

**THE USE OF INTERNATIONAL HUMAN RIGHTS LAW BY SUPERIOR NATIONAL  
COURTS IN KENYA AND SOUTH AFRICA**

by

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## DECLARATION

I declare that this thesis, which I hereby submit for the degree of DOCTOR LEGUM (LL.D), at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Dennis Mutua Ndambo

November 2020

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## DEDICATION

*For  
Agnes, Isaac, Josef, Emmanuel and David.*



## SUMMARY

The practice of domestic courts continues to present challenges for understanding the relationship between international law and municipal law. Whereas constitutions increasingly contain more or less similar provisions on international law, the subsequent use of international law by domestic courts varies from traditional doctrinal approaches. This divergence by domestic courts is attributable to the fact that domestic and international courts/tribunals are engaged in exchanging ideas and formulating similar decisions on diverse substantive law issues out of a sense of common judicial identity and enterprise. Due to the multitude of actors and the complexity of the relationships involved, the traditional monism-dualism doctrines do not accurately reflect current practice. Rather, this process is better termed as transnational judicial dialogue. Through transnational judicial dialogue, domestic courts collectively engage in the co-constitutive process of creating and shaping international legal norms and, in turn, ensuring that those norms shape and inform domestic norms. This study analyzes decisions of the superior courts of Kenya and South Africa in order to understand the manner in which the courts receive, interpret and re-formulate international legal norms. It is clear that the domestic courts are not mere conduits for the reception of international legal norms into the domestic legal order but that they act as mediators between the international and domestic legal norms. This study also attempts to demonstrate that transnational judicial dialogue may provide normative guidance for the relationship between international law and national law in the domestic legal order.

**Keywords:** International law, human rights law, treaties, custom, general principles of law, judicial decisions, resolutions, transnational judicial dialogue, dualism, monism, norms, international courts, domestic courts, Kenya, South Africa

## ABBREVIATIONS AND ACRONYMS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACtJHR	African Court of Justice and Human Rights
ANC	African National Congress
AU	African Union
CEDAW	Committee on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CJAU	Court of Justice of the African Union
CmRC	Committee on the Rights of the Child
CODESA	Convention for a Democratic South Africa
CoE	Committee of Experts
DSB	Dispute Settlement Body
EAC	East African Community
EACJ	East African Court of Justice
EACSO	East African Common Services Organisation
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GATT	General Agreement on Tariffs and Trade
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
IBEAC	Imperial British East Africa Company
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the former Yugoslavia
IGAD	Intergovernmental Authority on Development
ILC	International Law Commission
ILO	International Labour Organisation
ITLOS	International Tribunal for the Law of the Sea
JCPC	Judicial Committee of the Privy Council
MPNP	Multi Party Negotiating Process
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SADC	Southern African Development Community
SAPS	South African Police Service
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WTO	World Trade Organisation

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## Chapter 1

### Introduction

#### 1. Background

In the 1960s, some African states included in their constitutions provisions that incorporated international law into the domestic legal system.<sup>1</sup> Generally, states in Francophone Africa were more likely to incorporate international law through their constitutions than states in Anglophone Africa.<sup>2</sup> However, these provisions were more concerned with incorporating treaties than with other sources of international law.<sup>3</sup> It was not until the 1990s that Malawi, Namibia and South Africa started a trend of explicitly mentioning customary international law as well in national constitutions.<sup>4</sup> Similarly, upon attaining independence, many African states enacted constitutions that either included a bill of rights or contained provisions that protected norms of customary international human rights law<sup>5</sup> and international human rights treaties.<sup>6</sup> Therefore, international law has, for several decades, influenced the constitutional design of many African states, particularly those intending to entrench democracy.<sup>7</sup> However, many African constitutions do not explicitly set out the status and role of international law in the domestic legal system.

While Kenya was under British rule between 1886 and 1963, the British promulgated several constitutions for the colony but these constitutions did not explicitly mention international law. At independence in 1963, the only reference to international law in the Kenyan Constitution was a provision that empowered Parliament to pass a law in order to give effect to a treaty that the national government had concluded, or to an arrangement with or decision of an

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<sup>1</sup> T Maluwa, "The incorporation of international law and its interpretational role in municipal legal systems in Africa: An explanatory survey" (1998) 23 *South African Yearbook of International Law* 45, 56.

<sup>2</sup> *ibid* 56-57.

<sup>3</sup> T Maluwa, *International Law in Post-Colonial Africa* (Kluwer 1999) 31.

<sup>4</sup> *ibid* 32. More recent examples include the constitutions of Angola (2010), Mozambique (2004), Somalia (2012), Swaziland (2005) and Zimbabwe (2013), which can be found at <[www.constituteproject.org](http://www.constituteproject.org)> accessed June 2016.

<sup>5</sup> F Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2012) 518.

<sup>6</sup> C Heyns and W Kaguongo, "Constitutional Human Rights Law in Africa" (2006) 22 *South African Journal on Human Rights* 673.

<sup>7</sup> T Ginsburg, S Chernykh and Z Elkins, "Commitment and Diffusion: How and Why National Constitutions Incorporate International Law" (2008) 1 *University of Illinois Review* 201, 202.

international organization.<sup>8</sup> A new constitution was promulgated in 1969<sup>9</sup> but this constitution did not expressly mention international law. After several unsuccessful attempts at constitutional review, Kenya finally enacted a new constitution in 2010.<sup>10</sup> This constitution contains provisions that expressly mention international law.

On the other hand, South Africa's experience with colonisation from 1652 to 1910 was markedly different and longer. The Dutch applied Roman-Dutch law at the Cape from the beginning of settlement.<sup>11</sup> In keeping with the tradition of Dutch courts, while the Cape was under Dutch rule, international law would have been directly applicable by the courts as part of the common law without the need for statutory incorporation.<sup>12</sup> When the British took over from the Dutch (1795 – 1803 and 1806 – 1910), they allowed the continued application of Roman-Dutch law as the common law of the Cape Colony,<sup>13</sup> meaning that international law was still part of the colony's law. The Orange Free State and the *Zuid-Afrikaansche Republiek* (South African Republic), two Boer settlements, became independent states and gained international recognition.<sup>14</sup> The only reference to international law in their constitutions was to the treaty making powers of the state president.<sup>15</sup> Roman-Dutch law was also extended from the Cape to the Natal Colony, the Orange Free State and the *Zuid-Afrikaansche Republiek* (South African Republic),<sup>16</sup> meaning that customary international law was also part of the common law of these territories.<sup>17</sup>

The British defeated and annexed the two Boer republics during the Anglo-Boer war (1899 – 1902).<sup>18</sup> In 1909, the British Parliament passed an Act that united the four colonies (Cape, Natal, Orange River and Transvaal) as the Union of South Africa, with nominal independence but still subordinate to Britain.<sup>19</sup> The British Parliament enacted the *Statute of Westminster*,

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<sup>8</sup> Section 68 of the Kenya (Independence) Order in Council, 1963, S.I. 1968.

<sup>9</sup> Constitution of Kenya, 1969, Act No. 5 of 1969.

<sup>10</sup> The Constitution of Kenya, 2010, Kenya Gazette Supplement No. 55 of 2010.

<sup>11</sup> HR Hahlo and E Kahn, *The South African Legal System and Its Background* (Juta 1973) 571-572.

<sup>12</sup> J Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 49.

<sup>13</sup> HR Hahlo and E Kahn (n 11) 575.

<sup>14</sup> *ibid.*

<sup>15</sup> Article XXXIX and Article XL of the Constitution of Orange Free State, 10 April 1854, in GW Eybers, *Select Constitutional Documents Illustrating South African History: 1795-1910* (George Routledge 1918) 293; Article 27 and Article 28 of the Grondwet of the South African Republic, February 1858, in *ibid* 367.

<sup>16</sup> HR Hahlo and E Kahn (n 11) 576.

<sup>17</sup> J Dugard (n 12) 49.

<sup>18</sup> A Wessels, *The Anglo-Boer War 1899-1902* (Sun Press 2011) 78-79.

<sup>19</sup> G Carpenter, "Public Law: Constitutional Law" in WJ Hosten and others (eds), *Introduction to South African Law and Legal Theory* (Butterworths 1995) 952-953.



1931, in order to increase the autonomy of the Dominions. To confirm this status, the Union Parliament enacted the *Status of the Union Act, 1934* and the *Royal Executive Functions and Seals Act, 1934*.<sup>20</sup> After the formation of the Union, the mention of international law in the constitutions of 1910,<sup>21</sup> 1961<sup>22</sup> and 1983<sup>23</sup> was to extend the application of treaties that had been binding on the colonies to the Union (and later, Republic)<sup>24</sup> and to vest the power of concluding treaties on the executive.<sup>25</sup> Arguably, customary international law would have continued to apply as part of the common law, albeit with some qualification.<sup>26</sup> After decades of apartheid rule, South Africa enacted an “interim” constitution in 1994<sup>27</sup> to govern the transition to a truly democratic state.<sup>28</sup> The current constitution was enacted in 1996<sup>29</sup> and it made few changes to the already international law friendly provisions of the previous constitution.<sup>30</sup>

## 2. Research problem and research questions

The current constitutions of Kenya and South Africa incorporate international law into the domestic legal systems but in differing ways. Kenya’s constitutional provisions on international law are rather brief and are primarily concerned with stating that international law is part of Kenyan law. Conversely, South Africa’s Constitution elaborates on the domestic application and role of international law. Arguably, these differences would have a bearing on the relationship between international law and these states’ national legal orders, and would be expected to produce differing results in the manner in which the national courts treat international law vis-a-vis national law. However, it appears that the superior courts in both

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<sup>20</sup> WPM Kennedy, “Status of South Africa” (1935) 1 University of Toronto Law Journal 147.

<sup>21</sup> South Africa Act, 1909 (9 Edw. VII c. 9).

<sup>22</sup> Republic of South Africa Constitution Act, 32 of 1961.

<sup>23</sup> Republic of South Africa Constitution Act, 110 of 1983.

<sup>24</sup> Section 148 of the 1909 Constitution, section 112 of the 1961 Constitution, and section 94 of the 1983 Constitution.

<sup>25</sup> Section 7 of the 1961 Constitution and section 6 of the 1983 Constitution.

<sup>26</sup> J Dugard (n 12) 51-53.

<sup>27</sup> Constitution of the Republic of South Africa, 1993, date of assent: 25 January 1994.

<sup>28</sup> ME Olivier, “International Law in South African Municipal Law: Human Rights Procedure, Policy and Practice” (LL.D thesis, University of South Africa, 2002) 168.

<sup>29</sup> Constitution of the Republic of South Africa, 1996, Act 108 of 1996, date of assent: 16 December 1996; date of commencement: 4 February 1997.

<sup>30</sup> R Keightley, “Public International Law and the Final Constitution” (1996) 12 South African Journal on Human Rights 405: Some of the changes in the 1996 Constitution include the omission of the word “binding” in Section 232 on customary international law; the distinction between treaties that need approval by Parliament and those that do not in section 231(2) and (3); the introduction of self-executing provisions of treaties and the requirement that incorporation of treaties is to be done through national legislation in section 231 (4).

states treat international law in similar ways. First, the courts do not follow a coherent approach in their selection of international law sources. Second, the courts do not strictly respect the monist or dualist provisions of the constitutions. These observations present challenges to classifying court approaches within traditional legal doctrines.

This study will analyse the decisions of superior courts in Kenya and South Africa before and after the enactment of the two states' current constitutions in order to understand the status and role of international law, in general, and international human rights law, in particular, in the domestic sphere. In addition, this thesis will investigate whether there is a hierarchical relationship between international law and international human rights law within the respective states' legal orders. This investigation will also provide a clearer picture of the trends in the treatment of international human rights law in the domestic legal systems of Kenya and South Africa. A comparison of these two jurisdictions will provide different lessons that may be beneficial to each other and to other jurisdictions that share similar circumstances and challenges. Ultimately, this inquiry will help in understanding the direction(s) of the relationship between general international law and municipal law. There appears to be a general effort to reconcile the branches and norms of international law in order to make international law more coherent.<sup>31</sup> This study will investigate the extent to which it is possible to involve domestic courts in such an effort.

The main research question for this study is: To what extent does transnational judicial dialogue explain the way that Kenyan and South African superior courts use international human rights law? The subsidiary questions flowing from the research question are:

- i) How have the Kenyan and South African national laws recognized treaties, custom and other sources of international law?
- ii) To what extent does international human rights law enjoy a different status from other branches of international law in the Kenyan and South African constitutions?
- iii) How have the Kenyan and South African superior courts relied upon treaties, custom and other sources of international law?

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<sup>31</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 Apr 2006; MT Kamminga and M Scheinin (eds), *The Impact of International Human Rights Law on General International Law* (Oxford University Press, 2009).

- iv) To what extent do the Kenyan and South African superior courts treat international human rights law differently from other branches of international law?

### 3. Theoretical approach and literature review

This study will analyse the extent to which the practice of superior courts in Kenya and South Africa conforms to a doctrinal approach. Due to the multitude of actors and the complexity of the relationships involved, the traditional monism-dualism doctrines do not appear to accurately reflect current practice. This thesis will investigate whether an alternative doctrine, transnational judicial dialogue, offers a more accurate description of the current relationship between international law and national law in Kenya and South Africa.

#### i. Historical overview of the relationship between international law and municipal law

The relationship between the international legal order and the domestic one has traditionally been portrayed as the monism-dualism dichotomy.<sup>32</sup> Proponents of dualism hold that international law and municipal law operate in separate orders and that none can interfere with the other's respective subject matter.<sup>33</sup> As a result, for international law to operate within the domestic arena it has to be domesticated and even then, it is applied as municipal law. On the other hand, monists hold that international law and municipal law are part of the same system and that international law is superior to municipal law.<sup>34</sup> Therefore, international law does not have to be domesticated in order to apply in the domestic arena.

However, this traditional dichotomy became insufficient to explain the complexity of contemporary practice. In many instances, the practice of national courts regarding international law could be categorised as falling in between monism and dualism. Thus, variants of these doctrines emerged, including radical monism, inverted monism, harmonisation, and pluralism.<sup>35</sup> The monism-dualism debate waned in the 20<sup>th</sup> century in light

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<sup>32</sup> JG Starke, "Monism and dualism in the theory of international law" (1936) 17 *British Year Book of International Law* 66.

<sup>33</sup> MN Shaw, *International Law* (6th edn, Cambridge University Press, 2008) 131.

<sup>34</sup> *ibid* 131.

<sup>35</sup> DP O'Connell, "The Relationship between International Law and Municipal Law" (1960) 48(3) *Georgetown Law Journal* 431.

of the uncertainties of the time and there was a movement towards pragmatism.<sup>36</sup> These pragmatic approaches were based on the constitutional doctrine and practice of states.<sup>37</sup> Thus, there arose rules assigning a status to international law in the domestic sphere, and rules on resolving disputes between international and national law. However, these approaches are essentially dualist for two reasons.<sup>38</sup> First, international law's *effectiveness* in the domestic legal order still relies to an extent on a rule of domestic law.<sup>39</sup> This rule is sometimes contained in the written law (e.g. in the constitution) or in custom (e.g. judicial practice). Secondly, even if this rule determines the *superiority* of international law over national law, this rule is usually constitutive and not declaratory.<sup>40</sup> Essentially, a truly monist relationship would not require a national constitutional rule.

Still, these constitutional doctrines have also been rendered inadequate in light of the dispersion of authority from the state to supra-state organizations and private actors.<sup>41</sup> As a result, other doctrines are being formulated in order to explain both the context in which international law operates, and the manner in which international law interacts with municipal law. Regarding the context, it is no longer sufficient to talk about the international legal order as entirely state-centric; on the contrary, individuals and groups of individuals are acting both domestically and transnationally, and in the process affecting the decisions of national governments.<sup>42</sup> This context can be analysed from two perspectives. The first perspective, referred to as transnational legal process, "describes ... how public and private actors... interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."<sup>43</sup> Through interaction between transnational actors, international legal norms become internalized when they inform decisions and actions of a state's domestic structures.<sup>44</sup> Second, these domestic structures interact in a concurrent perspective referred to as transgovernmental networks, which describes a disaggregation of the

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<sup>36</sup> WN Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser 2006) 131; J Nijman and A Nollkaemper (eds), "Introduction" in *New Perspectives on the Divide between National and International Law* (Oxford University Press, 2007) 2.

<sup>37</sup> M Kumm, "Democratic Constitutionalism Encounters International Law: Terms of Engagement" in S Choudhry(ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 258.

<sup>38</sup> *ibid.*

<sup>39</sup> T Maluwa (n 1) 50.

<sup>40</sup> M Kumm (n 37) 258, fn 6.

<sup>41</sup> J Nijman. and A Nollkaemper (n 34) 3.

<sup>42</sup> A-M Slaughter, "International Law in a World of Liberal States" (1995) 6 *European Journal of International Law* 503 508.

<sup>43</sup> HH Koh, "Transnational Legal Process" (1996) 75 *Nebraska Law Review* 181, 183-184.

<sup>44</sup> *ibid* 204.

state such that its constituent parts are cooperating with their counterparts in other states instead of the traditional state-state formal negotiation.<sup>45</sup> This interaction between the executives, legislatures, judiciaries, and administrative agencies across national borders leads to an export of regulatory processes between states, resulting in better treaty compliance and where this is lacking, then the networks ensure co-operation between governments.<sup>46</sup>

From the above two perspectives on transnational interaction, we can decipher a doctrine that more accurately describes the relationship between international law and municipal law in the domestic legal order: transnational judicial dialogue. Increasingly, national judiciaries are taking part in a transnational judicial dialogue, which refers to “informal networks of domestic courts worldwide, interacting with and engaging each other in a rich and complex dialogue on a wide range of issues”.<sup>47</sup> Thus, courts are exchanging ideas and formulating similar decisions on diverse substantive law issues out of a sense of common judicial identity and enterprise.<sup>48</sup> The interaction of judiciaries takes place on a vertical level (between national and international/supranational courts), and horizontal level (between courts of the same status, be they national, supranational or international) involving both international law and municipal law.<sup>49</sup> The informal forms of communication involved include comparative analysis of international law and foreign law,<sup>50</sup> judicial comity,<sup>51</sup> and face-to-face contact among judges from different states.<sup>52</sup> This study will analyse the various ways in which the superior courts of Kenya and South Africa engage in such a dialogue, including in settling constitutional questions that have a bearing on international law; whether these superior courts show a preference for engaging with particular courts as opposed to others; and the qualitative value to be attached to this dialogue.

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<sup>45</sup> K Raustiala, “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law” (2002) 43(1) *Virginia Journal of International Law* 1 3-6.

<sup>46</sup> *ibid* 6.

<sup>47</sup> M Waters, “Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law” (2004) 93 *Georgetown Law Journal* 487, 490.

<sup>48</sup> A-M Slaughter, “A Typology of Transjudicial communication” (1994) 29 *University of Richmond Law Review* 99, 101-102.

<sup>49</sup> A-M Slaughter, “Judicial Globalization” (2000) 40 *Vancouver Journal of International Law* 1103, 1104.

<sup>50</sup> S Choudhry, “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation” (1999) 74(3) *Indiana Law Journal* 819.

<sup>51</sup> A-M Slaughter, *A New World Order* (Princeton University 2009) 86-91.

<sup>52</sup> *ibid* 96-99.

## ii. Transnational judicial dialogue as a doctrine

As discussed above, courts worldwide appear to communicating with each other at various levels and in diverse ways. This form of transnational interaction has previously been referred to as transjudicial communication.<sup>53</sup> However, transnational judicial dialogue goes further to show how “domestic courts collectively engage in the co-constitutive process of creating and shaping international legal norms and, in turn, ensuring that those norms shape and inform domestic norms.”<sup>54</sup> Thus, domestic courts are not mere conduits for the reception of international legal norms into the domestic legal order but they act as mediators between the international and domestic legal norms. When domestic courts make their decisions they have the potential to influence the development of international legal norms. This influence occurs when domestic courts articulate legal norms at the transnational level such that the norms become part of the international legal discourse. When several transnational actors discuss these domestic norms, there is a tendency to converge on a single dominant normative standard at the international level. This international normative standard is then utilised by domestic courts, and in this way international legal norms re-shape the domestic ones.<sup>55</sup>

This study will analyze decisions of superior courts in order understand the manner in which the judiciary receives, interprets and re-formulates international legal norms. In addition, where certain judicial decisions may show an apparent deference to the executive, or involve a restricted application of international legal norms, or express an activist judicial attitude, transnational judicial dialogue will help in determining the extent to which such decisions have modified the respective international legal norms.

Doctrines that focus solely on practice are criticized for not sufficiently providing “a well-developed normative framework for thinking about the relationship between national and international law”.<sup>56</sup> These doctrines are more deliberative and discursive, and do not provide a view on the direction in which the relationship between national and international law should evolve.<sup>57</sup> This study will analyse court decisions in Kenya and South Africa in order to understand whether transnational judicial dialogue may provide normative guidance for the relationship between international law and national law in the domestic legal order.

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<sup>53</sup> A-M Slaughter (n 48) 101.

<sup>54</sup> M Waters (n 47) 490.

<sup>55</sup> *ibid* 554.

<sup>56</sup> M Kumm (n 37) 260.

<sup>57</sup> J Nijman, and A Nollkaemper (n 36) 3.

#### 4. Methodology

This study will focus on Kenya and South Africa since the two countries enacted new constitutions after a period of great social upheaval and to signify a break from their undemocratic pasts.<sup>58</sup> Both Kenya and South Africa were colonised by the British and they inherited the common law legal system.<sup>59</sup> Courts in common law based countries are more likely to make reference to decisions from other jurisdictions and so these two countries are useful analysing transnational judicial dialogue. Additionally, while present day South Africa comprises several previously independent and minority white ruled territories, Kenya was colonised as a more or less single unit. It is Kenya that has had a longer period of majority African rule compared to South Africa. These circumstances offer an interesting backdrop for comparing the development of international law. Also, South Africa is a good case because of its arguably advanced constitutional recognition of international law.<sup>60</sup> Since Kenya's Constitution contains many provisions that are similar to those of South Africa, this comparison may offer lessons for Kenya in terms of the approaches used in interpreting those constitutional provisions.

In addition, this study will focus on the decisions of superior courts as it is through litigation that human rights are deliberated, interpreted and elucidated.<sup>61</sup> Thus, litigation bridges the “gulf between law and practice”<sup>62</sup> and clarifies the current understanding of the extent of human rights provisions. While there is a selection bias arising from using two countries for a comparative study, this study is important as the findings may lay the groundwork for similar studies in the same jurisdictions or others.<sup>63</sup>

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<sup>58</sup> Committee of Experts on Constitution Review, *Preliminary Report of the Committee of Experts on Constitution Review*, 17<sup>th</sup> November 2009, 7; L Du Plessis, “International law and the evolution of (domestic) human-rights law in post-1994 South Africa” in J Nijman and A Nollkaemper (eds) *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007) 316.

<sup>59</sup> South Africa adopted the civil law legal system as well, meaning that South Africa has a hybrid legal system.

<sup>60</sup> T Maluwa, “International human rights norms and the South African interim constitution 1993” (1993) 19 *South African Yearbook of International Law* 14.

<sup>61</sup> M Killander, “Foreword” in M Killander, (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010) v.

<sup>62</sup> RLK Ngidi, “The role of international law in the development of children’s rights in South Africa: A children’s rights litigator’s perspective” in M Killander (n 58) 191.

<sup>63</sup> T Landman “Social Science Methods and Human Rights” in F Coomans, F Grünfeld and MT Kamminga (eds), *Methods of Human Rights Research* (Intersentia 2009) 38-39.



This thesis will use a historical approach to carry out an analysis of the colonial to post-colonial situations in Kenya and South Africa. This will assist in understanding the state's response to international human rights obligations and the society's appreciation of its human rights entitlements, as reflected in litigation. Thus, this will be an analysis that will aim to place the superior courts' decisions within the society's opinion of international law.

This inquiry will sift through mostly reported cases in order to identify the trends in the judiciary's approach to international human rights law in Kenya and South Africa. Because law reporting in Kenya is limited, this study will focus on decisions from the High Court, Court of Appeal and Supreme Court so as to ensure a wide representative sample. Conversely, due to the extensive law reporting in South Africa, this study will focus mainly on the Constitutional Court and Supreme Court of Appeal of South Africa. In addition, this study will analyze court decisions from only superior courts in Kenya and South Africa because the doctrine of judicial precedence in these two states means that it is decisions of superior courts that are authoritative and indicative of a normative direction.

This investigation will not merely focus on how the superior courts of Kenya and South Africa assist the state in integrating international legal norms and bringing the domestic legal order in conformity with the international legal order. Instead, this study will go further to analyze the role of these courts in shaping international legal norms as applied in the domestic legal order.

Also, this thesis will not focus on executive implementation of international law except where this has come under judicial review or where there are documents stating the executive's interpretation of its obligations under international law. Such an analysis of state compliance with international obligations is usually faced with methodological difficulties.<sup>64</sup> Instead, analysis of judicial review of executive actions or documents regarding international law will provide a better understanding of how domestic courts mediate between domestic and international legal norms.

This study will analyze the relationship between international law and national law in the domestic arena, and not necessarily in the international arena. To that extent, this study will

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<sup>64</sup> For example, it is often a matter of causal conjecture when trying to link a state's compliance with the remedies articulated by the African Commission: F Viljoen and L Louw, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights" (2007) 101(1) *American Journal of International Law* 1, 32.



analyze normative hierarchy in the national legal order and not in the international legal order except where such an issue arises in the respective state's court's decision. In practice, normative hierarchy in the international legal order is of minimum impact, and there is still no uniform state practice that can generate a universal rule on such a hierarchy.<sup>65</sup> However, where the decisions of the superior courts in Kenya and South Africa may indicate a normative hierarchy, the findings may be helpful in generating such a rule.

## 5. Conceptual framework

When referring to international law, this study will use the generally accepted sources of international law as set out in Article 38 of the Statute of the International Court of Justice (ICJ Statute).<sup>66</sup> These are international conventions, international custom, general principles of law, judicial decisions and teachings.<sup>67</sup> For brevity, this study will not delve into criticisms of the doctrine of sources of international law,<sup>68</sup> or the hierarchy of those sources, or deal with the comprehensiveness of Article 38(1) of the ICJ Statute.<sup>69</sup> In addition, it is beyond the scope of this thesis to discuss the diverse and alternative definitions of international law. In order to maintain a clear focus, this study will rely on the orthodox understanding of international law.

For uniformity, this thesis will use the more common term “treaty”, and as defined in Article 2(1) of the Vienna Convention on the Law of Treaties,<sup>70</sup> to encompass international

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<sup>65</sup> E De Wet and J Vidmar, “Conclusions” in E De Wet and J Vidmar (eds), *Hierarchy in International Law* (Oxford University Press 2012) 303.

<sup>66</sup> I Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press, 2003) 5; H Thirlway, “The Sources of International Law” in MD Evans (ed), *International Law* (Oxford University Press, 2010) 97. Article 38(1) of the Statute of the International Court of Justice (adopted: 26 June 1945; entry into force: 26 October 1945) 832 USTS 993 (ICJ Statute) states:

‘1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’

<sup>67</sup> The categorization of these sources into formal and material has been criticized because of overlaps between these sources: MN Shaw (n 31) 71.

<sup>68</sup> See T Hillier, *Sourcebook on Public International Law* (Cavendish Publishing 1998) 59-64.

<sup>69</sup> See H Thirlway (n 66) 115-120.

<sup>70</sup> Vienna Convention on the Law of Treaties (date of adoption: 23 May 1969, entry into force: 27 January 1980) 1155 UNTS 331 art 2:

- (1) For purposes of the present Convention:

conventions and other nomenclature that is used for documents of the same character. While there is considerable difficulty in determining what constitutes a treaty,<sup>71</sup> a treaty is basically a legally binding agreement between states or between states and international organisations, and that is governed by international law. A distinction is sometimes made between ‘law-making’ treaties (that create universal obligations) and ‘contract’ treaties (that are mere legal transactions).<sup>72</sup> However, such a distinction is riddled with uncertainty<sup>73</sup> and such debates are beyond the scope of this study.

International custom or customary international law refers to rules emanating from state practice (*usus*) coupled with a belief that the practice is required as a matter of law (*opinio juris sive necessitas*). Both traditional and modern customary international law still rely on these two elements but give differing weight to each element.<sup>74</sup> Although a distinction may be made between universal, general, regional or particular custom,<sup>75</sup> this thesis will not dwell on this controversial area.

There are considerable differences in the understanding of the phrase “general principles of law”. This study will work with three common meanings of this source of international law.<sup>76</sup> First, the phrase could refer to legal principles common to municipal legal systems such as estoppel. Second, the phrase could refer to general principles applicable directly to international legal relations (e.g. consent, reciprocity and the equality of states). Third, it could refer to principles applicable to legal relations generally (e.g. the finality of agreements and the legal validity of agreements).

Article 38(1)(d) of the ICJ Statute makes a distinction between the above sources, and judicial decisions and teachings by describing the latter two as subsidiary means for determining the rules of law. The phrase “judicial decisions” obviously includes decisions of international

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(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;”

<sup>71</sup> M Fitzmaurice and O Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing, 2005) 1 ff.

<sup>72</sup> See P Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th rev edn, Routledge 1997) 37-38.

<sup>73</sup> MN Shaw (n 331) 74.

<sup>74</sup> AE Roberts, “Traditional and modern approaches to customary international law: A reconciliation” (2001) 95 *American Journal of International Law* 757.

<sup>75</sup> D Devine, “What international customary law is part of South African Law?” (1987) 13 *South African Yearbook of International Law* 119.

<sup>76</sup> H Thirlway (n 66) 108-109.

courts and tribunals. Such decisions usually expound on rules of international law derived from treaty, custom or general principles of law. While there is no system of judicial precedent in international law, international courts and tribunals often rely on their past decisions.<sup>77</sup> It is also accepted that this source includes decisions of municipal courts in two ways. First, municipal courts can elucidate a particular rule of international law. Second, municipal courts, as organs of states, can make decisions that are considered state practice, which is an element of customary international law.<sup>78</sup>

Historically, eminent academic writers were very crucial during the early development of international law. However, the role of scholars is now less to do with formation of rules of international law than with elucidating them.<sup>79</sup> The works of scholars are often quoted in heads of arguments and decisions of courts and tribunals, and in legal advice given to governments. In addition to scholars, there are other authoritative works on international law. These include draft articles by the International Law Commission, and reports of expert bodies and international conferences.<sup>80</sup>

Article 38(1)(d) of the ICJ Statute implicitly opens up the space for reference to principles or guidelines that are not legally binding but that carry some political strength in the international arena. These principles or guidelines arise from declarations or resolutions of international conferences or organisations. Treaties that are not yet in force or that are not legally binding on some states are also relevant here. These principles and guidelines are indicative of emerging norms that could eventually become legally binding.<sup>81</sup>

## 6. Chapter breakdown

Chapter 2 will analyse the constitutional history of Kenya through the pre-colonial, colonial and post-colonial periods in order to set the context for studying the place of international law in the domestic legal order. This chapter will analyse the interaction of Kenya's superior courts with supra-national courts on international law during the colonial and independence periods.

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<sup>77</sup> I Brownlie (n 66) 20-21.

<sup>78</sup> H Thirlway (n 66) 110-111. See also *Jurisdictional immunities of the state (Germany v Italy: Greece intervening) (Judgment)* [2012] ICJ Rep 99, paras. 72-77.

<sup>79</sup> A Aust, *Handbook of International Law* (Cambridge University Press 2005) 10.

<sup>80</sup> I Brownlie (n 66) 24.

<sup>81</sup> P Malanczuk (n 72) 54.

Chapter 3 will analyse Kenya's constitutional and legislative provisions on international law and the manner in which the superior courts have interpreted these provisions. This chapter will interrogate the type of dialogue that Kenya's superior courts have had with other courts since the enactment of the 2010 Constitution, and how this dialogue has shaped international legal norms in the domestic legal order.

Chapter 4 will provide a historical account of legal developments in South Africa in order to relate these developments to the current legal order. This chapter will analyse the extent to which colonisation by different European powers and apartheid rule influenced the democratic state's interaction with international law, and whether this influence is still perceptible.

Chapter 5 will analyse how South Africa's superior courts have interpreted constitutional and legislative provisions on international law. This chapter will also analyse how South Africa's superior courts engage with other courts in shaping the relationship between international law and national law.

Chapter 6 will analyse the extent to which the decisions of superior courts in Kenya and South Africa reflect a transnational judicial dialogue and conclude whether this dialogue has resulted in a re-formulation of international legal norms as applied in the domestic legal order.

## Chapter 2

### International law during the development of Kenya's legal system

#### 1. Introduction

The purpose of this chapter is to lay the context for discussing the extent to which Kenyan courts have engaged in transnational judicial dialogue. First, this chapter will lay out the historical development of Kenya's legal system from the colonial period to the period prior to the enactment of the 2010 Constitution. Second, this chapter will undertake an analysis of the status of international law in Kenya's legal system during those periods. Third, this chapter will highlight the possibilities of Kenyan courts engaging in transnational judicial dialogue during that period.

#### 2. Kenya's legal system in the pre-colonial period

Around the first century CE the early inhabitants of the East African coast began trading with Arab merchants.<sup>1</sup> Gradually, the Arabs, mostly from the Persian Gulf, settled in the East African coast between the fifth and ninth centuries.<sup>2</sup> These Arabs established a suzerainty<sup>3</sup> system: each coastal town was ruled by a *sheikh*<sup>4</sup> who owed allegiance to whichever sultan<sup>5</sup> was the strongest in the Arabic region.<sup>6</sup> During this period, these Arabs at the East African coast entered into agreements with African tribes and with each other,<sup>7</sup> and later with European powers.<sup>8</sup> Prior to the Arabs coming to East Africa, the African inhabitants of Zanzibar and the coast practiced traditional dispute settlement mechanisms.<sup>9</sup> The Arabs brought with them Islamic law and from the 12<sup>th</sup>

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<sup>1</sup> N Chittick, "The Coast before the arrival of the Portuguese" in BA Ogot (ed), *Zamani: A Survey of East Africa* (2nd edn, EAPH/ Longman 1974) 102.

