Act of the African Union (CA). Mozambique is a state party to the African Union (AU) and therefore has an obligation to protect, promote and fulfil the human rights of her nationals as contained in the provisions of the Constitutive Act. The Constitutive Act and the U.N. Charter apply directly in the Mozambican legal order.⁸⁸ These instruments, though contain human rights implications, they are not human rights instruments per se but create obligations on the state at the international arena in dealings with other states.

4.2.2 The Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights

The Mozambican Constitution accepted the UDHR as a source of interpretation of fundamental rights enshrined in the Mozambican Constitution. The Constitution also gave the same interpretative power to the UDHR to the African Charter on Human and Peoples' Rights, when interpreting fundamental rights enshrined in the constitution. Article 43 of the Mozambican Constitution states that:

⁸⁸ Art 17 (2) Constitution of Mozambique.

‘The constitutional principles in respect of fundamental rights shall be interpreted and integrated in harmony with the Universal Declaration of Human Rights and with the African Charter of Human and Peoples Rights’.

Legal practitioners in Mozambique have not taken advantage of the leeway that the Constitution gives these two instruments. A broad analysis of this provision would lead to the conclusion that these instruments are directly applicable in the Mozambican legal order.

4.2.3 The ICCPR and the ICESCR: general aspects

As already mentioned, Mozambique is a state party to one of the two major United Nations human rights treaties, that is, the International Covenant on Civil and Political Rights, it has not been transformed in domestic legislation but several principles of those instruments are enshrined in the Mozambican Constitution and ordinary legislation.

Mozambique has not yet ratified the ICESCR, but a considerable number of the principles of that instrument have been incorporated into the Constitution and in the ordinary laws. The fact that principles of the ICESCR have been incorporated into national legislation cannot be understood as an implicit ratification.

Regarding to the other instruments ratified by Mozambique, very few of them have been transformed into domestic law. What makes the author of this paper conclude that the government is not willing to create the necessary conditions for the enforcement of those instruments in domestic courts.

4.2.4 The judiciary and the enforcement of international human rights law

The Constitution of Mozambique mandates the Supreme Court, provincial courts and district courts to hear human rights matters. At the bottom level, there are a number of community courts functioning outside the formal justice system and they are also

mandated to deal with human rights matters.⁸⁹ Constitutional Council is mandated to administer justice in constitutional matters and issues related to elections though it is not a judicial body.⁹⁰

Courts are the only bastions of human rights in the land, as Mozambique does not have a commission on human rights like some African countries. Experience has shown the courts to be reactive rather than proactive in terms of applicability of fundamental rights.⁹¹ Given that human rights are recognized and accepted as positive law, through their declaration in the constitutional charter of fundamental rights and freedoms and through internationally accepted principles, they should be logically justifiable in a court of law. Article 70 of the Mozambican Constitution states that:

‘Every citizen shall have the right of recourse to the courts against acts that violate their rights and interests recognised by the Constitution and the laws’.

The article 89 further states that:

‘All citizens shall have the right to present petitions, complaints and claims to the competent authority in order to demand the restitution of their rights violated or in defence of the public interest’.

These two constitutional provisions elucidated that human rights in the Mozambican legal order are justiciable through the courts and this was the line of thought the courts took in the *case of Religious Holidays*⁹² and in the *Montepuez case*.⁹³ The

⁸⁹ Art 242 (1) Constitution of Mozambique.

⁹⁰ Art 241 (1) (2), 244 (1) (2) Constitution of Mozambique.

⁹¹ L Mondlane: Nurturing Justice from Liberation Zones to a Stable Democratic State *in* Human Rights Under Africa Constitutions, 2003, p198, A A An-Na'im (ed); two examples in where the courts played a reactive role was in the two main human rights cases in Mozambique, they will be illustrated later in this section.

