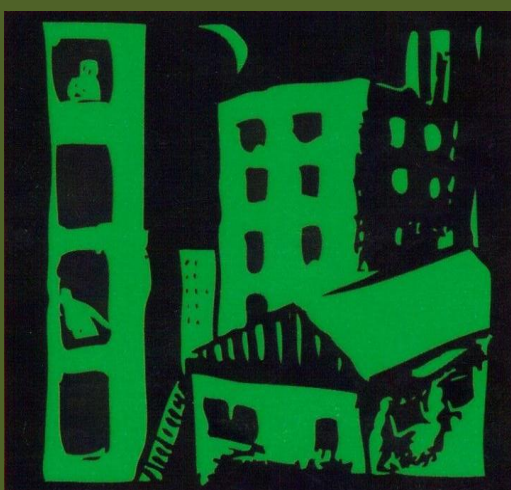


LAW  
DEMOCRACY  
& DEVELOPMENT



VOLUME 17 (2013)

DOI: <http://dx.doi.org/10.4314/idd.v17i1.18>

ISSN: 2077-4907

## How international human rights law influences domestic law in Africa

MAGNUS KILLANDER

*Senior Lecturer & Head of Research,  
Centre for Human Rights, University of  
Pretoria*

### 1 INTRODUCTION

International law plays an important role in framing the content of national law. This is evident with regard to norms of environmental law, crime prevention and human rights, to name just a few areas where norms adopted by global and regional organisations influence, and to a certain extent harmonise, national legal and policy frameworks.<sup>1</sup>

The focus of this article is on how international human rights law influences the content of national law whether, for example, through direct application of international human rights law by national courts or through inspiring new national legislation based on international instruments. It also

---

<sup>1</sup> With regard to legal harmonisation in the context of Africa see eg Killander M “Legal harmonization in Africa: Taking stock and moving forward” (2012) 47 *The International Spectator* 83.

considers the impact of “international expert” made law, such as, the decisions of regional and UN quasi-judicial bodies and courts. The article provides an overview of these issues in relation to Africa highlighting pertinent examples from national case law and legislation illustrating particular points.

## 2 THE ROLE OF INTERNATIONAL LAW IN THE DOMESTIC LEGAL SYSTEM

### 2.1 Treaty law

A distinction is often made between states that are monist and dualist; that is between states where international treaties are purportedly directly applicable by courts in the same way as national legislation and states where parliament must either incorporate the treaty through national legislation, or use the treaty as a basis for national legislation.<sup>2</sup>

With regard to monist states any self-executing norm would in theory be directly applicable. A self-executing norm is a norm that is specific enough to provide an explicit right or obligation.<sup>3</sup> That is the theory. In practice national legislation takes precedence in the traditional monist states in Africa, such as, those with a French, Belgian or Portuguese colonial heritage. However, despite the theory, international law generally plays little role in litigation in these states,<sup>4</sup> This can be illustrated with respect to Mali which has ratified both the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Despite this, a few years ago a proposed new family law providing for more equality between men and women met with great popular resistance and the government was forced to withdraw the proposed legislation, despite government’s commitment thereto and widespread calls for its adoption, including from UN treaty monitoring bodies.<sup>5</sup> Prior to the proposed legislation there had been no legislative attempt to turn the obligations under the international instruments into reality. Eventually a law which kept discriminatory provisions of the old Family Law was adopted.<sup>6</sup> Similarly, courts in Senegal refused to apply the UN Convention against Torture, ratified by Senegal, to provide jurisdiction in the case against Hissène Habré, the former Chadian dictator in exile in Senegal who is

<sup>2</sup> Dugard J *International law: A South African perspective* (2011) at 42-43; Viljoen F *International human rights law in Africa* (2012) at 518-525.

<sup>3</sup> Buergethal T “Self-executing and non-self-executing treaties” (1992) IV *Recueil des Cours* 343.

<sup>4</sup> Killander M & Adjohoun H “International law and domestic human rights litigation in Africa: An introduction” in Killander M (ed) *International law and domestic human rights litigation in Africa* (2010) at 5-11. Benin is an exception; see Tanoh A & Adjohoun A “International law and human rights litigation in Côte d’Ivoire and Benin” in Killander (2010) at 109. See also the country studies in Centre for Human Rights *The impact of the African Charter and Women’s Protocol in selected African states* (2012).

<sup>5</sup> Concluding comments of the Committee on the Elimination of Discrimination against Women: Mali, CEDAW/C/MLI/CO/5, 3 February 2006, para 11.