<sup>2</sup> *ibid* 103.

<sup>3</sup> This referred to a relationship in which a sovereign state accepted a limited sovereignty while acknowledging the supremacy of another sovereign state over it: WPB Shephard, "Suzerainty" (1899) 1(3) *Journal of the Society of Comparative Legislation* 432.

<sup>4</sup> This is the equivalent of a governor.

<sup>5</sup> This is a ruler who claimed sovereignty.

<sup>6</sup> N Chittick (n 1) 103.

<sup>7</sup> FJ Berg, "The Coast from the Portuguese invasion to the Rise of the Zanzibar Sultanate" in BA Ogot (n 1) 116.

<sup>8</sup> *ibid*. For instance, in 1727, the sheikh of Pate entered into an agreement with the Portuguese, who helped dislodge the Omani Arabs from Mombasa. In addition, *Sayyid* Said bin Sultan, the Sultan of Oman and later Zanzibar, signed commercial agreements with the United States of America, Great Britain and France in 1833, 1839 and 1844 respectively: RG Landen, *Oman since 1856* (Princeton University Press, 1967) 75.

<sup>9</sup> HI Majamba, *Perspectives on the Kadhi's Courts in Zanzibar* (Zanzibar Legal Services Centre 2008) 3.

century it quickly spread in the East African coast.<sup>10</sup> Disputes were settled in informal settings as there were no religious courts.<sup>11</sup> When the Sultan of Muscat moved his capital to Zanzibar in 1832, he co-opted this informal system.<sup>12</sup> The Sultan allowed several European states to exercise extraterritorial jurisdiction over their nationals in Zanzibar, meaning that Europeans were subject to their own laws.<sup>13</sup> The British, whose main interest in East Africa was to curb the slave trade, set up a consulate in Zanzibar in 1841.<sup>14</sup> The British consul there exercised admiralty, civil and criminal jurisdiction over British subjects and British protected persons.<sup>15</sup> He could also decide cases brought by subjects of the Sultan against British subjects.<sup>16</sup> A British consular court was established in Zanzibar in 1866 and through treaties with the UK, other European powers eventually ceded their extraterritorial jurisdiction to this British consular court.<sup>17</sup> Through a further agreement with the Sultan, coupled with British legislation, the British established a consular court at Mombasa in 1890.<sup>18</sup> Thus, in Zanzibar and at the coast, Americans and Europeans were subject to the British consular courts while other inhabitants were subject to the Sultan's courts.<sup>19</sup>

The law applied by the British consular courts in Zanzibar was Indian law (that is, legislation enacted in the British colony of India), and in cases where Indian law did not apply, then English common law and statutes applied.<sup>20</sup> The courts applied legislation from the British colony of India since this legislation had codified English common law, making for easier reference.<sup>21</sup> Since

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<sup>10</sup> IB Oba, "Evolution of Kadhis Courts in Zanzibar" (2015) 37 *Journal of Law, Policy and Globalization* 1, 3.

<sup>11</sup> HI Majamba (n 9) 4.

<sup>12</sup> *ibid.*

<sup>13</sup> Extraterritorial jurisdiction refers to "the condition of persons or things, not outside the actual territory but outside the *jurisdiction* of the Sovereign in whose territory they find themselves and whose jurisdiction should, normally, be co-extensive with his territory." (PW Thornely, "Extraterritoriality" (1926) 7 *British Year Book of International Law* 121, 122. Extraterritorial jurisdiction allowed European states to exercise judicial powers over their subjects in Zanzibar through consuls.

<sup>14</sup> B Stanley, "Zanzibar" in MRT Dumper and B Stanley (eds), *Cities of the Middle East and North Africa: A Historical Encyclopedia* (ABC-CLIO, 2007) 393.

<sup>15</sup> YP Ghai and JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present* (Oxford University Press, 1970) 126-127.

<sup>16</sup> JS Read, "Justice on Appeal: A Century Plus of Appeal Courts and Judges in Tanzania" in CM Peter. and H Kijo-Bisimba (eds), *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* (Legal and Human Rights Centre, 2007) 56-57.

<sup>17</sup> S Abrahams, "The Reorganization of the Zanzibar Courts" (1924) 6(4) *Journal of Comparative Legislation and International Law* 293, 294.

<sup>18</sup> YP Ghai and JPWB McAuslan (n 15) 31.

<sup>19</sup> S Abrahams, "The Conflict of Laws in Zanzibar" (1941) 23(4) *Journal of Comparative Legislation and International Law* 169, 169.

<sup>20</sup> JER Stephens, "The Laws of Zanzibar" (1913) 13(3) *Journal of the Society of Comparative Legislation* 603.

<sup>21</sup> M Deflem, "Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, The Gold Coast, and Kenya" (1994) 17(1) *Police Studies* 45, 54-55.

Zanzibar was considered a district of the Bombay Presidency in the colony of India,<sup>22</sup> appeals from the consular courts lay to the High Court of Bombay.<sup>23</sup> In the East African interior, the Imperial British East Africa Company was initially to exercise jurisdiction in accordance with agreements signed with tribal chiefs but in 1889 British legislation authorised the Company to apply the substance of the law of England.<sup>24</sup> However, in practice, the Company's officials either dispensed discipline with unfettered control in areas that had been pacified or they left African traditional justice systems undisturbed.<sup>25</sup>

### 3. The use of international law in the pre-colonial period

From the 16<sup>th</sup> century onwards, Europeans considered their relations with non-Europeans to be outside the domain of international law. Under natural law theory, non-European communities enjoyed a subordinate status to Europeans.<sup>26</sup> Legal positivist thought went further by stripping non-European polities of any semblance of sovereignty because they did not conform to European standards of civilization.<sup>27</sup>

In addition, during the 18<sup>th</sup> century onwards, Europeans considered their agreements with non-Europeans not to be treaties under international law for several reasons.<sup>28</sup> First, legal positivist jurists asserted that Africans did not possess international personality while Arabs possessed only

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<sup>22</sup> The Bombay Presidency was a province of the British colony of India. When the British declared a protectorate over Zanzibar in 1890, they preferred to rule indirectly using local rulers, and handling the affairs of the protectorate through the Governor of India.

<sup>23</sup> YP Ghai and JPWB McAuslan (n 15) 128.

<sup>24</sup> *ibid* 130.

<sup>25</sup> *ibid* 129.

<sup>26</sup> J Muldoon, *Popes, Lawyers and Infidels: The Church and Non-Christian World, 1250-1550* (University of Pennsylvania Press, 1979) 19.

<sup>27</sup> GW Gong, *The Standard of 'Civilization' in International Society* (Oxford University Press, 1984) 53-57.

<sup>28</sup> In this study, "treaty" and "agreement" will be used to distinguish between, respectively, instruments recognized as creating legal obligations in international law versus instruments not considered to have the same effect, during the 18<sup>th</sup> century. The legality or otherwise of the "treaties" concluded between Europeans and non-Europeans is beyond the scope of this study. However, it should be noted that there are strong grounds for arguing that such agreements were actually treaties under international law and that Europeans acted in contravention of international law when they did not adhere to the terms of the agreements. In particular, under customary international law, Europeans were bound to adhere to the terms contained in the treaties of cession and protectorates. Additionally, the widespread and sustained practice of Europeans entering into agreements with non-Europeans supports the argument that these agreements were governed by and created (international) law: M van der Linden, *The Acquisition of Africa (1870-1914): The Nature of International Law* (Brill, 2016) 241.



quasi-sovereignty.<sup>29</sup> Second, these agreements were ultimately meant for resolving territorial claims between the European powers.<sup>30</sup> For instance, in the 1800s, the British had entered into agreements with the Sultan of Zanzibar who had some informal influence over the East African coast and interior.<sup>31</sup> When the Germans rapidly signed agreements with African chiefs in the interior in the early 1880s, thereby undermining the Sultan's, and by extension British influence, the British instigated an international commission comprising Germany and France to delineate the Sultan's dominion.<sup>32</sup> The Sultan was not represented at this commission that was held in 1886 and the final treaty between the three powers was imposed upon the Sultan.<sup>33</sup>

The main reason that European powers continued to enter into agreements with non-Europeans, despite the doubtfulness of the agreements in international law, was that this process was more politically convenient than using military force.<sup>34</sup> In fact, European powers acquiesced to explorers, missionaries and trading companies concluding these agreements since the European powers could conveniently disclaim title to the territory if it subsequently turned out that the territory was not valuable.<sup>35</sup> Moreover, since the European powers were not eager to liberally acquire and administer the territories directly, they acquiesced when trading companies established some influence over the territory.<sup>36</sup> With time, these trading companies gradually gained power to

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<sup>29</sup> E Keene, "A Case Study of the Construction of International Hierarchy: British Treaty-Making against the Slave Trade in the Early Nineteenth Century" (2007) 61 *International Organization* 311, 314, 326-329.

<sup>30</sup> A Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40(1) *Harvard International Law Journal* 1, 34-44.

<sup>31</sup> YP Ghai and JPWB McAuslan (n 15) 5.

<sup>32</sup> C Singh, "The Republican Constitution of Kenya: Historical Background and Analysis" (1965) 14 *International and Comparative Law Quarterly* 878, 879: "...the Commission agreed in November 1886 that the Zanzibar territory comprised the islands of Zanzibar, Pemba, Mafia; a ten-mile strip along the coast from the Rovuma River to the Tana River; the towns of Kismayu, Brava, Merka, Mogadiscio with the territory within a radius of ten miles; and the town of Warsheikh with territory within a radius of five miles."

<sup>33</sup> YP Ghai and JPWB McAuslan (n 15) 5. The British and Germans entered into an agreement dividing the hinterland between them; the British were to occupy present-day Kenya and Uganda while the Germans occupied present-day mainland Tanzania. In 1890, Germany and Britain entered into another agreement in which Germany renounced its claim to Uganda and the British claimed it (ibid 9).

<sup>34</sup> J Mugambwa, "A 'Protected State' in the Uganda Protectorate? Re-examination of Buganda's Colonial Legal Status" (1989) 1 *African Journal of International and Comparative Law* 446, 453.

<sup>35</sup> For example, "[i]n 1824, a protectorate over Mombasa was declared by a naval officer, but the British Government refused to ratify his action and the protectorate was withdrawn in 1826. In 1877, Sir William Mackinnon had obtained from the Sultan the promise of a concession concerning the whole of East Africa but, for some reason which the researches of historians have failed to discover, he did not take it up. In 1884, Sir Harry Johnston had obtained a grant of land in the Kilimanjaro area ..." but this was not later sanctioned by the British Government (C Singh 31) 882 fn 5).

<sup>36</sup> DK Fieldhouse, *The Colonial Empires: A Comparative Survey from the Eighteenth Century* (Delacorte Press, 1971) 149-152, 161-173.



exercise “sovereign rights over non-European peoples who were deprived of any sort of sovereignty.”<sup>37</sup> Thus, the British East Africa Association, a private trading business formed in 1886 with the support of some officials in the British government, was encouraged to establish British influence in the East African region.<sup>38</sup> In 1887, the Association entered into a 50 year concession agreement with the Sultan of Zanzibar which authorised the Association to administer the coastal strip on behalf of the Sultan.<sup>39</sup> In the same year, the Association entered into 27 agreements with some tribes in the interior, whereby these tribes acknowledged the Association’s “sovereign rights for a distance of 200 miles from the coast.”<sup>40</sup> In 1888, the Association was granted a Charter by the British Government and it became the Imperial British East Africa Company (IBEAC).<sup>41</sup> The royal charter characterized the Company as an extension of the Crown and so the Company could exercise some sovereign rights on behalf of the British Government.<sup>42</sup> In order to administer the interior without much resistance, the Company also concluded agreements with tribal chiefs.<sup>43</sup>

.Because Europeans considered non-Europeans to be uncivilized, Europeans states claimed that non-European polities did not possess sovereignty, and that their territory was *terra nullius*. Such

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<sup>37</sup> A Anghie (n 30) 33. Such chartered companies gained international legal sanction under the General Act of the Brussels Conference Relative to the African Slave Trade (signed: 2 July 1890) 1892 [C.6557] XCV.1; Treaty Series No. 7, 1892. Article VI of the General Act authorized the European powers to delegate their responsibilities regarding suppression of the slave trade to chartered companies. (YP Ghai and JPWB McAuslan (n 15) 10).

<sup>38</sup> MR Dilley, *British Policy in Kenya Colony* (2nd edn, Frank Cass 1966) 14-15. Because the territory appeared to be of little economic or strategic interest, the British Government was reluctant to *directly* administer the East African territory and instead preferred to use the Association and Company acting under the authority of the Foreign Office. (BA Ogot, “Kenya under the British, 1895 to 1963” in BA Ogot (n 1) 249).

<sup>39</sup> HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, 1991) 9. Thus, the Association could “purchase public lands, appoint subordinate officers, pass laws for the government of the districts, and establish courts of justice.” (C Singh (n 31) 884).

<sup>40</sup> PL McDermott, *British East Africa, or IBEA* (Chapman & Hall 1893) 10.

<sup>41</sup> C Singh (n 32) 880.

<sup>42</sup> A Anghie (n 30) 33. The status of the Imperial Charter was unclear but “[p]rimarily its object was to empower British subjects to raise taxes, impose customs dues, administer justice, make treaties, and generally assume the powers of government within a specified area without rendering themselves liable, as individuals, to prosecution in British courts for arbitrary acts which only governments may perform”. (R Oliver, “Some Factors in the British Occupation of East Africa, 1884-1894” (1951) 15(1) *Uganda Journal* 49, 56.)

<sup>43</sup> HWO Okoth-Ogendo (n 39) 10. “The treaties were in the following form: ‘Let it be known to all whom it may concern that ..... has placed himself and all his territories, countries, people and subjects under the protection, rule and government of the Imperial British East Africa Company, and has ceded to the said Company all his sovereign rights and rights of the government over all his territories, countries, peoples and subjects and that the said Company have assumed the said rights ceded to them as aforesaid, and that the said Company hereby grant their protection and the benefit of their rule and government to him, his territories, countries, peoples and subjects, and hereby authorize him to use the flag of the said Company as a sign of their protection. Dated at .... this ..... day of .... 18.....’” (ibid fn 14).

claims justified the acquisition of African territory by Europeans through occupation.<sup>44</sup> By this point in time, English courts had held that customary international law was part of the common law without the need for domestication.<sup>45</sup> Conversely, treaties needed to be domesticated in order to be law in the domestic sphere.<sup>46</sup> Therefore, it is plausible that courts established in British overseas territories would follow the same rules regarding the applicability of international law in the domestic sphere. However, there is uncertainty over the extent to which international law would have applied in the East African region at the time. In Zanzibar and at the coast, the British consuls applied Indian law and, to a lesser extent, English law when handling cases involving Britons. In the interior, it was not clear what English law was applied by the Company's officials. The British allowed the natives in the interior to apply their own laws. Therefore, the application of English law, and by extension international law, was doubtful. In addition, records kept by the consular courts do not contain entries on the law applied in trials.<sup>47</sup> The earliest court records date to 1868 in Zanzibar and the recorded cases appear to have been mundane.<sup>48</sup> Under these circumstances, it appears that questions of international law only arose when a European challenged the civil<sup>49</sup> or criminal<sup>50</sup> jurisdiction of the British consular courts. These cases were decided on the basis that, by agreement, the sovereigns concerned had conferred jurisdiction over their nationals to the British authorities.<sup>51</sup>

In addition, the interaction between the consular courts and other courts was probably very limited. The consular courts in Zanzibar and Mombasa interacted only with the Bombay High Court, and these courts were directed to apply Indian statutes, and English common law and statutes. Therefore, these courts acted as extensions of the British courts and were bound by the doctrine of precedence. The courts did not refer to each other's decisions as a way of enriching their decisions or maintaining a global judicial community. In summary, there was no transnational judicial dialogue as described in Chapter 1.

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<sup>44</sup> A Anghie (n 30) 45.

<sup>45</sup> *Buvot v Barbuitt* (1737) Cas. Temp. Talbot 281; *Triquet v Bath* (1764) 3 Burr. 1478. However, the courts still wrestled with the existence of particular customary international law rules: *Regina v Keyn* (1876) 2 Ex. D. 63.

<sup>46</sup> *The Parliament Belge* (1879) 4 P.D. 129.

<sup>47</sup> The author is aware that apart from international law and private law, relations between Europeans and non-Europeans were regulated by a *sui generis* law. However, that discussion would be beyond the scope of this thesis.

<sup>48</sup> JS Read (n 16) 57.

<sup>49</sup> *Wagji Korji v Thoria Tapan and Others* (1878) I.L.R. 3 Bom. 58.

<sup>50</sup> *Queen-Empress v Rego Montopoulo* (1895) I.L.R. 19 Bom. 741.

<sup>51</sup> JS Read (n 16) 58-59.

#### 4. Kenya's legal system during the colonial period

In 1895, the Company ceded to the British Government all the land under the Company's administration.<sup>52</sup> At that time, this territory comprised the ten mile coastal strip belonging to the Sultan, an area north of the coastal strip that had been obtained from the Germans, and the interior up to Lake Naivasha in the west, as agreed between the British and the Germans in the Anglo-German Agreement of 1890. Through an agreement, the coastal strip was administered on the Sultan's behalf by the British Government, which made an annual payment to the Sultan.<sup>53</sup> That same year, the British Government declared the entire territory (the coastal strip and the interior) a protectorate – the East African Protectorate.<sup>54</sup>

The British developed separate subordinate and superior courts for Europeans and non-Europeans.<sup>55</sup> In 1897, the British established a High Court, magistrates courts and native courts.<sup>56</sup> Appeals for Europeans went up to the Judicial Committee of the Privy Council (JCPC) in England, while appeals for non-Europeans went up to a court presided over by the Commissioner in the protectorate. In addition, these courts were set in the colonial government's twin approach to justice: judicial and administrative.<sup>57</sup> Thus, Europeans and Asians were subject to courts that were presided over by judicial officers (judges and magistrates), while Africans were subject to courts that were staffed by administrative officers (chiefs, district commissioners, provincial commissioners, and village headmen).<sup>58</sup> The few inter-racial civil cases and serious criminal offences by Africans were handled by magistrates.<sup>59</sup> Also, for much of the colonial period, the

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<sup>52</sup> YP Ghai and JPWB McAuslan (n 15) 12.

<sup>53</sup> C Singh (n 32) 882.

<sup>54</sup> JB Ojwang, *Constitutional Development in Kenya* (ACTS Press, 1990) 23.

<sup>55</sup> YP Ghai and JPWB McAuslan (n 15) 130.

<sup>56</sup> C Singh (n 32) 925.

<sup>57</sup> *ibid* 129-138.

<sup>58</sup> Arabs, the majority of whom were Muslims and who were mostly confined to the coast, were subject to the *kadhi's* courts. *Kadhi's* courts are Muslim religious courts and they had the same status as the magistrates' courts (*ibid* 137).

<sup>59</sup> P Swanepoel, "Indifferent Justice? A History of the Judges of Kenya and Tanganyika, 1897 – 1963" (PhD thesis, University of Edinburgh, 2010) 94.

British prevented Africans from accessing legal education so as to avoid Africans fighting colonial repression.<sup>60</sup> Therefore, the judges, magistrates and administrative officers were all Europeans.

The British transferred parts of present day Uganda to the East Africa Protectorate in 1902. In 1920, the British annexed the interior part of present day Kenya, naming it the Colony of Kenya, while the coastal strip remained as the Kenya Protectorate. The full title of the territory was the Colony and Protectorate of Kenya.<sup>61</sup> From 1950 onwards, attempts were made to integrate the judicial system but these changes were not far-reaching. The changes that were made included establishing a unified system of appeals to the High Court (later renamed Supreme Court), and replacing the administrators in the African courts with judicial officials who were still Europeans.<sup>62</sup> However, racial segregation continued by maintaining parallel traditional courts for Africans and Muslim courts.<sup>63</sup> In addition, Africans were still distrustful of the court system such that they rarely instituted civil cases.<sup>64</sup> Thus, prior to Kenya's independence in 1963, the justice system comprised three types of subordinate courts, a superior court (the Supreme Court), and two supra-colonial appellate courts (the Court of Appeal for Eastern Africa and the JCPC).<sup>65</sup> The Court of Appeal for Eastern Africa, established in 1902, heard appeals from the colonies of Kenya, Tanganyika, Uganda and Zanzibar.<sup>66</sup> The JCPC decided appeals from all regional supra-colonial courts, and High Courts or Supreme Courts.<sup>67</sup>

As in the pre-colonial period, during the colonial period the interaction between colonial courts and supra-colonial courts was more in the form of reception of English law as opposed to dialogue.<sup>68</sup> Several reasons can account for the courts' reliance on English law and concomitant avoidance of international law. First, the legislation that established the courts contained a clause<sup>69</sup>

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<sup>60</sup> SD Ross, "A Comparative Study of the Legal Profession in East Africa" (1973) 17 *Journal of African Law* 279.

<sup>61</sup> C Singh (n 32) 882-883.

<sup>62</sup> YP Ghai and JPWB McAuslan (n 15) 360-361.

<sup>63</sup> *ibid* 171.

<sup>64</sup> *ibid* 361.

<sup>65</sup> TO Elias, "Colonial Courts and the Doctrine of Judicial Precedence" (1955) 18 *Modern Law Review* 356, 357.

<sup>66</sup> *ibid* 359-360.

<sup>67</sup> *ibid* 361.

<sup>68</sup> C L'Heureux-Dubé "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34 *Tulsa Law Journal* 15, 17.

<sup>69</sup> Section 11(a) of the East Africa Order in Council, 1897 (often referred to as the "reception clause"):

11.—(a.) Subject to the other provisions of this Order, and to any Treaties for the time being in force relating to the Protectorate, Her Majesty's criminal and civil jurisdiction in the Protectorate shall, so far as circumstances admit, be exercised on the principles of, and in conformity with, the enactments for the time being applicable as hereinafter-mentioned of the Governor-General of India in Council, and of the Governor of Bombay in Council, and according

that obliged the courts to apply English law as the residual law. This clause was repeated in successive British legislation concerning the colony as well but the courts applied English decisions even where the applicable law was an Indian statute.<sup>70</sup> Second, the judges were trained in England and it appears that the judges there were indifferent to, or ignorant of, international law.<sup>71</sup> Third, the JCPC, as the final appellate court for the colonies, maintained uniformity of the English common law in the British Empire through the doctrine of precedent.<sup>72</sup> Therefore, the courts in the colonies and protectorates relied exclusively on English decisions and they interpreted international law in a manner that legitimised colonialism. In doing so, the courts also legitimized the colonial government's racial laws and policies.

While during the colonial period the number of courts increased, there was still a lack of transnational judicial dialogue. The courts of the colonies and protectorates shared an attitude of maintaining a common unity within the British Empire. This was the main reason behind the courts referring to English decisions and to each other's decisions. Therefore, where the courts referred to each other's decisions, it was as a way of reinforcing the common understanding of imperial law. Additionally, common law countries rely on case law more than civil law countries. Thus, it was highly unlikely that the courts of one empire would refer to decisions of another empire with the common purpose of a global judicial community.

## **5. The use of international law in the colonial period**

From the onset, the British practice over the East African territories deviated from the established international law on the status of colonies and protectorates. In international law, a protectorate was a state that entrusted the control of its foreign relations to another state.<sup>73</sup> The relationship was that of a weak state submitting its sovereignty to a stronger state while maintaining its internal

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to the course of procedure and practice observed by, and-before, the Courts in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction of the High Court of Judicature at Bombay according to their respective jurisdiction and authority, and so far as such enactments, procedure, and practice are inapplicable, shall be exercised under, and in accordance with, the common and statute law of England in force at the commencement of this Order.

<sup>70</sup> YP Ghai and JPWB McAuslan (n 15) 171.

<sup>71</sup> WE Beckett, "International Law in England" (1938) 50 *Law Quarterly Review* 257.

<sup>72</sup> JN Matson, "The Common Law Abroad: English and Indigenous Laws in the British Commonwealth" (1993) 42(4) *International and Comparative Law Quarterly* 753, 755.

<sup>73</sup> HA Smith, *Great Britain and the Law of Nations: A Selection of Documents*, vol. I (P.S. King 1932) 67.

self-government.<sup>74</sup> In theory, the relationship between the protecting power and protectorate *inter se* was governed, not by international law, but by the municipal law of the protecting power.<sup>75</sup> Since the protecting power assumed the external functions of the protectorate, then the protectorate could not directly interact with other states without the consent of the protecting power.<sup>76</sup> This situation was made more concrete when the territory became a colony since under international law a colony did not possess separate personality but was considered to be part of the metropolitan state.<sup>77</sup> Thus, the United Kingdom and her overseas territories formed a unitary state in international law while the constituent parts were governed by British constitutional law.<sup>78</sup> In the case of Kenya, the relevant municipal law would have comprised British legislation and constitutional practice, while the indigenous inhabitants of East Africa would have become British protected persons.<sup>79</sup>

However, as mentioned earlier, the British treated African polities as lesser territories. The British maintained the fiction that Zanzibar, and the East African coast and interior were foreign territories with control over their internal affairs while in actual fact the British exercised significant control over the protectorate's internal affairs.<sup>80</sup> This fiction was important as it enabled the British to evade legal liability for acts performed under their authority by the Association, the Company, and the protectorate government.<sup>81</sup> The judiciary was also complicit in maintaining this fiction as they held that despite the British setting up the machinery of government in the territory, the territory

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<sup>74</sup> A distinction was sometimes made in English law, but not in international law, between “protected states” and “protectorates” whereby the former were originally sovereign states that ceded their external sovereignty through treaty while the latter were originally non-sovereign communities whose territory was acquired through conquest or agreements with tribal chiefs. (J Mugambwa (n 34) 3-4).

<sup>75</sup> J Mugambwa (n 34) 455-456. A contrasting view is held by Crawford who asserts that the relationship between a protecting power and a *protected state* was governed by international law (J Crawford, *The Creation of States in International Law* (Oxford University Press, 2006) 202).

<sup>76</sup> HA Smith (n 73) 67-68.

<sup>77</sup> R Gordon, “Saving Failed States: Sometimes a Neo-Colonialist Notion” (1997) 12 *American University Journal of Law and Politics* 903, 940.

<sup>78</sup> JES Fawcett, “Treaty Relations of British Overseas Territories” (1949) 26 *British Year Book of International Law* 86, 91.

<sup>79</sup> YP Ghai and JPWB McAuslan (n 15) 18.

<sup>80</sup> BA Ogot (n 38) 249-250. The Association and Company had acted under the authority of the *Foreign Jurisdiction Act, 1843*, which gave the British Government only consular jurisdiction in the territory. This fiction was continued when the Foreign Office assumed responsibility for administering the newly declared protectorate.

<sup>81</sup> YP Ghai and JPWB McAuslan (n 15) 10-11.



was still a foreign country and so British officials were immune from suits arising from their administrative actions.<sup>82</sup>

Thus, protectorates declared over African territories were often referred to as *colonial protectorates* because the degree of administration exercised over them was similar to that over a colony while at the same time the protecting power maintained that the territories were foreign territories.<sup>83</sup> Therefore, from the very beginning of its existence, the East African Protectorate was treated like a colony.<sup>84</sup> In British constitutional law, a colony was a British possession, that is, territory acquired either through settlement, conquest or cession, and was administered as part of its territory.<sup>85</sup>

When Britain formally annexed the territory in 1920, the protectorate continued to be administered under the *Foreign Jurisdiction Act, 1890* while the colony was administered under the *British Settlement Act, 1887*.<sup>86</sup> However, in practice, there was no distinction between the protectorate and the colony as the same government organs operated in both.<sup>87</sup> The same Governor, Executive Council, Legislative Council and courts exercised authority over both the colony and the protectorate.<sup>88</sup>

The British usually administered a new territory as a district of an existing colony, and so simply extended the application of the laws of that colony to the new territory.<sup>89</sup> English common law was thus applied as the residual law on matters not covered by the Indian legislation or English statutes.<sup>90</sup> However, the English common law that was applied to British colonies was basic and

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<sup>82</sup> *Ole le Njogo and Others v. A.G. of the East African Protectorate* (1914) 5 E.A.L.R. 70. The court relied on a similar decision on the Bechuanaland Protectorate (*Rex v Earl of Crewe ex parte Sekgome* [1910] 2 K.B. 576).

<sup>83</sup> HM Albaharna, *The Legal Status of the Arabian Gulf States: A Study of the Treaty Relations and their International Relations* (Manchester University Press, 1968) 63, 80-81.

<sup>84</sup> C Singh (n 32) 886.

<sup>85</sup> JES Fawcett (n 78) 88.

<sup>86</sup> *ibid* 890.

<sup>87</sup> G Muigai "Constitutional Government and Human Rights in Kenya" (1990) 6(1) *Lesotho Law Journal* 107, 110-111.

<sup>88</sup> YP Ghai and JPWB McAuslan (n 15) 51. In 1905, legislation had transferred responsibility for the protectorate from the Foreign Office to the Colonial Office, which was better equipped to administer the territory. The government of the colony now comprised the Commissioner (who was renamed the Governor and Commander-in-Chief), a Legislative Council and an Executive Council. The Legislative Council included non-governmental officers and was a concession to the European settlers' demands for representative government while the Executive Council was a concession to the Commissioner/ Governor as it comprised only government officials (*ibid* 42-43).

<sup>89</sup> JN Matson (n 72) 760.

<sup>90</sup> K Roberts-Wray, *Commonwealth and Colonial Law* (Stevens and Sons, 1966) 478.

stripped of the curbs against arbitrary power that had developed over centuries of English history.<sup>91</sup> As mentioned earlier, in the 18<sup>th</sup> century, customary international law was considered part of English common law without the need for domestication. However, the common law was subject to the priority given to an Act of Parliament or a decision of a superior national court.<sup>92</sup> On the other hand, treaties had to be domesticated through an Act of Parliament before they became part of British law.<sup>93</sup> Since Britain and her colonies and protectorates formed one state in international law, the treaties that the British Government entered into with other states affected the colonies and protectorates.<sup>94</sup> However, from the 19<sup>th</sup> century onwards, there evolved a practice of expressly limiting the territorial scope of treaties to British overseas territories, or alternatively, the British Government could require that local legislation was passed in order to make a treaty apply to a self-governing colony (that is, a colony with a government comprising elected leaders).<sup>95</sup> For instance, the British Government ratified many International Labour Organization (ILO) treaties that contained a clause requiring metropolitan states to apply the treaties to their colonies.<sup>96</sup> However, the colonial government often delayed in enacting the domesticating legislation for several years after the ratification.<sup>97</sup> Also, the enacted laws were so weak that the colonial government did not fully implement the treaty obligations.<sup>98</sup> Therefore, colonial powers were able

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<sup>91</sup> JF Scotton, “Judicial Independence and Political Expression in East Africa – Two Colonial Legacies” (1970) 6 East African Law Journal 1, 3.

<sup>92</sup> MN Shaw, *International Law* (6th edn, Cambridge University Press, 2008) 141.

<sup>93</sup> *ibid* 148-149.

<sup>94</sup> *ibid* 93.

<sup>95</sup> This was the so-called “colonial clause” (*ibid* 94). Kenya became a self-governing colony between June and December 1963. See discussion in the next section.

<sup>96</sup> The Convention concerning Unemployment (Convention No. 2, adopted: 28 November 1919; entry into force: 14 July 1921) contained the following clause:

Article 5

1. Each Member of the International Labour Organisation which ratifies this Convention engages to apply it to its colonies, protectorates and possessions which are not fully self-governing--

(a) except where owing to the local conditions its provisions are inapplicable; or

(b) subject to such modifications as may be necessary to adapt its provisions to local conditions.

2. Each Member shall notify to the International Labour Office the action taken in respect of each of its colonies, protectorates, and possessions which are not fully self-governing.

Conversely, the Convention concerning the Rights of Association and Combination of Agricultural Workers

(Convention No. 11, adopted 25 October 1921; entry into force: 11 May 1923) contained the following clause:

“Article 6: Each Member of the International Labour Organisation which ratifies this Convention engages to apply it to its colonies, possessions and protectorates, in accordance with the provisions of Article 35 of the Constitution of the International Labour Organisation.”

<sup>97</sup> A Clayton and DC Savage, *Government and Labour in Kenya 1895-1963* (Frank Cass, 1974) 185-186.

<sup>98</sup> For example, the colonial government maintained harsh master and servant laws even though such laws had been repealed in England several years before the British colonised Kenya (DM Anderson, “Master and Servant in Colonial Kenya” (2000) 41(3) *Journal of African History* 459). This was despite the British Government having



to exclude the territorial scope of treaties in their colonies when it was expedient to do so.<sup>99</sup> This was particularly useful for the British Government in evading international scrutiny since during the colonial period, the government carried out racially discriminatory policies and legislation.<sup>100</sup>

Between 1954 and 1960, the British Government promulgated three constitutions for the Kenya Colony. The constitutions were informally named after the Secretary of State for the Colonies that had been responsible for their enactment. In response to increasing demands for participatory governance by the various racial groups, Oliver Lyttelton, the Secretary of State for the Colonies, enacted a law in 1954 that provided for the colonial government to nominate representatives of Africans, Asians and Europeans in a Council of Ministers.<sup>101</sup> This constitution was not satisfactory to the racial groups as the Africans and Asians felt that they were under-represented while the Europeans objected to the Africans and Asians getting any positions.<sup>102</sup> When Africans refused to cooperate with this system of racial proportions in the government, the new Secretary of State for the Colonies, Lennox-Boyd, imposed a new constitution in 1957.<sup>103</sup> While the 1957 Constitution slightly increased the representation of Africans and Asians in the Legislative and Executive Councils, the Africans rejected it because the British Government did not show a commitment towards granting independence to the colony.<sup>104</sup> In 1960, the new Secretary of State for the Colonies, Ian Macleod, invited the elected members of the Legislative Council to a constitutional conference at Lancaster in London. The conference proposals gave Africans a majority in the

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ratified the Penal Sanctions (Indigenous Workers) Convention (adopted: 27 June 1939; entry into force: 8 July 1948) in 1943. The convention contained the following clause:

Article 4

1. In respect of the territories referred to in article 35 of the Constitution of the International Labour Organisation, each Member of the Organisation which ratifies this Convention shall append to its ratification a declaration stating:
  - (a) the territories to which it undertakes to apply the provisions of the Convention without modification;
  - (b) the territories to which it undertakes to apply the provisions of the Convention subject to modifications, together with details of the said modifications;
  - (c) the territories to which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
  - (d) the territories in respect of which it reserves its decision.
2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.
3. Any Member may by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of subparagraphs (b), (c) or (d) of paragraph 1 of this Article.