⁹² The so called *Religious Holiday case* is of the landmarks judgements issued in Mozambique after the independence. It was issued by the Supreme Court acting as the Constitutional Council. The judgement, issued on 27 December 1996, dealt with the issue of the secularity of the state versus the right to religion. Parliament enacted a law creating religious, and in particular Christian and Islamic holidays; this law could not have a binding force before promulgation by the President. The President held back the promulgation of the law and

legal profession in Mozambique has not developed the aptitude of fashioning out human rights cases in terms of international human rights in courts; as a result, the courts have also not developed the expertise for handling human rights cases based on international human rights law.⁹⁴

Many scholars believe that the civil law countries are more likely apply international human rights since they are associated with the monist school and international human rights is directly applicable in these systems.⁹⁵ Mozambique would probably be one of the exceptions to this, only a handful of these instruments are directly applicable and a great number must be published in the official journal before application. The government has not taken the initiative to publish these instruments.

In addition, the Mozambican legal system does not adhere to the practice of precedence. Use of precedence gives legal practitioners room to fashion their cases based on international human rights with the use of precedents set by international and regional human rights systems or other domestic courts. Jurisprudence is therefore an important vehicle through which international human rights instruments can be evoked in domestic courts.

requested the Constitutional Council to analyse whether the draft law was in accordance with the constitution. The Supreme Court ruled that the draft legislation was unconstitutional on the ground that Mozambique is a secular state and for that reason there is a clear-cut separation between state and religious affairs. Consequently, by introducing religious holidays, the state is dealing with matters that fall within the religious sphere. *In C Heynes: Human Rights Law in Africa, 2004, p1341-1342.*

⁹³ In the *Montepuez case* more than a hundred demonstrators, members of the main opposition party were arrested. The demonstration was a result of the general elections in 1999, which the opposition deemed not to be free and fair. The police arrested them and put them into a small cell where they all died overnight. Some of the police officers who arrested the demonstrators were convicted and sentenced to imprisonment as well as to payment of compensation to the victims' families. An appeal is pending in the Supreme Court. *In C Heynes: Human Rights Law in Africa, 2004, p1342.*

⁹⁴ As n 90.

⁹⁵ B Peterson: Complementarity Between Key Instruments of International Law, available at <http://www.idpproject.org/IDP_project/Complementarity_%20of_HR_and_IHLGP.pdf> (accessed 19/10/05).

4.3 Ghana

4.3.1 International Human rights education and the legal profession in Ghana

International human rights law is taught at the university level in Ghana, there are two universities offering international human rights law in their curricula, University of Ghana and Kwame Nkrumah University of Science and Technology. In both universities international human rights law is an optional subject. Candidates for the legal profession in Ghana should hold a LL.B and be admitted to the Law school for two-year postgraduate professional course. Graduates from the other courses apart from law can also be admitted to the Law School unlike the LL.B holder they take a four-year course to become professional lawyers.⁹⁶

It has been argued that few lawyers follow cases with international human rights law implications, if so senior lawyers couch them as constitutional law claims as a result of limited knowledge of international human rights jurisprudence.⁹⁷ Economic reasons have also contributed to the lack of enforcement of these human rights instruments; litigation on international human rights law is seen as non lucrative business in Ghana making it less attractive. Finally political reasons have also contributed to the lack of enforcement of these human rights instruments. In the past, legal practitioners were afraid of reprisal from the government authorities and therefore never brought human rights claims against the state. All these factors have affected the enforcement of international human rights in the domestic courts in Ghana.⁹⁸

4.4 Status of ratification of main international human rights instruments, its impact in domestic courts and Ghana's international human rights obligation in general

Ghana has ratified a couple of international human rights law instruments both at the international and regional level. At the regional level Ghana is party to the African

⁹⁶ N K A Busia: *Competing Visions of Liberal Democracy and Socialism in Human Rights Under Africa Constitutions*, 2003, p53, A A An-Na'im, (ed).

⁹⁷ As above.

⁹⁸ As 95 above.