<sup>6</sup> Diarra ST “Women’s rights in Mali ‘set back 50 years’ by new ‘Family Code’ law”, *Guardian Weekly* 1 May 2012. Available at <http://www.guardian.co.uk/global-development/2012/may/01/womens-rights-mali-50-years> (accessed 20 February 2012).

accused of crimes against humanity, including torture. Eventually Senegal amended its national legislation to allow for prosecution of international crimes committed outside Senegal.<sup>7</sup> In some instances non-publication of a ratified treaty, in the national *Gazette* has been used as a reason to not apply a ratified treaty and in others that a particular provision of an international treaty is not self-executing. However, often the reasoning is murky or non-existing.<sup>8</sup>

In contrast, international law has played an important role in a number of cases before courts in African common law jurisdictions despite most of these countries being dualist in relation to treaty law.<sup>9</sup> Some Commonwealth states have taken the route of placing more emphasis on the importance of international treaties though again the theory is not always reflected in practice. Few states have explicitly incorporated international human rights treaties. Nigeria incorporated the African Charter on Human and Peoples' Rights shortly after ratifying the treaty. Nigerian courts have held that the Charter has a status higher than national legislation, allowing the courts to challenge decrees ousting their jurisdiction during the military dictatorship of the 1990s.<sup>10</sup>

Some African Commonwealth states have taken the route of automatic constitutional incorporation of treaties. Thus, Namibia at independence chose to follow the German monist model. Article 144 of the 1990 Namibian Constitution provides:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Despite this constitutional provision, international law has played a minimal role in Namibian constitutional jurisprudence.<sup>11</sup>

In South Africa it was suggested at the drafting stage of the interim Constitution that the Namibian model should be followed.<sup>12</sup> In the end an ambiguous formulation was chosen which has been widely interpreted as purely dualist with regard to treaty norms. A similar provision was included in the final 1996 Constitution.<sup>13</sup> This is not to say that international human rights law does not play an important role in interpreting the South African Constitution and South African legislation as illustrated by numerous

<sup>7</sup> Human Rights Watch "Chronology of the Habré case." Available at <http://www.hrw.org/news/2012/03/09/chronology-habr-case> (accessed 20 February 2012).

<sup>8</sup> Killander & Adjohoun (2010) at 6-7.

<sup>9</sup> Killander & Adjohoun (2010); Viljoen (2012) at 522-524; country studies in Centre for Human Rights *The impact of the African Charter and Women's Protocol in selected African states* (2012).

<sup>10</sup> Ayeni V "The impact of the African Charter and Women's Protocol in Nigeria" in Centre for Human Rights (2012) 121 at 127-129.

<sup>11</sup> Horn N "International human rights norms and standards: The development of Namibian case and statutory law" in Horn N & Bösl A (eds) *Human rights and the rule of law in Namibia* (2008) at 144; Zongwe DP "Equality has no mother but sisters: The preference for comparative law over international law in the equality jurisprudence in Namibia" in Killander (2010) at 123..

<sup>12</sup> Olivier M "The status of international law in South African municipal law: Section 231 of the 1993 Constitution" (1994) 19 *SAYIL* 1 at 2-3.

<sup>13</sup> Customary international law explicitly forms part of the law of the land under s 232 of the South African Constitution.

cases in the constitutional era.<sup>14</sup> New impetus to take international law seriously was given by the South African Constitutional Court's 2011 majority decision in *Glenister v President of the Republic of South Africa* (*Glenister case*). The Court held:<sup>15</sup>

Section 231(4) ... provides that an international agreement 'becomes law in the Republic when it is enacted into law by national legislation.' The fact that section 231(4) expressly creates a path for the domestication of international agreements may be an indication that section 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them.

In discussing section 231(4), the Court does not mention the second part of sub-section 4: "but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". This may be because the case did not deal with a right that could be considered self-executing. However, clarity as to the meaning of this provision is still needed.<sup>16</sup>

The Court opened up for extensive reliance on international law in constitutional interpretation commensurate with the obligation on courts in section 39(1)(b) to "consider international law" when interpreting the Bill of Rights:<sup>17</sup>

The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law. And international law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.

The Court further held:<sup>18</sup>

Section 233...demands any reasonable interpretation that is consistent with international law when legislation is interpreted. There is, thus, no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.

Kenya's 2010 Constitution is at least on paper very international law friendly. Article 2(6) provides: "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." The provision is not necessarily stronger than the Namibian constitutional provision cited above, as new national legislation that explicitly sets out to make a provision of a treaty inapplicable would probably be held to be constitutional. However, the impact of international law is likely to be felt more in

---

<sup>14</sup> See eg De Wet E "South Africa" in Shelton D (ed) *International law and domestic legal systems: Incorporation, transformation and persuasion* (2011) at 567; Ngidi RLK "The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective" in Killander (2010) at 173.