<sup>99</sup> A Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press, 2013) 181.

<sup>100</sup> C Singh (n 32) 909.

<sup>101</sup> Additional Royal Instructions, 13 April 1954, Government Notice 582 of 1954 (“Lyttelton Constitution”).

<sup>102</sup> K Kyle, *The Politics of the Independence of Kenya* (Palgrave, 1999) 64.

<sup>103</sup> Kenya (Constitution) Order in Council, 1958 (S.I. 600) (“Lennox-Boyd Constitution”).

<sup>104</sup> BA Ogot, “The Decisive Years: 1956-1963” in BA Ogot and WR Ochieng’ (eds), *Decolonization and Independence in Kenya* (James Currey, 1995) 60.

Legislative and Executive Councils.<sup>105</sup> However, some of the European delegates rejected the proposals and Macleod had to impose the new constitution.<sup>106</sup>

These constitutions were primarily aimed at increasing the number of non-whites in the administration of the colony rather than establishing a comprehensive legal system for the colony.<sup>107</sup> As such, these constitutions did not contain provisions on the status or role of international law in the colony's legal order. This would have made it difficult for the colony's courts to refer to international law. In addition, the supra-colonial courts, that is, the Court of Appeal for Eastern Africa and the Judicial Committee of the Privy Council, always referred to English decisions on matters that would ordinarily involve international law. For instance, in deciding whether a Bugandan could challenge an act of state in court, the Court of Appeal for Eastern Africa referred to only one English decision that was in the negative.<sup>108</sup> This was consistent with the point made earlier that even English courts rarely made reference to international law. For example, the Court of Appeal and the House of Lords, when discussing the powers of the Crown in the Kenya Protectorate, confined themselves to English decisions that reiterated British colonial practice.<sup>109</sup> Even when these courts referred to these English decisions, they reiterated the constitutional relationship between the metropolitan state and its overseas territories. The decisions did not discuss the prevailing customary rules regarding colonies.

The 1960 Constitution contained a basic bill of rights that copied the right to property in the 1959 Nigerian Constitution and the bill of rights in the 1959 Nigerian Constitution.<sup>110</sup> However, this bill of rights was very limited in scope and it could also be restricted further through conservative interpretation of those provisions. At the same time, the British Government enacted legislation that maintained restrictions on the rights of non-Europeans to engage in transactions.<sup>111</sup> Also,

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<sup>105</sup> K Kyle (n 102) 104.

<sup>106</sup> Kenya (Constitution) (Amendment No. 2) Order in Council, 1960 (S.I. 2201) ("Macleod Constitution").

<sup>107</sup> BA Ogot (n 1) 289.

<sup>108</sup> *Katikiro of Buganda v Attorney-General of Uganda* [1959] EA 382 at 399-400 referring to *Salaman v Secretary of State for India* [1906] 1 KB 613 at 640. A similar decision was reached in *Daudi Ndibarema v Engazi of Ankole* [1959] EA 552, referring to *Sobhuza II v Miller and Others* [1926] AC 518.

<sup>109</sup> *Nyali Ltd v Attorney-General* [1955] 1 All ER 646; [1956] 2 All ER 689; [1956] 1 QB 1; [1955] 2 WLR 649, CA referring to *Sobhuza II v Miller* [1926] AC 518, *Rex v Earl Crewe* [1910] 2 KB 576; and *In re Southern Rhodesia*. Even though the Court of Appeal referred to the work of William Edward Hall, an English writer on international law, the judges relied only on the sections that dealt with British practice.

<sup>110</sup> COH Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press, 2007) 225.

<sup>111</sup> C Singh (n 32) 914.

British policymakers, in order to further their interests in Kenya, focussed on personal relationships with African elites as opposed to formal institutions. In this way, British officials in most spheres could not shake off the culture of racial superiority.<sup>112</sup> This would explain the ambivalence of the colonial judiciary towards human rights issues. In 1931, an Indian challenged the racially discriminatory nature of an auction of town plots.<sup>113</sup> The Supreme Court of Kenya dismissed the case but the Court of Appeal for Eastern Africa decided in his favour before the Privy Council also dismissed the case.<sup>114</sup> None of the courts discussed the legitimacy of the racial aspect and no case law was cited in the decisions. In 1951, a prominent African was prosecuted and convicted for growing coffee without a permit. On appeal, the Supreme Court of Kenya set aside the conviction on the ground that the Governor's regulations requiring Africans to acquire permits to grow coffee were *ultra vires* the parent legislation. Similar reasoning was applied in 1961 by a magistrate when acquitting an African who had been charged with violating a curfew order that applied only to Africans. On appeal, the Supreme Court of Kenya set aside the acquittal, stating that while the curfew order was racially discriminatory, the parent legislation allowed for such discrimination.<sup>115</sup> Again, no case law or international law was cited in the court's decisions, even though by this time the UK had signed up to international instruments touching on human rights.<sup>116</sup>

The British Government's duplicity with regard to human rights was evident in the 1950s when faced with radical African resistance. The *Mau Mau* uprising was the most prominent radical movement against the British racial policy in Kenya.<sup>117</sup> In response to the uprising, the British Government declared a state of emergency in Kenya in 1952 that lasted until 1960.<sup>118</sup> The British Army was deployed and it used 'exemplary force' to counter this insurgency.<sup>119</sup> In the course of the counterinsurgency, over 20,000 Africans were killed and more than 150,000 were placed in detention without trial.<sup>120</sup> During this period, a number of international human rights instruments

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<sup>112</sup> CP Cullen, "Kenya is no doubt a special case": British policy towards Kenya, 1960-1980" (PhD thesis, Durham University, 2015) 113-114.

<sup>113</sup> *A.H. Kaderbhai v Local Government Lands and Settlement Commissioner* 12 KLR 12.

<sup>114</sup> *Local Government Lands and Settlement Commissioner v Kaderbhai* [1931] AC 652.

<sup>115</sup> *Attorney-General v Kathenge Njoroge* [1961] EA 348.

<sup>116</sup> See below the discussion on the *Mau Mau*.

<sup>117</sup> *Mau mau* was a grassroots movement that used guerrilla tactics against the British: F Furedi, *The Mau Mau War in Perspective* (Currey, 1989) 24, 25; T Kanogo, *Squatters and the Roots of Mau Mau* (Currey, 1987) 122.

<sup>118</sup> R Blakeley, *State Terrorism and neoliberalism: The North in the South* (Routledge, 2009) 81.

<sup>119</sup> H Bennett, "The other side of the COIN: Minimum and exemplary force in the British Army counterinsurgency in Kenya" (2007) 18(4) *Small Wars and Insurgencies* 638, 638.

<sup>120</sup> *ibid.*

were applicable to the colony. The main instruments were the Universal Declaration of Human Rights,<sup>121</sup> (UDHR); the ILO's Convention Concerning Forced or Compulsory Labour,<sup>122</sup> (Forced Labour convention); the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>123</sup> (European Convention); and the 1949 Geneva Conventions.<sup>124</sup> However, the British Government was able to circumvent them for several reasons.<sup>125</sup> First, there were "flaws" inherent in international law at the time. Whereas the international system became alive to the harshness of colonial exploitation, international law still retained its imperialist character.<sup>126</sup> Second, until the 1940s, international law was not concerned with the treatment of individuals by their own governments.<sup>127</sup> Third, because of the British Government's inaction, the legally binding treaties mentioned above could not be effectively invoked by Africans in the colonies.<sup>128</sup> Whereas the British Parliament or the colony's government could domesticate a treaty, this was not always done.

The British Government circumvented the human rights instruments in several ways. First, the British Government did not give serious attention to the UDHR. The British played an active role during the negotiation of the UDHR, and from the outset they insisted on a treaty as opposed to a declaration.<sup>129</sup> However, the UDHR was not legally binding, and its vague and aspirational terms allowed the British and other states to continue subjugating their colonies.<sup>130</sup> Therefore, the British

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<sup>121</sup> Universal Declaration of Human Rights, adopted by United Nations General Assembly resolution 217 A (III) of 10 December 1948, U.N. GAOR Res. 71, U.N. Doc. A/810 at 71 (1948).

<sup>122</sup> Convention Concerning Forced or Compulsory Labour, Convention C029 (adopted: 28 June 1930, entered into force: 1 May 1932).

<sup>123</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14) (ETS No. 5) (adopted: 4 November 1950, entered into force: 3 September 1953) 213 UNTS 222.

<sup>124</sup> 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted: 12 August 1949, entered into force: 21 October 1950) 75 UNTS 31; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted: 12 August 1949, entered into force: 21 October 1950) 75 UNTS 85; 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted: 12 August 1949, entered into force: 21 October 1950) 75 UNTS 135; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted: 12 August 1949, entered into force: 21 October 1950) 75 UNTS 287.

<sup>125</sup> H Bennett (n 119) 641-643.

<sup>126</sup> A Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities" (2006) 27(5) *Third World Quarterly* 739,746-749.

<sup>127</sup> AWB Simpson, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (Oxford University Press, 2001) 91.

<sup>128</sup> H Bennett (n 119) 640.

<sup>129</sup> J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999) 15-17.

<sup>130</sup> E Posner, *The Twilight of Human Rights Law* (Oxford University Press, 2014) 17.

outwardly portrayed themselves as committed to the protection of human rights but this was not reflected in practice.

Second, the British Government often conscripted thousands of Africans to work on European farms, in contravention of the Forced Labour convention, which it had ratified in 1931.<sup>131</sup> During World War II, the colonial government forced some 16,000 Africans, including women and children, to work on coffee and tea plantations belonging to white settlers.<sup>132</sup> The justification given by the British Secretary of State for the Colonies in Parliament was that these plantations were “essential undertakings” that enabled “the colony to play its part in meeting the food supply requirements of the United Nations ...”<sup>133</sup> However, the conscription of Africans was done under very deplorable conditions and was comparable to the old slave trade.<sup>134</sup> Again, during the *Mau Mau* counterinsurgency, the colonial government rounded up thousands of Africans and sent them to work camps. The Colonial Office reasoned that it was permissible under Article 2(d) of the Forced Labour Convention to use detainees on works related to ending the “emergency”, which was a term in the Convention that excluded from its scope acts that would ordinarily be considered to be forced or compulsory labour.<sup>135</sup> Therefore, the Forced Labour convention contained exceptions that enabled states to legally avoid breaching the convention.

Third, the British managed to circumvent the European Convention in several ways. The British were the first to ratify the Convention in 1951,<sup>136</sup> and they extended application of the Convention to their colonies in 1953.<sup>137</sup> Thus, during part of the Emergency, the British were bound to comply

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<sup>131</sup> The convention did not contain a “colonial clause”, probably because of the convention’s universal character (JES Fawcett (n 78) 97.

<sup>132</sup> BA Ogot (n 1) 283.

<sup>133</sup> House of Commons debates, “Kenya (Compulsory Labour)”, HC Deb 12 May 1943, vol 389, cc608-10.

<sup>134</sup> BA Ogot (n 1) 268.

<sup>135</sup> H Bennett (n 119) 641.

<sup>136</sup> AWB Simpson (n 127) 2.

<sup>137</sup> C Heyns, “African Human Rights Law and the European Convention” (1995) 11(2) South African Journal of Human Rights 252, 255. At the time, the convention’s “colonial clause” was drafted as follows:

Article 63

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of

with the Convention in the Kenya Colony.<sup>138</sup> In 1954 the British Government lodged a derogation with the Council of Europe in respect of the State of Emergency in Kenya.<sup>139</sup> No derogation was allowed from the provisions regarding life, torture and inhuman or degrading treatment or punishment, and slavery or servitude.<sup>140</sup> However, the British were not held to account for their actions for several reasons: the European Commission for Human Rights (ECHR) and the European Court of Human Rights (ECtHR) started operations in 1953 and 1958 respectively, while the atrocities were committed mostly between 1952 and 1953;<sup>141</sup> the jurisdiction of the ECtHR and individual petitions to the ECHR were optional,<sup>142</sup> and the British Government did not agree to them until 1966;<sup>143</sup> the inter-states complaints system was not used against Britain because other European powers, allies of Britain, were also busy suppressing insurgencies in their colonies;<sup>144</sup> and most importantly, the colonial government did not domesticate the Convention in the Kenya Colony.<sup>145</sup>

Fourth, the British Government played a part in limiting the applicability of the 1949 Geneva Conventions in situations of civil war.<sup>146</sup> Up until the 19<sup>th</sup> century, international law did not regulate internal uprisings,<sup>147</sup> but during negotiations on the Geneva Conventions, many states were prepared to make this extension.<sup>148</sup> However, the British Government, concerned about its counterinsurgency campaigns in the colonies, constantly proposed amendments to the drafts.<sup>149</sup> In

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the Commission to receive petitions from individuals, non-governmental organisations or groups of individuals in accordance with Article 25 of the present Convention.

<sup>138</sup> H Bennett (n 119) 641.

<sup>139</sup> AWB Simpson (n 127) 877.

<sup>140</sup> *ibid* 874.

<sup>141</sup> H Bennett (n 119) 641. The judgment of the ECtHR in *Lawless v Ireland* (No. 3) (Merits) [1961] ECHR 2, setting out the criteria for declaration of a public emergency that would permit derogation from fundamental rights and freedoms, came in 1961.

<sup>142</sup> M Janis, RS Kay and AW Bradley, *European Human Rights Law: Text and Materials* (Oxford University Press, 2008) lxxv.

<sup>143</sup> AWB Simpson (n 127) 4.

<sup>144</sup> H Bennett (n 119) 641.

<sup>145</sup> YP Ghai and JPWB McAuslan (n 15) 413. In 1897, the British Government passed legislation that empowered the Commissioner, who was the chief executive officer of the territory, to make laws for, *inter alia*, “securing the observance of any treaty for the time being in force relating to the protectorate ...” (*ibid* 37)

<sup>146</sup> H Bennett (n 119) 642-643.

<sup>147</sup> L Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 3.

<sup>148</sup> H Bennett (n 119) 642.

<sup>149</sup> Swiss Federal Council, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A (Federal Political Department 1949) 48-62.



the end, Common Article 3 of the Geneva Conventions was so “innocuous” that it was not clear what effect it had.<sup>150</sup> Further, the UK delayed ratification of the Conventions until 1957.<sup>151</sup>

Essentially, by negotiating the adoption of weak treaties and by restricting the applicability of those treaties, the British Government ensured that there was little room for measuring its adherence to international law. Thus, domestic courts could not effectively rely on treaties while international courts could not find much fault in the British Government’s conduct in relation to its colonies.

## **6. Kenya’s legal system in the post-independence period**

In 1962, the British Secretary of State for the Colonies held a constitutional conference in London with African, Asian and European elected leaders from Kenya.<sup>152</sup> There were major divisions between the racial groups as well as within the groups.<sup>153</sup> The Africans were agitating for majority self-rule but they were also divided over whether to form a “federal” or unitary government. The European settlers wanted assurance that their property and investment would be protected but they were split on whether to acquiesce to African rule or to insist on white supremacy. The Asians were also concerned about protecting their interests; some of them favoured African rule while others sought to continue the system of racial representation based on fixed proportions. Arabs from the coastal strip and Somalis from the northern region wanted to secure a special status for their respective areas. The compromise that the delegates reached was that the administration of Kenya would be divided between the national government and seven regional governments.<sup>154</sup> There was to be a bicameral Parliament comprising the House of Representatives and a Senate while each of the regions would have a regional assembly. At the conclusion of the conference, there was still disagreement on some issues and these were completed in the course of 1963. The constitution was promulgated when Kenya was granted internal self-governing status on 1 June 1963.<sup>155</sup> A more detailed constitution was enacted when Kenya was granted independence on 12

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<sup>150</sup> I Dettner, *The Law of War* (3rd edn, Routledge, 2016) 189-190.

<sup>151</sup> H Bennett (n 119) 643.

<sup>152</sup> RM Maxon, *East Africa: An Introductory History* (3rd edn, West Virginia University Press 2009) 258.

<sup>153</sup> *ibid.*

<sup>154</sup> C Singh (n 32) 895-897.

<sup>155</sup> Kenya Order in Council, 1963, S.I. 791 (“internal self-government Constitution”).

December 1963.<sup>156</sup> Simultaneously, the British Government renounced the right to directly legislate and govern Kenya.<sup>157</sup>

After independence, most former colonies maintained the colonial power's legal system and traditions.<sup>158</sup> Kenya maintained the English common law system due to its familiarity and to foster inclusiveness by removing racial and class distinctions.<sup>159</sup> The British attempted to impart their constitutional system, developed over centuries, to Kenya through a written constitution.<sup>160</sup> The 1963 Constitution established a bicameral legislature, comprising the House of Representatives and the Senate. In addition, there was a Prime Minister appointed by the colonial Governor from amongst members of the House of Representatives. The independence of the judiciary was entrenched in the 1963 Constitution by giving judges security of tenure and they could only be removed following a judicial inquiry. Also, the courts' powers to check executive and legislative authority were enhanced more than those of the courts in Britain.<sup>161</sup> However, the Governor still retained executive and legislative powers, and a veto power over Parliament's legislation.

The 1963 Constitution contained an elaborate bill of rights, modelled on the constitutions of Nigeria and Uganda, and the European Convention.<sup>162</sup> The bill of rights was intended to safeguard the interests of the minority communities (small African communities, Arabs, Asians and Europeans) against those of the major communities.<sup>163</sup> It guaranteed personal freedoms by protecting the rights to liberty, life and freedom of movement, and by prohibiting slavery, servitude, forced labour, and arbitrary search of person and property. The bill of rights also ensured civil rights such as freedom of assembly, association, conscience and expression. It also proscribed discrimination through laws or conduct of public officials. Finally, the bill of rights

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<sup>156</sup> Kenya (Independence) Order in Council, 1963, S.I. 1968 ("Independence Constitution"). Both the internal self-government Constitution and the independence Constitution were similar in many respects. Unless otherwise stated, reference to the 1963 Constitution means the independence Constitution.

<sup>157</sup> Kenya Independence Act, 1963, (c. 54).

<sup>158</sup> U Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 *American Journal of Comparative Law* 5, 15.

<sup>159</sup> SF Joireman, "The Evolution of the Common Law: Legal Development in Kenya and India" (2006) 44(2) *Commonwealth & Comparative Politics* 190, 201.

<sup>160</sup> SB Pfeiffer, "The Role of the Judiciary in the Constitutional Systems of East Africa" (1978) 16(1) *Journal of Modern African Studies* 33, 38.

<sup>161</sup> *ibid* 36.

<sup>162</sup> YP Ghai and JPWB McAuslan (n 15) 413.

<sup>163</sup> YP Ghai, "Independence and Safeguards in Kenya" (1967) 3(3) *East African Law Journal* 177, 192.



assured the protection of the legal and judicial process by placing safeguards in the civil and criminal proceedings.<sup>164</sup>

Between 1964 and 1968, Kenya's Parliament made several significant amendments to the 1963 Constitution, with the aim of consolidating power in the Executive.<sup>165</sup> The major changes to the constitution took away the powers of the regional government units (*majimbo*) in making judicial appointments and instead vested them in the President. Thus, the President could appoint judges without consulting the regional government units. In addition, the President could order the detention of anyone or exercise emergency powers, and these actions were not subject to the courts' review. As an extra-constitutional measure, the President often appointed foreigners as judges on short term, renewable contracts, and so they did not enjoy security of tenure. When the 1969 Constitution<sup>166</sup> was enacted, it contained numerous restrictions to the human rights provisions on the grounds of maintenance of public order, morality, and public health without defining these terms.<sup>167</sup> The constitution gave to the President the power to solely appoint the Chief Justice and the power to appoint the members of the Judicial Service Commission that exercised disciplinary control over the judiciary. In addition, the President could solely appoint the members of a tribunal for the removal of a judge while in the case of the removal of the Chief Justice the President appointed the chairman of the tribunal. Also, one of the grounds for removal of a judge from office was simply misbehaviour.

For the next 40 years, Kenya maintained the 1969 Constitution but successive governments continued to make numerous constitutional amendments that severely restricted the human rights provisions.<sup>168</sup> In addition, the courts' judicial review powers were limited through constitutional amendments and legislation that reserved extensive powers to the executive.<sup>169</sup> In particular, the security of tenure of judges, the Attorney General, and the Controller and Auditor General was removed. Also, the powers given to the executive under laws such as the *Chief's Authority Act*,

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<sup>164</sup> YP Ghai and JPWB McAuslan (n 15) 414 - 428.

<sup>165</sup> PLO Lumumba, "A Journey Through Time in Search of a New Constitution" in PLO Lumumba, MK Mbondenyei and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (LawAfrica, 2011) 23-31.

<sup>166</sup> Constitution of Kenya Act, 1969, Act No. 5 of 1969.

<sup>167</sup> P Chitere, and others, *Kenya Constitutional Documents: A Comparative Analysis* (Chr. Michelsen Institute, 2006) 34.

<sup>168</sup> PLO Lumumba (n 165) 31-35.

<sup>169</sup> M Mutua, "Justice under siege: The rule of law and judicial subservience in Kenya" (2001) 23(1) Human Rights Quarterly 96.

the *Preservation of Public Security Act* and the *Public Order Act*, were excluded from judicial challenge. Certain offences under the *Penal Code* were made non-bailable and suspects could be detained for 14 days before being arraigned in court. The judiciary was also subject to interference from the executive, meaning that judges and magistrates acted at the mercy of the executive.<sup>170</sup> There were several instances where the Chief Justice issued circulars to judges in line with public announcements made by the President. Furthermore, the legal profession was also subservient to the executive until the 1990s when lawyers reacted to the arbitrary arrests of their colleagues.<sup>171</sup> Also, the Kenyan Government refused to either sign up to some human rights treaties<sup>172</sup> or it did not domesticate the ones that it ratified.<sup>173</sup>

At independence, there was no law setting out the status or role of international law in Kenya. The only provision touching on international law was section 68 of the 1963 Constitution that empowered Parliament to pass a law in order to give effect to a treaty that the government had concluded.<sup>174</sup> While this provision indicates that Kenya's approach to treaties was dualist, the provision appears to give Parliament the discretion on whether to domesticate a treaty. In practice,

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<sup>170</sup> L Hannan, "Bias and Judicial Outrage" (1991) 141 *New Law Journal* 900.

<sup>171</sup> SD Ross, "The Rule of Law and Lawyers in Kenya" (1992) 30(3) *Journal of Modern African Studies* 421, 435-438.

<sup>172</sup> Kenya has not yet acceded to the Convention on the Prevention and Punishment of the Crime of Genocide (adopted: 9 December 1948; entry into force: 12 January 1951) 78 UNTS 277.

<sup>173</sup> A treaty that Kenya signed but did not ratify is the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted: 30 November 1973, entry into force: 18 July 1976) 1015 UNTS 243. Kenya signed the treaty on 2 October 1974. Some of the treaties that Kenya acceded to but did not domesticate include the International Covenant on Civil and Political Rights (adopted: 16 December 1966, entry into force: 23 March 1976) 999 UNTS 171 and 1057 UNTS 407 (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (adopted: 16 December 1966, entry into force: 3 January 1976) 993 UNTS 3 (ICESCR). Kenya acceded to these treaties on 1 May 1972. However, Kenya did not ratify or accede to the two Optional Protocols to the ICCPR. Another treaty that Kenya acceded to but did not domesticate is the African Charter on Human and Peoples' Rights (adopted: 27 June 1981, entry into force: 21 December 1986) 21 I.L.M. 58. Kenya acceded to the treaty on 23 January 1992.

<sup>174</sup> Section 68 of both the Kenya Order in Council, 1963, S.I. 791 ("Internal Self-government Constitution") and Kenya (Independence) Order in Council, 1963, S.I. 1968 ("Independence Constitution") (NB: In this study, references to the 1963 Constitution shall be to the "Independence Constitution" unless otherwise stated):

68 (1) Subject to the provisions of subsection (2) of this section, Parliament may, for the purpose of implementing any treaty, convention or agreement between the Government of Kenya and some country other than Kenya or any arrangement with or decision of any international organization of which the Government of Kenya is a member, make laws for Kenya or any part thereof with respect to any matter specified in Part I of Schedule of this Constitution.

(2) A Bill for an Act of Parliament under this section shall not be introduced into the National Assembly unless a draft of that Bill has, not less than 21 days before such introduction, been transmitted by the Prime Minister to the President of the Regional Assembly of every Region concerned and unless the Bill, when introduced, is in the terms of that draft or in such amended form as may have been agreed to by notice in writing under the hand of the President of the Regional Assembly of every Region concerned.

government ministers could often enter into treaties on behalf of Kenya but without Parliament's oversight.<sup>175</sup> When Kenya became a republic in 1964, the constitution<sup>176</sup> neither retained this provision nor did it contain any provision on international law. Probably in response to these circumstances, in 1964 a Member of Parliament moved a motion seeking to compel Government Ministers to submit treaty proposals for Parliament's approval before negotiation with other states.<sup>177</sup> However, the motion was defeated and it appears that Government Ministers continued negotiating and signing treaties without Parliament's oversight.

The 1969 Constitution<sup>178</sup> also did not contain a provision touching on the status or application of international law in Kenya's legal order. Additionally, the *Judicature Act*,<sup>179</sup> which was enacted in 1967, listed the laws to be applied by the courts in Kenya in section 3, but this did not include international law.<sup>180</sup> Section 4(2) of the same Act only stated that the High Court was to exercise its admiralty jurisdiction in conformity with international law.<sup>181</sup> It appears that prior to 2010, Kenya emulated other former British colonies in adopting the British approach to international

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<sup>175</sup> JB Ojwang' and L Franceschi "Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment" (2002) 46(1) *Journal of African Law* 43, 55.

<sup>176</sup> Constitution of Kenya (Amendment) Act, 1964, Act No. 28 of 1964.

<sup>177</sup> Kenya National Assembly Official Report, vol. 3, part II, 1964, col. 2214-2238, 2484-2493.

<sup>178</sup> Constitution of Kenya, 1969, Act No. 5 of 1969.

<sup>179</sup> Chapter 8, Laws of Kenya.

<sup>180</sup> Section 3 of the Judicature Act (Chapter 8, Laws of Kenya):

3(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—

- (a) the Constitution;
- (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
- (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

<sup>181</sup> Section 4(2) of the Judicature Act (Chapter 8, Laws of Kenya):

4(2) The admiralty jurisdiction of the High Court shall be exercisable—

- (a) over and in respect of the same persons, things and matters; and
- (b) in the same manner and to the same extent; and
- (c) in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.

law.<sup>182</sup> The practice of former British colonies was to domesticate treaties before they could apply internally while customary international law was applicable without the need for domestication as long as it did not conflict with municipal law.<sup>183</sup> Under these circumstances, the other sources of international law do not appear to have been relevant for Kenya's courts.

### **i. Treaties**

At independence in 1963, the Kenya Government sent a declaration to the United Nations (UN) Secretary-General stating that Kenya would honour bilateral and multilateral treaties entered into by the colonial government for a period of two years. After the expiry of the two years, the Kenya Government would decide to terminate, succeed or accede to the treaties.<sup>184</sup> In this manner, the Kenya Government used emerging state practice to avoid treaty obligations that were inimical to its interests.<sup>185</sup> Kenya's declaration was extended for a further two years and finally expired in 1967.<sup>186</sup> Thereafter, the Kenya Government either re-negotiated or terminated commercial treaties, while it retained all extradition and judicial assistance treaties.<sup>187</sup>

During this period, the negotiation, signing and ratification of treaties was done by the executive without legislative oversight. In the absence of constitutional or legislative provisions on the matter, the practice was that the cabinet would give approval for the Ministry of Foreign Affairs to negotiate a treaty.<sup>188</sup> However, other ministries also went ahead to negotiate bilateral treaties on behalf of the state.<sup>189</sup> After negotiation of the treaty, the relevant ministry would prepare a cabinet memorandum for the cabinet to discuss and give its approval for ratification of the treaty by the Attorney-General.<sup>190</sup> Thereafter, the Attorney-General's office would then prepare the necessary

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<sup>182</sup> DM Isabirye, "The Status of Treaties in Kenya" (1980) 20 *Indian Journal of International Law* 63.

<sup>183</sup> PF Gonidec, "The Relationship of International Law and National Law in Africa" (1998) 10 *African Journal of International and Comparative Law* 244, 245-46.

<sup>184</sup> LG Franceschi, "Constitutional Regulation of International Law in Kenya" in PLO Lumumba, MK Mbondenyei and SO Odero (eds) (n 167) 253.

<sup>185</sup> See AD McNair, *Law of Treaties* (Clarendon Press, 1986) 600 ff.

<sup>186</sup> LG Franceschi (n 184) 253, fn 64.

<sup>187</sup> *ibid* 254.

<sup>188</sup> JB Ojwang' and L Franceschi (n 175) 55.

<sup>189</sup> *ibid*.

<sup>190</sup> A Angwenyi, "Environmental Legislation and Domestication of International Environmental Law in Kenya", a paper presented at the Sesei Program Sub-regional Legal Workshop held in Nairobi, 13-17 December 2004, p. 15 <<http://www.bcrpretoria.org.za/>> accessed 3 July 2016.

instruments of ratification of the treaty.<sup>191</sup> Since there was no constitutional or legislative provision on domestication of ratified treaties after 1964, of the over 400 multilateral and bilateral treaties that Kenya concluded prior to 2010, many of them were never domesticated.<sup>192</sup> The methods used for domesticating treaties in Kenya can be grouped into three main categories. First, legislation that expressly mentioned the treaties intended for domestication; second, legislation that adopted in its text the language used in the treaties intended for domestication; and third, some treaties were brought into force by certain acts of the Executive.

In the first category, the legislation often had a preamble or section that mentioned the particular treaty. For example, the *Privileges and Immunities Act*<sup>193</sup> mentions the Vienna Convention on Diplomatic Relations<sup>194</sup> and the Vienna Convention on Consular Relations.<sup>195</sup> The *Geneva Conventions Act*<sup>196</sup> mentions “International Conventions done at Geneva on the 12th August, 1949” in its preamble and then reproduces the 1949 Geneva Conventions<sup>197</sup> in its schedules. The repealed *Arbitration Act*<sup>198</sup> referred to the 1923 Protocol on Arbitration Clauses<sup>199</sup> and to the 1927 Convention on Execution of Foreign Arbitral Awards,<sup>200</sup> and then set them out in the First and Second Schedules respectively. An interesting modification in this category is the *Treaty for East African Co-operation Act 1967*<sup>201</sup> (Treaty Act) that stated that it was meant to domesticate the treaty establishing the East African Community (EAC) and then set out the treaty in its schedule.<sup>202</sup> Section 6 of the Act continued in force the existing laws that had been made by the E.A.C.’s predecessor, the East African Common Services Organisation (EACSO), while section 8(1) gave the future Acts of the E.A.C. the force of law in Kenya.<sup>203</sup> Thus, the Act domesticated pre-existing and future legislation of the E.A.C.

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<sup>191</sup> *ibid.*

<sup>192</sup> JB Ojwang’ and L Franceschi (n 175) 56.

<sup>193</sup> Chapter 179, Laws of Kenya.

<sup>194</sup> Vienna Convention on Diplomatic Relations (adopted: 18 April 1961, entry into force: 24 April 1964) 500 UNTS 95.

<sup>195</sup> Vienna Convention on Consular Relations (adopted: 24 April 1963, entry into force: 19 March 1967) 596 UNTS 261.

<sup>196</sup> Chapter 198, Laws of Kenya.

<sup>197</sup> 1949 Geneva Conventions (n 124).

<sup>198</sup> Chapter 49, Laws of Kenya, now repealed by Arbitration Act, Act No. 4 of 1995.

<sup>199</sup> Protocol on Arbitration Clauses (adopted: 24 September, 1923, entered into force: 28 July 1924). 27 LNTS 157.

<sup>200</sup> Convention on the Execution of Foreign Arbitral Awards (adopted: 26 September, 1927) 92 LNTS 302.

<sup>201</sup> Preamble and Schedule I to Act No. 31 of 1967, Laws of Kenya.

<sup>202</sup> Treaty for East African Co-operation (adopted: 1 December 1967) 6 ILM 932.

<sup>203</sup> *Okunda v Republic* [1970] EA 453 (High Court, Nairobi) at 455 (Mwendwa, CJ).