Charter on Human and Peoples' Rights and the Refugee Convention of the Organization of the African Unity. At the international level Ghana is party to the ICESCR, ICCPR, CRC, CEDAW and the Convention on the Prevention and Punishment of the Crime of Genocide amongst others.

Provisions of the ICCPR have been incorporated into 1992 Constitution. The Ghana refugee law, 1992 (PNDCL 305) was substantially reinforced with the incorporation of the Provisions of the UN Convention Relating to the Status of Refugees of 1967 and the Organization of the African Unity Convention Governing the Specific Aspects of refugee Problems in Africa of 1969. Provisions of the CRC were incorporated in the Children's Act, 1998 (Act 560).⁹⁹

The incorporation of those treaties in Ghana national legislation is a positive step with regard to the enforcement of international human rights instruments into domestic legislation. The mere fact that principles of those instruments were incorporated into national legislation does not prevent us to make some criticism in terms of slow incorporation of international human rights law treaties in domestic legislation.

4.4.1 The judiciary and the enforcement of international human rights law

The Constitution has vested in the High Court and in the Supreme Court original jurisdiction in the determination of any matter relating to the enforcement of the fundamental human rights and freedoms guaranteed.¹⁰⁰

In the *case of Edusei v Attorney General*¹⁰¹ Plaintiff invoked the original jurisdiction of the Supreme Court for the enforcement of his fundamental right to freedom of movement to freely leave and enter Ghana. The Attorney General raised the preliminary objection that since the plaintiff was seeking the enforcement of his right to freedom of movement, it was the High Court and not the Supreme Court that was vested with jurisdiction to entertain the suit. The Court ruled in support of the Attorney –General's position that

⁹⁹ As n 68, p1135.

¹⁰⁰ Art 33 & 130 Ghanaian Constitution.

¹⁰¹ (1996-1997) SCGLR 1.

taking the totality of the relevant articles into account the Supreme Court's original jurisdiction cannot be invoked in this case because no issue of interpretation is raised; that the Supreme Court's original jurisdiction can properly be invoked if only the parties are really contending the meaning of a particular provision of the Constitution or urging different or diametrically opposed views as to the actual meaning of the said provision.

As result of this decision, it is settled that the original jurisdiction to enforce fundamental rights is vested in the High Courts. As a result of the delay and expenditures envisaged in the High Court, the Commission on Human Rights and Administration of Justice (CHRAJ) is mandated to make decisions on human rights violations and is more flexible and less onerous in character.¹⁰²

CHRAJ is a quasi judicial constitutional body.¹⁰³ Though not pure judicial body, it has in its decisions been developing a human rights jurisprudence that may in the future serve as the basis for the interpretation of the Ghanaian constitutional human rights provisions.

The judges in Ghana have the tendency to view international human rights law as a separate body of law without justiciability in the national jurisdiction. This is because of lack of systematic training on international human rights law to the judiciary though some judges have attended international human rights colloquiums.¹⁰⁴

Nonetheless, there are very progressive judges and lawyers that have enforced international human rights law in domestic courts in Ghana for example in the case of *New Patriotic Party v. Inspector general of Police (the Public Order Case)*¹⁰⁵; the Supreme Court was called upon to determine the scope to right to freedom of association and assembly as provided for under the 1992 Constitution. Since independence, police officers in Ghana had frequently denied permits to political

¹⁰² K Quasigah: Trends in the Promotion and Protection of Human rights under the 1992 Constitution (Unpublished). p5.

¹⁰³ Art 216 Ghana Constitution.

¹⁰⁴ As n 95 above, p78-81.

¹⁰⁵ (1993-1994) 2 GLR 459.

opposition groups to hold political rallies or demonstrations on the basis of maintaining public order.

In two instances in 1993 the New Patriotic Party (NPP) applied for permits to hold political rallies in compliance with the Public Order Decree of 1972. In both of these instances, the permits were initially granted, but then withdrawn on the day of the planned rallies.