<sup>15</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) para 181.

<sup>16</sup> Killander M "Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision: *Claasen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)" (2010) 26(2) *South African Journal on Human Rights* 386.

<sup>17</sup> *Glenister* para 192.

<sup>18</sup> *Glenister* para 202.

Kenya than it has in Namibia as even under the previous Constitution Kenyan courts were quite open to international law arguments.<sup>19</sup>

An example of the application of international human rights law under the 2010 Kenyan Constitution is *Re Zipporah Wambui Mathara* where the High Court applied the prohibition in Article 11 of the International Covenant on Civil and Political Rights (ICCPR) on imprisonment for civil debt.<sup>20</sup> In *David Njoroge Macharia v Republic (David Njoroge Macharia case)*<sup>21</sup> the Court of Appeal held:

Under the new Constitution, state funded legal representation is a right in certain instances. *Article 50 (1)* provides that an accused shall have an advocate assigned to him by the State and at state expense, **if substantial injustice would otherwise result** (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of *Article 2 (6)*. Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

It is interesting to note that the Court of Appeal arguably does not only consider the text of the ICCPR to be binding on Kenya but also the “commentaries” of the UN Human Rights Committee. In the case at hand this led the Court to find that legal aid must be provided in a case where a defendant may face the death penalty, citing case law of the UN Human Rights Committee and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of the African Commission on Human and Peoples’ Rights to this effect. The role of treaty body interpretation will be discussed further below.

Some Bills of Rights, such as, those of Ghana<sup>22</sup> and Uganda,<sup>23</sup> have provisions that the rights listed are not exhaustive. International human rights law could be used to fill identified gaps.<sup>24</sup> Even states with no constitutional, or legislative, provisions to anchor reliance on international human rights law have done so, albeit very selectively and to a large extent dependent on individual judges.<sup>25</sup> The strict dualism applied by most judges in these countries goes well beyond the more open attitude to international law of judges of their former colonial master, the United Kingdom.<sup>26</sup>

<sup>19</sup> Ambani JO “Navigating past the ‘dualist doctrine’: The case for progressive jurisprudence on the application of international human rights norms in Kenya” in Killander (2010) 25.

<sup>20</sup> High Court at Nairobi (Milimani Commercial Courts) Bankruptcy Cause 19 of 2010, ruling, 24 September 2010, [2010] eKLR.

<sup>21</sup> Court of Appeal at Nairobi, Criminal Appeal 497 of 2007, judgment 18 March 2011, [2011] eKLR.

<sup>22</sup> Constitution of the Republic of Ghana 1992 art 33(5): “The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.”

<sup>23</sup> Constitution of the Republic of Uganda 1995 art 45: “The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned.”

<sup>24</sup> Kabumba B “The application of international law in the Ugandan judicial system: A critical inquiry” in Killander (2010) at 99.

<sup>25</sup> See Killander & Adjolohoun and the country chapters on Ghana and Botswana, Tanzania and Zambia in Killander (2010).

<sup>26</sup> Killander & Adjolohoun (2010) at 11-12.

Arguably, the fact that most states today involve Parliament in the ratification of at least major international treaties has removed the main theoretical obstacle to their application as national legislation. For example, treaty ratification in Kenya has traditionally been exclusively in the hands of the executive. The role of international law in the new Constitution means that this had to change to allow for democratic control of what becomes part of Kenyan law. Thus the Treaty Making and Ratification Act 2012 provides that Parliament must approve the ratification of treaties. However, some states still do not provide for any role of Parliament in the ratification of treaties and the direct application of treaty provisions as national legislation could be seen as undemocratic. Even with regard to states where Parliament approves ratification, this is often a formality and the implications of ratification of such treaties are much less discussed than national Bills.

## 2.2 Customary international law and soft law

International human rights law is not made up only of treaties but also includes customary international law. The role of custom is not very clear with regard to human rights and in most instances is unimportant as the law is heavily codified, albeit often vague. The position of customary international law is rarely mentioned in constitutions<sup>27</sup> and rarely explicitly referred to by courts. The meaning of constitutional provisions is sometimes unclear, such as, the reference to “the general rules” of international law in the Kenyan and Namibian Constitutions.<sup>28</sup> Arguably “general rules” should be interpreted as customary international law which has been held to be part of national law in most states where the question has come before the courts.