In the second category, the legislation was usually drafted in a manner similar to the treaty intended for domestication. However, in some cases the legislation did not expressly identify the relevant treaty. For example, the *Environmental Management and Coordination Act*<sup>204</sup> uses language that resembles the text of the Convention on Biological Diversity<sup>205</sup> and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.<sup>206</sup> The repealed *Wildlife (Conservation and Management) Act*<sup>207</sup> domesticated the African Convention on the Conservation of Nature and Natural Resources<sup>208</sup> and the Convention on International Trade in Endangered Species of Wild Fauna and Flora,<sup>209</sup> but without referring to the treaties. Conversely, the *International Crimes Act*<sup>210</sup> states in its preamble only that it is meant to “make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions”. The text of the Act is drafted in similar language to that of the Statute of the International Criminal Court.<sup>211</sup>

The third category concerned mostly treaties on extradition and mutual legal assistance. Here, Kenya’s Cabinet Ministers were authorized to sign memoranda or to do an exchange of letters on behalf of Kenya with other states. It was not explicit whether the Cabinet Secretary was required to publish the agreements in a gazette notice. This was the case when Kenya concluded agreements with several European countries to the effect that Kenya would prosecute suspected pirates in 2008 captured by those European countries.<sup>212</sup>

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<sup>204</sup> Act No. 8 of 1999, Laws of Kenya.

<sup>205</sup> Convention on Biological Diversity (adopted 5 June 1992; entry into force: 29 December 1993) 1760 UNTS 79; 31 ILM 818 (1992).

<sup>206</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entry into force: 5 May 1992) 1673 UNTS 126; 28 ILM 657 (1989).

<sup>207</sup> Chapter 376, Laws of Kenya.

<sup>208</sup> African Convention on the Conservation of Nature and Natural Resources (adopted: 15 September 1968; entry into force: 16 June 1969) 1001 UNTS 3.

<sup>209</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted: 3 March 1973; entry into force: 1 July 1975) 993 UNTS 243.

<sup>210</sup> Act No. 16 of 2008, Laws of Kenya.

<sup>211</sup> Statute of the International Criminal Court (adopted: 17 July 1998; entry into force: 1 July 2002) 2187 UNTS 90.

<sup>212</sup> JT Gathii, “Kenya’s Piracy Prosecutions” (2010) 104(3) *American Journal of International Law* 416, 417.



## ii. Customary international law

As mentioned earlier, Kenya's constitutions of 1963, 1964 and 1969 did not contain provisions on customary international law. The closest connection between the constitutions and customary international law may be the resemblance of the bills of rights in those constitutions to the human rights instruments at the time. The bills of rights in those constitutions, although copied from the Nigerian and Ugandan independence constitutions,<sup>213</sup> drew their ultimate inspiration from the European Convention and the UDHR. The expression of those particular rights in several bills of rights and in the international instruments signified their widespread acceptance, which is an element of custom. The European Convention, inspired by the UDHR,<sup>214</sup> was meant to give effect to certain rights contained in the UDHR.<sup>215</sup> and it was signed by 15 of the 17 member states of the Council of Europe.<sup>216</sup> The UNGA proclaimed the UDHR. "as a common standard of achievement for all peoples and all nations"<sup>217</sup> and was adopted by 48 of the 58 member states of the UN.<sup>218</sup> By the 1960s, there was a growing consensus among scholars as to the customary international law status of the UDHR.<sup>219</sup> Therefore, the nearly unanimous states' approval of both the UDHR and the European Convention, and the use of the European Convention in the drafting of bills of rights in the 1960s was a significant reflection of *opinio juris*. However, state practice was yet to catch up with *opinio juris*, as not many states adhered to human rights provisions during this time.<sup>220</sup> In addition, the bills of rights in Kenya's constitutions had been negotiated in the late 1950s to the early 1960s, with the British Government's main motivation being to secure the protection of the

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<sup>213</sup> COH Parkinson (n 110) 223, 243-244.

<sup>214</sup> RCA White and C Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press, 2010) 3 - 4.

<sup>215</sup> Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted: 4 November 1950, entered into force: 3 September 1953) ETS No. 5, 213 UNTS 222.

<sup>216</sup> AWB Simpson (n 127) 753.

<sup>217</sup> Preamble to the Universal Declaration of Human Rights, adopted by United Nations General Assembly resolution 217 A (III) of 10 December 1948, U.N. GAOR Res. 71, U.N. Doc. A/810 at 71 (1948).

<sup>218</sup> Department of Public Information, *Yearbook of the United Nations, 1948-1949* (United Nations, 1949) 535.

<sup>219</sup> E Schwelb, *Human rights and the international community: The roots and growth of the Universal declaration of human rights, 1948-1963* (Quadrangle Books, 1964) 37; H Waldock, "Human Rights in Contemporary International Law and the Significance of the European Convention" [1965] *The European Convention on Human Rights* (International and Comparative Law Quarterly Supplementary Publication 11 15; JP Humphrey, "The UN Charter and the Universal Declaration of Human Rights" in E Luard (ed) *The International Protection of Human Rights* (Thames and Hudson, 1967) 53; LB Sohn, "The Universal Declaration of Human Rights" (1967) 8(2) *Journal of the International Commission of Jurists* 17; United Nations General Assembly, "Montreal Statement of the Assembly of Human Rights" (1968) 9(1) *Journal of the International Commission of Jurists* 94, 95.

<sup>220</sup> T Buergenthal, "The United Nations and the Development of Rules Relating to Human Rights" (1965) 59 *Proceedings of the American Society for International Law* 132, 134.

white settlers' interests.<sup>221</sup> It is, therefore, unlikely that the negotiators paid any serious attention to the customary international law status of human rights.

An indirect connection between Kenya's municipal law and customary international law may be through legislation which domesticated treaties that had already codified custom. For example, the Privileges and Immunities Act<sup>222</sup> domesticated the Vienna conventions on diplomatic and consular relations,<sup>223</sup> which may be said to have codified the customary diplomatic law.<sup>224</sup> The Geneva Conventions Act<sup>225</sup> domesticated the Geneva Conventions of 1949,<sup>226</sup> whose selected provisions may also be said to have codified the customary law of war.<sup>227</sup> The repealed Territorial Waters Act<sup>228</sup> and the repealed Continental Shelf Act<sup>229</sup> domesticated two of the 1958 Conventions on the law of the sea.<sup>230</sup> However, the legislation was domesticating the relevant treaties as such and there was no reference to customary international law in the main body of the legislation.

## 7. The judicial use of international law after independence

Because international law was not expressly mentioned in the constitution or legislation, the courts did not have an authoritative basis for referring to international law. Also, courts found it difficult to rely on treaties because treaties had to be domesticated and this was not always done.<sup>231</sup> In addition, the eroding of the independence of the judiciary and the subservience of the legal

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<sup>221</sup> COH Parkinson (n 110) 245, 260.

<sup>222</sup> Chapter 179, Laws of Kenya.

<sup>223</sup> Vienna Convention on Diplomatic Relations (n 194); Vienna Convention on Consular Relations (n 195).

<sup>224</sup> M Hardy, *Modern Diplomatic Law* (Manchester University Press, 1968) 5-6; RR Baxter, "Treaties and Custom" (1970) 129 *Recueil des Cours* 27, 87.

<sup>225</sup> Chapter 198, Laws of Kenya.

<sup>226</sup> 1949 Geneva Conventions (n 124).

<sup>227</sup> T Meron, "The Geneva Conventions as Customary Law" (1987) 81(2) *American Journal of International Law* 348.

<sup>228</sup> Chapter 371, Laws of Kenya, also repealed by the Maritime Zones Act (Act No. 6 of 1989) which now domesticates the 1982 United Nations Convention on the Law of the Sea (adopted: 10 December 1982, entered into force: 16 November 1982) 1833 UNTS 3.

<sup>229</sup> Chapter 312, Laws of Kenya, also repealed by the Maritime Zones Act (Act No. 6 of 1989).

<sup>230</sup> 1958 Convention on the Territorial Sea and the Contiguous Zone (adopted: 29 April 1958, entered into force: 10 September 1964) 516 UNTS 205; 1958 Convention on the Continental Shelf (adopted: 29 April 1958, entry into force: 10 June 1964) 499 UNTS 311. However, the 1958 Conventions on the law of the sea were more of political compromises than codifications of international custom (R-J Dupuy and D Vignes, (eds) *A Handbook on the New Law of the Sea* (Martinus Nijhoff, 1991) xlix, 329).

<sup>231</sup> For a more recent opinion on the dualist position during this period see *Kenya Small Scale Farmers Forum and 6 others v Republic of Kenya and 2 others* [2013] eKLR (High Court, Nairobi), paras. 41 and 52.



profession further prevented the liberal interpretation of the human rights contained in the constitution. It was not until after the truly democratic general elections of 2002 that the courts became more liberal in their decisions. Therefore, there is a marked difference in the courts' decisions during the periods 1963-2002 and 2003-2010.

Between 1963 and 2002, it appears that the courts adopted two main approaches to engaging with courts of other jurisdictions. First, Kenyan courts relied on English decisions and procedures to the exclusion of decisions from other jurisdictions.<sup>232</sup> Most decisions made soon after independence cited little or no case law but those that extensively cited case law were often cases dealing with admiralty law issues. There were very few cases that discussed the applicability of international law.<sup>233</sup> Even where the judges noted that a Kenyan law had domesticated a treaty, they did not use the treaty in interpreting the law but rather relied on English decisions.<sup>234</sup> This is attributable to the fact that a few years after independence, the judiciary still comprised English judges while the legal profession comprised English-trained Asians and Europeans.<sup>235</sup> As mentioned earlier, English-trained lawyers rarely cited international law in their pleadings and arguments. In addition, while appeals to the JCPC were discontinued in 1965, the court had left a lasting impression on Kenya's judicial system and legislation.<sup>236</sup> Additionally, Parliament replaced the previous Indian legislation with English common law based legislation.<sup>237</sup> Therefore,

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<sup>232</sup> *Coffee Marketing Board v Harbours Corporation* [1973] EA 126 (Court of Appeal, Mombasa); *Owners of the Motor Vessel "Lilian S" v Caltex Oil (K) Ltd* [1986-1989] EA 305 (Court of Appeal, Mombasa); *Babulal Narshi & Co. Ltd. v Deutsch Ost-Afrika-Linie* [1974] EA 436 (High Court, Mombasa); *The Despina Pontikos* [1975] EA 38 (High Court, Mombasa); *Ministry of Defence of the Government of the United Kingdom v Ndegwa* [1976-1985] EA 294 (Court of Appeal, Nairobi); *Ngwabe v Manyara* [2004] eKLR (High Court, Mombasa); *East African Power Management Limited v Owners of the Vessel "Victoria Eight"* [2005] eKLR (High Court, Mombasa); *East African Power Management Limited v Owners of the Vessel "Victoria Eight"* [2006] eKLR (High Court, Mombasa); *Kenya Marine Contractors EPZ Ltd v Owners of Motor Vessel "Omimos"* [2006] eKLR (High Court, Mombasa); *PIL Kenya Limited v Joseph Oppong* [2009] eKLR (Court of Appeal, Mombasa). But see *Ronning v Societe Navale Chargeurs Delmas Vieljeux and Another* [1976-1985] EA 513 where the court extensively relied on American, Canadian and English cases.

<sup>233</sup> *In the Matter of an Application by Evan Maina* Miscellaneous Civil Case No. 7 of 1969 (unreported); *Charles Okunda Mushiya and Donald Meshack Ombisi v Republic* [1970] EA 453 (High Court, Nairobi); *East African Community v Republic* [1970] EA 457 (Court of Appeal, Nairobi); *Ministry of Defence of the Government of the United Kingdom v Ndegwa* [1976-1985] EA 294 (Court of Appeal, Nairobi); *Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank* [1999] eKLR (Court of Appeal, Nairobi).

<sup>234</sup> *Owners of the Motor Vessel "Lilian S" v Caltex Oil (K) Ltd* [1986-1989] EA 305 (Court of Appeal, Mombasa); *Babulal Narshi & Co. Ltd. v Deutsch Ost-Afrika-Linie* [1974] EA 436 (High Court, Mombasa).

<sup>235</sup> YP Ghai and JPWB McAuslan (n 15) 382-383.

<sup>236</sup> *ibid* 365-366.

<sup>237</sup> *ibid* 376-378.

advocates were more likely to quote, and the judges more likely to rely on, English decisions with which they were familiar. Also, section 3 of the *Judicature Act* contained the old “reception clause” that imported English statutes, common law and equity as some of the laws to be applied by Kenyan courts in default of the constitution and legislation. While section 4(2) of the *Judicature Act* directed the High Court to exercise its admiralty jurisdiction in conformity with international law *and* comity, most Kenyan courts did not consider international law but relied on English decisions.

In the few cases that discussed international law, the judges only made references to an international rule before falling back on to English decisions. The classic examples are two cases where Kenyans were prosecuted for offences provided under legislation of the EAC. In one case the relevant legislation of the EAC. empowered the Commissioner of Customs to summarily fine an offender while in the other case the legislation of the EAC. stated that the prior consent of the Counsel for the EAC. was required for prosecutions. When the legislation was challenged, the courts held that the EAC. legislation was invalid for being inconsistent with Kenya’s constitutional guarantees on right to a fair trial<sup>238</sup> and independence of the Attorney-General.<sup>239</sup> In one case, the court noted the international decisions<sup>240</sup> quoted by the EAC’s Counsel and stated:

“We agree that both these cases concerned conflicts between international treaties and municipal laws and decided, on the basis of accepted principles of international law, that in such conflicts the treaties should prevail... No conflict between the Treaty for East African Co-operation and the Kenya Constitution or other Kenya law has arisen. If we did have to decide a question involving a conflict between Kenya law on the one hand and the principles or usages of international law on the other ... and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenya law prevailed...”<sup>241</sup>

A few observations can be made here. First, the court did not consider the authoritativeness of the decisions to Kenyan courts. Second, the court did not explain why it departed from what it

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<sup>238</sup> *In the Matter of an Application by Evan Maina* Miscellaneous Civil Case No. 7 of 1969 (unreported).

<sup>239</sup> *Charles Okunda Mushiya and Donald Meshack Ombisi v Republic* [1970] EA 453 (High Court, Nairobi) at 455-456.

<sup>240</sup> *Greco-Bulgarian Communities, Advisory Opinion*, 1930 PCIJ (Ser. B) No. 17 (July 31) and *German Interests in Polish Upper Silesia* (Germany v Poland) (Merits), 1926 PCIJ (Ser. A) No. 7 (May 25).

<sup>241</sup> *ibid* 455.

recognised as “the accepted principles of international law.” Third, the court confused matters when it referred to treaties in one part and referred to “principles and usages of international law” in other part, presumably referring to custom. Fourth, the court appeared to conflate the relationship between municipal law and customary international law on the one hand and treaties on the other. Fifth, the court did not make clear what it meant by Kenyan law (e.g. statute or common law) that would prevail over international law. The point was made somewhat clearer on appeal when the court held that treaties had to be domesticated and that the constitution prevailed over such domesticated treaties.<sup>242</sup> However, the court did not consider the relationship between municipal law and customary international law.

In a case from the 1980s,<sup>243</sup> the plaintiff had sued a British soldier over a collision involving their vehicles, and also sued the Ministry of Defence Claims Commission (UK) for vicarious responsibility. The Commission’s application for the suit against it to be struck out was dismissed at the High Court as the judge stated that the Commission was not the Ministry of Defence of the United Kingdom, and therefore was not immune from suit.<sup>244</sup> On appeal, the three judges upheld the Commission’s claim that it had no separate legal personality from the Government of the United Kingdom and so was immune from suit in a foreign court. The whole decision rested on an uncontroverted statement in an affidavit by the Commission’s lawyer that the Commission was the Ministry of Defence of the Government of the United Kingdom.<sup>245</sup>

One judge, relying on an English case,<sup>246</sup> made the statement:

“I have been unable to locate any local authority on the point. Nevertheless, it is a matter of international law that our courts will not entertain an action against certain privileged persons and institutions unless the privilege is waived. The class of such persons and institutions include

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<sup>242</sup> *East African Community v Republic* [1970] EA 457 (Court of Appeal, Nairobi) at 460 (per Sir Charles Newbold, P.).

<sup>243</sup> *Ministry of Defence of the Government of the United Kingdom v Ndegwa* [1976-1985] EA 294 (Court of Appeal, Nairobi).

<sup>244</sup> *ibid* 299 (per Law, JA).

<sup>245</sup> *ibid* 298 (per Chesoni, AJA); *ibid* 299 (per Law, JA); *ibid* 300 (per Hancox, JA).

<sup>246</sup> *Thai-Europe Tapioca Service Ltd v Government of Pakistan Ministry of Food and Agriculture Directorate of Agricultural Supplies Imports and Shipping Wing* [1975] 3 All ER 961.

sovereigns or heads of state and governments, foreign diplomats and their staff, consular officers and representatives of international organizations like UNO and OAU...”<sup>247</sup>

Relying on other English cases,<sup>248</sup> the judge stated that the principle was restrictive and that it would not apply to a foreign sovereign or government acting in a private capacity.<sup>249</sup> The other judges upheld the same principle relying on English cases<sup>250</sup> but did not consider the restrictiveness of the principle. However, the judges did not settle whether the soldier was acting in the course of his employment when he caused the accident. The judges, therefore, took for granted that by virtue of the employment relationship that the Commission was being sued in a governmental capacity, and so entitled to immunity.<sup>251</sup>

Second, the courts often deferred to the executive in human rights cases that were likely to antagonise the state.<sup>252</sup> Because the Asian and European advocates benefitted from the colonial racial structure, many of them had avoided cases dealing with civil liberties.<sup>253</sup> Only a handful of Indian lawyers had defended *Mau Mau* detainees in criminal trials during the Emergency period. At independence, the citizenship status of Asians and Europeans was rather precarious. The Law Society of Kenya, dominated by Asians and Europeans, was thus unable to seriously challenge the government’s arbitrary rules. To illustrate the judiciary’s cautiousness at Kenya’s independence, a few cases may be cited here. An African widow successfully challenged the discriminatory nature of a law that prevented the High Court from granting letters of administration to Africans.<sup>254</sup> Similarly, a number of foreigners successfully challenged the racially discriminatory decisions of

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<sup>247</sup> *Ministry of Defence of the Government of the United Kingdom v Ndegwa* [1976-1985] E.A. 294 (Court of Appeal, Nairobi) at 296 (per Chesoni, AJA).

<sup>248</sup> *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 Q.B. 529; *Congreso del Partido* [1978] 1 All E.R. 1169 and *Czarnikov Ltd v Centrala Handlu Zagranicynego ‘Rolimpex’* [1978] All ER 81; *Planmount Ltd v Republic of Zaire* [1981] All E.R. 1110.

<sup>249</sup> *Ministry of Defence of the Government of the United Kingdom v Ndegwa* [1976-1985] EA 294 (Court of Appeal, Nairobi) at 298 (per Chesoni, AJA).

<sup>250</sup> *ibid* 299 (per Law, JA) quoting *Mighell v Sultan of Johore* [1894] 1 Q.B. 149 and *Thai-Europe Tapioca Service Ltd v Government of Pakistan* [1975] 1 W.L.R. 1485; *ibid* 300 (per Hancox, JA) quoting *Compania Naviera Vasiongada v Cristina, The Christina* [1938] 1 All E.R. 719 and *Thai-Europe Tapioca Service v Government of Pakistan* [1975] 3 All E.R. 961.

<sup>251</sup> *ibid* 298 (per Chesoni, AJA).

<sup>252</sup> JB Ojwang and JA Otieno-Odek, "The judiciary in sensitive areas of public law: Emerging approaches to human rights litigation in Kenya" (1988) 35 *Netherlands International Law Review* 29.

<sup>253</sup> YP Ghai, "Law and Lawyers in Kenya and Tanzania: Some political economy considerations" in CJ Dias and others (eds) *Lawyers in the Third World: comparative and developmental perspectives* (Scandinavian Institute of African Studies and the International Center for Law in Development, 1981) 144.

<sup>254</sup> *Re Maangi* [1965] EA 637.

quasi-judicial bodies to deny them licences.<sup>255</sup> Conversely, an accused person, who had had been compelled to give incriminatory evidence before his trial, was unsuccessful in objecting to the admission of that evidence in his trial.<sup>256</sup> This was despite the express provision in the constitution guaranteeing that an accused person should not be compelled to give evidence at his trial. In fact, the court went on to hold that the constitution should be interpreted using the ordinary and natural sense of the words used just like any other legislative enactment.<sup>257</sup>

In cases that involved an issue that challenged the executive's power, the courts appeared to interpret the law in favour of the executive. This approach had a profound effect on the courts in other areas that would have ordinarily invited the consideration of international law. Even though the 1969 Constitution contained a bill of rights inspired by international law, the courts did not uniformly protect the rights contained therein. There was a tendency by the courts to protect individuals' proprietary rights as opposed to their political rights. Therefore, the courts were more willing to protect the freedom of conscience,<sup>258</sup> the right to property,<sup>259</sup> and the right to legal representation.<sup>260</sup> In cases on the freedom from discrimination,<sup>261</sup> the courts held in favour of the applicant mainly because doing so enhanced the right to private property.<sup>262</sup> Conversely, the courts often deferred to the executive when a case involved balancing between the claims of the state against those of the individual. Therefore, the courts restrictively interpreted the protection against

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<sup>255</sup> *Madhwa and Others V City Council of Nairobi* [1968] EA 406; *Fernandes v Kericho Liquor Licensing Court* [1968] EA 640.

<sup>256</sup> *Republic v El Mann* [1968] EA 357.

<sup>257</sup> *ibid* 360.

<sup>258</sup> *Lalji Meghji Patel v. Karson Premji* [1976] K.L.R. 112 (Court of Appeal); *Mugaa M'Mpwii v. G.N. Kariuki* Civil Case No. 556 of 1981 (High Court, Nairobi) (unreported).

<sup>259</sup> *Muhuri v. Attorney-General*, Civil Case No. 1021 of 1964 (unreported); *Haridas Chaganlal v. Kericho Urban District Council* [1965] E.A. 370; *New Munyu Sisal Estates Ltd. v. Attorney-General* (1972) E.A. 88.

<sup>260</sup> *Andrea v Republic* [1970] EA 46 (High Court, Nairobi); *Ogola v Republic* [1973] EA 277 (High Court, Nairobi).

<sup>261</sup> *Re Maangi* [1968] E.A. 637; *Madhwa v. City Council of Nairobi* [1968] E.A. 406; *Fernandes v. Kericho Liquor Licensing Court* [1968] E.A. 640; *Shah Vershi Devshi v. Transport Licensing Board* [1971] E.A. 289.

<sup>262</sup> JB Ojwang and JA Otieno-Odek (n 254) 47.

inhuman treatment;<sup>263</sup> the freedom of assembly and association;<sup>264</sup> freedom of expression;<sup>265</sup> right to protection of the law;<sup>266</sup> and the freedom of movement.<sup>267</sup> The courts were more willing to uphold the right to personal liberty as between individuals but not as against the state, particularly during the 1980s and 1990s when the courts became complicit in the executive's policy of clamping down on political opposition.<sup>268</sup> In some instances, the High Court held that it lacked jurisdiction to enforce the political rights contained in the 1969 Constitution.<sup>269</sup> This is remarkable in light of the fact that under section 60, the High Court enjoyed unlimited original jurisdiction on all matters. Also, section 84 of the 1969 Constitution designated the High Court as the court with the competence to deal cases on enforcement of the fundamental rights and freedoms contained in the constitution. Even more incredible is that the High Court had been enforcing some of the rights in the constitution for several decades. In all these cases, the courts did not refer to international law when making their decisions.

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<sup>263</sup> *John Harun Mwau v. R.*, Criminal Appeal No. 128 of 1983 (High Court, Nairobi) (unreported); *Rupert Nderitu v Attorney-General*, reported in Daily Nation, 21 November 1985; Cf. *Felix Njagi Marete v. Republic*, reported in Kenya Times, 30 April 1987.

<sup>264</sup> *Odiago v. Registrar of Societies* Civil Appeal No. 27 of 1961 (Nairobi) (unreported); *Kaggia v Republic* [1969] E.A. 451; *Angaha and Others v Registrar of Trade Unions* [1973] EA 297; *Alukwe v. Registrar of Trade Unions* Civil Appeal No. 26 of 1977 (Nairobi) (unreported); *Tera Aduda v. Registrar of Trade Unions* [1978] K.L.R. 119.

<sup>265</sup> *Andrew Mungai Muthemba v. Republic* Criminal Case No. 25 of 1981 (High Court, Nairobi) (unreported); *Republic v. David Onyango Oloo*, reported in Daily Nation, 27 October 1982; *Aaron Gitonga Ringera and 3 Others v Paul K. Muite and 10 Others*, Civil Case No. 1330 of 1991 (High Court, Nairobi) (unreported).

<sup>266</sup> *El Mann v. Republic* [1969] E.A. 347; *Charles Young Okang v. Republic* Civil Case No. 1189 of 1979 (High Court, Nairobi) (unreported); Cf. *Stanley Munga Githunguri v. Attorney-General* Civil Case No. 271 of 1986 (High Court, Nairobi) (unreported); *Stanley Munga Githunguri v. Attorney-General* Criminal Appeal No. 271 of 1985 (High Court, Nairobi) (unreported).

<sup>267</sup> *Ooko v. Republic* Civil Case No. 1159 of 1966 (High Court) (unreported); *Re Application by Mwau*, Miscellaneous Civil Case No. 299 of 1983 (High Court, Nairobi) (unreported); *Raila Odinga v. Attorney-General*, reported in Daily Nation, 7 March 1986; *Mirugi Kariuki v. Attorney-General*, (High Court) reported in Daily Nation, 24 December 1986; *Isaiah Ngotho Kariuki v. Attorney-General*, (High Court) reported in Daily Nation, 3 February 1983.

<sup>268</sup> Cf. *Republic v Kadhi, Kisumu ex parte Nasreen* [1973] EA 153 (High Court, Nairobi) with *In the Matter of an Application by Muthoni Muriithi on behalf of Mwangi Stephen Muriithi*, Miscellaneous Criminal Application No. 88 of 1982 (unreported); *R. v. Commissioner of Prisons ex p Wachira and Others*, Civil Case No. 60 of 1984 (unreported); *Raila Odinga v. Attorney-General and Detainees' Review Tribunal*, Miscellaneous Civil Application No. 104 of 1986 (unreported); *In the Matter of an Application by Scholastica Waithe Kamau on behalf of Gibson Kamau Kuria*, Miscellaneous Criminal Application No. 53 of 1987 (unreported); *In the Matter of an Application by Ida Betty Odinga on behalf of Raila Amolo Adongo*, Miscellaneous Criminal Application No. 374 of 1988 (unreported); *Koigi wa Wamwere v Attorney General*, 1990, reported in Nairobi Law Monthly, 30, 1991, 44.

<sup>269</sup> *James Kefa Wagara and Rumba Kinuthia v John Anguka and Ngaruro Gitahi*, Civil Case No. 724 of 1988 (High Court, Nairobi) (unreported); *Joseph Maina Mbacha and Others v Attorney-General*, Miscellaneous Application No. 356 of 1989 (unreported); *Mathew Ondeyo v. David Onyanha and Another*, reported in Nairobi Law Monthly, 29, 1991, 41-42.



Even after the resumption of multiparty democracy in 1992, the government continued its repression of human rights and interference with the judiciary.<sup>270</sup> Due to pressure from civil society, political groups, religious organisations, and international financial institutions in the 1990s, the government made some of gradual and positive constitutional amendments.<sup>271</sup> These changes included: security of tenure for constitutional offices such as that of the Attorney-General was restored; multiparty democracy was re-introduced; presidential term limits were entrenched; the word “sex” was added as a prohibited basis for discrimination; and a number of draconian statutes were repealed.<sup>272</sup> The coming into power of a more democratic government in 2003 gave renewed impetus to the attempts at constitutional reforms.<sup>273</sup> During this period, the various constitutional drafts contained provisions on international law and it appears that these drafts influenced the courts to consider international law in their decisions.<sup>274</sup> For instance, in *Rono v Rono*,<sup>275</sup> the High Court justified its reference to an undomesticated treaty on the fact that the then draft constitution designated custom and treaties as part of Kenya’s law. In addition, Kenyan judges were attending various judicial colloquia on the domestic application of international human rights norms.

The pro-executive trend of judicial decisions appeared to change from 2003 onwards. Remarkably, in the absence of constitutional or legislative authorisation, the courts considered international law more liberally than before. It appears that the various constitutional drafts influenced the courts to consider international law in their decisions.<sup>276</sup> For example, in *R.M. (a minor)*,<sup>277</sup> the High Court stated that “[w]here not domesticated, treaties may be taken into account in seeking to interpret ambiguous provisions in the municipal law.”<sup>278</sup> This also appears to have been the intended

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<sup>270</sup> KG Adar and IM Munyae "Human Rights Abuse in Kenya under Daniel arap Moi 1978-2001" (2011) 5(1) African Studies Quarterly 1, 8-13.

<sup>271</sup> YP Ghai and JPWB McAuslan (n 15) iii.

<sup>272</sup> *ibid* iv.

<sup>273</sup> PLO Lumumba (n 165) 41.

<sup>274</sup> A Nyarango, “Customary International Law and Its Status in the Constitution of Kenya” <<http://ssrn.com/>> accessed 18 July 2016.

<sup>275</sup> *Mary Rono v Jane Rono* [2005] eKLR (Court of Appeal, Eldoret).

<sup>276</sup> *ibid*; NW Orago, “The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective” (2013) 13 African Human Rights Law Journal 415, 418.

<sup>277</sup> *R.M. (a minor suing through her friend) J.K. & Another v Attorney-General* [2006] eKLR (High Court, Nairobi).

<sup>278</sup> *ibid* 18.

meaning of a similar statement in *Rono v Rono*,<sup>279</sup> and in *A.O.G. v S.A.J.*<sup>280</sup> This statement expressly assigns an alternative role for treaties in situations where application of the treaty may be challenged for lack of domestication.

Similar to the decisions made in the 1960s, the courts also made clear the supreme position of the municipal law in the domestic sphere. In *R.M. (a minor)*,<sup>281</sup> the High Court, in considering whether a provision of a national law was discriminatory, held that the clear words of the constitution or legislation took precedence over a ratified treaty, even where that national law was in conflict with the ratified treaty.<sup>282</sup> The court added that legislation ought to be construed in such a way as to avoid a conflict with international law but that the primacy given to municipal law would not cure a state's breach of its international obligations.<sup>283</sup>

During this period, the courts did not appreciate the differences between the sources of international law and they did not qualitatively differentiate the authoritativeness of international instruments. In a number of decisions, judges appear to have been overly enthusiastic in applying international law that they did not pay due regard to the difference in the sources of international law. For example, some judges did not appear to understand what amounted to customary international law rule. In *Peter Waweru*,<sup>284</sup> the court stated that the principles of sustainable development as enumerated in section 3 of the *Environmental Management and Coordination Act, 1999*<sup>285</sup> were part of customary international law and that the courts ought to take them into account

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<sup>279</sup> *Mary Rono v Jane Rono* [2005] eKLR (Court of Appeal, Eldoret).

<sup>280</sup> *A.O.G. v S.A.J. & Another* [2011] eKLR (Court of Appeal, Nairobi).

<sup>281</sup> *R.M. (a minor suing through her friend) J.K. & Another v Attorney-General* [2006] eKLR (High Court, Nairobi).

<sup>282</sup> *ibid* 17-18. See also *Peter Anyang' Nyong'o & Others v Attorney-General* [2007] eKLR (High Court, Nairobi), 8 and 9.

<sup>283</sup> *R.M. (a minor suing through her friend) J.K. & Another v Attorney-General* [2006] eKLR (High Court, Nairobi).

See also *Peter Anyang' Nyong'o & Others v Attorney-General* [2007] eKLR (High Court, Nairobi), 8 and 12.

<sup>284</sup> *Peter K. Waweru v Republic* [2006] eKLR (High Court, Nairobi).

<sup>285</sup> Act No. 8 of 1999, Laws of Kenya:

3(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.

...

(5) In exercising the jurisdiction conferred upon the Court under subsection 3, the High Court shall be guided by the following principles of sustainable development:

- (a) the principle of public participation in the development of policies plans and processes for the management of the environment;
- (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
- (c) the principle of international co-operation in the management of environmental resources shared by two or more states;



when determining environmental cases.<sup>286</sup> The judges did not elaborate to what extent section 3 of the Act encapsulated customary international law, and whether in the particular case they were applying customary international law or national law. However, the judges did not refer to state practice in supporting this position. Therefore, it appears that they were buttressing the position already captured in national law to support their decision.

In several instances, the courts did not distinguish between treaty and custom. In *Rono v Rono*,<sup>287</sup> a succession matter, the Court of Appeal relied on the Bangalore Principles of 1989<sup>288</sup> in deciding that “international customary law and treaty law can be applied by state courts where there is no conflicting existing municipal law, even in the absence of implementing legislation.”<sup>289</sup> A similar decision was made in *Lerionka ole Ntutu*<sup>290</sup> and in *A.O.G. v S.A.J.*<sup>291</sup> Of course, these decisions conflated the domestication of treaty and custom, since under British practice customary international law does not need domestication.

In *R.M. (a minor)*,<sup>292</sup> the court stated that: “The general principle [is] unless there is a provision in the local law of automatic domestication of a convention or treaty is that a convention does not automatically become municipal law unless by virtue of ratification.” Here, the court misunderstood the effect of ratification, especially in a state that follows British practice, which is that ratification only has an immediate effect on a state’s obligations internationally but nationally. The matter was dealt with in a proper manner in *Peter Anyang’ Nyong’o*.<sup>293</sup> In dealing with the E.A.C. Treaty,<sup>294</sup> the High Court held that international treaties were not ‘*strictu sensu* “laws” in

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- (d) the principle of intergenerational equity;
  - (e) the polluter pays principle; and
  - (f) the precautionary principle.

<sup>286</sup> *Peter K. Waweru v Republic* [2006] eKLR (High Court, Nairobi), 7.

<sup>287</sup> *Mary Rono v Jane Rono* [2005] eKLR (Court of Appeal, Eldoret).