The Supreme Court declared that the Decree that required police permit for assembly and demonstration was declared unconstitutional in view of the Article 21 (1)(d) of the 1992 Constitution, the Supreme Court proceeded to order that the Inspector General of Police should ensure that the decision be posted at all police stations through out the country for the information and guidance of police personnel.¹⁰⁶

Regarding the applicability of the international human rights law in this case, Archer CJ relied on the African Charter on Human and Peoples' Rights. According to the Chief Justice:

Ghana is a signatory to this African Charter and member states of the OAU and parties to the Charter are expected to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to the rights and duties. I do not think that the fact that Ghana has not passed specific legislation to give effect to the Charter cannot be relied upon.

Further in the case of *Issa Iddi Abass & others v. Accra Metropolitan Assembly and another (Sodom and Gomorrah case)*¹⁰⁷ a case involving socio and economic rights was brought before the High Court of Justice of Ghana in 2002. In this case the

¹⁰⁶ K Quashigah: The Constitutional Right to Freedom of Assembly and Procession in Ghana in the Light of the Decision in the Public Order Case and the Public Order Act. p4.

¹⁰⁷ Unreported , Misc 1203/2002, In the High Court, Accra, held on Wednesday 24th July 2002 before His Lorship, Yaw Appau, J. *in* K Quasigah: Trends in the Promotion and Protection of Human rights Under the 1992 Constitution (Unpublished).p7.

plaintiffs sought to assert their rights to a number of social and economic rights provided in the constitution and in the international human rights instruments more precisely the ICESCR and UDHR. The Court ruled in favour of the defendants, arguing that the plaintiffs were trespassers and should therefore not be permitted to benefit from their act of lawlessness.

As much as the decision of the judge in this case was not progressive in enforcing socio economic rights. Lawyers and the judges made reference to international human rights instruments in that two cases, what constituted a positive step to the enforcement of international human rights in domestic courts.

This chapter discussed how the courts of Mozambique and Ghana have enforced international human rights law in domestic courts; the next chapter draws the conclusion of the aspects discussed in the entire paper with great emphasis of the aspects discussed in this chapter.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

The current chapter seeks to draw conclusions of the study and give recommendations. Conclusions will be drawn from the analysis and discussions of the findings from the previous chapters and a great emphasis will be given to the chapter 4, which is the case study of this work. Recommendations will be given in accordance with what should be improved or changed in Mozambique and Ghana.

From the research carried out on the enforcement of international human rights law in domestic courts in Mozambique and Ghana, there is an urgent need of change of the attitude of the governments, magistrates and lawyers. Having looked at a whole range of issues from the constitutional provisions dealing with international human rights law, ratification to enforcement of those norms in domestic courts this study concludes that:

- The Constitutional provision of both countries, Mozambique and Ghana with regard to the reception and transformation of international human rights law are characterised by the rigidity of the dualist approach, though Mozambique is in advanced position with the direct applicability of the African Charter, UN Charter, the applicability of the African Charter on Human and Peoples' Rights and the UDHR when interpreting fundamental rights.
- The dualist approach adopted by the two countries impacts negatively on the enforcement of international human rights in domestic courts, considering that if the states commit itself internationally to respect human rights of its nationals, there should not be the need to pass into national legislation.
- Regarding the competence to make international human rights law treaties, Mozambique seems more flexible in the sense that the power is not only concentrated in the President of the Republic as for the case of Ghana but it can be delegated to the other governmental institutions. The Cabinet in Mozambique also has original powers to make treaties.

- Judges and lawyers in Ghana do not gain much knowledge of international human rights at the university and judicial training. However, Ghanaian judges and lawyers have shown more progressiveness in enforcing international human rights in domestic courts as compared to Mozambican lawyers and judges.
- Ghana and Mozambique have a limited number of international human rights instruments transformed in the national legislation, which impacts negatively on their enforcement at the domestic level.
- The teaching of international human rights law related subjects in those countries in the majority of the cases are optional and mostly at the universities.