As with customary law at the national level, customary international law is not static but constantly developing. Declarations and resolutions with normative content adopted by authoritative international bodies, such as, for example, the UN General Assembly or Human Rights Council or the AU Assembly of Heads of State and Government could, combined with state practice, develop customary international law. In themselves such declarations and resolutions constitute what Shelton has called “primary soft law”.<sup>29</sup>

Shelton refers to resolutions and decisions adopted by regional human rights courts and quasi-judicial bodies, such as, the African Commission on Human and Peoples' Rights, as well as decisions and general comments adopted by the UN treaty monitoring bodies as “secondary soft law”.<sup>30</sup> The views of these bodies have rarely been cited in African national case law despite giving more specific content to the obligations under the treaties. Courts in most states would probably view such pronouncements as persuasive in the same way as comparative case law from foreign jurisdictions which is more commonly used, although with a general preference for non-

<sup>27</sup> An exception is s 232 of the South African Constitution.

<sup>28</sup> Constitution of Kenya art 2(5); Constitution of the Republic of Namibia art 144.

<sup>29</sup> Shelton D “Soft law” in *Handbook of international law* (2008). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003387&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003387&download=yes) (accessed 19 February 2013) at 4.

<sup>30</sup> Shelton (2008) at 5.

African case law. Arguably, these interpretations should be given a higher status. In *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, the International Court of Justice held:<sup>31</sup>

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of states parties to the first Optional Protocol, and in the form of its 'General Comments'. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the states obliged to comply with treaty obligations are entitled.

The Court made a similar statement with regard to the jurisprudence of the African Commission on Human and Peoples' Rights.<sup>32</sup>

Virtually no African state takes into consideration in its constitution or legislation the role of the jurisprudence established by international experts. Article 48 of the Constitution of the Seychelles is an exception:

*48. Consistency with international obligations of Seychelles*

This Chapter shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provisions of this Chapter, take judicial note of –

- (a) the international instruments containing these obligations;
- (b) the reports and expression of views of bodies administering or enforcing these instruments;
- (c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;
- (d) the Constitutions of other democratic states or nations and decisions of the courts of the states or nations in respect of their Constitutions.

Courts should thus view the decisions of international treaty monitoring bodies as tools of interpretation of national law in the same way as courts consider foreign comparative jurisprudence.

The Kenyan Court of Appeal followed this approach in the *David Njoroge Macharia* case, though the Court provided no reasons as to why it followed this approach. Justice Egonda-Ntende provided some reasons for considering such decisions in his separate opinion in the judgment of the Supreme Court of Uganda in *Attorney General v Kigula and Others*:<sup>33</sup>

It is worthwhile noting that Uganda acceded to the International Covenant on Civil and Political rights on 21st September 1995 and to the First Optional Protocol on 14<sup>th</sup> February 1996. At the very least the decisions of the Human Rights Committee are therefore very persuasive in our jurisdiction. We ignore the same at peril of infringing our obligations under that treaty and

<sup>31</sup> Judgment of 30 November 2010 para 66.

<sup>32</sup> Para 67.

<sup>33</sup> Constitutional Appeal 3 of 2006, judgment of 21 January 2009.

international law. We ought to interpret our law so as not to be in conflict with the international obligations that Uganda assumed when it acceded to the International Covenant on Civil and Political Rights.

In most states the extent to which international law (in the wide sense) or foreign comparative law dominates arguments is dependent on counsel.<sup>34</sup> In South Africa, where courts must consider international law and may consider foreign law, both foreign and international law is often considered under the same banner and international law, in particular the interpretation of treaty bodies, is often ignored. Arguably the obligatory consideration of international law by South African courts should include consideration, albeit not always application of, such pronouncements. In particular the case law of the African Commission on Human and Peoples' Rights is often ignored. One of the few references to the Commission's case law was when the Supreme Court of Appeal of South Africa quoted the African Commission's decision in the *Ogoniland* case in its judgment in *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Modderklip case)*.<sup>35</sup> However, the Constitutional Court of South Africa has as far as the author is aware never cited a decision by the African Commission despite the fact that counsel in some cases have cited relevant Commission cases in their submissions to the Court. This is so despite the fact that the Court has relatively frequently cited provisions of the African Charter on Human and Peoples' Rights and other African human rights instruments.<sup>36</sup> Similar neglect of African case law has been identified in Zimbabwe and elsewhere on the continent.<sup>37</sup>

### 2.3 Hierarchy in international law

Legal norms often come into conflict with each other. Theories have been developed with regard to the role of international law in the national legal system, as discussed above. What about different obligations under international law? One way to address this problem is, as discussed below, through implementing legislation. Ideally the ratification of a treaty should be preceded by a compatibility study. However, such studies are not undertaken systematically in most African states.<sup>38</sup>

It is sometimes argued that human rights law is normatively superior to other norms of international law, in particular *jus cogens* norms, such as, the prohibition

---

<sup>34</sup> Based on interviews with judges in Lesotho, Thabane and Shale list lack of awareness and access, lack of reference to such instruments and decisions by counsel, and lack of domestication as reasons why Lesotho courts do not generally refer to the African Charter, the Women's Protocol and the jurisprudence of the Commission. See Thabane T & Shale I "The impact of the African Charter and Women's Protocol in Lesotho" in Centre for Human Rights (2012) at 79.