<sup>288</sup> Commonwealth Secretariat, *Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms* (1988), reprinted as “The Bangalore Principles on the Domestic Application of International Human Rights Norms” (1988) 14 Commonwealth Law Bulletin 1196.

<sup>289</sup> *Mary Rono v Jane Rono* [2005] eKLR (Court of Appeal, Eldoret), para. 24.

<sup>290</sup> *Re Estate of Lerionka ole Ntutu (Deceased)* [2008] eKLR.

<sup>291</sup> *A.O.G. v S.A.J. & Another* [2011] eKLR (Court of Appeal, Nairobi).

<sup>292</sup> *R.M. (a minor suing through her friend) J.K. & Another v Attorney-General* [2006] eKLR (High Court, Nairobi).

<sup>293</sup> *Peter Anyang’ Nyong’o & Others v Attorney-General* [2007] eKLR

<sup>294</sup> Treaty for the Establishment of the East African Community (adopted: 30 November 1999, entry into force: 7 July 2000) 2144 UNTS 255.

terms of the constitutional and legislative process set out in the Constitution.’ Hence, treaties had to be domesticated before they became applicable in Kenya.

The courts often did not distinguish treaties from non-legally binding international instruments. Similarly, they did not distinguish treaties ratified by Kenya from those that it had not or could not. Some of the instruments that were commonly referred to included UN General Assembly declarations, general comments of the various UN human rights committees, European conventions, ILO conventions, and decisions of the Inter-American Court of Human Rights and the European Court of Human Rights.<sup>295</sup> Whereas the judges often stated that non-domesticated treaties were useful in interpreting ambiguous constitutional or statutory provisions, they usually went beyond this limit. In all these cases, the courts did not explain the non-binding nature of these instruments and decisions. Also, the courts did not explain the reason for relying on those instruments and decisions.

Generally, the courts were more willing to consider international law but their methodology was questionable. First, the courts did not appreciate the differences between the various sources of international law and their relationship with municipal law. Second, the courts did not qualitatively differentiate between *de lege ferenda* (the law as it should be) and *de lege lata* (the law as it is); the courts often referred to instruments that were not legally binding in the same breath as legally binding instruments. Still, the courts displayed more of dialogic approach than the receptive approach displayed in the years following Kenya’s independence. Kenyan judges appeared to appreciate that they were not making decisions in isolation of the world community and that they were contributing to a common global jurisprudence. The courts discussed various international instruments and decisions of international courts when interpreting Kenyan law even when there was no constitutional or legislative authorisation to do so. This liberal use of international law and comparative law continued after the enactment of the 2010 Constitution, which is discussed on the next section.

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<sup>295</sup>*R.M. (a minor suing through her friend) J.K. & Another v Attorney-General* [2006] eKLR (High Court, Nairobi); *Lemeiguran & Others v Attorney-General & Others* [2006] eKLR; *Peter K. Waweru v Republic* [2006] eKLR (High Court, Nairobi); *Andrew Omtata Okoiti & Others v Attorney-General & Others* [2010] eKLR.

## 8. Conclusion

This chapter has provided a historical outline of Kenya's legal developments in order to provide the context for discussing the place of international law in Kenya's legal system. The first part set out the establishment of the legal system from pre-colonial to colonial period. As mentioned, the colonial government maintained the fiction that the protectorate was a foreign territory but in actual fact the British exercised unlimited jurisdiction. Upon formalisation of colonial status, the British implemented racial laws and policies. Under such circumstances, the courts relied more on English decisions than international law and interpreted international law in a manner that legitimised colonialism. Thus, the interaction between Kenyan and other courts was more of reception than dialogue as the courts did not engage in reformulating the principles contained in the English decisions.

After independence, the courts continued to rely exclusively on English decisions and law as the colonial experience had left a lasting impression on the judicial system. In addition, as the executive consolidated power, the judiciary became subservient and did not rely on international law, particularly in human rights litigation. It was only after multi-party democracy was reintroduced that the judiciary became responsive to international law. The interaction between Kenyan and other courts became more of dialogue than reception as the courts discussed instruments and decisions that were both legally binding and those that were not. This dialogue was not methodologically stringent and may have blurred the distinction between binding and non-binding international law. However, this dialogue exemplified that the courts were more aware of their ties to external courts and their role in maintaining an international rule of law.

## Chapter 3

### The use of international law in Kenya under the 2010 Constitution

#### 1. Introduction

This chapter aims to demonstrate the ways in which Kenyan courts engaged in transnational judicial dialogue after the enactment of the 2010 Constitution. First, the chapter will set out and discuss the constitutional and legislative provisions that expressly mention international law. This will involve an analysis of the extent to which the various sources of international law are accommodated in those constitutional and legislative provisions. Second, this chapter will analyse the way in which the courts have interpreted and applied those provisions. This will include a discussion on whether those sources of international law are directly applicable domestically.<sup>1</sup> Third, the chapter will compare the courts' approach to using international law with the period prior to the enactment of the 2010 Constitution.

#### 2. Prelude to the 2010 Constitution

As mentioned in the previous chapter, the constitutional review process begun in the 1990s. The first milestone was the 1992 constitutional amendment that legalised multiple parties. As a result of the government's delay in making comprehensive constitutional changes, civil society organisations and the opposition parties initiated mass protests in 1997.<sup>2</sup> Eventually the government agreed to work with the opposition parties on some minimal legal reforms while excluding civil society organisations. The *Constitution of Kenya Review Act, 2002*<sup>3</sup> was enacted and it established a commission that was to review the constitution and to come up with a draft constitution. The Commission was often frustrated in its work by the government but it eventually

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<sup>1</sup> A distinction has sometimes been made between "direct applicability" and "direct effect" (see JA Winter, "Direct applicability and direct effect: Two distinct and different concepts in Community law" (1972) 9(4) Common Market Law Review 425). However, this distinction has been criticized for being misleading and based on a wrong methodology (see P Eleftheriadis, "The direct effect of Community law: Conceptual issues" (1996) 16(1) Yearbook of European Law 205). This thesis will use the two terms interchangeably to refer to 'the formal validity of a rule of international law in the national legal order' (ibid 220).

<sup>2</sup> KG Adar and IM Munyae, "Human Rights Abuse in Kenya under Daniel arap Moi 1978-2001" (2001) 5(1) African Studies Quarterly 1, 8-13.

<sup>3</sup> Act No. 9 of 2008, Laws of Kenya.

drew up a draft constitution (“Bomas Draft”, named after the venue of its adoption). In 2002, President Daniel Moi abruptly dissolved Parliament, leading to a general election that disrupted the constitutional review process.<sup>4</sup> After the elections, the new president, Mwai Kibaki, and his government then took over the process. In 2005 the Attorney-General, Amos Wako, drafted a proposed constitution (“Wako Draft”) that was to be submitted to a referendum. At the 2005 referendum, the “Wako Draft” was rejected by 58% to 42%. The main reason for rejection of the draft constitution was that the government had made some controversial changes that deviated from the “Bomas Draft”.<sup>5</sup>

In 2007, Kenya held a general election, whose results were violently contested, leading to thousands of deaths, injuries and forced displacement.<sup>6</sup> After the post-election violence of 2007-2008, there was a renewed effort at constitutional review.<sup>7</sup> The *Constitution of Kenya Review Act, 2008*<sup>8</sup> was enacted and it established a Committee of Experts (CoE). The CoE made use of the previous draft constitutions in coming up with a new draft (Harmonized Draft Constitution).<sup>9</sup> After public consultation, the CoE produced another draft (Revised Harmonized Draft Constitution).<sup>10</sup> This draft constitution was then submitted to a referendum where it received overwhelming support of 69% to 31%. The draft constitution was adopted and promulgated as the new constitution on 27 August 2010.<sup>11</sup>

### 3. Constitutional and legislative provisions on international law

Unlike the previous constitutions, the 2010 Constitution expressly mentions international law and sets out various roles for international law. First, there are several provisions on the

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<sup>4</sup> PLO Lumumba, “A Journey Through Time in Search of a New Constitution” in PLO Lumumba, MK Mbondenyei and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (LawAfrica, 2011) 41.

<sup>5</sup> P Chitere, and others, *Kenya Constitutional Documents: A Comparative Analysis* (Chr. Michelsen Institute, 2006) 4.

<sup>6</sup> Human Rights Watch, *Ballots to Bullets: Organised Political Violence and Kenya’s Crisis of Governance* (2010).

<sup>7</sup> PLO Lumumba (n 4).

<sup>8</sup> Act No. 9 of 2008, Laws of Kenya.

<sup>9</sup> PLO Lumumba) (n 4) 41.

<sup>10</sup> *ibid* 43.

<sup>11</sup> Constitution of Kenya, 2010, Legal Notice 133 of 2010, Schedule, Kenya Gazette Supplement No. 55 of 2010.

implementation of international law. Article 2 provides for the reception of international law and appears distinguish between at least two sources of international law by stating in part as follows:

2 ...

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

In addition, article 21(4) provides that the “State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.” This provision appears to give prominence to international human rights law, particularly human rights treaties. These provisions are further buttressed by article 132(1)(iii) that directs the president to submit a report to the National Assembly on the progress made in fulfilling Kenya’s international obligations, and article 132(5) that directs the president to ensure that those international obligations are fulfilled by the relevant cabinet secretaries. In addition, under article 59(2)(g), the Kenya National Human Rights and Equality Commission acts as “the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.”

Second, there are provisions that are geared towards ensuring that Kenyan legislation is in conformity with international law. Article 50(2)(n)(ii) states that a person cannot be convicted for an act or omission that was not an international crime at the time of the act or omission. Also, article 51(3)(b) obliges Parliament to enact legislation that takes into account the relevant international human rights instruments when legislating on the humane treatment of persons detained, held in custody or imprisoned. In addition, article 58(6)(a)(ii) provides that any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights only to the extent that the legislation is consistent with international law.

Third, the constitution also ensures that the conduct of public officers is in conformity with international law. The constitution provides that the president, the deputy-president, cabinet secretaries and county governors may be impeached or removed from office where they are

suspected of having committed a crime under international law.<sup>12</sup> In addition, article 143(4) takes away the immunity from criminal and civil proceedings enjoyed by the president while in office where the crime committed arises under a treaty ratified by Kenya and which prohibits such immunity.

In addition to the constitutional provisions, there are also Acts that expressly mention international law. For instance, the *Kenya Defence Forces Act* directs the Chief of Defence Forces to “ensure that members of the Defence Forces discharge the functions and exercise their powers in accordance with ... international treaties ratified and binding on the State.”<sup>13</sup> In addition, members of the Defence Forces are required to render their services “in compliance with the customary international law and treaties, or other international agreements ratified by, or binding on the State.”<sup>14</sup> The Act goes on to specify certain matters that should be addressed in a treaty on military co-operation between Kenya and another state or international organisation.<sup>15</sup>

These provisions are a positive addition as they supplement the list of applicable law found in section 3 of the *Judicature Act*.<sup>16</sup> The *Judicature Act* only mentions the constitution, Kenyan legislation, U.K. legislation, English common law and equity, and African customary law as the law applicable in Kenya. In the sections that follow, this chapter will discuss how these constitutional and legislative provisions have been interpreted by the courts. The provisions will be discussed in the order in which they appear in the constitution and not the traditional order that follows article 38(1) of the Statute of the International Court of Justice.

However, it is necessary to mention that some judges have faced difficulties in using these provisions when discussing international law. First, some judges appear not to understand what qualifies as international law. Judges have often taken rules enacted by an international body to constitute international law. In one case,<sup>17</sup> the judge stated that the arbitration and conciliation rules of the United Nations Commission on International Trade Law and of the London Court of

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<sup>12</sup> Articles 145(1)(b), 150(1)(b)(ii), 152(6)(b) and 181(1)(b) respectively.

<sup>13</sup> Kenya Defence Forces Act, Act No. 25 of 2012, section 12(j).

<sup>14</sup> *ibid* section 38(c).

<sup>15</sup> *ibid* section 37.

<sup>16</sup> Chapter 8, Laws of Kenya.

<sup>17</sup> *CMC Holdings and Another v Jaguar Land Rover Exports Limited* [2013] eKLR (High Court, Nairobi).



International Arbitration conferred jurisdiction on Kenyan courts because those rules were international law. Similarly, in another case, after stating that he had to seek guidance from international law, the judge relied on United Nations (UN) and African guidelines on evictions without discussing their legal status in relation to Kenya.<sup>18</sup> In one appeal, a judge held that guidelines on the judiciary's application of human rights norms were treaties.<sup>19</sup> In another appeal, one of the judges stated that Kenya had ratified judicial guidelines on application of human rights norms, and that they were therefore part of Kenya's laws.<sup>20</sup> In the same case, his fellow judge added that UN guidelines on the independence of the judiciary embodied general rules of law and so were applicable in Kenya.<sup>21</sup> In another case, the judges held that several resolutions and guidelines on press freedom were "by dint of Article 2(5) and (6) of the 2010 Constitution, part of the law of Kenya."<sup>22</sup> A judge in another case quoted article 2(5) and (6) and then discussed exclusively a general comment of the Committee on Economic, Social and Cultural Rights (CESCR).<sup>23</sup>

Second, some judges are not sure which provision of the constitution to rely on when discussing international law. Often, judges use both article 2(5) and (6) as authorisation to rely on international law but the judges do not appreciate the source of international law referred to in each of those provisions. In one case,<sup>24</sup> the judge stated that:

"[I]t is clear to me that the said Constitution incorporates the general rules of international law in the courts of Kenya. The Rome Statute is an international treaty and hence embodies rules of international law."<sup>25</sup>

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<sup>18</sup> *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others* [2013] eKLR (Industrial Court, Nairobi) [80] – [84].

<sup>19</sup> *Mukazitoni Josephine v Attorney General Republic of Kenya* [2015] eKLR (Court of Appeal, Nairobi) [76], referring to the Bangalore Principles on Domestic Application of International Human Rights Norms.

<sup>20</sup> *Dennis Mogambi Mong'are v Attorney General and 3 others* [2014] eKLR (Court of Appeal, Nairobi), 18, judgment of Murgor, JA., referring to the Bangalore Principles on Domestic Application of International Human Rights Norms, and the Latimer House on the separation of powers.

<sup>21</sup> *ibid* 44, judgment of Otieno-Odek, JA.

<sup>22</sup> *Royal Media Services Ltd and 2 others v Attorney General and 8 others* [2014] eKLR (Court of Appeal, Nairobi), separate judgment of Maraga, JA, para. 84; see also separate judgment of Musinga, JA, [133].

<sup>23</sup> *Susan Waithera Kariuki v The Town Clerk, Nairobi City Council and 2 Others* [2011] eKLR (High Court, Nairobi), 5.

<sup>24</sup> *Kenya Section of the International Commission of Jurists v Attorney General and Another* [2011] eKLR (High Court, Nairobi).

<sup>25</sup> *ibid* 11. A similar statement was made in *Joseph Kimani Gathungu v Attorney General and Others* [2010] eKLR (High Court, Mombasa) 13.



The judge ought to have relied on article 2(6) instead of article 2(5) since Kenya had ratified and domesticated the Rome Statute. Also, it is difficult to discern from this decision what constitutes “rules of international law”. Similarly, in another case discussing the immunity of an international organisation, the judge stated that the agreement between the organisation and Kenya was applicable by virtue of article 2(5) and (6) of the 2010 Constitution.<sup>26</sup> Also, in one case, the judge stated that the petitioners’ rights had been infringed under “the general rules of international law, including any treaty or convention ratified by Kenya, which form part of the law of Kenya as per Article 2(5) and 2(6) of the Constitution of Kenya, 2010.”<sup>27</sup> This statement is flawed in that, by referring to both provisions, it conflates several sources of international law. In fact, the only source of international law that the judge discussed was treaties.

In another case,<sup>28</sup> the judge stated that:

“... I do not think that the position that international law applies only in cases where it has been domesticated and incorporated is good law. I know that the Treaty Making and Ratification Act, 2012 was enacted to give effect to Article 2(6) of the Constitution but Article 2(5) on application of international law principles applies squarely to this case.”<sup>29</sup>

Here, the judge appeared to imply that non-domesticated treaties were international law principles and that they could be relied on by virtue of article 2(5) of the 2010 Constitution.

Sometimes, a judge has quoted both article 2(5) and (6) but in the end only relied on treaties. In one case,<sup>30</sup> the judge stated that the petitioners’ rights under “...the general rules of international law, including any treaty or convention ratified by Kenya ...” had been infringed.<sup>31</sup> However, the

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<sup>26</sup> *Mwangi Patrick Githinji and 14 others v International Organization for Migration* [2013] eKLR (Industrial Court, Nairobi), 5.

<sup>27</sup> *C.K. (A Child) through Ripples International as her guardian and next Friend and 11 others vs. The Commissioner of Police/ Inspector General of the National Police Service and 3 others* [2013] eKLR (High Court, Meru).

<sup>28</sup> *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others* [2013] eKLR (Industrial Court, Nairobi).

<sup>29</sup> *ibid* [79].

<sup>30</sup> *C.K. (A Child) through Ripples International as her guardian & next friend & 11 Others v Commissioner of Police/Inspector General of the National Police Service & 2 Others* [2013] eKLR (High Court, Meru).

<sup>31</sup> *ibid* 9 and 15.

judge relied only on treaties in deciding in favour of the petitioners.<sup>32</sup> In another case,<sup>33</sup> the judges sitting on appeal approved the trial judge’s use of article 2(5) and (6) in order to rely on several treaties.<sup>34</sup> Similarly, in another case, the judges stated that “[t]he principle of equality and non-discrimination has its underpinnings in various international conventions which now form part of our laws by dint of article 2(5) and 2(6).”<sup>35</sup>

#### 4. Treaties

The 2010 Constitution refers to “treaty or convention” in article 2(6) and article 59(2)(g) but it is not clear why both terms are used. Section 2(1) of the *Treaty Making and Ratification Act*<sup>36</sup> defines a treaty using the exact wording contained in Article 2(1) of the Vienna Convention on the Law of Treaties,<sup>37</sup> but adds that the definition includes “convention”. It appears that in Kenya’s legal framework, the terms “treaty” and “convention” are interchangeable. Curiously, the *Treaty Making and Ratification Act* contains separate definitions for a “treaty” and a “bilateral treaty”. The Act defines a bilateral treaty as “an agreement concluded between Kenya and any other State or between Kenya and an international organisation.” The Act appears to distinguish treaties concluded between states from those treaties concluded between states and international organisations. However, Kenyan courts have not demonstrated any such difference in their decisions.<sup>38</sup>

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<sup>32</sup> *ibid* 9.

<sup>33</sup> *New Vision Kenya (NVK Mageuzi) and 3 others v Independent Electoral and Boundaries Commission and 5 Others* [2014] eKLR (Court of Appeal, Nairobi).

<sup>34</sup> *ibid* [18].

<sup>35</sup> *Rose Wangui Mambo and 2 others v Limuru Country Club and 17 others* [2014] eKLR (High Court, Nairobi) [94].

<sup>36</sup> Act No. 45 of 2012.

<sup>37</sup> Vienna Convention on the Law of Treaties (date of adoption: 23 May 1969, entry into force: 27 January 1980) 1155 UNTS 331:

Article 2

Use of terms:

(2) For purposes of the present Convention:

(b) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;”

<sup>38</sup> See for example *Karen Njeri Kandie v Alassane Ba & Another* [2015] eKLR (Court of Appeal, Nairobi).

Section 4 of the *Treaty Making and Ratification Act* states that the responsibility of initiating the treaty making process, negotiating and ratifying treaties lies with the “national executive”. Article 130(1) of the 2010 Constitution states that the national executive comprises the President, the Deputy President and the rest of the Cabinet. It appears that the representation of Kenya in foreign affairs is a collective responsibility and that it is up to the members of the national executive to determine who makes the relevant decisions. The Act does not indicate who is supposed to sign the text of a negotiated treaty but it specifies that it is the Cabinet Secretary in charge of foreign affairs that ratifies the treaty. Parliament’s role in the treaty making process is only in giving approval for ratification of a treaty<sup>39</sup> or an amendment or modification to the treaty.<sup>40</sup> Section 17 states that the withdrawal from a treaty should follow the same process as that of initiating the treaty making process. This means that it is only the national executive that has the competence to deal with withdrawal but Parliament does not have a role in the process.

The *Treaty Making and Ratification Act* makes a distinction between those treaties that need Parliament’s approval and those that do not. The former treaties are dealt with later in the sections below. With respect to those treaties that do not need Parliament’s approval, the 2010 Constitution and the *Treaty Making and Ratification Act* are not explicit. Section 3(2) of the Act specifies that the Act applies to multilateral treaties, and to bilateral treaties dealing with specified matters.<sup>41</sup>

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<sup>39</sup> Section 9. Approval for ratification

- (1) Where the ratification of a treaty referred to in section 7 is approved by the National Assembly without any reservations to the treaty, the relevant Cabinet Secretary shall, within thirty days from the date of the approval of the ratification of treaty request the Cabinet Secretary to prepare the instrument of ratification of the treaty.
- (2) Where a treaty referred to in section 7 is approved for ratification with reservations to some provisions of the treaty, the treaty shall be ratified with those reservations to the corresponding article in the treaty.
- (3) Where the National Assembly refuses to approve the ratification of the treaty referred to in section 7, the Government shall not ratify the treaty.

<sup>40</sup> Section 10. Ratification of Treaty

- (1) All instruments of ratification of a treaty shall be signed, sealed and deposited by the Cabinet Secretary at the requisite international body and a copy thereof shall be filed with the Registrar.
- (2) Where a treaty ratified under this Act is subsequently amended or modified, the amendment or modification shall be ratified only after compliance with the procedure set out in this Part.
- (3) The provisions of subsection (2) shall apply similarly to protocols signed under a treaty.

<sup>41</sup> Section 3: Application

- (1) This Act applies to treaties which are concluded by Kenya after the commencement of this Act.
- (2) This Act shall apply to—
  - (a) multilateral treaties;
  - (b) bilateral treaties which deal with—
    - (i) the security of Kenya, its sovereignty, independence, unity or territorial integrity;
    - (ii) the rights and duties of citizens of Kenya;

This implies that it is bilateral treaties not dealing with the specified matters that do not require Parliament's approval. Also, section 3(4) states that notwithstanding the provisions of section 3(2)(b), "the government may enter into bilateral agreements (a) necessary for matters relating to government business; or (b) relating to technical, administrative or executive matters." Thus, there are three categories of treaties that do not need Parliament's approval: those that are excluded by implication in section 3(2)(b), and the two categories mentioned in section 3(4).

Since there is no further guidance on determining which treaties do not need Parliament's approval, there is the possibility of the government erroneously subjecting some treaties to that procedure. For instance, the government has sought Parliament's approval for ratification of bilateral treaties on air services, even though they do not touch on the matters specified in section 3(2)(b) of the Act.<sup>42</sup> Conversely, the government has not submitted several bilateral investment treaties for Parliament's approval, even though the treaties may have an impact on the domestic law or involve financial consequences.<sup>43</sup> Other jurisdictions with similar provisions usually exclude from Parliament's approval those agreements that are routine and usually involving minor every day issues handled by government departments.<sup>44</sup>

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- (iii) the status of Kenya under international law and the maintenance or support of such status;
  - (iv) the relationship between Kenya and any international organisation or similar body; and
  - (v) (v) the environment and natural resources.
- (3) A treaty relating to the adjustment, alteration or variation of the present position of Kenya on matters of sovereignty, independence and territorial integrity shall be approved in a referendum in accordance with Article 255 of the Constitution:

Provided that the process of ensuring that the boundaries are correctly marked on the ground in accordance with the instruments establishing them shall not be deemed to amount to adjustment, variation or alteration under this section.

- (4) Notwithstanding subsection (2)(b), the Government may enter into bilateral agreements—
- (a) necessary for matters relating to government business; or
  - (b) relating to technical, administrative or executive matters.

<sup>42</sup> See the report of the Department Committee on Transport, Public Works and Housing on the ratification of the bilateral air services agreement between Kenya and the Hellenic Republic; Kenya and Burkina Faso; Kenya and Cambodia; Kenya and Seychelles, and Kenya and Finland, National Assembly, June 2019, <<http://www.parliament.go.ke/>> accessed 3 October 2019).

<sup>43</sup> B Nyamori, "The Kenyan Parliament and Investment Treaty Making" (2019) 10(2) *Investment Treaty News* 221.

<sup>44</sup> J Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 49; NJ Botha, "National treaty law and practice: South Africa" in DB Hollis, MR Blakeslee and LB Ederington (eds) *National treaty law and practice: Dedicated to the memory of Monroe Leigh* (Martinus Nijhoff, 2005) 588, fn 30.

It is arguable whether bilateral investment treaties do not need Parliament's approval, considering the potential financial impacts that flow from an unfavourable investor-state dispute settlement mechanism. The issue arose recently with regard to a "double taxation" treaty between Kenya and Mauritius. Referring to the Act's use of the words "bilateral treaties" in section 3(2)(b) and "bilateral agreements" in section 3(4), the High Court held that there was a difference between the two terms and that "bilateral treaties" needed Parliament's approval while "bilateral agreements" did not.<sup>45</sup> This was a rather simplistic determination since section 2 of the Act defines both "treaty" and "bilateral treaty" using the word "agreement". There was therefore no reason to attach significance to the difference in wording. Instead, the court should have paid more attention to the nature and contents of the treaty.<sup>46</sup> For instance, most bilateral treaties and treaties of a technical, administrative or executive nature do not usually require ratification by the state parties, and so they are often excluded from Parliament's approval.<sup>47</sup> Thus, the court should have considered whether the relevant double taxation treaty fell into any of those categories. Further, the court should have elaborated on the types of agreements that are excluded by section 3(4) of the Act.

It is therefore up to the executive to decide which treaties do not need Parliament's approval. There is therefore the risk that the executive can circumvent seeking Parliament's approval for treaties that could have a negative impact on Kenya's economic, legal or political situation. While these treaties do not require Parliament's approval before ratification, there is also no requirement for Parliament to be notified about them after ratification. This represents a further democratic deficit as it allows the executive to bind Kenya to treaties without oversight. Again, there is no written procedure for the conclusion or implementation of those treaties. This means that there is no requirement for the executive to ensure that Kenya's national interests are protected when concluding these treaties. The democratic deficit is somewhat mitigated by the *Statutory Instruments Act*.<sup>48</sup> Where such treaties enter into force after publication of a notice in the *Kenya Gazette*, the Act now requires that the notice be tabled before Parliament. If the notice is not tabled

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<sup>45</sup> *Tax Justice Network—Africa v. Cabinet Secretary for National Treasury & 2 others* [2019] eKLR (High Court, Nairobi) [35].

<sup>46</sup> For this approach see *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58 [109] – [112].

<sup>47</sup> EC Schlemmer, "An Overview of South Africa's Bilateral Investment Treaties and Investment Policy" (2016) 31(1) ICSID Review 167, 170.

<sup>48</sup> Act No. 23 of 2013.

before Parliament within seven days of publication, then it automatically ceases to have effect. Parliament also has the power to approve or annul such a notice.

The following sections will deal with three main issues concerning treaties: whether treaties require domestication, whether they are directly applicable, and the hierarchical position of treaties in Kenya's legal system.

**i. Domestication versus non-domestication, and the direct applicability of treaties**

While article 2(6) of the 2010 Constitution recognises ratified treaties as sources of law in Kenya, the provision is ambiguous. First, it is not clear whether ratified treaties need to be domesticated. Second, it is not clear whether this provision refers to treaties ratified both before and after the 2010 Constitution was enacted. As a result, the provision has been the subject of differing interpretations by the High Court<sup>49</sup> and the Court of Appeal.<sup>50</sup> Parliamentary debates also appear to show that there is a lot of confusion on the above issues.<sup>51</sup>

The Supreme Court, in 2017, pronounced itself on the issue of which treaties are referred to in article 2(6) of the 2010 Constitution. In *Karen Kandie v Alassane Ba*,<sup>52</sup> the Supreme Court declined to discuss whether Kenya was now monist or dualist as it was not relevant to the case.<sup>53</sup> The court held that article 2(6) of the 2010 Constitution did not distinguish between treaties ratified before and after the enactment of the 2010 Constitution.<sup>54</sup> In addition, the constitution was not subject to the rule against retrospective application of legislation.<sup>55</sup> Therefore, article 2(6) of the 2010

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<sup>49</sup> *Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission and 3 Others* [2014] eKLR (High Court, Nairobi) [40] and [41]. In several cases, the High Court has interpreted article 2(6) to mean that ratification automatically makes a treaty legally applicable in Kenya and there is no need for domestication: *Royal Media Services Ltd and 2 others v Attorney General and 8 others* [2013] eKLR (High Court, Nairobi) [105]; *Kenya Small Scale Farmers Forum and 6 others v Republic of Kenya and 2 others* [2013] eKLR (High Court, Nairobi) [41] and [52]. On the other hand, there are cases in which the High Court has stated that ratification does not automatically turn a treaty into law in Kenya since law-making powers are specified in the constitution: *Walter Osapiri Barasa v The Cabinet Secretary, Ministry of Interior and Coordination and 3 Others* [2014] eKLR (High Court, Nairobi) [50]; *Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission and 3 others* [2014] eKLR (High Court, Nairobi).

<sup>50</sup> *David Njoroge Macharia v Republic* [2011] eKLR (Court of Appeal, Nairobi) 15-17.

<sup>51</sup> National Assembly, Hansard, 9 February 2011, Question No. 634: Ratification of OAU/AU Treaties, 9-15; National Assembly, Hansard, 23 February 2016, Report on fulfilment of international obligations, 47-48.

<sup>52</sup> *Karen Njeri Kandie v Alassane Ba & Another* (2017) eKLR (Supreme Court, Nairobi).

<sup>53</sup> *ibid* [37] – [38].

<sup>54</sup> *ibid* para. 41. This point had already been made by the Court of Appeal: *Karen Njeri Kandie v Alassane Ba & Another* [2015] eKLR (Court of Appeal, Nairobi) 8.

<sup>55</sup> *ibid* [42].

Constitution referred to all treaties ratified by the Kenyan executive and it applied retrospectively with the effect that treaties ratified before the enactment of the 2010 Constitution are still part of the law of Kenya. This decision essentially makes it clear that treaties ratified before and after the enactment of the 2010 Constitution are part of the law of Kenya. Following this reasoning, it would seem that treaties that had been ratified before the enactment of the 2010 Constitution, but that had not yet been domesticated, do not now have to be domesticated. This is further supported by the fact that the only legislation dealing with treaties, the *Treaty Making and Ratification Act*, does not mention domestication of treaties.<sup>56</sup>

The direct applicability of treaty provisions in Kenya is rather uncertain, especially since no court has made a comprehensive decision on the issue. The High Court, while deciding a case using the previous constitution, alluded to the possibility of the direct applicability of treaty provisions under the 2010 Constitution.<sup>57</sup> The closest that a Kenyan court came to giving direct effect to a treaty provision was in an *obiter dictum* when the judge said that she would not uphold a section in the *Civil Procedure Act* because it was incompatible with a provision of the International Covenant on Civil and Political Rights (ICCPR).<sup>58</sup> Afterwards, several Kenyan courts mistakenly dealt with this issue as simply a question of hierarchy between treaties and legislation.<sup>59</sup> The issue was properly addressed when one judge made the following statement:

“The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand bearing in mind that legislative authority, which is derived from the people of Kenya, is conferred by Parliament under Article 94 .... The issue then, is not necessarily one of hierarchy but of application of treaties and conventions.”<sup>60</sup>

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<sup>56</sup> However, section 13(2) of the *Treaty Making and Ratification Act* states that “The Registry [of Treaties] shall ... (c) contain the status of all treaties pending ... domestication and the timelines for such ... domestication ...” This provision implies that there are treaties that would still require domestication. However, in light of the Supreme Court decision, this provision appears superfluous and ought to be deleted.

<sup>57</sup> *Kenya Small Scale Farmers Forum and 6 others v Republic of Kenya and 2 others* [2013] eKLR (High Court, Nairobi) [41].

<sup>58</sup> *Re Zipporah Wambui Mathara* [2010] eKLR (High Court, Nairobi) [10].

<sup>59</sup> *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa* [2010] eKLR (High Court, Nairobi); *David Njoroge Macharia v Republic* [2011] eKLR (Court of Appeal, Nairobi).

<sup>60</sup> *Beatrice Wanjiku and Another v Attorney-General and Another* [2012] eKLR (High Court, Nairobi) [23].



Implicit in the statement is that the subject matter of a treaty could render its provisions directly applicable in the domestic courts. However, the judge also appeared to give preference to legislation over treaties. In fact, the judge later asserted that since there was no conflict between the ICCPR and the *Civil Procedure Act and Rules*, the ICCPR was at best an interpretive aid.<sup>61</sup> This implies that a Kenyan court would only give direct effect to a treaty provision in the absence of legislation on the issue at hand. However, the judge did not justify his reason for giving legislation primacy over the treaty provision and how the courts should resolve a conflict between legislation and treaty provisions. Fundamentally, the judge did not offer guidance on the treaty provisions that would be given direct effect in Kenya. As discussed below, by the time this decision was made, there was substantial literature that could have guided the court in giving a comprehensive answer.

Most jurisdictions that allow direct applicability of treaty provisions usually require certain conditions to be met. First, the parties to the treaty must have intended to confer rights on individuals such that individuals could enforce those rights in national courts.<sup>62</sup> Second, the provision must be clear, unconditional and not dependent on implementing legislation.<sup>63</sup> Third, applying the treaty provision must not lead to a conflict with municipal law.<sup>64</sup> Using the above criteria, it is possible to argue that most of the provisions of the ICCPR are directly applicable. While the wording used in article 2<sup>65</sup> of the ICCPR and the drafting history of the ICCPR show

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<sup>61</sup> *ibid* [24].

<sup>62</sup> A Nollkaemper, “The direct effect of public international law” in JM Prinszen and A Schrauwen (eds) *Direct effect. Rethinking a classic of EC legal doctrine* (Europa Law Publishing 2004) 169-179.