5.2 Recommendations

a) To speed up the integration of the international human rights principles into domestic legal systems, the study recommends that the governments of Mozambique and Ghana should follow these lines of action:

- Take urgent measures through your parliaments on amending constitutions with regard to reception and applicability of international human rights law in the national legal order. Enshrine in your constitutions the direct applicability of international human rights instruments so that the enforcement is facilitated.
- Take concrete steps to fulfil the international obligation in which you commit yourselves at the international level in your domestic system.
- Develop policies to implement at the public and private schools both primary and secondary levels subjects related to the basics in human rights because human rights are for everyone and everyone should be aware of their rights.

- Make the enforcement of international human rights law in domestic courts a rule rather than the exception.
- b) To the parliaments of Mozambique and Ghana**
- Take an active role to pressure governments to transform international human rights instruments into national legislation so that they are easily enforced in the internal legal order.
- c) To the Judges and Lawyers in Mozambique and Ghana**
- Play a more proactive role with regard to the enforcement of international human rights law in domestic courts.
 - Lawyers be progressive with regard to the international human rights law, get to know these instruments as the same laws of their national jurisdiction
- d) To the Centre for Judicial training in Mozambique and the Law School in Ghana**
- Those two institutions should include in their syllabus international human rights law related subjects to better train the judges and lawyer on the matter.
- e) Universities in Mozambique and Ghana**
- Include international human rights law related subjects in your curriculum as compulsory courses.
- f) To the civil society groups**
- Put pressure to the state to create conditions for the applicability of international human rights law norms internally.

Last but not least it is recommended that the recommendations given here should be followed in order to change the actual scenario of the lamentable enforcement of international human rights law in Mozambique and Ghana.

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Bibliography

Books

An-Na'im, A A (ed) (2003): Human Rights Under African Constitutions: Realizing the Promise for Ourselves. Philadelphia (University of Pennsylvania Press).

Alam, S M (2005): Enforcement of International Human Rights Law by Domestic Courts. Bangladesh (University of Chittagong Press).

Akehurst, M (1992): A Modern Introduction to International Law. London (George Allen & Unwin Publishers).

Alston, P (2003): The European Union and Human Rights. Oxford (Oxford University Press).

Bayefsky, A (ed) (2000): The UN Human Rights Treaty System in the 21st Century. The Hague, London, Boston (Kluwer Law International)

Black's Law Dictionary (1983).

Barreira, PA (2002): Apostila de Direito Internacional Público. São Paulo (São Paulo Editora).

Brownlie, I (2002): Principles of Public International Law. Oxford (Oxford University Press).

Christian Tomuschat (2004): Human Rights: Between Idealism and Realism. Oxford (Oxford University Press).

Conforti, B; Francioni, F (eds) (1997): Enforcing International Human Rights in Domestic Courts. The Hague / Boston / London (Martinus Nijhoff Publishers).

Cintra, D A D (2005): O Judiciário e os Tratados Internacionais Sobre Direitos Humanos. São Paulo (São Paulo Editora).

Cassese, A (1985): Modern Constitutions and International Law. Oxford (Oxford University Press).

Dias, J P S (2003): Direito Internacional Público 'Súmarios Desenvolvidos. Figueira da Foz (Universidade Internacional Manuais).

Dugard, J (2000): International Law: A South African Perspective. Cape Town: Juta Ltd. 2nd Ed.

Feldman, C G (1996) : La Implementación de Tratados Internacionales de Derechos Humanos por el Paraguay. Paraguay (Konrad Adenauer Publications).

Gouveia, J B (2004): Manual de Direito Internacional Público. Coimbra (Livraria Almedina).

Heyns, C (ed) (2004): Human Rights Law in Africa. Leiden, Boston (Martinus Nijhoff Publishers). Vol. I & II.

Harvey, R (2004): Children in Armed Conflict: A Guide to International Humanitarian and Human Rights Law, (UNDP Publication).