<sup>35</sup> *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) para 27.

<sup>36</sup> Assefa AG "The impact of the African Charter and Women's Protocol in South Africa" in Centre for Human Rights (2012) 161 at 167.

<sup>37</sup> Mutangi T *et al*, "The impact of the African Charter and Women's Protocol in Zimbabwe" in Centre for Human Rights (2012) 175 at 178-179 and other chapters in the book.

<sup>38</sup> See the country chapters in Centre for Human Rights (2012).



against torture.<sup>39</sup> However, in these instances the question often becomes whether non-*ius cogens* norms derived from the primary peremptory norm should take precedence. For example, does the obligation to prosecute those suspected of torture imply that customary international law relating to immunity should not apply in such cases? Questions such as these have not come before national courts in Africa. Issues of different international obligations have arisen where there have been situations which are similar to the inherent limitations of most human rights: the fact that most human rights are not absolute and must be balanced against other rights and interests. In their 2006 study, Heyns and Kaguongo noted that all the examined Bills of Rights included rights with internal limitations, and that 25 constitutions included general limitation clauses.<sup>40</sup> In the *Republic v Gorman and Others* the Supreme Court of Ghana held:<sup>41</sup>

Ghana, as a party to the United Nations Convention on Narcotic Drugs and Psychotropic Substances, shoulders a constitutional exultation to enforce this Convention, while at the same time protecting the constitutional presumption of innocence of all accused persons. ...

public interest considerations focused on the societal problems of drug addiction, and the need to abide by the treaty obligations of Ghana in the enforcement of anti-narcotics laws, weigh heavily against the grant of bail...

Similarly in a case dealing with the religious use of cannabis, the majority judgment of the South African Constitutional Court held:<sup>42</sup>

The use made of cannabis by Rastafari cannot in the circumstances be sanctioned without impairing the state's ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution.

### 3 THE ROLE OF INTERNATIONAL LAW IN DOMESTIC LAWMAKING

So far this article has discussed how international law influences the domestic legal order directly, with a focus on the direct use of international human rights law in the courts. However, international law influences national law not only directly but also indirectly, for example, through incorporation in national legislation.

The constitutions of most African states and in particular their Bills of Rights are to a great degree influenced by international human rights law, in some instances explicitly referred to in the Preamble.<sup>43</sup> The Bills of Rights of independence constitutions were to a significant extent carbon copies of the European Convention on

<sup>39</sup> For a detailed discussion of international human rights law in relation to various other sub-field of international law see De Wet E & Vidmar J (eds) *Hierarchy in international law: The place of human rights* (2012).

<sup>40</sup> Heyns C & Kaguongo W "Constitutional human rights law in Africa" (2006) 22 *South African Journal on Human Rights* 673 at 680.

<sup>41</sup> *The Republic v Gorman and Others* (2004) AHRLR 141 (GhSC 2004) at paras 38 and 50.

<sup>42</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794; 2002 (3) BCLR 231 at para 139.

<sup>43</sup> Heyns & Kaguongo (2006) at 680.

Human Rights.<sup>44</sup> In early 2013 only one independence constitution remains in Africa virtually unaltered with regard to structure and rights protection: Botswana's 1966 Constitution.<sup>45</sup>

The rights recognised in African bills of rights vary. In their 2006 study Heyns and Kaguongo found that equality/non-discrimination, freedom of opinion, expression and movement, and the rights to privacy and property were recognized in all African bills of rights.<sup>46</sup> Interestingly the right to privacy is not recognised in the African Charter on Human and Peoples' Right and the right to property is not recognised in the UN covenants. Enforcement procedures are clearly set out in most constitutions in Commonwealth Africa while lacking in many African civil law jurisdictions. With regard to constitutions that provided for enforcement measures socio-economic rights are often explicitly non-justiciable.<sup>47</sup>

Many international human rights treaties include provisions similar to Article 1 of the African Charter on Human and Peoples' Rights which provides that states should "adopt legislative or other measures to give effect" to the right provided in the Charter. As indicated in this provision, states are given much leeway as to how to implement a particular provision. International human rights monitoring bodies generally view compliance as an obligation of result rather than an obligation of process. However, in some instances implementing legislation is required. For example, there is an assumption that State parties to the Rome Statute on the International Criminal Court, which has been ratified by more than 30 African states, will adopt implementing legislation. This is necessary among, others, because the principle of complementarity requires that states should not be unable to prosecute crimes under the Statute nationally.