<sup>63</sup> P Craig and G De Búrca, *EU Law. Text, Cases and Materials* (6th edn, Oxford University Press, 2011) 190.

<sup>64</sup> E De Wet, “The reception of international law in the South African legal order: An introduction” in E De Wet, H Hestermeyer and R Wolfrum (eds), *The Implementation of International Law in Germany and South Africa* (PULP, 2015) 34.

<sup>65</sup> Article 2:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

that states did not intend to make the ICCPR directly applicable as international law, states did not expressly exclude such a possibility.<sup>66</sup> In addition, it appears that the Human Rights Committee (HRC) relies on the purpose of the ICCPR to demand that states ensure that the ICCPR can be directly invoked in domestic courts.<sup>67</sup> A survey of state parties' reports to the HRC was carried out in 2000 and it revealed that most state parties considered the ICCPR's provisions to be directly applicable.<sup>68</sup> Kenya's reports to the HRC have so far been vague on this issue and the HRC is likely to demand further clarification.<sup>69</sup>

However, there are provisions of the 2010 Constitution that point towards denying the direct applicability of treaty provisions. Article 21(4) of Kenya's Constitution requires the state to "enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms." Implicit in this provision is that human rights treaty provisions, in particular, require implementing legislation. Although this provision does not appear to apply to other types of treaties, those other treaty provisions could be subject to article 94(5) of the 2010 Constitution. Article 94(5) of the 2010 Constitution reiterates that it is only Parliament that "has the power to make provision having the force of law in Kenya." Again, implicit in this provision is the necessity for legislation and therefore a denial of the direct applicability of treaty provisions. Some treaties are denied direct applicability by a two-step process involving the executive and the legislature. For instance, section 41 of the *Income Tax Act*<sup>70</sup> requires the Minister to issue a notice with regard to a double taxation agreement. In addition, section 11 of the *Statutory Instruments Act* requires the notice to be submitted to Parliament within a specified period.<sup>71</sup>

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- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

<sup>66</sup> A Seibert-Fohr "Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Para. 2" (2001) 5 *Max Planck Yearbook of United Nations Law* 399, 420–429.

<sup>67</sup> *ibid* 436-438; M Bossuyt 'The Direct Applicability of International Instruments on Human Rights' (1980) 15 *Revue Belge de Droit International* 317, 327.

<sup>68</sup> C Harland "The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents" (2000) 22(1) *Human Rights Quarterly* 187, 195-197.

<sup>69</sup> See Concluding observations of the Human Rights Committee at its 83<sup>rd</sup> session, 14 March-1 April 2005, Doc. CCPR/CO/83/KEN, para. C. 8; Concluding observations adopted by the Human Rights Committee at its 105<sup>th</sup> session, 9-27 July 2012, Doc. CCPR/C/KEN/CO/3, para. C. 5.

<sup>70</sup> Chapter 470, Laws of Kenya.

<sup>71</sup> Failure to adhere to the second step led to the court striking down the Minister's notice in *Tax Justice Network—Africa v. Cabinet Secretary for National Treasury & 2 others* [2019] eKLR (High Court, Nairobi) [42] – [43].

## ii. Hierarchy between municipal law and treaties

The 2010 Constitution does not explicitly set out the hierarchy of laws in Kenya. It is only by analysing several articles of the constitution that a hierarchy can be discerned. Article 2(1) provides that the 2010 Constitution is the supreme law while article 2(4) provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency. By referring to treaties in the same article that reiterates the supremacy of the constitution (the “supremacy clause”), it means that treaties do not have a status above the constitution. This was the holding of the Court of Appeal in a case that challenged the constitutionality of the death penalty.<sup>72</sup> The Court of Appeal made the same decision in a later case dealing with digital migration.<sup>73</sup> In addition, some commentators state that the additional words “under this Constitution” in article 2(6) subordinate treaties to the 2010 Constitution.<sup>74</sup> Therefore, it is settled that treaties have a status below the constitution. However, this situation could present problems when dealing with the ICCPR, especially if the ICCPR provisions are considered to be directly applicable. The HRC has repeatedly required state parties to ensure that their constitutions conform to the ICCPR.<sup>75</sup> While the ICCPR itself does not expressly require that it is accorded a status above a state’s constitution, the HRC appears to rely on the ICCPR’s purpose to *informally* require such a status.

The other issue that arises is whether treaties have a higher status than legislation. Some commentators are of the view that a higher status for international norms is preferable, especially in light of the progressive nature of the international human rights regime.<sup>76</sup> One commentator relies on the words “under this Constitution” in article 2(6) to mean that treaties are immediately below the constitution and that they have a higher status than legislation.<sup>77</sup> In addition, the HRC

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<sup>72</sup> *Joseph Njuguna Mwaura and 2 Others v Republic* [2013] eKLR (Court of Appeal, Nairobi).

<sup>73</sup> *Royal Media Services Ltd and 2 others v Attorney General and 8 others* [2014] eKLR (Court of Appeal, Nairobi), separate judgment of Nambuye, JA, [131].

<sup>74</sup> LG Franceschi “Constitutional Regulation of International Law in Kenya” in PLO Lumumba, MK Mbonyeni and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings*, (LawAfrica, 2011) 276.

<sup>75</sup> A Seibert-Fohr (n 66) 440-441, referring to Comments on Iceland, Doc. CCPR/C/79/Add. 26, (1993), para. 7; Concluding Observations on Slovenia, Doc. CCPR/C/79/Add. 40, para. 8; Concluding Observations on Morocco, Doc. CCPR/C/79/Add. 44, para. B 4; Concluding Observations on Jamaica, HRC Report, GAOR, Suppl. No. 40, Doc. A/53/40, Vol. 1, B., para. 72. See also General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, para. 13.

<sup>76</sup> LG Franceschi (n 74) 274; T Kabau and C Njoroge “The application of international law in Kenya under the 2010 Constitution: Critical issues in harmonization of the legal system” (2011) 44 *Comparative and International Law Journal of Southern Africa* 293, 299.

<sup>77</sup> LG Franceschi (n 74) 274.

has repeatedly required state parties to give the ICCPR either a status equal to the constitution or at least higher than legislation.<sup>78</sup> However, the courts have made inconsistent judgments based on article 2(6), holding that ratified treaties take precedence over legislation and *vice-versa*. In the first such case,<sup>79</sup> the High Court judge considered, *obiter*, the relevance of international law in a suit for stay of execution of an order arising from another case.<sup>80</sup> Whereas the judge did not actually state that treaties took precedence over legislation, this judgment has often been interpreted to mean that treaties occupied a higher status to legislation.<sup>81</sup>

The issue of hierarchy was considered in another case concerning work-place discrimination.<sup>82</sup> The judge stated that the effect of article 2(5) and (6) was “to transform Kenya from a dualistic state where national law prevailed over international law to a monistic state where national laws are on an equal footing with international law.”<sup>83</sup> A similar decision was made in another case where the High Court held that the highest rank that a treaty could attain was parity with an Act of Parliament.<sup>84</sup> In a case that followed soon thereafter,<sup>85</sup> the judge implied that when deciding a matter, relevant legislation would be given priority over a treaty and that the relevant provisions of the ICCPR were “at best an interpretative aid.”<sup>86</sup>

When the issue arose before the Court of Appeal, the court did not conclusively deal with the issue. The court simply stated that the previous dualist position in Kenya may have changed and then went on to refer to two cases decided under the previous constitution and a case decided afterward.<sup>87</sup> This issue was again considered by the Court of Appeal, where it was held that “the highest level an international convention can get to in the municipal law hierarchy is that of an

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<sup>78</sup> A Seibert-Fohr (n 66) 441-443.

<sup>79</sup> *Re Zipporah Wambui Mathara* [2010] eKLR (High Court, Nairobi).

<sup>80</sup> The judge had already decided to grant the stay of execution by relying on the *Bankruptcy Act* (Chapter 53, Laws of Kenya, now repealed) (see *ibid* [8]).

<sup>81</sup> T Kabau and O Ambani, “The 2010 Constitution and the application of international law in Kenya: A case of migration to monism or regression to dualism?” (2013) 1 Africa Nazarene University Law Journal 36, 42.

<sup>82</sup> *V.M.K v CUEA* [2013] eKLR (Industrial Court, Nairobi).

<sup>83</sup> *ibid* [46].

<sup>84</sup> *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa* [2010] eKLR (High Court, Nairobi).

<sup>85</sup> *Beatrice Wanjiku and Another v Attorney-General and Another* [2012] eKLR (High Court, Nairobi).

<sup>86</sup> *ibid* [24].

<sup>87</sup> *David Njoroge Macharia v Republic* [2011] eKLR (Court of Appeal, Nairobi) 15-17, referring to *Mary Rono v Jane Rono* [2005] eKLR (Court of Appeal, Eldoret) [21]; *Rose Moraa & Another v Attorney-General* [2006] eKLR (High Court, Nairobi) 17-18; and *Re Zipporah Wambui Mathara* [2010] eKLR (High Court, Nairobi) [9] – [10].

ordinary Act of Parliament.”<sup>88</sup> This decision, in view of the superior position of the Court of Appeal and because the Supreme Court in *Karen Kandie v Alassane Ba*<sup>89</sup> declined to delve into the issue, appears to have conclusively determined that treaties enjoy the same status as legislation. There are some Acts that specifically provide that in case there is a conflict between provisions of the Act and a treaty, then the treaty provisions would prevail.<sup>90</sup> In the few cases in which the courts considered the possible conflict between a treaty and legislation, the courts opted to interpret the legislation in conformity with the treaty.<sup>91</sup> Thus, in accordance with the principle of *lex posterior derogat priori*, a treaty can overrule previous legislation while subsequent legislation can overrule a previous treaty.

In sum, with the enactment of the 2010 Constitution, treaties do not *per se* require to be domesticated. However, an individual cannot directly invoke a treaty provision in Kenyan courts unless that treaty provision meets certain requirements. Even if the treaty provision meets those requirements, the 2010 Constitution appears to deny the direct applicability of treaty provisions. The constitution is superior to treaties but treaties enjoy the same status as legislation. However, in view of the HRC’s past decisions, the HRC is likely to require that the ICCPR, in particular, is given a higher status than legislation or even the constitution.

## 5. Customary international law

This section will deal with three main issues that arise from the 2010 Constitution’s provisions on international law. First, there is a difference of opinion on whether the wording in article 2(5) of the 2010 Constitution actually refers to customary international law. The second issue concerns

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<sup>88</sup> *Royal Media Services Ltd and 2 others v Attorney General and 8 others* [2014] eKLR (Court of Appeal, Nairobi), separate judgment of Maraga JA [57].

<sup>89</sup> *Karen Njeri Kandie v Alassane Ba & Another* (2017) eKLR (Supreme Court, Nairobi).

<sup>90</sup> For example, Public Procurement and Asset Disposal Act, Act No. 33 of 2015, section 6(1): “Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail.”

<sup>91</sup> *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa* [2010] eKLR (High Court, Nairobi); *David Njoroge Macharia v Republic* [2011] eKLR (Court of Appeal, Nairobi); *Beatrice Wanjiku and Another v Attorney-General and Another* [2012] eKLR (High Court, Nairobi).

whether customary international law can be given direct effect domestically. Third, the hierarchy between municipal law and customary international law needs to be ascertained.

**i. Reference to customary international law**

The phrase “general rules of international law” in Kenya’s Constitution has presented difficulties since it does not expressly refer to customary international law. According to some commentators, the phrase refers to customary international law.<sup>92</sup> During the debates on the Ratification of Treaties Bill (which was later renamed the Treaty Making and Ratification Bill), Members of Parliament were of the view that article 2(5) of the 2010 Constitution refers to customary international law.<sup>93</sup> Article 2(5) is drafted in similar terms to article 144 of the 1990 Namibian Constitution which provides that:

“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.”<sup>94</sup>

Article 144 of the Namibian Constitution is also similar to article 25 of the 1949 German Constitution.<sup>95</sup> The phrase “general rules of public international law” in article 25 of the 1949 German Constitution is believed to refer to customary international law.<sup>96</sup> Due to similarity in the wording, it has been argued that article 144 of the Namibian Constitution also refers to customary international law.<sup>97</sup> Therefore, it is also possible to apply the same argument to article 2(5) of

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<sup>92</sup> EBN Abenga, “The place of international law in the hierarchy of valid norms under the 2010 Kenyan Constitution” 2011 <<http://ssrn.com/abstract=2101565>> accessed 10 August 2016; EO Ashers “Incorporating transnational norms in the Constitution of Kenya: The place of international law in the legal system of Kenya” (2013) 3(11) *International Journal of Humanities and Social Science* 266, 267; T Kabau and C Njoroge (n 76) 294 .

<sup>93</sup> See the views expressed in National Assembly, Hansard, 29 November 2011, *The Ratification of Treaties Bill*, p. 56 and National Assembly, Hansard, 30 November 2011, *The Ratification of Treaties Bill*, pp. 70-71.

<sup>94</sup> Constitution of the Republic of Namibia, 1990, Act No. 1 of 1990, *Government Gazette*, 1990-03-21, No. 2, p. 1-80.

<sup>95</sup> Basic Law of the Federal Republic of Germany, May 23, 1949, *Federal Law Gazette I*, p. 1, article 25: “The general rules of public international law form part of the Federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory.”

<sup>96</sup> K Doehring “Non-discrimination and equal treatment: under the European Human Rights Convention and the West German Constitution with particular reference to discrimination against aliens” (1970) 18(2) *American Journal of Comparative Law* 305, 311. For a similar view regarding article 10 of the 1947 Constitution of Italy, see: A La Pergola and P Del Duca “Community law, international law and the Italian constitution” (1985) 79(3) *American Journal of International Law* 598, 601.

<sup>97</sup> GM Erasmus “The Namibian Constitution and the Application of International Law” (1989) 15 *South African Yearbook of International Law* 97; T Maluwa, *International Law in Post-Colonial Africa* (Kluwer Law 1999) 32.



Kenya's Constitution. The provision was considered in one case,<sup>98</sup> where the judge stated that the phrase "general rules of international law" referred to customary international law. In making this assertion, the judge referred to the drafting history of the 2010 Constitution and stated that the previous draft constitutions had intended to incorporate customary international law.<sup>99</sup> However, this provision has also been interpreted to refer to general principles of law, which is discussed in the next section.

The situation is compounded by the fact that some judges are unsure of what constitutes customary international law. As a result, in some cases a judge has qualified certain concepts as customary international law without a solid basis for such an assertion. This occurred in one case where a non-governmental organisation (NGO) sought to compel the government to arrest former Sudanese President Omar Al Bashir.<sup>100</sup> The International Criminal Court (ICC) had issued two arrest warrants against Al Bashir and the ICC Registrar sent requests to all states for assistance in the arrest and surrender of Al Bashir to the court should he enter the respective territory. After Al Bashir entered and left Kenya without the Kenyan Government arresting him, the NGO sought to compel the government to issue an arrest warrant against Al Bashir, who was scheduled to make another visit to Kenya.<sup>101</sup> The judge stated that:

"Universal jurisdiction is the *jus cogens* obligation under international law ... Genocide, war crimes, and crimes against humanity are regarded under international law as *delicti jus gentium* ... The Rome statute has jurisdiction over the said crimes... I subscribe to the view that the Rome Statute obligations are in any case customary international law which a State cannot contravene ... I further subscribe to the view that the duty to prosecute international crimes has developed into *jus cogens* and customary international law, thus delegating States to prosecute perpetrators wherever they may be found.."<sup>102</sup>

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<sup>98</sup> *Kituo Cha Sheria and others v Attorney General* [2013] eKLR (High Court, Nairobi).

<sup>99</sup> *ibid* [71].

<sup>100</sup> *Kenya Section of the International Commission of Jurists v Attorney General and Another* [2011] eKLR (High Court, Nairobi).

<sup>101</sup> *ibid* 4.

<sup>102</sup> *ibid* 14.



First, the judge ignored the conceptual differences between universal jurisdiction and *jus cogens*.<sup>103</sup> Currently, universal (criminal) jurisdiction is the principle that a state is entitled to take legal proceedings against a person accused of certain crimes that are considered *heinous* and *universally abhorred* even though that state has no connection to the place of the crime, or the nationality of the perpetrator or victim.<sup>104</sup> On the other hand, *jus cogens* refers to norms that are so fundamental that they are peremptory and no derogation is permitted from them.<sup>105</sup> *Jus cogens* norms have traditionally arisen through treaties e.g. the prohibition against genocide, slavery, and torture.<sup>106</sup> Thus, two concepts of *jus cogens* and universal jurisdiction are distinct since universal jurisdiction deals with individual responsibility while *jus cogens* deals with state responsibility.<sup>107</sup> Also, the two concepts apply in limited instances, although they may overlap when dealing with certain international crimes such as genocide.<sup>108</sup> Second, the judge did not appreciate the extent to which universal jurisdiction has received acceptance. The concept is still contested and it is rarely used by national courts.<sup>109</sup> Third, the judge went too far in holding that the Rome Statute was binding on non-state parties. Fourth, the judge did not clarify which obligations arising from the Rome Statute actually embodied customary international law. Fifth, apart from making a general statement, the judge did not actually demonstrate whether the duty to prosecute international crimes has developed into *jus cogens* and customary international law.<sup>110</sup>

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<sup>103</sup> For a discussion on the relationship between universal jurisdiction and *jus cogens*, see BS Brown “The Evolving Concept of Universal Jurisdiction” (2001) 35(2) *New England Law Review* 383, 391-395.

<sup>104</sup> S Macedo (ed) “Introduction” in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press 2004) 4. Previously, universal jurisdiction applied to piracy and hijacking because of the difficulty of using traditional bases of jurisdiction to prosecute those crimes that had been committed beyond a state’s borders (DF Donovan and A Roberts “The emerging recognition of universal civil jurisdiction” (2006) 100(1) *American Journal of International Law* 142, 143).

<sup>105</sup> MC Bassiouni “A Functional Approach to ‘General Principles of International Law’” (1990) 11 *Michigan Journal of International Law* 768, 801-809;

<sup>106</sup> *ibid.*

<sup>107</sup> KC Randall “Universal Jurisdiction under International Law” (1988) 66 *Texas Law Review* 785, 829-831.

<sup>108</sup> BS Brown (n 97) 392.

<sup>109</sup> MC Bassiouni “Universal jurisdiction for international crimes: Historical perspectives and contemporary practice” (2000) 42 *Virginia Journal of International Law* 81, 152-153; Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences (International Law Association 2000) 309-310.

<sup>110</sup> MC Bassiouni “International Crimes: ‘*Jus Cogens*’ and ‘*Obligatio Erga Omnes*’” (1996) 59(4) *Law and Contemporary Problems* 63, 67. Universal jurisdiction was properly applied in respect of piracy in several cases: *Hassan M. Ahmed v. Republic* [2010] eKLR (High Court, Mombasa), 6, 10-11 and *Attorney-General v. Mohamud Mohammed Hashi and Others* [2012] eKLR (Court of Appeal, Nairobi), 2, 4-6.

In another case challenging the government's intended forcible encampment of refugees living in urban areas,<sup>111</sup> the judge repeatedly stated that the principle of *non-refoulement* is now a customary international law norm.<sup>112</sup> *Non-refoulement* is a principal in international law that forbids states from expelling or returning refugees to a state where they are likely to face persecution.<sup>113</sup> Traditionally, the principal emanated from treaties dealing with refugees in the 20<sup>th</sup> century, and its scope was limited to certain instances. With time, the principle's scope was broadened by human rights law at the international and regional levels through the connection to the prohibition against torture, and cruel, inhuman or degrading treatment.<sup>114</sup> There is a general consensus that the principle has attained the status of international custom.<sup>115</sup> However, in the case at hand, the judge also stated that *non-refoulement* was a peremptory norm and that it was part of the general rules of international law that were applicable to Kenya through article 2(5) of the 2010 Constitution.<sup>116</sup> Here, the judge conflated customary international law with peremptory norms, without elaborating what each concept meant. Again, the judge made a general assertion without demonstrating whether the principle of *non-refoulement* had attained the status of *jus cogens*. The assertion that *non-refoulement* is a *jus cogens* norm is highly contested and is not supported by state practice.<sup>117</sup>

So far, judges have not analysed state practice and *opinio juris* when asserting that a certain concept has attained customary international law status. Instead, judges usually refer to a textbook on international law when discussing custom. For example, when asserting that *non-refoulement* was a customary law norm, the judge in the above mentioned case relied only on a definition contained in an encyclopedia on international law.<sup>118</sup> In another case, when discussing the immunity of states and intergovernmental organizations, the judge referred exclusively to

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<sup>111</sup> *Kituo Cha Sheria and others v Attorney General* [2013] eKLR (High Court, Nairobi).

<sup>112</sup> *ibid* paras. 44 and 70.

<sup>113</sup> GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press, 2007) 201.

<sup>114</sup> T Molnár "The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell" (2006) 1(1) *Corvinus Journal of International Affairs* 51, 51-55.

<sup>115</sup> W Kälin, M Caroni and L Heim "Article 33, para. I (Prohibition of Expulsion or Return ('Refoulement')/Defese d'Expulsion et de Refoulement)" in A Zimmerman, J Dörschner and F Machts (eds), *The 1951 Convention relative to the status of refugees and its 1967 protocol: A commentary* (Oxford University Press 2011) 1345-1346.

<sup>116</sup> *Kituo Cha Sheria and others v Attorney General* [2013] eKLR (High Court, Nairobi), para. 71.

<sup>117</sup> JC Simeon "What is the future of *non-refoulement* in international refugee law" in SS Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 191-193.

<sup>118</sup> *Kituo Cha Sheria and others v Attorney General* [2013] eKLR (High Court, Nairobi), para. 44, referring to Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia of Public International Law* (vol. 8, Amsterdam 1985) 456).

textbooks on public international law.<sup>119</sup> The judge also stated “that environmental impact assessments are also now a general principle in customary international law arising from the obligation on states to cooperate with each other in good faith, in mitigating transboundary environmental risks.”<sup>120</sup> She did not actually cite any state practice or *opinio juris* on environmental impact assessments but instead referred to a general statement regarding emerging environmental law norms made in a decision of the International Court of Justice (ICJ).<sup>121</sup> At the time of the judgment in 2014, the assertion that there existed a general international legal obligation to carry out environmental impact assessments had already appeared in several dissenting opinions of the ICJ<sup>122</sup> before it was expressed in a majority decision of the ICJ.<sup>123</sup>

Often, judges make casual assertions that a certain issue has customary status. In a more recent case, the judges asserted that “public participation in environmental law issues and governance has risen to the level of a generally accepted rule of customary international law” and therefore the right to public participation was part of Kenyan law vide article 2(5) of the 2010 Constitution.<sup>124</sup> Instead of expounding on the customary basis of the requirement for public participation, the court only made reference to the Stockholm and Rio Declarations<sup>125</sup> but without clarifying that they were not legally binding instruments. The judges also simply stated that traditional fishing rights were recognised as “general principles of international customary law” as found in the United Nations Convention on the Law of the Sea.<sup>126</sup> Again, the judges did not engage in any further discussion on the customary basis for this assertion.

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<sup>119</sup> *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR (Environment and Land Court, Nairobi), 7.

<sup>120</sup> *ibid* 19.

<sup>121</sup> *Case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, [1997] ICJ Rep 75.

<sup>122</sup> Dissenting opinion of Judge Weeramantry in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, [1995] ICJ Rep 344; Dissenting opinion of Judge Weeramantry in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, [1966] ICJ Rep 140; Separate opinion of Judge Weeramantry in *Case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 111-112.

<sup>123</sup> *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep 83.

<sup>124</sup> *Mohamed Al Baadi and Others v Attorney General and Others* [2018] eKLR (High Court, Nairobi) [221].

<sup>125</sup> On 16 June 1972, the United Nations Conference on the Human Environment (UNCHE) adopted the Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”). This document recognized the right to a healthy environment. On 14 June 1992, the United Nations Conference on Environment and Development (UNCED) adopted the Rio Declaration on Environment and Development (Rio Declaration). This document contained a set of principles on sustainable development.

<sup>126</sup> *ibid* [299], [304].

It appears that when faced with custom and treaties, judges are more confident in applying treaties. Judges usually make cursory and incomplete references to customary international law, while they easily reference treaties or legislation, although this is also imperfectly done. In one case,<sup>127</sup> the applicants sought relief from the courts after they were summarily dismissed by the Nigerian High Commission. The judge was requested to rule on whether the court had jurisdiction to hear the claim. Instead of the judge discussing the development of the concept of foreign sovereign immunity and demonstrating its relevance to the case at hand, the judge made confusing statements in ruling against the court assuming jurisdiction. The judge stated that the Nigerian High Commission enjoyed immunity from the criminal, civil, labour and administrative jurisdiction of Kenya which could only be waived by Nigeria. This statement was incorrect as it conflated diplomatic immunity with sovereign immunity. The judge went on to discuss examples of states that had restricted sovereign immunity through legislation, and he relied on both the Vienna Convention on Diplomatic Relations, and the Convention on Jurisdictional Immunities of States and Their Property.<sup>128</sup>

Since the judge proceeded from the erroneous view that he was dealing with an issue of state immunity, he was bound to come to a manifestly wrong decision. Also, while the judge recognized the development of state immunity in customary international law, he did not go further to consider the applicability of customary international law in Kenya. For instance, the judge noted that there was no Kenyan law that restricted immunity of states in employment contracts. Here, the judge could have demonstrated whether the recent developments in customary international law were relevant. In fact, since there was no Kenyan law on sovereign immunity, customary international law should have been the applicable law in this case. Additionally, apart from simply mentioning the Vienna Convention on Diplomatic Relations and the Convention on Jurisdictional Immunities of States and Their Property,<sup>129</sup> the judge did not actually discuss their relevance to the case. By ignoring customary international law and instead haphazardly referring to international instruments, it was implicit in the ruling that the court privileged treaties over customary international law.

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<sup>127</sup> *Elkana Khamisi Samarere and Another v Nigerian High Commission* [2013] eKLR (Industrial Court, Nairobi).

<sup>128</sup> *ibid* [4], [8] and [9].

<sup>129</sup> This treaty has not yet entered into force, and Kenya has not ratified it.

This is not an isolated case as there are others where various courts appeared to confuse diplomatic immunity, state immunity and immunity for international organisations. Sovereign (or state) immunity is a bar to the exercise of jurisdiction because of the sovereign independent status of the entity or individual concerned. It is raised in the form of a preliminary plea that is made at the commencement of proceedings and, if successful, would halt the proceedings.<sup>130</sup> Related to state immunity are diplomatic immunity and immunity of an international organisation. Diplomatic immunity is granted to representatives of states to enable them perform their functions without hindrance.<sup>131</sup> It developed through international custom but it is now codified in treaties.<sup>132</sup> Meanwhile, international organisations and their officials also enjoy functional immunities. These immunities are dependent on the instruments relating to the organisation, such as the constituent treaty and the headquarters agreement.<sup>133</sup> In a number of cases, the court's failure to distinguish between these concepts has resulted in incorrect decisions.<sup>134</sup> Usually, the judges start by discussing state immunity under customary international law but then they bring in diplomatic immunity as well. Each of these immunities has different exceptions and so applying the wrong immunity in a case leads to injustice.

The only case on immunity to have reached the highest court in Kenya, the Supreme Court, is that of *Karen Kandie v Alassane Ba*.<sup>135</sup> In that case, an employee of Shelter Afrique, an international organisation created through treaty by several African states, complained that she was physically assaulted by the organisation's managing director and that her employment was terminated after

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<sup>130</sup> H Fox "International law and restraints on the exercise of jurisdiction by national courts of states" in MD Evans (ed), *International Law* (Oxford University Press 2010) 343.

<sup>131</sup> T Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Limited 1998) 316.

<sup>132</sup> *ibid.*

<sup>133</sup> *ibid* 319.

<sup>134</sup> See *Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank* [1999] eKLR (Court of Appeal, Nairobi); *Gerard Killeen v International Centre of Insect Physiology & Ecology* [2005] eKLR (Industrial Court, Nairobi); *Elkana Khamisi Samarere & Another v Nigerian High Commission* [2013] eKLR (Industrial Court, Nairobi); *John Kaluai & 4 others v Colonel Mark Christie & another* [2014] eKLR (High Court, Nyeri); *Josephine Wairimu Wanjohi v International Committee of the Red Cross* [2015] eKLR (High Court, Nairobi); *Edward Onkendi v International Centre of Insect Physiology and Ecology (ICIPE)* [2016] eKLR (Employment and Labour Relations Court, Nairobi); *Nancy Macnally v International Centre of Insect Physiology and Ecology (ICIPE)* [2016] eKLR (Employment and Labour Relations Court, Nairobi); *Unicom Limited v Ghana High Commission* [2016] eKLR (Court of Appeal, Nairobi).

<sup>135</sup> *Karen Njeri Kandie v Alassane Ba & Another* [2012] eKLR (Industrial Court, Nairobi); *Karen Njeri Kandie v Alassane Ba & Another* [2015] eKLR (Court of Appeal, Nairobi); *Karen Njeri Kandie v Alassane Ba & Another* [2017] eKLR (Supreme Court, Nairobi).

she reported the matter to the police.<sup>136</sup> While this case was discussed in the section on treaties, it is necessary also to discuss it here in order to illustrate the erroneous reference to customary international law. At the first court to hear the matter, the Industrial Court judge erroneously stated that the organisation enjoyed “the same privileges and immunity status as a foreign state”.<sup>137</sup> Similarly, the Court of Appeal erroneously held that the organisation enjoyed *sovereign* immunity.<sup>138</sup> The Supreme Court properly relied on the organisation’s founding treaties to hold that the organisation enjoyed immunity.<sup>139</sup> While dismissing the appeal, the Supreme Court did not discuss and clarify the different types of immunity involved. As a result, there is no authoritative guidance on the many court decisions that confuse immunities for diplomats, international organisations and for states.

**ii. Direct applicability of customary international law and hierarchy between municipal law and customary international law**

Prior to the enactment of the 2010 Constitution, Kenya would have likely followed the approach taken by the United Kingdom as at 12 August 1897.<sup>140</sup> That is, customary international law was applicable as part of the common law. However, as discussed in the previous chapter, there was no case that applied customary international law through this avenue. Now, article 2(5) the 2010 Constitution appears to recognise customary international law as separate from the common law. In addition, the words used in the constitutional provision imply that Kenya takes a monist approach to customary international law. The use of the phrase “shall form part of the law of Kenya” means that there are no preconditions to the application of customary international law.

Ideally, customary international law would be directly applicable in court. However, there has been no case in which this issue has been comprehensively debated and decided. The only instance in which the courts tendentiously gave direct effect to international custom was when the judges asserted that “public participation in environmental law issues and governance has risen to the

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<sup>136</sup> *Karen Njeri Kandie v Alassane Ba & Another* [2015] eKLR (Court of Appeal, Nairobi) 1-2.

<sup>137</sup> *ibid.*

<sup>138</sup> *ibid* 11-14.

<sup>139</sup> *Karen Njeri Kandie v Alassane Ba & Another* [2017] eKLR (Supreme Court, Nairobi) [59] – [62].

<sup>140</sup> The British established a nascent legal system for present day Kenya by enacting the East Africa Order in Council, 1897. This law, and others like it that followed in later years, contained a clause (“reception clause”) that specified the temporal limit for the application of English law to the territory. Section 3(1) of the *Judicature Act* sets this date as the cut off point for determining the common law that is applicable to Kenya.



level of a generally accepted rule of customary international law” and therefore the right to public participation was part of Kenyan law vide article 2(5) of the 2010 Constitution.<sup>141</sup> However, the judges did not elaborate further on the customary nature of the right and the domestic implications flowing therefrom.

Because customary international law is unwritten, this could present difficulties for Kenyan courts in ascertaining a certain rule. In addition, in order to assert the direct applicability of a customary rule, the rule must meet be clear and precise, it must confer individual rights, and it must not require implementing legislation.<sup>142</sup> In the absence of explicit judicial decision on the direct applicability of custom, it is open to conjecture that customary international law would require the legislature’s separate approval. This is implied from the cases dealing with treaties in which judges held that because article 94(5) of the 2010 Constitution gave Parliament the exclusive law making role then no law could have effect without Parliament’s approval.<sup>143</sup>

As mentioned earlier, the 2010 Constitution does not explicitly set out the hierarchy of laws in Kenya. Whereas the *Judicature Act* contains a hierarchical list, the list does not mention international law. Articles 2(1) and (4) of the 2010 Constitution establish that the constitution is supreme over other laws and that any law that is inconsistent with the constitution is void to the extent of the inconsistency. Therefore, this means that customary international law does not have a status above the constitution.<sup>144</sup> As to the status of customary international law vis-à-vis legislation, the courts have not yet made a specific decision on this issue. Prior to the enactment of the 2010 Constitution, Kenya would have likely followed the English approach that customary international law, as part of the common law, was subject to legislation and judicial decisions of superior courts.<sup>145</sup> However, since article 2(5) the 2010 Constitution appears to recognise customary international law as separate from the common law, this means that customary

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<sup>141</sup> *Mohamed Al Baadi and Others v Attorney General and Others* [2018] eKLR (High Court, Nairobi) [221].

<sup>142</sup> A Nollkaemper (n 62).

<sup>143</sup> For example, see *Njuguna S. Ndung’u v Ethics & Anti-Corruption Commission and 3 Others* [2014] eKLR (High Court, Nairobi) [40] and [41] (emphasis removed).

<sup>144</sup> See cases referring to international law generally and not specifically custom: *Joseph Njuguna Mwaura and 2 Others v Republic* [2013] eKLR (Court of Appeal, Nairobi); *Royal Media Services Ltd and 2 others v Attorney General and 8 others* [2014] eKLR (Court of Appeal, Nairobi), separate judgment of Nambuye, JA, [131].