Morowa, A H E; Schreuer C (2003): Enforcing International Human rights in Domestic Courts: Role of Non-Governmental Organisations. Philadelphia (University of Philadelphia Press).

Mello, C A (2002): Curso de Direito Internacional Público. São Paulo (Editora Saraiva).

Miranda, J (2002): Curso de Direito Internacional Público. Lisboa.

Nádia, A (2003): Direito Internacional Privado: Teoria e Prática Brasileira. Rio de Janeiro (Editora Renovar).

Nmehielle, V O O (2001): The African Human Rights System: Its Laws, Practice, and Institutions. The Hague, London, New York (Martinus Nijhoff Publishers).

Quadros, F; Gonçalves, A (1998): Manual de Direito Internacional Público. Coimbra (Livraria Almedina).

Shapiro, M (1981): Courts: A Comparative and Political Analysis. Chicago (Chicago University Press).

Shaw, M N (2003): International Law. Cambridge (University of Cambridge Press)

Steiner, H J; Alston, P (2000): International Human Rights in Context: Law, Politics, Morals. Oxford (Oxford University Press). 2nd Ed.

Simma, B (1995): The Charter of the United Nations: A Commentary. Oxford (Oxford University Press).

Starke, J G (1989): Introduction to International Law. London (Butterworths). 10th Ed.

S Rosenne (1984): Practice and Methods of International Law. New York (Oceana).

Thomas C; Oelz, M; Beaudonnet, X (2004): The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence and Practical Implications.

United Nations (1997) : A Basic Handbook for UN Staff (UNDP Publication).

Wallace, R; Holliday, N (2005): International Protection of Human Rights. London (London External).

Journals and Reviews

Benvenisti, E (1993): Judicial Misgivings Regarding the Application of International Law : An Analysis of Attitudes of National Courts, European Journal of International Law. Vol.159.

Conforti, B (1993): The Activities of national Courts and the International Relations of their State, Yearbook of the Institute of International Law, Vol 65. Part I, p. 428.

Dugard, J (1990): International Law and the South African Constitution, European Journal of International Law, Vol. 8.

G Slyz (1995-1996): International Law in National Courts, New York University Journal of International Law and Politics, p 258-270.

Henkin, L (1986-1987): The Constitution and U.S. Sovereignty 'A Century of Chinese Exclusion and its Progeny', Harvard Law Review. 100.

Kareen, K (2000): Here and There: International Law in Domestic Courts, New York University Journal of International Law and Politics. Vol. 32.

Keohane, R (1992): Compliance with International Commitments 'Politics within a Framework Law, American Society of International Law, Vol. 86, p176

Kelly, C (2001): The Value Vacuum 'Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop, Michigan Journal of International Law. Vol 22. p673.

Schermes, H (1990): The Role of Domestic Courts in Effectuating International Law, Leiden Journal of International Law, Vol. 3, p77-79.

Starke, J G (1936): Monism and Dualism in the Theory of International Law, British Year Book of International Law.

Articles

Adede, O: Domestication of International instruments ' a study for the Kenyan Constitution' available at <<http://www.kenyaconstitution.org/docs/07d017.htm>> (accessed 12/09/2005).

Ariosi, M F : As Relações Entre o Direito Internacional e o Direito Interno, available at <http://jus2.uol.com.br/doutrina/texto.asp?id=5940> (accessed 20/09/ 2005).

Bussani, M; Mattei, U: Making Other Path Efficient 'Economic Analysis and Tort Law in Less Developed Countries', 1995, Background paper available at <<http://www.jus.unitn.it/cardozo/Review//Matei1htm>> (accessed 24/09/05).

Conclusion and Recommendations of the Seminar on the National Implementation of the ACHPR available at <www.chr.up.ac.za/hr_docs/african/docs/other/other10.doc> (Accessed 11/10/05).

Davies, O (2005): Human Rights and Poverty Reduction 'Realities, Controversies and Strategies. (Background Paper).