The Vienna Convention on the Law of Treaties in Article 27 provides "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Even though implementation legislation may not explicitly be required, it is thus clear that if a treaty cannot be applied directly in a state, the government must ensure that, as a minimum, there is no existing legislation that prevents the implementation of the treaty provisions. In some instances even constitutional provisions have been held by treaty bodies to violate provisions of human rights treaties. For example the CEDAW Committee has in its concluding observations on Zambia's state report recommended that the state "repeal art. 23 (4) of the constitution, which permits discrimination in areas of law that most affects women."<sup>48</sup> Treaty bodies have also called on states to give particular rights, such as socio-economic rights, constitutional protection. Ideally states should adopt comprehensive legislative reform to ensure that the national legal framework corresponds to the requirements of

---

<sup>44</sup> Heyns C "African human rights law and the European Convention" (1995) 11(2) *South African Journal on Human Rights* 252.

<sup>45</sup> Fombad CM "Botswana: Introductory notes." Available at [http://web.up.ac.za/sitefiles/file/47/15338/Botswana\(1\).pdf](http://web.up.ac.za/sitefiles/file/47/15338/Botswana(1).pdf) (accessed 12 February 2013).

<sup>46</sup> Heyns & Kaguongo (2006) at 683.

<sup>47</sup> Heyns & Kaguongo (2006) at 676-677.

<sup>48</sup> *Report of the Committee on the Elimination of Discrimination against Women, A/57/38 at para 231.*

ratified treaties. National law reform commissions can assist in this process, but the extent to which this happens is unclear.

National legislation which has been adopted to reflect international human rights law include legislation dealing with children's rights, women's rights, refugee rights, disability rights and trafficking. Often international bodies, such as, the United Nations Children's Fund (UNICEF) with regard to children's rights and the United Nations Higher Commissioner for Refugees (UNHCR) with regard to refugee rights, play an important role in relation to legal reform following ratification of relevant treaties.

Some legislation which has been adopted as a result of the ratification of international treaties makes explicit reference to the instruments which have inspired the legislation. For example, the Children's Act of Kenya, passed before the 2010 Constitution, provides in its Preamble that it is "[a]n Act of Parliament to ... give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes".<sup>49</sup> Refugee Acts generally make reference to the UN Convention relating to the Status of Refugees and its Protocol as well as to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>50</sup> In certain instances UN instruments are referred to while African instruments are not referred to even if ratified by the state in question.<sup>51</sup>

Where an Act refers to more than one treaty there may be inconsistencies between the norms in the underlying treaties. These inconsistencies, which usually create uncertainty in regard to international obligations, need to be resolved through national legislation or through judicial interpretation. For instance the African Charter on the Rights and Welfare of the Child makes reference to the best interests of the child as "the primary consideration" as opposed to the Convention on the Rights of the Child which states that they are "a primary consideration". However, it is the UN provision that dominates in national legislation, probably because of the influence of UN staff in the drafting of the legislation.

In contrast, African states have generally adopted the wider definition of who is a refugee in the OAU Refugee Convention and not the more narrow definition in the UN Refugee Convention read together with its Protocol.<sup>52</sup> An exception is Botswana which

<sup>49</sup> Children's Act, No. 8 of 2001. See also Children's Protection and Welfare Bill 2004 (Lesotho), The Child Right Act 2007 (Sierra Leone), Children's Act 38 of 2005 (South Africa).

<sup>50</sup> Loi n° 2005/006 du 27 juillet 2005 portant statut des réfugiés (Cameroon); Refugee Proclamation No 409, 2004 (Ethiopia); Refugee Act No. 15 of 2008 (The Gambia); Refugee Law, 1992 (Ghana); The Refugee Act No 13, 2006 (Kenya); Refugee Act, 1993 (Liberia); Refugee Act, 1989 (Malawi); Loi no 98-040 du 20 juillet 1998 portant statut des réfugiés (Mali); Ley núm. 21/91, por la que se establece el procedimiento de atribución del estatuto de refugiado (Mozambique); Namibia Refugees (Recognition and Control) Act, 1999 (Namibia); National Commission for Refugees, Etc Act No 52 of 1989 (Nigeria); Loi n° 34/2001 du 5 juillet 2001 sur les réfugiés (Rwanda); Refugees Protection Act, 2007 (Sierra Leone); Refugees Act, 1998 (South Africa); Loi no 19 du 29 décembre 2000 portant statut des réfugiés au Togo; and Refugee Act, 1983 (Zimbabwe).