<sup>145</sup> MN Shaw, *International Law* (6th edn, Cambridge University Press 2008) 141.



international law is not subject to the previous qualifications. Therefore, it is possible that customary international law enjoys the same rank as legislation and domestic judicial decisions.

In sum, judges have exhibited a lack of certainty on what is customary international law and how to use it. When judges declare that a certain matter has attained the status of customary international law, they do not actually explain how they came to that conclusion. In addition, most judges do not rely on customary international law but instead favour applying treaties. It is often argued that domestic courts rarely refer to customary international law because it is vague, uncertain, difficult to ascertain the relevant rule and undemocratic. On the contrary, it is asserted that treaties, while written, also suffer the same deficiencies.<sup>146</sup> Instead, other reasons for judges avoiding customary international law include the judges' preference for written rules; their lack of knowledge of international custom; their perception of international custom as dealing exclusively with inter-state matters, and their belief that international custom is not a sufficient basis for a claim.<sup>147</sup> As the cases discussed above have shown, the decisions of Kenyan courts could be enriched if lawyers and judges engaged more with customary international law. The direct applicability of customary international law is uncertain but it appears to be doubtful. It is also uncertain whether customary international law would overrule conflicting legislation and court decisions.

## **6. General principles of law**

Since the 2010 Constitution does not use the exact phrase “general principles of law”, this section will first deal with whether the 2010 Constitution makes implicit reference to general principles of law. Afterwards, this section will deal with the hierarchy of those principles in Kenya and their direct applicability. As mentioned chapter 1, this study will work with three common meanings of this source of international law. First, the phrase could refer to legal principles common to municipal legal systems such as estoppel. Second, the phrase could refer to general principles applicable directly to international legal relations (e.g. consent, reciprocity and the equality of

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<sup>146</sup> J Wouters “Customary international law before national courts: Some reflections from a continental European perspective” (2004) 4(1) *Non-State Actors and International Law* 25, 28-31.

<sup>147</sup> *ibid* 31-36.

states). Third, it could refer to principles applicable to legal relations generally (e.g. the finality of agreements and the legal validity of agreements).<sup>148</sup> General principles of law are in the nature of standards.<sup>149</sup> Whereas rules necessitate a particular decision, principles give direction when applying rules.<sup>150</sup> Essentially, general principles of law fill in the gaps left by treaties and international custom. In addition, general principles of law are used when interpreting customary and treaty rules.<sup>151</sup>

#### **i. Reference to general principles of law**

Some commentators are of the view that article 2(5) of the 2010 Constitution refers exclusively to customary international law.<sup>152</sup> However, the wording used is similar to that of the German Constitution,<sup>153</sup> and the courts have held that the wording in the German Constitution also covers general principles of law.<sup>154</sup> In the Kenyan context, there is the view that the phrase “general rules” in article 2(5) may be widely defined to mean general principles of law.<sup>155</sup> According to this view, this wide definition would encompass customary international law rules, principles drawn from municipal law, principles necessary for international co-existence, principles intrinsic to the idea of law and basic to all legal systems, universal principles and principles of natural law.<sup>156</sup> This wider definition is preferable as it ensures the application in Kenya of common transnational legal standards.

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<sup>148</sup> H Thirlway, “The Sources of International Law” in MD Evans (ed), *International Law* (Oxford University Press, 2010) 108-109.

<sup>149</sup> R Kwiecień “General principles of law: The gentle guardians of systematic integration of international law” (2017) XXXVII Polish Yearbook of International Law 235, 235-236.

<sup>150</sup> B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006) 24; GG Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law* (1958) 7.

<sup>151</sup> M Andenas and L Chiussi “Cohesion, convergence and coherence of international law” in M Andenas and others (eds), *General Principles and the Coherence of International Law* (Koninklijke Brill NV 2019) 10.

<sup>152</sup> EBN Abenga (n 92); T Kabau and C Njoroge (n 76) 294.

<sup>153</sup> Basic Law of the Federal Republic of Germany, May 23, 1949, Federal Law Gazette I, p. 1, article 25: “The general rules of public international law form part of the Federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory.”

<sup>154</sup> See 2 BvR 1475/07 (4 September 2008), para. 20 and BVerfGE 118, 124 (8 May 2007) [63].

<sup>155</sup> EO Ashers (n 92) 267-268.

<sup>156</sup> *ibid* quoting O Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 50-55.

This suggested wider interpretation of general principles of law could account for the approach taken by several judges. In a case mentioned earlier,<sup>157</sup> the judge referred to the concept of universal jurisdiction as having attained *jus cogens* status. While this is an erroneous view, the judge's understanding may have been that universal jurisdiction was a general principle that was necessary for ensuring the prosecution of international crimes. Similarly, in the *Okenyo Omwansa* case,<sup>158</sup> the judge stated that “the international prohibition against slavery and servitude is one of the peremptory norms in international law (*jus cogens*) and which apply to Kenya as part of the general rules of international law by dint of Article 2(5) of the 2010 Constitution.”<sup>159</sup> Here, the judge, by relying on article 2(5) to apply a *jus cogens* norm, appeared to make use of the suggested wider definition of general principles of law.

There appears to be only one instance when the courts attempted to use general principles of law properly. In that case, the judges stated that “it is now recognised as part of the rules of international law that the principle of legality is an integral part of the rule of law.”<sup>160</sup> The judges referred to article 2(5) of the 2010 Constitution for this assertion. It appears that the judges used the terms “legality” and the “rule of law” in the sense of principles that are common to most legal systems. The judges drew on examples from Africa and Europe to elaborate on the meaning of these two concepts. While the judges did not expressly state that they were applying general principles of law, they appeared to be identifying such principles by surveying domestic courts' decisions.

Except in this last case, Kenyan courts have been conflating customary international law with general principles of law. Identifying customary international law rules requires a survey of state conduct and *opinio juris*.<sup>161</sup> Conversely, general principles of law are usually abstracted from existing and precise international and municipal rules. As such, general principles of law involve more remote proof of state acceptance than explicit state consent or generalized state practice.<sup>162</sup> In addition, customary international law comprises ascertainable rules on a particular issue while

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<sup>157</sup> *Kenya Section of the International Commission of Jurists v Attorney General and Another* [2011] eKLR (High Court, Nairobi).

<sup>158</sup> *Okenyo Omwansa George and Another v Attorney General and 2 Others* [2012] eKLR (High Court, Nairobi).

<sup>159</sup> *ibid* [61].

<sup>160</sup> *Aids Law Project v Attorney General and 3 others* [2015] eKLR (High Court, Nairobi) [62].

<sup>161</sup> *Jurisdictional immunities of the state (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99 [55].

<sup>162</sup> BI Bonafé and P Palchetti “Relying on general principles in international law” in C Brölman and Y Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 163.

general principles of law are standards that offer guidance on how to apply those rules. Since these two sources of international law have different qualities, there is a likelihood of judges making wrong decisions when they confuse the two.

**ii. Direct applicability of general principles of law and hierarchy between municipal law and general principles of law**

The lack of an express distinction between customary international law and general principles of law in the 2010 Constitution ordinarily should present difficulties for their applicability.<sup>163</sup> However, as mentioned above, the German Constitution uses the same wording, and there is the view that the provision establishes “an open door allowing general principles of international law to automatically influence German law.”<sup>164</sup> Similarly, Kenyan courts appear to be comfortable in using article 2(5) of the 2010 Constitution to refer to general principles of law. Another reason in favour of applying general principles of law is their nature. Because general principles of law are not rules *per se*, then they do not have to be as detailed as customary and treaty rules. For the same reason, general principles of law cannot confer rights on individuals. Therefore, application of general principles of law is probably more acceptable and not as contentious as customary or treaty rules.

Similar to customary international law, the position of general principles of law would be below the 2010 Constitution because of article 2(4). However, the position with regard to legislation is not explicitly set out and none of the cases cited earlier discussed this issue. It is plausible that, like customary international law, general principles of law would enjoy the same status as legislation. However, during application, general principles of law are likely to overrule municipal law because of their nature as standards. For instance, in one of the cases cited earlier, the court struck down a certain legislative provision because it was not compatible with the principle of legality.<sup>165</sup>

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<sup>163</sup> The 1976 Constitution of Portugal and the 1993 Constitution of the Russian Federation appeared to make a distinction between customary international law and general principles of law: H Vallikivi “Domestic Applicability of Customary International Law in Estonia” (2002) VII *Juridica International Law Review* 28, 31.

<sup>164</sup> R Wolfrum, H Hestermeyer and S Vöneky “The reception of international law in the German legal order: An introduction” in E De Wet, H Hestermeyer and R Wolfrum (eds) (n 64) 17.

<sup>165</sup> *Aids Law Project v Attorney General and 3 others* [2015] eKLR (High Court, Nairobi) [88].

The rarity in the use of general principles of law is reflective of the poor knowledge that judges have of international law. Judges have not demonstrated that they are aware of the distinction between customary international law and general principles of law. This situation is compounded by some commentators who state that domestic judges should be at liberty to employ international legal norms without paying attention to conceptual accuracy.

## 7. Judicial decisions

This section will discuss whether the Kenya's domestic law provides a framework for the implementation and use of decisions made by international judicial bodies. Decisions on international law matters are rendered by a variety of institutions, ranging from judicial to quasi-judicial bodies. Whereas these judicial decisions are not sources of law *per se*, they play a significant role in the development of international law.<sup>166</sup> In fact, the compulsory jurisdiction and specialisation exercised by some of these institutions means that their decisions are more than persuasive in other cases.<sup>167</sup>

The 2010 Constitution, the *Judicature Act* and the *Treaty Making and Ratification Act* do not mention judicial decisions despite the fact that Kenya is a party to international and regional treaties that provide for supra-national courts. Generally, decisions by judicial bodies where Kenya is a party to the proceedings are binding on Kenya and Kenya would be required to implement them. However, it is not clear what status such decisions occupy in Kenya. Because such decisions would arise from a treaty, then it is likely that those decisions enjoy the same status as legislation as well as executive directives since there is parity between the executive and the legislature.

Another issue that arises is how such decisions should be implemented. Depending on the nature of the decision, Kenya may be required to either implement the decision through executive directives or by enacting legislation. Article 132(5) of the 2010 Constitution states that the "President shall ensure that the international obligations of the Republic are fulfilled through the

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<sup>166</sup> GI Hernandez "International judicial lawmaking" in C Brölman and Y Radi (eds), *Research handbook on the theory and practice of international law-making* (Edward Elgar, 2016) 200.

<sup>167</sup> *ibid* 211.

actions of the relevant Cabinet Secretaries.” This implies that a cabinet secretary could implement a judicial decision that specifically affects their area of competence and that is too narrow to warrant Parliament’s intervention. Conversely, where a judicial decision touches on broad and fundamental issues, then, consistent with article 94(5) of the 2010 Constitution, Parliament may have to legislate before the decision is implemented.

In addition, the applicability of decisions of international judicial bodies in domestic courts is of pertinence. Domestic courts are not ordinarily bound to follow decisions of international judicial bodies. However, there are instances where decisions of international judicial bodies are of more than persuasive value in domestic courts. This is especially the case where the international judicial body is specialised in a particular area of international law. Where domestic courts engage in a discussion of a decision of an international judicial body, the domestic courts contribute to clarification and coherence of international norms. Often, domestic courts in states that are subject to the compulsory jurisdiction of a regional or international tribunal are more likely to adhere to the decisions of those bodies.<sup>168</sup>

International courts and tribunals are the first set of judicial institutions that make binding decisions. Kenya made a declaration<sup>169</sup> in 1963 accepting the obligations contained in the Charter of the UN<sup>170</sup> and another declaration<sup>171</sup> in 1965 accepting the ICJ’s compulsory jurisdiction. Because a decision of the ICJ binds only the parties to the case,<sup>172</sup> then Kenya is not bound by or required to implement decisions in cases to which it is not a party. Prior to 2014, the ICJ had not heard any dispute involving Kenya and so there was no ICJ decision requiring Kenya’s implementation. At the moment, there is a pending dispute between Kenya and Somalia regarding

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<sup>168</sup> DL Sloss and MP Van Alstine “International law in domestic courts” in W Sandholtz and C.A. Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar, 2017) 79.

<sup>169</sup> Declaration of Acceptance of the Obligations contained in the Charter of the United Nations, 12 December 1963, 483 UNTS 233.

<sup>170</sup> Charter of the United Nations and Statute of the International Court of Justice (adopted: 26 June 1945; entry into force: 26 October 1945) 1 UNTS XVI (hereinafter “UN Charter”).

<sup>171</sup> Declaration recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court, 19 April 1965, 531 UNTS 113.

<sup>172</sup> Article 59 of the Statute of the International Court of Justice (adopted: 26 June 1945; entry into force: 26 October 1945) 832 USTS 993 (hereinafter “ICJ Statute”): “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

their maritime boundary.<sup>173</sup> In 2017, the court rejected Kenya’s preliminary objection to the court’s jurisdiction and found Somalia’s application admissible.<sup>174</sup> Since the case concerns Kenya’s territorial boundaries, the court’s final decision could require Kenya to alter those boundaries. Such a decision would have to be implemented through a constitutional amendment brought either by a Member of Parliament or through popular initiative, and it must be approved through a referendum.<sup>175</sup>

As a party to the UN Convention on the Law of the Sea,<sup>176</sup> Kenya is bound by decisions made by the dispute settlement forum that it chooses.<sup>177</sup> Those forums are the International Tribunal for the Law of the Sea (ITLOS), the ICJ, an arbitral tribunal and a special tribunal.<sup>178</sup> Kenya made a declaration excluding those forums in the interpretation or application of articles 15, 74 and 83 of UNCLOS relating to sea boundary delimitations, or those involving historic bays or titles.<sup>179</sup> Apart from the case between Kenya and Somalia that is pending at the ICJ, there is no decision on maritime issues that Kenya is required to implement.

Kenya ratified the treaty<sup>180</sup> establishing the International Criminal Court (ICC) in 2005 and domesticated it in 2008.<sup>181</sup> The International Crimes Act contains provisions for the implementation of the ICC’s decisions on various matters such as arrest warrants and prison sentences. In 2010, the Court authorised the ICC Prosecutor to initiate an investigation *proprio motu* in relation to alleged crimes against humanity committed in Kenya during the post-election violence of 2007-2008.<sup>182</sup> The Prosecutor charged six individuals, two of whom went on to become

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<sup>173</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Application No. 161 of 28 August 2014.

<sup>174</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, (Preliminary Objections), (Judgment), [2017] ICJ Rep 3.

<sup>175</sup> See articles 255, 256 and 257 of the Constitution of Kenya, 2010.

<sup>176</sup> United Nations Convention on the Law of the Sea (adopted: 10 December 1982; entry into force: 16 November 1994) 1833 UNTS 397 (hereinafter “UNCLOS”). Kenya ratified the treaty on 2 March 1989 and domesticated it through the *Maritime Zones Act*, Cap. 378, Laws of Kenya.

<sup>177</sup> UNCLOS, Article 296.

<sup>178</sup> *ibid* Article 287.

<sup>179</sup> Declaration under Article 298 of 24 January 2017.

<sup>180</sup> Rome Statute of the International Criminal Court (adopted: 17 July 1998; entry into force: 1 July 2002) 2187 UNTS 90 (hereinafter “Rome Statute”). Kenya ratified the treaty on 15 March 2005.

<sup>181</sup> Kenya enacted the *International Crimes Act*, Act No. 16 of 2008, Laws of Kenya.

<sup>182</sup> International Criminal Court, “Situation in the Republic of Kenya, ICC-01/09”, <<https://www.icc-cpi.int/kenya>> accessed 13 November 2019. In *Joseph Kimani Gathungu v Attorney General & 5 Others* [2010] eKLR, the High Court dismissed an objection to the ICC initiating an investigation into the 2007-2008 post-election violence.



the President and Deputy President of Kenya. None of the individuals were convicted as the charges were withdrawn at various stages due to lack of sufficient evidence.<sup>183</sup> The Court later issued warrants of arrest against three other individuals for allegedly corruptly influencing witnesses in those cases.<sup>184</sup> However, Kenya has not yet complied with the warrants of arrest.

Another ICC case that tested Kenya's compliance with the ICC's warrants of arrest was with regard to former Sudanese President Omar Al-Bashir. In 2005, the UNSC referred the situation in Darfur, Sudan to the ICC, and the ICC's Pre-Trial Chamber issued two warrants of arrest against Al-Bashir in 2009 and 2010.<sup>185</sup> Additionally, the Pre-Trial Chamber sent requests for state parties, including Kenya, to co-operate in effecting the warrants of arrest.<sup>186</sup> However, when Al-Bashir attended Kenya's promulgation of the new constitution in August 2010, the Kenyan Government did not arrest him.<sup>187</sup> Later, when Al-Bashir was scheduled to attend a meeting of the Intergovernmental Authority on Development (IGAD) in Kenya, a non-governmental organisation (NGO) approached the High Court to issue a provisional arrest warrant.<sup>188</sup> The High Court granted the provisional arrest warrant and stated that if the Kenyan Government refused to effect it then any person with the requisite legal capacity could do so or could apply for an order compelling the government to effect it.<sup>189</sup> The Court of Appeal set aside the provisional arrest warrant because Al-Bashir's absence made it impossible to effect the warrant. However, the court confirmed that any person could apply for the provisional arrest warrant and that the government was under an obligation to effect it.<sup>190</sup>

Kenya signed and ratified the protocol establishing the African Court on Human and Peoples' Rights (ACtHPR).<sup>191</sup> The protocol establishing the ACtHPR directs state parties to comply with

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<sup>183</sup> *ibid.*

<sup>184</sup> *ibid.*

<sup>185</sup> International Criminal Court, "Situation in Darfur, Sudan, ICC-02/05", <<https://www.icc-cpi.int/darfur>> accessed 21 November 2019.

<sup>186</sup> *ibid.*

<sup>187</sup> Associated Press, "Kenya defends failure to arrest Sudan's president Omar al-Bashir in Nairobi", The Guardian, Sunday 29 August 2010, <<https://www.theguardian.com/>> accessed 21 November 2019.

<sup>188</sup> *Kenya Section of the International Commission of Jurists v Attorney General and Another* [2011] eKLR (High Court, Nairobi).

<sup>189</sup> *ibid.* 20.

<sup>190</sup> *Attorney General and 2 Others v Kenya Section of the International Commission of Jurists* [2018] eKLR 24.

<sup>191</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of African Court of Human and Peoples' Rights (adopted: 10 June 1998; entered into force: 25 January 2004) (hereinafter "ACtHPR Protocol").

and execute the Court's judgments.<sup>192</sup> In addition, the Court's rules state that the Court's decision is binding on the parties to the case.<sup>193</sup> This means that it is only the parties to the case that are bound by and required to implement the Court's decisions. In 2013, the ACtHPR ordered provisional measures against Kenya in an application filed by the African Commission on Human and Peoples' Rights (ACmHPR).<sup>194</sup> The Kenyan Government was required to, *inter alia*, reinstate restrictions it had imposed on land transactions in the Mau Forest complex. Since no legislation was enacted to implement this order, it appears that the Kenyan Government implemented it through a ministerial directive.<sup>195</sup> In 2017, the ACtHPR held that the Kenyan Government had violated several provisions of the African Charter and directed the Kenyan Government "to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken."<sup>196</sup> The Court reserved its decision on reparations until after the parties make submissions on the issue. The decision on violations to the African Charter leaves Kenya with the discretion to decide how to implement it. In response to the decision, the Kenyan Government set up a taskforce to come up with proposals on implementing the decision.<sup>197</sup> However, the taskforce did not come up with recommendations within the set timeframe and the government had to set up another one.<sup>198</sup> The broad mandate of the taskforce

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Kenya signed the treaty on 7 July 2003 and ratified it on 4 February 2004. On 17 December 2003, Kenya also signed the protocol creating the Court of Justice of the African Union (CJAU), the Protocol of the Court of Justice of the African Union (adopted: 1 July 2003 entry into force: 11 February 2008). Through Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights (adopted: 1 July 2008; not yet in force), these two courts were merged into the African Court of Justice and Human Rights (ACtJHR). However, Kenya has not yet ratified the protocol establishing the new court.

<sup>192</sup> ACtHPR Protocol, article 30: "The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."

<sup>193</sup> Rules of Court of the African Court of Human and Peoples' Rights, adopted on 2 June 2010, rule 61(5): "The judgment of the Court shall be binding on the parties."

<sup>194</sup> *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Order of provisional measures, 15 March 2013.

<sup>195</sup> S Mkwale "Lift ban on land deal in Mau Forest, State told", *The Standard*, 10 June 2019, available at <<https://www.standardmedia.co.ke/>> accessed 11 May 2020. Also, see *Clement Kipchirchir & 38 others v Principal Secretary Ministry of Lands Housing and Urban Development & 3 others* [2015] eKLR [13], where one of the parties claimed that there was a "political caveat" in place barring any dealing in the land.

<sup>196</sup> *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgement, Merits, 26 May 2017.

<sup>197</sup> Task force on the implementation of the decision of the African Court issued against the Government of Kenya in respect of the rights of the Ogiek community of Mau, Gazette Notice No. 10944 of 23 October 2017, *Kenya Gazette*, Vol. CXIX, No. 167, 5786.

<sup>198</sup> Task force on the implementation of the decision of the African Court issued against the Government of Kenya in respect of the rights of the Ogiek community of Mau and enhancing the participation of indigenous communities in the sustainable management of forests, Gazette Notice No. 11215 of 25 October 2018, *Kenya Gazette*, Vol. CXX, No. 134, 3824-3825.

indicates that its recommendations are likely to require enactment of legislation in order to comply with the Court's decision.

Kenya ratified and domesticated the treaty<sup>199</sup> establishing the East African Community (EAC) in the year 2000. The EAC treaty creates the East African Court of Justice (EACJ) and it requires partner states to implement judgments of the EACJ.<sup>200</sup> Generally, the Court's decision binds only the parties to the case before it. However, in 2014, the Court stated that its decisions in cases brought under article 30 of the EAC treaty bind both parties and non-parties to the cases.<sup>201</sup> This means that Kenya could be required to implement a decision of the Court in a case to which Kenya is not a party. However, the Court's judgments are essentially declaratory, which results in habitual non-compliance by state parties.<sup>202</sup> Regardless of state compliance with the EACJ's decisions, the court is credited with positively influencing the actions of state and non-state actors in the region.<sup>203</sup> Kenya's law<sup>204</sup> domesticating the EAC treaty is silent on the implementation of the Court's decisions. It is, therefore, up to the government to decide how to implement the decision. When the EACJ decided that the election of Kenya's representatives to the East African Legislative Assembly was not in conformity with the EAC treaty,<sup>205</sup> Kenya's Parliament enacted new rules on elections and then conducted a re-election.<sup>206</sup> In another case, the Kenyan Government had refused to effect a warrant of arrest against a cabinet secretary who had failed to authorise payment of

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<sup>199</sup> Treaty for the Establishment of the East African Community (adopted: 30 November 1999, entry into force: 7 July 2000) 2144 UNTS 255 (hereinafter "EAC treaty").

<sup>200</sup> *ibid* article 38(3): "A Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court."

<sup>201</sup> *Henry Kyarimpa v Attorney General of Uganda*, EACJ Appeal No. 6 of 2014 [120]. Article 30(1) is as follows: "Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

<sup>202</sup> A Possi "An Appraisal of the Functioning and Effectiveness of the East African Court of Justice" (2018) 21(1) Potchefstroom Electronic Law Journal 1, 9. Another study found that state compliance with the EACJ's decisions was better compared to those of the ACtHPR. However, the study was limited, covering only Tanzania and Uganda with respect to the EACJ (VO Ayeni "State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five African states" (LL. D thesis, University of Pretoria, 2018) 125).

<sup>203</sup> V Lando "The domestic impact of the decisions of the East African Court of Justice" (2018) 18(2) African Human Rights Law Journal 463, 484.

<sup>204</sup> *Treaty for Establishment of the East African Community Act*, Act No. 2 of 2000, Laws of Kenya.

<sup>205</sup> *Prof. Peter Anyang' Nyong'o v. A.G. of Kenya and Others* Reference No. 1 of 2006.

<sup>206</sup> V Lando (n 203) 470.

compensation for malicious prosecution to Tanzania national. While the Court declared that Kenya had violated the EAC treaty,<sup>207</sup> the Kenyan Government is yet to comply with the decision.

Decisions of arbitral panels established under investment treaties are also authoritative to some extent. Kenya ratified the treaty<sup>208</sup> creating the International Centre for the Settlement of Investment Disputes (ICSID) in 1966 and domesticated it the same year.<sup>209</sup> The treaty states that arbitral awards are binding on the parties to a dispute,<sup>210</sup> but all contracting states to the treaty are required to recognise and enforce those awards.<sup>211</sup> This means that Kenya may, where appropriate, be required to implement the ICSID's decisions, even where Kenya is not a party to the dispute. There are three disputes against Kenya that foreign investors have submitted to ICSID.<sup>212</sup> Two of the disputes were decided in Kenya's favour but one is the subject of an appeal. The third dispute has not yet been concluded.

Kenya is also party to the 1907 treaty<sup>213</sup> establishing the Permanent Court of Arbitration (PCA). The PCA's decision is binding only on the parties to the dispute and any state that intervenes in the dispute.<sup>214</sup> The PCA has not yet heard any dispute concerning Kenya. Kenya has not specifically domesticated the PCA treaty but international arbitrations are covered by the *Arbitration Act, 1995*. Under the Act, international arbitration awards "shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards".<sup>215</sup> Section 41 of the Act

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<sup>207</sup> *James Alfred Koroso v. The Attorney General of the Republic of Kenya and The Principle Secretary Ministry of State for Provincial Administration and Internal Security of the Republic of Kenya*, Reference No. 12 of 2014.

<sup>208</sup> Convention on the Settlement of Investment Disputes between States and nationals of other States (adopted: 18 March 1965; entry into force: 14 October 1966) 575 UNTS 159 (hereinafter "ICSID Convention").

<sup>209</sup> Kenya enacted the *Investment Disputes Convention Act*, Cap. 522, Laws of Kenya.

<sup>210</sup> ICSID Convention, Article 53.

<sup>211</sup> *ibid* Article 54.

<sup>212</sup> *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29); *WalAm Energy LLC v. Republic of Kenya* (ICSID Case No. ARB/15/7); *World Duty Free Company Limited v. Republic of Kenya* (ICSID Case No. ARB/00/7).

<sup>213</sup> The Hague Convention for the Pacific Settlement of International Disputes of 1907 (adopted: 18 October 1907; entry into force: 26 January 1910) 1 *Bevans* 577; 2 *AJIL Supp.* 43 (1908) (hereinafter "PCA Convention"). Kenya acceded to the treaty on 12 April 2006.

<sup>214</sup> PCA Convention, Article 84.

<sup>215</sup> Arbitration Act, 1995, Act No. 4 of 1995, Laws of Kenya, section 36(2). On 10 February 1989, Kenya acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted: 10 June 1958, entry into force: 7 June 1959) 330 UNTS 3. At the same time, Kenya made a declaration that it would "apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State" (Declaration of 10 February 1989, 1523 UNTS 354).

provides that the Act also binds the government. Therefore, a successful claimant at the PCA in an arbitration with the Kenyan Government can seek an order from the High Court recognising and enforcing the award.

Conversely, decisions of the quasi-judicial bodies under the World Trade Organisation (WTO) have more authoritative value.<sup>216</sup> Kenya became a member of the General Agreement on Tariffs and Trade (GATT)<sup>217</sup> in 1964 and a member of the WTO<sup>218</sup> in 1995. Disputes under the WTO are determined by panels, the Appellate Body and arbitrators. The decisions of these bodies become binding upon parties to the disputes when the Dispute Settlement Body adopts the bodies' reports.<sup>219</sup> However, interpretations of the WTO Agreement by the Ministerial Conference and the General Council are binding on all WTO member states.<sup>220</sup> Kenya has not featured as either a claimant or respondent in a WTO dispute. However, Kenya appeared as a third party in three related disputes,<sup>221</sup> but Kenya is neither directly bound by or required to implement the decisions.

The lack of express constitutional provisions on the applicability of international judicial decisions does present difficulties for Kenya. Consequently, the applicability of such decisions depends on a variety of factors. First, where there is enabling legislation, then the provisions of the legislation will offer some guidance. For instance, section 4 of the *Investment Disputes Convention Act* provides that an arbitral decision is to be recognised and enforced in Kenya as if it were a final decree of the High Court. Sections 29 and 32 of the *International Crimes Act* requires the Minister in charge of national security or any person to approach the High Court for issuance of an arrest warrant or a provisional arrest warrant respectively. Second, where there is no enabling legislation, then the nature and subject matter of the decision may determine its application. Thus, some matters may be implemented through an executive directive while others may require enactment

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<sup>216</sup> GI Hernandez (n 166) 23.

<sup>217</sup> General Agreement on Tariffs and Trade (adopted: 30 October 1947; entry into force: 1 January 1948) 55 UNTS 194. Kenya became a party to the treaty on 5 December 1964 through succession under article XXVI: 5(c) of the treaty.

<sup>218</sup> Marrakesh Agreement Establishing the World Trade Organization (adopted: 15 April 1994, entry into force: 1 January 1995) 1867 UNTS 154 (hereinafter "WTO Agreement"). Kenya ratified the treaty on 23 December 1994.

<sup>219</sup> World Trade Organisation, *A Handbook on the WTO Dispute Settlement System* (2nd edn, Cambridge University Press, 2017) 12.

<sup>220</sup> *ibid.*

<sup>221</sup> Appellate Body Report, *EC — Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R and WT/DS283/AB/R (28 April 2005).

of legislation. So far, the Kenyan Government has complied with few of the judicial decisions made against it. However, similar to other domestic courts, Kenyan courts are likely to conform to decisions of international judicial bodies that exercise compulsory jurisdiction. This presents an avenue for Kenyan courts to mediate between international and domestic norms.

## 8. Declarations, resolutions, and non-binding instruments and decisions

As mentioned in chapter 1, Article 38(1)(d) of the ICJ Statute implicitly opens up the space for reference to instruments that are not legally binding but that carry some political strength in the international arena.<sup>222</sup> These instruments include declarations and resolutions of international or inter-governmental organisations; guidelines or recommendations by bodies created under treaties; and treaties that are not yet in force or that are not binding on some states. Neither Kenya's 2010 Constitution or legislation regulates the applicability of these instruments. Since such instruments are not covered under article 2(5) and (6) of the 2010 Constitution, they are not sources of law as such. However, depending on their nature or subject matter, the instruments could be more than just persuasive and Kenyan courts may be required to apply them in court or to implement them.

For instance, there is a difference in the authoritativeness of UN General Assembly (UNGA) and Security Council (UNSC) resolutions. Generally, UNGA resolutions are considered to be legally binding on organisational matters while those of the UNSC are legally binding on operational matters.<sup>223</sup> Therefore, states are generally required to implement UNSC resolutions in the domestic sphere.<sup>224</sup> In 2015, the High Court considered the applicability and status of UNSC resolutions. The UNSC had issued resolutions requiring states to co-operate with the International Criminal

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<sup>222</sup> P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev edn, Routledge, 1997) 54.

<sup>223</sup> I Detter, "The Effects of Resolutions of International Organizations" in J Makarczyk (ed), *Theory of International law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer 1996) 384.

<sup>224</sup> Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.



Tribunal for Rwanda (ICTR).<sup>225</sup> The ICTR prosecutor requested the Kenyan Government to assist in arresting one suspect. Consequently, the government applied for a court order in order to seize the property of the suspect. The High Court judge quoted a passage from a book on international criminal law and simply asserted that, as a member of the UN, Kenya was bound by and ought to implement UNSC resolutions.<sup>226</sup> On appeal, the court based its decision on the previous constitution since the case was filed prior to the enactment of the 2010 Constitution. The Court of Appeal stated that the UNSC resolutions were binding at the international level but that they could not be implemented domestically without enabling legislation.<sup>227</sup> This would also be the current position because UNSC resolutions are not covered in article 2(5) and (6) of the 2010 Constitution and there is no legislation on their implementation. Thus, UNSC resolutions cannot be directly applied in Kenyan courts and they would have to be implemented through new legislation or executive directives.

Similarly, the decisions of quasi-judicial bodies are of varied authority. Several UN human rights treaties create bodies that monitor state parties' compliance with their obligations under the treaties.<sup>228</sup> These bodies regularly consider state reports, issue concluding observations and recommendations on those reports, publish general comments on the interpretation of provisions of the parent treaties, and consider complaints from individuals concerning state violations of the parent treaties. While Kenya is a party to UN human rights treaties that create these quasi-judicial

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<sup>225</sup> UNSC Resolutions Nos. 955 of 1994, S/RES/955 (1994); 978 of 1995, S/RES/978 (1995); 1165 of 1998, S/RES/1165 (1998); 1503 of 2003, S/RES/1503 (2003) and 1534 of 2004, S/RES/1534 (2004).

<sup>226</sup> *Attorney General v Félicien Kabuga & 2 Others* [2008] eKLR (High Court, Nairobi) 3-4, referring to A Cassese, *International Criminal Law* (Oxford University Press, 2003).

<sup>227</sup> *Mukazitoni Josephine v Attorney General Republic of Kenya* [2015] eKLR (Court of Appeal, Nairobi) [86].