Enforcing International Human Rights Standards in Domestic Legal Systems available at <<http://fxi.org.za/archives/Medialaw/legal.htm>> (accessed 20/08/05).

George, Y: The African Charter on Human and Peoples' Rights and Domestic Laws, <<http://academic.udayton.edu/race/06hrights/GeoRegions/Africa/Africa03.htm>> (accessed 20/09/05),

Hofstötter, B (2005): The Problem of Non-Compliant National Courts in European Community Law. (MA Dissertation unpublished).

International Customary Law at Wikipedia the Free Encyclopedia available at <http://en.wikipedia.org/wiki/Customary_international_law> (accessed 22/09/05).

Jurist Legal Intelligence: The Netherlands Constitution, Government and Legislation available at <<http://www.jurist.law.pitt.edu/world/Netherlands.htm>> (accessed 25/09/2005).

K Quashigah: Trends in the Promotion and Protection of Human rights Under the 1992 Constitution (Unpublished).

K Quashigah The Constitutional Right to Freedom of Assembly and Procession in Ghana in the Light of the Decision in the Public Order Case and the Public Order Act.

Layton R: When and How Can Domestic Judges and Lawyers Use International Law in Dualist Systems available at <training.itcilo.org/ils/ils_judges/training_activities/2005/A900406/english/participation1.htm> - 30k> (accessed 22/09/05).

Nguyen, M (2005): The Question of Failed States 'Australia and the Notion of State Failure'. (Paper).

Online Dictionary Labortalk.com available at <<http://encyclopedia.laborlawtalk.com>> (accessed 10/10/05). Definition of treaty.

Prefontaine, D; Lee Q (2004): The Rule of Law and the Independence of the Judiciary. (Paper).

Peterson, B: Complementarity Between Key Instruments of International Law, at <[http://www.idpproject.org/IDP_project/Complementarity %20of HR and IHLGP.pdf](http://www.idpproject.org/IDP_project/Complementarity_%20of_HR_and_IHLGP.pdf)>. (accessed 19/10/05).

Piovesan, F: A Constituição Brasileira de 1988 e os Tratados Internacionais de Protecção dos Direitos Humanos, in Enciclopédia e Dicionário de Direitos Humanos, available at <<http://www.dhnet.org.br/direitos/militantes/flaviapiovesan/flavia88.html>> (accessed 14/08/05).

Strategies for Enforcing Economic Social Rights Through Domestic Legal System, University of Minnesota Human Rights Resources Center available at <www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm> (accessed 21/09/05).

Vasciannie, S: Human Rights in Jamaica 'International and Domestic Obligations', available at <www.undp.org/fojam/stephen%20vasciannie.doc> (accessed 16/10/05);

UN Documents

United Nations, General Assembly Resolution 217(A), *General Assembly Official Records, 3rd Session, Part I, Resolutions*, p. 71. (Resolution that creates the UDHR).

Laws

Constitution of the Republic of Mozambique 2004

Constitution of the Republic of Ghana 1992

Statute of the International Court of Justice

Case Law

Marckx case on 13 June 1979 (Series A. no 39), European Court of Justice.

Reena Bajracharya and Others v. The HMG Supreme Court of the Kingdom of Nepal, 2054, Writ No. 2812

Religious Holiday case Montepuez case 1/96 – CCAAHF

Montepuez case 325/2002-A.

Edusei v Attorney General in Supreme Court Ghana Law Report (1996-1997)

SCGLR.

General Sani Abacha & Others v. Chief Gani Fawehinmi, (2000) SC of Nigeria.

New Patriotic Party v. Inspector general of Police (the Public Order Case) (1993-1994) 2 GLR.

Sodom and Gomorrah case in K Quashigah: Trends in the Promotion and Protection of Human Rights Under the 1992 Constitution (Unpublished).

Interviews

Dr. Carlos Serra (date of the interview 18 October 2005)

Dr. Luis Huamusse (date of interview 16 October 2005)