<sup>51</sup> See eg Law No 126 of 2008 amending the provisions of the Child Law (Egypt); The Family Act, 2003 (Mozambique); Child Act, 2008 (Act 10) (South Sudan); Law of the Child Act No 21, 2009 (Tanzania); and Refugees (Recognition and Control) Act, Cap. 25:03 (Botswana).

<sup>52</sup> Loi n° 2005/006 du 27 juillet 2005 portant statut des réfugiés (Cameroon) s 2; Refugee Proclamation No 409, 2004 (Ethiopia) s 4; Refugee Act No 15 of 2008 (The Gambia) s 22; Refugee Law, 1992 (Ghana)

uses the UN definition.<sup>53</sup> Some states provide that refugees, for the additional reasons set out in the OAU Convention, should be determined as a class and not on an individual basis.<sup>54</sup>

It is not only binding international law that informs laws and policies. Angola, Burundi, Kenya, Liberia, Sierra Leone, Sudan and Uganda have adopted laws or policies dealing with internally displaced persons based on the UN Guiding Principles on Internal Displacement.<sup>55</sup>

#### 4 CONCLUSION

The impact of international law is strongly felt in the national legal order. Courts in some African states are hesitant to invoke international human rights law, while in others it is relatively easy to have courts seriously consider treaty norms or the interpretation of these norms by authoritative international bodies. The role of counsel is essential in persuading courts to rely on international law arguments. In many instances courts may have been influenced by international human rights law arguments even when these are not recorded in the judgment.

Perhaps more important than direct application or interpretative use of international law by courts is the implementation of these norms within national legislation and policy. Legislation in various African states has been influenced by United Nations, African Union and sub-regional instruments on human rights, environmental law, and so forth. With regard to human rights it is subject specific treaties, such as, those dealing with children, refugees, etc which have had the most impact on national legislation. General human rights law, such as the African Charter on Human and Peoples' Rights, is reflected in national Bills of Rights. Many times states do not automatically consider the implications of ratifying a treaty. Civil society organisations and international bodies have an important role to play in ensuring that a state's international obligations are implemented in the national legal order.

This article has examined the impact of international human rights law on the national legal order. This is not to say that actors at the national level, such as, courts, parliaments, and civil society actors, should only be recipients of an international law

---

s 26; The Refugee Act No 13, 2006 (Kenya) s 3; Refugee Act 1983 (Lesotho) s 3; Refugee Act, 1993 (Liberia) s 3; Refugee Act, 1989 (Malawi) s 2; Loi no 98-040 du 20 juillet 1998 portant statut des réfugiés (Mali) s 2; Ley núm. 21/91, por la que se establece el procedimiento de atribución del estatuto de refugiado (Mozambique) s 1; Namibia Refugees (Recognition and Control) Act, 1999 (Namibia) s 3; National Commission for Refugees, Etc Act No 52 of 1989 (Nigeria) s 20; Loi n° 34/2001 du 5 juillet 2001 sur les réfugiés (Rwanda) s 1; Refugees Protection Act, 2007 (Sierra Leone) s 2; Refugees Act, 1998 (South Africa) s 3; Regulation of Asylum Act 1974 (Sudan) s 2; Refugees Act, 1998 (Tanzania) s 4; Loi no 19 du 29 décembre 2000 portant statut des réfugiés au Togo s 1; The Refugees Act, 2006 (Uganda) s 4; and Refugee Act, 1983 (Zimbabwe) s 3.

<sup>53</sup> Refugees (Recognition and Control) Act, Cap. 25:03, schedule.

<sup>54</sup> The Refugee Act No 13, 2006 (Kenya) s 3; Refugee Act, 1993 (Liberia) s 3.

<sup>55</sup> Article 19 *Kenya: Internally Displaced Persons Bill, 2012*, Legal analysis, July 2012, 22; Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No 56 of 2012 (Kenya).

decided in faraway international fora. Indeed, international human rights law is best developed through a constant dialogue between the national and the international.

## BIBLIOGRAPHY

### Books and chapters in books

Ambani JO “Navigating past the ‘dualist doctrine’: The case for progressive jurisprudence on the application of international human rights norms in Kenya” in Killander M (ed) *International law and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press (2010)

Assefa AG “The impact of the African Charter and Women’s Protocol in South Africa” in Centre for Human Rights *The impact of the African Charter and Women’s Protocol in selected African states* Pretoria: Pretoria University Law Press (2012) 161

Ayeni V “The impact of the African Charter and Women’s Protocol in Nigeria” in Centre for Human Rights *The impact of the African Charter and Women’s Protocol in selected African states* Pretoria: Pretoria University Law Press (2012) 121

Centre for Human Rights *The impact of the African Charter and Women’s Protocol in selected African states* Pretoria: Pretoria University Law Press (2012)

De Wet E & Vidmar J (eds) *Hierarchy in international law – The place of human rights* Oxford: Oxford University Press (2012)

De Wet E “South Africa” in Shelton D (ed) *International law and domestic legal systems: Incorporation, transformation and persuasion* Oxford: Oxford University Press (2011) 567

Dugard J *International law: A South African perspective* Landsowne: JUTA (2011)

Horn N “International human rights norms and standards: The development of Namibian case and statutory law” in Horn N & Bösl A (eds) *Human rights and the rule of law in Namibia* Windhoek: Macmillan Namibia (2008) 144

Kabumba B “The application of international law in the Ugandan judicial system: A critical inquiry” in Killander M (ed) *International law and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press (2010) 99

Killander M & Adjolohoun, H “International law and domestic human rights litigation in Africa: An introduction” in Killander M (ed) *International law and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press (2010) 5

Mutangi T, Makanje-Aalboek R & Kuvheya L “The impact of the African Charter and Women’s Protocol in Zimbabwe” in Centre for Human Rights *The impact of the African Charter and Women’s Protocol in selected African states* Pretoria: Pretoria University Law Press (2012) 175

Ngidi RLK “The role of international law in the development of children’s rights in South Africa: A children’s rights litigator’s perspective” in Killander M (ed) *International law*

*and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press (2010) 173

Tanoh A & Adjlohoun H “International law and human rights litigation in Côte d’Ivoire and Benin” in Killander M (ed) *International law and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press 2010) 109

Thabane T & Shale I “The impact of the African Charter and Women’s Protocol in Lesotho” in Centre for Human Rights *The impact of the African Charter and Women’s Protocol in selected African states* Pretoria: Pretoria University Law Press (2012) 79

Viljoen F *International human rights law in Africa* Oxford: Oxford University Press (2012)

Zongwe DP “Equality has no mother but sisters: The preference for comparative law over international law in the equality jurisprudence in Namibia” in Killander M (ed) *International law and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press (2010) 123

### Journal articles

Buergenthal T “Self-executing and non-self-executing treaties” 1992 IV *Recueil des Cours* 343

Heyns C “African human rights law and the European Convention” (1995) 11(2) *South African Journal on Human Rights* 252

Killander M “Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision: *Claasen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)” (2010) 26(2) *South African Journal on Human Rights* 386

Killander M “Legal harmonization in Africa: Taking stock and moving forward” (2012) 47 *The International Spectator* 83

Olivier M “The status of international law in South African municipal law: Section 231 of the 1993 Constitution” (1994) 19 *South African Yearbook on International Law* 1

### Cases

*Attorney General v Kigula and Others*: Constitutional Appeal 3 of 2006, Supreme Court of Uganda, judgment of 21 January 2009

*Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, International Court of Justice, judgment of 30 November 2010

Court of Appeal at Nairobi, Criminal Appeal 497 of 2007, judgment 18 March 2011, [2011] eKLR

High Court at Nairobi (Milimani Commercial Courts) Bankruptcy Cause 19 of 2010, ruling, 24 September 2010, [2010] eKLR. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)

*Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA)

*Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794; 2002 (3) BCLR 231

*Re Zipporah Wambui Mathara* High Court at Nairobi (Milimani Commercial Courts) Bankruptcy Cause 19 of 2010, ruling, 24 September 2010, [2010] eKLR

*The Republic v Gorman and Others* (2004) AHRLR 141 (GhSC 2004)

### Electronic sources

Article 19 “*Kenya: Internally Displaced Persons Bill, 2012*, Legal analysis, July 2012”. Available at <http://www.article19.org/data/files/medialibrary/3362/12-10-08-LA-kenya.pdf> (accessed 12 February 2013)

Diarra ST “Women’s rights in Mali ‘set back 50 years’ by new ‘Family Code’ law”, *Guardian Weekly* 1 May 2012. Available at <http://www.guardian.co.uk/global-development/2012/may/01/womens-rights-mali-50-years> (accessed 20 February 2012)

Fombad CM “Botswana: Introductory note.” Available [http://web.up.ac.za/sitefiles/file/47/15338/Botswana\(1\).pdf](http://web.up.ac.za/sitefiles/file/47/15338/Botswana(1).pdf) (accessed 12 February 2013)

Human Rights Watch “Chronology of the Habré case.” Available at <http://www.hrw.org/news/2012/03/09/chronology-habr-case> (accessed 20 February 2012)

Shelton D “Soft law” in *Handbook of international law* (2008). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003387&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003387&download=yes) (accessed 19 February 2013)