<sup>228</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted: 21 December 1965, entry into force: 4 January 1969) 660 UNTS 195 (hereinafter "ICERD"); International Covenant on Civil and Political Rights (adopted: 16 December 1966, entry into force: 23 March 1976) 999 UNTS 171 (hereinafter "ICCPR"); International Covenant on Economic, Social and Cultural Rights (adopted: 16 December 1966, entry into force: 3 January 1976) 993 UNTS 3 (hereinafter "ICESCR"); Convention on the Elimination of All Forms of Discrimination against Women (adopted: 18 December 1979, entry into force: 3 September 1981) 1249 UNTS 13 (hereinafter "CEDAW"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted: 10 December 1984, entry into force: 26 June 1987) 1465 UNTS 85 (hereinafter "CAT"); Convention on the Rights of the Child (adopted: 20 November 1989, entry into force: 2 September 1990) 1577 UNTS 3 (hereinafter "CRC"); Convention on the Rights of Persons with Disabilities (adopted: 24 January 2007, entry into force: 3 May 2008) 2515 UNTS 3 (hereinafter "CRPD"); International Convention for the Protection of All Persons from Enforced Disappearance (adopted: 20 December 2006, entry into force: 23 December 2010) 2176 UNTS 3 (hereinafter "ICPPED"); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted: 18 December 1990, entry into force: 1 July 2003) 2220 UNTS 3 (hereinafter "CMW") (The individual complaints procedure under the CMW is not yet in operation).



bodies,<sup>229</sup> Kenya has not accepted those bodies' individual complaints procedures. Thus, there are no decisions by the treaty bodies that Kenya is required to implement. Conversely, Kenya's state reports on its implementation of the relevant treaties have attracted several recommendations from the treaty bodies.<sup>230</sup> The recommendations on state reports and decisions on individual complaints by these treaty bodies are not considered binding on states but they have a strong persuasive value because of the bodies' mandate of interpretation of the parent treaties. In addition, the bodies have become very assertive in requiring state parties to comply with the bodies' decisions and recommendations.<sup>231</sup> Kenya's various state reports reveal that the government has complied with some recommendations by either enacting legislation or carrying out institutional reforms.

The African Commission on Human and Peoples' Rights (ACmHPR) was established under the African Charter to promote and protect human and peoples' rights, and to interpret the Charter.<sup>232</sup> Since the ACmHPR is a quasi-judicial body, states generally do not consider its decisions to be legally binding.<sup>233</sup> The ACmHPR has decided three communications against Kenya. In the *John D. Ouko* decision,<sup>234</sup> the complainant alleged that he had been arbitrarily arrested, tortured and forced to flee Kenya. The ACmHPR found that Kenya had violated the Charter, and ordered Kenya to allow the complainant to return to Kenya. While this decision would likely be implemented through an executive directive, it is not clear whether the government implemented this decision.<sup>235</sup>

In the *Nubian Community* decision,<sup>236</sup> the complainants alleged that the Kenyan Government discriminated against them when they applied for citizenship, that the government had denied

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<sup>229</sup> Kenya acceded to the ICERD on 13 September 2001; the ICCPR on 1 May 1972; the ICESCR on 1 May 1972; the CEDAW on 9 March 1984; and the CAT on 21 February 1997. Kenya ratified the CRC on 30 July 1990 and the CRPD on 19 May 2008. Kenya signed the ICPED on 6 February 2007 but has not ratified it. Kenya has not signed or ratified the CMW.

<sup>230</sup> For the state reports and concluding observations, see <<https://tbinternet.ohchr.org>> accessed 21 November 2019.

<sup>231</sup> F Viljoen and L Louw "State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004" (2007) 101 *American Journal of International Law* 1,14-17.

<sup>232</sup> African Charter (n 174) Articles 30 and 45.

<sup>233</sup> C Okoloise "Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights" (2018) 48(1) *African Human Rights Law Journal* 27, 31; African Commission on Human and Peoples' Rights, Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights 04 - 06 September 2018, Zanzibar, Tanzania, 2, 6 and 9, <<https://www.achpr.org/>> accessed 21 November 2019.

<sup>234</sup> *John D. Ouko v Kenya*, Communication No. 232/99 (2000).

<sup>235</sup> P Kamari-Mbote and M Aketch, *Kenya: Justice Sector and the Rule of Law* (Open Society Foundations 2011) 32.

<sup>236</sup> *The Nubian Community in Kenya v The Republic of Kenya*, Communication 317/2006 (2015).

them land rights, and that the government arbitrarily evicted them from their land. The ACmHPR ordered Kenya to secure the community's access to citizenship and land rights. Relatedly, in 2009, two NGOs had complained on behalf of the Nubian community<sup>237</sup> to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), another quasi-judicial body.<sup>238</sup> The complainants alleged that Kenya had discriminated against Nubian children by not issuing them with birth certificates. The ACERWC had ordered the Kenyan Government to ensure that Nubian children could acquire Kenyan citizenship, and access to the highest attainable standard of health and education. The decisions of the ACmHPR and the ACERWC could be implemented through an executive directive as there is already enabling legislation on citizenship, education and health. However, the government has not implemented the two decisions in full. In response to the ACmHPR decision, the Kenyan Government granted the Nubian community a title deed to 288 acres of land.<sup>239</sup> However, with regard to citizenship, the government is yet to take corrective measures. In fact, the Nubian community recently challenged the government's directive on compulsory registration to a new information management system, citing the government's non-compliance with the two decisions.<sup>240</sup>

In the *Endorois* decision,<sup>241</sup> the complainants alleged that the Kenyan Government had evicted them from their ancestral land. The ACmHPR recognised the Endorois as an indigenous community and recommended that Kenya facilitates the community's unrestricted access to their ancestral land. In addition, the ACmHPR recommended that Kenya pay compensation and royalties to the community. The Kenyan Government did not immediately act on the decision and the ACmHPR had to issue a resolution calling on the government to implement the decision.<sup>242</sup> The Kenyan Government responded by establishing a taskforce to review the impact of the

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<sup>237</sup> *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, No. 002/Com/002/2009 (2011).

<sup>238</sup> The ACERWC is established under Article 32 of the African Charter on the Rights and Welfare of the Child (adopted: 11 July 1990, entry into force: 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990). Kenya ratified the treaty on 25 July 2000.

<sup>239</sup> PSCU (2017) "President Uhuru Kenyatta issues title deed to Kibra Nubians", Daily Nation, 2 June 2017, <<https://www.nation.co.ke/>> accessed 21 November 2019.

<sup>240</sup> *Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)* [2019] eKLR, paras. 5 and 39.

<sup>241</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, Communication No. 276/03 (2010).

<sup>242</sup> Resolution Calling on the Republic of Kenya to Implement the Endorois Decision - ACHPR/Res.257(LIV)2013.

decision.<sup>243</sup> However, there was still no progress on implementing the decision and the issue came up before the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of All Forms of Racial Discrimination (CERD).<sup>244</sup> In order to implement this decision, Kenya may have to enact legislation on land rights of indigenous communities.

Apart from these decisions of quasi-judicial bodies, decisions of judicial bodies in cases where Kenya is not a party are also not legally binding. However, Kenyan courts make extensive use of such decisions when interpreting Kenyan law. Judges have often referred to decisions of the ACtHPR,<sup>245</sup> the European Court of Human Rights (ECtHR),<sup>246</sup> the Inter-American Court of Human Rights (IACtHR)<sup>247</sup> and the ICJ.<sup>248</sup> In addition, Kenyan courts have increasingly relied on treaties from other regions, primarily the American Convention on Human Rights (ACHR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>249</sup> The courts also rely on declarations, resolutions and guidelines of international organisations, the most common being by the ACmHPR and the UNGA.<sup>250</sup> In some instances, judges have referred to non-legally binding instruments without reference to any legally binding instruments.<sup>251</sup> Sometimes, this has been at the expense of African instruments. For example, in one case,<sup>252</sup> the judge relied heavily on UN guidelines on evictions but only mentioned in passing

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<sup>243</sup> Task force on the implementation of the decision of the African Commission on Human and Peoples' Rights contained in Communication No. 276/2003 (Centre for Minority Rights Development on behalf of Endorois Welfare Council vs. Republic of Kenya), Gazette Notice No. 6708 of 19 September 2014, *Kenya Gazette*, Vol. CXVI, No. 115, 2550.

<sup>244</sup> See, respectively, Concluding observations on the combined second to fifth periodic reports of Kenya, E/C.12/KEN/CO/2-5, 6 April 2016, para. C, No. 15; and Concluding observations on the fifth to seventh periodic reports of Kenya, CERD/C/KEN/CO/5-7, 12 May 2017, para. C, No. 20.

<sup>245</sup> *Eric Gitari v Non-Governmental Organisations Co-ordination Board and 4 others* [2015] eKLR (High Court, Nairobi) [81] and [83].

<sup>246</sup> *Mike Rubia and another v Moses Mwangi and 2 others* [2014] eKLR (High Court, Nairobi) [25].

<sup>247</sup> *Kenya National Commission on Human Rights and another v Attorney General and 3 others* [2014] eKLR (High Court, Nairobi) [42].

<sup>248</sup> *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] eKLR (Environment and Land Court, Nairobi) 19.

<sup>249</sup> For example, see *David Njoroge Macharia v Republic* [2011] eKLR (Court of Appeal, Nairobi).

<sup>250</sup> See *Ibrahim Sangor Osman and Others v Minister for Provincial Administration and Internal Security and Others* [2011] eKLR (High Court, Embu).

<sup>251</sup> *Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 Others* [2014] eKLR (High Court, Nairobi).

<sup>252</sup> *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others* [2013] eKLR (Industrial Court, Nairobi).

the ACmHPR guidelines on implementation of rights.<sup>253</sup> In addition, the judge did not consider the relevant ACmHPR resolution on forced evictions.<sup>254</sup>

The judges do not usually discuss whether these instruments are legally binding or not. It is therefore not always clear whether the judges are using the instruments as interpretive aids or whether the judges are under a mistaken belief that any international instrument is binding as international law.

## 9. Transnational judicial dialogue in Kenya

As can be seen, the courts have been more generous in their engagement with international law and other courts under the 2010 Constitution than under the previous constitution. This engagement with international law and other courts arises from a sense of membership to a community of global courts. The immediate former Chief Justice stated:

“Of course, commonwealth and international jurisprudence will continue to be pivotal to the development of Kenya’s jurisprudence.... The task of growing radical jurisprudence involves partnership between judiciaries....The jurisdictions of India, Namibia, Benin, South Africa and Colombia are great partners because of their similarity to Kenya’s Constitution. Decolonizing jurisprudence requires South-South collaboration and collective reflection.”<sup>255</sup>

This statement demonstrates that Kenya’s Constitution encourages the courts to interact with other courts. However, this interaction should be in the form of “dialogue” as opposed to simply “reception”. Therefore, Kenyan courts should be analyzing international and national norms, and developing a convergence of those norms. In line with this approach, the Supreme Court, when deciding on the scope of its Advisory Opinion role, referred to the practice of foreign and international courts on advisory opinions.<sup>256</sup>

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<sup>253</sup> Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, adopted on 24 October 2011.

<sup>254</sup> Resolution on the right to adequate housing and protection from forced evictions, ACHPR/Res.231(LII)2012.

<sup>255</sup> W Mutunga “Human rights states and societies: A reflection from Kenya” (2015) 2 Transnational Human Rights Review 63, 82-84.

<sup>256</sup> *Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR (Supreme Court, Nairobi) [82] – [84].

However, the approach followed by most judges when relying on international law does not quite reach the level of dialogue. The judges refer to international law for two main reasons. First, judges often rely on international law when trying to fill a gap in Kenyan law. For instance, in one case,<sup>257</sup> the Court of Appeal judges noted that the phrase “substantial injustice” was not defined in the constitution. Therefore, the judges said that they had to rely on the ICCPR and comments by the HRC. Similarly, in another case,<sup>258</sup> the judge relied on international law since there was no Kenyan law on evictions.<sup>259</sup> A similar approach was taken by the High Court when dealing with the right to education.<sup>260</sup> The judges noted that the phrase “basic education” was not defined in the 2010 Constitution or the *Children Act*. As a result, they resorted to general comments of the CESCR and the Committee on the Rights of the Child (CmRC).<sup>261</sup>

Second, judges rely on international law to reiterate a position in the domestic law. In a case dealing with the rights of refugees,<sup>262</sup> the court noted that the government’s actions were a threat to the principle of *non-refoulement* as encapsulated in section 18 of the *Refugees Act*.<sup>263</sup> Because the judge did not rely on state practice when asserting that *non-refoulement* had attained the status of customary international law and *jus cogens*, it appears he was merely reinforcing national law. In other cases, the courts held that the death penalty was not in conflict with Kenya’s obligations arising from the ICCPR.<sup>264</sup> The judges noted that Kenya had not ratified the Second Optional Protocol<sup>265</sup> to the ICCPR. on the abolition of the death penalty, but they did not consider whether the instrument reflected international consensus on the death penalty.

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<sup>257</sup> *David Njoroge Macharia v Republic* [2011] eKLR (Court of Appeal, Nairobi) 18.

<sup>258</sup> *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others* [2013] eKLR (Industrial Court, Nairobi).

<sup>259</sup> *ibid* [79].

<sup>260</sup> *Gabriel Nyabola v Attorney General and 2 others* [2014] eKLR (High Court, Nairobi).

<sup>261</sup> *ibid* [32] – [38].

<sup>262</sup> *Kituo Cha Sheria and others v Attorney General* [2013] eKLR (High Court, Nairobi) [71].

<sup>263</sup> Act No. 13 of 2006.

<sup>264</sup> *Joseph Njuguna Mwaura and 2 Others v Republic* [2013] eKLR (Court of Appeal, Nairobi); *Jackson Maina Wangui and Another v Republic* [2014] eKLR (High Court, Nairobi).

<sup>265</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (date of adoption: 15 December 1989, entry into force: 11 July 1991) 1642 UNTS 414.

## 10. Conclusion

The 2010 Constitution contains several provisions that expressly mention international law as a source of law in Kenya. In addition, the 2010 Constitution also directs that legislation and the actions of public officials should be in conformity with international law. Also, the constitution directs the state to ensure the implementation of international human rights law. Thus, *prima facie*, the 2010 Constitution is international law friendly. These express and generous provisions in the constitution have encouraged the courts to make more use of international law in their decisions.

However, as can be seen from the analysis above, the judiciary and the legislature are still unsure of the correct position regarding international law in Kenya. There are various opinions on whether the 2010 Constitution introduces customary international law or general principles of law under article 2(5). In addition, it is not clear whether article 2(6) refers to all ratified treaties, including those not domesticated prior to the enactment of the 2010 Constitution. Another unresolved issue is whether self-executing treaty provisions apply in Kenya without the need for further legislation. Also, the hierarchical status of international law in Kenya is not settled.

While the courts tend to make more use of international instruments and decisions, there is not much rigour in specifying the binding nature of those materials. In addition, the High Court often makes contradictory decisions but the Court of Appeal and Supreme Court have not resolved some of these decisions. The wide use of international and comparative law is evidence that Kenyan courts realise that they are part of a community courts. However, the manner in which Kenyan courts rely on international law does not contribute to a convergence of international and national norms.

## Chapter 4

### International law during the development of South Africa's legal system

#### 1. Introduction

The purpose of this chapter is to lay the context for discussing the extent to which South African courts have engaged in transnational judicial dialogue. First, this chapter will lay out the historical development of South Africa's legal system from the colonial period to present day. Second, this chapter will undertake an analysis of the status of international law in South Africa's legal system during those periods. Third, this chapter will highlight the implications of that status on the possibilities of South African courts engaging in transnational judicial dialogue.

#### 2. South Africa's legal system in the pre-colonial period

South Africa, unlike Kenya, did not experience an early settlement and conquest by Arabs before the advent of Europeans. The San and Khoikhoi, who are descendants of the ancient inhabitants of southern Africa, traversed this region for several thousands of years.<sup>1</sup> The Khoisan were soon followed by Bantu-speaking people from central and eastern Africa around the third century CE and onwards.<sup>2</sup> Arab and Persian traders, who went as far as present-day Mozambique in the 14<sup>th</sup> century, were the earliest recorded visitors to the southern African coast.<sup>3</sup> In 1488, Portuguese sailors went round a cape at the southern tip of Africa.<sup>4</sup> The Portuguese initially named this cape the Cape of Storms but they later renamed it the Cape of Good Hope.<sup>5</sup> From then on, the Portuguese were followed by the English, Dutch, French and Scandinavians, who all sailed around the Cape in their voyages to Asia.<sup>6</sup> These Europeans, preoccupied with monopolising the Indian

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<sup>1</sup> RB Beck, *The History of South Africa* (2nd edn, Greenwood 2013) 18-20. The San and Khoikhoi are often referred to collectively as Khoisan because of their shared cultural, ethnic and linguistic ties.

<sup>2</sup> *ibid* 24-25.

<sup>3</sup> EH Warmington, "Africa in Ancient and Medieval Times" in EA Walker (ed), *The Cambridge History of the British Empire: Vol. VIII, South Africa, Rhodesia and the High Commission Territories* (Cambridge University Press 1963) 74-76. Herodotus' account of the circumnavigation of Africa by the Phoenicians has been discredited (see AB Lloyd "Necho and the Red Sea: Some Considerations" (1977) 63 *Journal of Egyptian Archaeology* 142, 148-154).

<sup>4</sup> EH Warmington (n 3) 81-82.

<sup>5</sup> RB Beck (n 1) 34.

<sup>6</sup> *ibid*.



Ocean trade, were more interested in establishing settlements in eastern Africa than at the Cape.<sup>7</sup> However, the Europeans occasionally traded with the inhabitants of the southern African coast.<sup>8</sup>

Generally speaking, the society during this period was fragmented and as such, there was no unified legal system. The San lived in small bands of families with each band headed by a nominal chief without institutionalised authority.<sup>9</sup> These bands lived in isolation from each other, leading to cultural heterogeneity and a lack of an overarching group identity.<sup>10</sup> Conversely, the Khoikhoi were culturally homogenous and lived in patrilineal clans.<sup>11</sup> Some of the clans would come together under a chiefdom and the chief ruled with the assistance of a council of clan heads.<sup>12</sup> The other African communities in the area were organised in small monarchical political units.<sup>13</sup> These communities could be culturally grouped as Sotho (Pedi, southern Sotho and Tswana) and Nguni (Mfengu, Mpondo, Ndebele, Ngoni, Swazi, Thembu, Xhosa and Zulu).<sup>14</sup> One of the characteristics that these communities had in common was that the chief ruled with the aid of councillors and officials.<sup>15</sup> In addition, decisions were made through discussion and consent.<sup>16</sup> The councillors would sometimes sit either to decide a dispute or to recognise a new customary law.<sup>17</sup> Despite these similarities, the communities lived apart and the differences between them meant that there was no compelling reason for their union as a single nation.

During this period, the nascent international law in the Western European tradition was primarily concerned with mercantilism.<sup>18</sup> European rulers endorsed maritime discovery on the additional basis that the European merchants would evangelise the non-European world.<sup>19</sup> European states

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<sup>7</sup> M Newitt, *A History of Mozambique* (C. Hurst & Co. Publishers 1995) 167-175.

<sup>8</sup> A Wilmot and JC Chase, *History of the Colony of the Cape of Good Hope from its discovery to the year 1819 and from 1820 to 1868* (J.C. Juta 1869) 10 ff.

<sup>9</sup> RB Beck (n 1) 19.

<sup>10</sup> R Elphick and VC Malherbe “The Khoisan to 1828” in R Elphick and H Giliomee (eds), *The Shaping of South African Society, 1652-1840* (Wesleyan University Press 2014) 5.

<sup>11</sup> *ibid* 6.

<sup>12</sup> RB Beck (n 1) 22.

<sup>13</sup> R Ross, *A Concise History of South Africa* (2nd edn, Cambridge University Press 2008) 16.

<sup>14</sup> TRH Davenport. and C Saunders, *South Africa: A Modern History* (5th edn, Macmillan Press, 2000) 57.

<sup>15</sup> *ibid* 72

<sup>16</sup> *Ibid* 73

<sup>17</sup> *ibid* 74

<sup>18</sup> SC Neff “A Short History of International Law” in MD Evans (ed), *International Law* (Oxford University Press 2010) 7-8.

<sup>19</sup> A Wilmot and JC Chase (n 8) 5.

often entered into treaties of friendship, commerce and navigation with each other in order to facilitate trade between their overseas territories.<sup>20</sup> Generally, Europeans considered that their relations regulated by international law. Conversely, Europeans did not relate with non-Europeans on the basis of international law but rather the natural law.<sup>21</sup> As mentioned in chapter 2, under natural law, non-Europeans enjoyed a subordinate status. These circumstances justified the punishment of non-Europeans for impeding trade or for offending Europeans.<sup>22</sup> On several occasions, the offensive conduct of European sailors towards the indigenous inhabitants at the southern African resulted in bloody battles.<sup>23</sup>

### **3. Development of a legal system under Dutch colonisation**

In contrast to Kenya, South Africa was colonised by two European powers. The Dutch colonised the Cape first and they imposed their own laws on the territory. They were followed by the British more than a century later, who also imposed their own laws to the territory. However, the British retained the common law (Roman-Dutch law) and this affected South Africa's legal tradition. In addition, the interaction between Roman-Dutch law and English law influenced the courts' interaction with international law

The Dutch were the only Europeans that established a temporary settlement at the Cape that eventually became permanent.<sup>24</sup> From around 1653, the foreign policy of the Dutch Republic was concentrated on securing the commercial interests of the Republic's merchants.<sup>25</sup> When the Spanish began to obstruct Dutch ships from obtaining goods from the Iberian ports, this compelled the Dutch to source for the goods from the Orient and the New World.<sup>26</sup> Since the Dutch were more concerned with commercial interests than with territorial sovereignty, the treaties that the Dutch concluded with the natives varied. The Dutch entrenched their sovereignty where the non-

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<sup>20</sup> SC Neff (n 18) 7.

<sup>21</sup> *ibid* 7-8.

<sup>22</sup> *ibid* 6-7.

<sup>23</sup> A Wilmot and JC Chase (n 8) 11-12, 17-19.

<sup>24</sup> The English, French and Portuguese had made attempts at settling at Robben Island and Table Bay but these were not successful: *ibid* 19, 24-25, 27.

<sup>25</sup> CG Roelofsen "The Netherlands until 1813: International aspects" in HF Van Panhuys and others (eds), *International Law in the Netherlands, Vol. I* (TMC Asser Institute 1978) 28.

<sup>26</sup> PJ Drooglever "The Netherlands colonial empire: Historical outline and some legal aspects" in *ibid* 104.

European ruler was weak or where they could not obtain essential goods anywhere else.<sup>27</sup> However, where the ruler was powerful the Dutch treaties were more commercial.<sup>28</sup> Thus, the treaties that the Dutch concluded with Africans were more discriminative of the Africans than those concluded with Arab and Asian rulers.<sup>29</sup>

As mentioned in chapter 2, European states formed trading companies that were granted extensive sovereign rights over non-European territories. Of relevance to South Africa was the Dutch East India Company.<sup>30</sup> In 1652 three ships belonging to the Dutch East India Company landed at the Cape and established a fortified base.<sup>31</sup> Initially, the Company's intention was not to encourage settlement beyond Table Bay. However, an increased demand for supplies for its ships led to the Company allowing some retired employees to set up farms at the Cape.<sup>32</sup> The settler farmers (*free burghers*) were only allowed to sell their produce to the Company at low fixed prices.<sup>33</sup> Labour for the farms was provided by slaves that were imported from other parts of Africa and Asia.<sup>34</sup> As the colony grew, settler farmers moved inland and dispossessed the local inhabitants of their land.<sup>35</sup> The Company entered into agreements of land cession and peace with the indigenous inhabitants.<sup>36</sup> However, the dominant European ideology at the time did not consider these agreements to be governed under international law as non-Europeans were forcefully denied international personality.<sup>37</sup> In fact, a Dutch Commander in Mauritius, another refreshment station, stated that such agreements were more of value as between the Dutch and other Europeans than with the Africans.<sup>38</sup>

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<sup>27</sup> *ibid* 118.

<sup>28</sup> *ibid*.

<sup>29</sup> *ibid* 122.

<sup>30</sup> The *Generale Vereenigde Nederlandsche Ge-Octroyeerde Oost-Indische Compagnie* was an amalgamation of several Dutch trading companies. It was granted a trading and shipping monopoly between the east of the Cape of Good Hope and the west of the Straits of Magellan: C Nierstrasz, *In the Shadow of the Company: The Dutch East India Company and its Servants in the Period of its Decline (1740 – 1796)* (Brill 2012) 74.

<sup>31</sup> CH Feinstein, *An Economic History of South Africa: Conquest, Discrimination and Development* (2005) 22.

<sup>32</sup> *ibid* 23.

<sup>33</sup> RB Beck (n 1) 35.

<sup>34</sup> *ibid* 28.

<sup>35</sup> R Ross (n 13) 23-27.

<sup>36</sup> A Wilmot and JC Chase (n 8) 87, 98; E Fagan "Roman-Dutch Law in its South African Historical Context" in R Zimmermann. and DP Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press 1996) 36-37.

<sup>37</sup> GW Gong, *The Standard of 'Civilization' in International Society* (Oxford University Press 1984) 53-57; J Muldoon, *Popes, Lawyers and Infidels: The Church and Non-Christian World, 1250-1550* (University of Pennsylvania Press 1979) 19.

<sup>38</sup> PJ Drooglever (n 26) 122, fn 84.

The Cape colony was administered by the Company which was more focussed on trade with Asia.<sup>39</sup> The Cape administration comprised the Commander (later Governor) and the Council.<sup>40</sup> Initially, the Council exercised administrative and judicial functions but it was later split into a Council of Policy and Council of Justice.<sup>41</sup> The Council of Justice (*Raad van Justitie*) was established in 1656 and was composed of untrained laymen that is, the Commander (later called the Governor), members of the Council of Policy and burgher councillors.<sup>42</sup> In 1682, a court of petty cases was established as well as inferior courts headed by *landdrosts* and *heemraden* (bailiffs and minor judicial officials). Appeals from these courts went to the *Raad van Justitie* while appeals from the judgments of the *Raad van Justitie* went to the High Court in Batavia.<sup>43</sup> The Cape administration's jurisdiction was initially exercised over only the Company's employees.<sup>44</sup> The Company considered the indigenous inhabitants as aliens and consequently not subject to the Company's jurisdiction.<sup>45</sup> However, within time, the Company began exercising some form of control over the indigenous inhabitants by appointing some of them as captains and by punishing delinquencies.<sup>46</sup> Eventually, the indigenous inhabitants were brought under Dutch jurisdiction but not as foreigners who would have enjoyed the protection of international law.<sup>47</sup> Some of the Cape farmers (*trekboers*) migrated eastwards in order to escape the increasingly unfair Company rule.<sup>48</sup>

When establishing colonies, the Company's Commanders were instructed to apply Roman-Dutch law to the territory.<sup>49</sup> Roman-Dutch law is a blend of medieval Dutch law (mainly of Germanic origin) and the Roman law of Justinian as received in the Netherlands in the fifteenth and sixteenth centuries when the German Reich and its feudal dependencies adopted Roman law as a system.<sup>50</sup>

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<sup>39</sup> HR Hahlo and E Kahn, *The South African Legal System and Its Background* (Juta & Company 1973) 568.

<sup>40</sup> *ibid* 568 – 569.

<sup>41</sup> *ibid* 568.

<sup>42</sup> AC Cilliers, C Loots and HC Nel, *The civil practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edn, Juta 2009) 3.

<sup>43</sup> *ibid*.

<sup>44</sup> CG Van der Merwe and JE Du Plessis, *Introduction to the Law of South Africa* (Kluwer Law International 2004) 9.

<sup>45</sup> *ibid*.

<sup>46</sup> RB Beck (n 1) 38; A Wilmot and JC Chase (n 8) 97-98.

<sup>47</sup> E Fagan (n 36) 38.

<sup>48</sup> R Ross (n 13) 42.

<sup>49</sup> AB Edwards, *The History of South African Law – An Outline* (Butterworths 1996) 65-66.

<sup>50</sup> HR Hahlo and E Kahn (n 39) 329.

The Netherlands comprised of seven provinces but the Company applied the law of Holland by virtue of Holland's dominant position in the Dutch Republic.<sup>51</sup> During the evolution of Roman-Dutch law in Holland, many Roman-Dutch jurists did not distinguish between international law and municipal law, and they applied international law rules domestically.<sup>52</sup> Dutch courts also applied customary international law and international agreements as a customary law rule before legislative authorisation to do so came in the 19<sup>th</sup> century.<sup>53</sup> For example, in 1858, the Dutch Supreme Court upheld a decision of the lower court in applying customary international law despite lack of legislative authorisation.<sup>54</sup> Similarly, in 1919, the Dutch Supreme Court reiterated the automatic incorporation of treaties into the domestic legal order.<sup>55</sup> In addition, some Dutch advocates and judges often relied on opinions of foreign jurists and decisions from foreign courts.<sup>56</sup> In this way, the courts in the Netherlands engaged in an early form of dialogue with courts in other states.

It is difficult to determine the extent to which the courts at the Cape relied on international law during Dutch rule. The earliest Dutch visitors to the Cape had in their possession the works of Roman-Dutch jurists.<sup>57</sup> In addition, the availability of Dutch literature at the Cape from the 18<sup>th</sup> century onwards significantly contributed to the adoption of Roman-Dutch law at the Cape.<sup>58</sup> In the course of administering the territory, the Cape's Councils passed local legislation and judgments but these did not make substantial changes to the Roman-Dutch law applied to the Cape.<sup>59</sup> The few advocates who practised in the Cape during this period were well versed in the Roman-Dutch law.<sup>60</sup> They often quoted extensively from the works of Roman-Dutch jurists, as

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<sup>51</sup> AB Edwards (n 49) 66.

<sup>52</sup> AJGM Sanders "The Applicability of Customary International Law in Municipal Law – South Africa's Monist Tradition" (1977) 40 *Tydskrif vir Hedensdaagse Romeins-Hollandse Reg* 147, 147 – 148.

<sup>53</sup> L Erades "International Law and the Netherlands Legal Order" in HF Van Panhuys and others (eds), *International Law in the Netherlands, Vol. III* (TMC Asser Institute 1980) 383, 385-386.

<sup>54</sup> *ibid* 382, citing W.10022; NJ 1917 p. 13.

<sup>55</sup> A Nollkaemper "The Netherlands" in D Sloss, and D Jinks (eds) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009) 331-332 citing Supreme Court, 3 March 1919, NJ 1919, 371.

<sup>56</sup> JE Scholtens "Early Roman-Dutch Law" [1959] *Acta Juridica* 74, 77-78.

<sup>57</sup> JTh De Smidt "Roman-Dutch Authorities at the Cape in the Eighteenth Century" (1996) 2(2) *Fundamina* 175, 179.

<sup>58</sup> CG Van der Merwe and others "The Republic of South Africa" in VV Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn, Cambridge University Press 2012) 96.

<sup>59</sup> HR Hahlo and E Kahn (n 39) 573-575.

<sup>60</sup> JTh De Smidt (n 57) 180.

well as writers from different parts of the Netherlands and other European countries.<sup>61</sup> The library of the *Raad van Justitie* was well stocked with these books.<sup>62</sup> Unfortunately, the records of the Cape courts were brief; they only indicated the decision reached and whether it was by vote.<sup>63</sup> Whereas the advocates quoted extensively from Roman-Dutch authorities, the judges did not record their reasoning and whether they relied on these authorities.<sup>64</sup> This makes it difficult to discern the extent to which the courts considered Roman-Dutch authorities and by extension international law. In theory, while the Cape was under Dutch rule, international law was directly applicable by the courts as part of the common law without the need for statutory incorporation.<sup>65</sup>

#### 4. Development of the legal system under British colonisation and the Boer Republics

##### i. Cape

In 1795, the British occupied the Cape for the first time in order to protect the sea route to India against the French.<sup>66</sup> A number of administrative changes were made to the Cape courts, and some features of the trial process were made less barbarous.<sup>67</sup> However, the composition of the judiciary remained largely unchanged, as did the applicable law (Roman-Dutch law) and legal procedures.<sup>68</sup> The occupation did not last long as Britain made a truce with the French in 1802, and agreed to restore the Cape to the Netherlands.<sup>69</sup> The truce was broken in 1803 and the British again took control of the Cape in 1806.<sup>70</sup> The British established a government in the Cape Colony and British settlers increased from 1820 onwards.<sup>71</sup> The British Parliament abolished slavery at the Cape in 1808 and in 1833 it enacted the Emancipation Act, thereby freeing all slaves in the British

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<sup>61</sup> I Farlam “The old authorities in South African practice” (2007) 75(4) *Tijdschrift voor Rechtsgeschiedenis* 399, 399-400 quoting GG Visagie, *Regspleging en Reg aan die Kaap van 1652 tot 1806* (Juta 1969) 70-72.

<sup>62</sup> *ibid* 400.

<sup>63</sup> AB Edwards (n 49) 73.

<sup>64</sup> *ibid*.

<sup>65</sup> J Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) 49.

<sup>66</sup> J Dugard, *Human Rights and the South African Legal Order* (Princeton University Press 1978). 5.

<sup>67</sup> HR Hahlo and E Kahn (n 39) 576.

<sup>68</sup> JP Van Niekerk “Judge John Holland and the Vice-Admiralty Court of the Cape of Good Hope, 1797-1803: Some Introductory and Biographical Notes (Part 1)” (2017) 23(2) *Fundamina* 176, 177.

<sup>69</sup> The Batavian Republic that had replaced the Republic of the Seven Provinces appointed a governor for the Cape, who together with a commissioner-general, made the central and local government and administration more democratic: *ibid* 569 fn 23).

<sup>70</sup> RB Beck (n 1) 55.

<sup>71</sup> R Ross (n 13) 37-38.

Empire.<sup>72</sup> Meanwhile, the Cape Governor passed a law in 1828 removing most discriminatory provisions against indigenous Africans and free coloured people.<sup>73</sup> In 1846, the Cape Governor was appointed as the High Commissioner for South Africa in order to represent the Crown in the sub-continent.<sup>74</sup> The Cape colony gained representative government in 1853 and responsible government in 1872.<sup>75</sup>

Between 1806 and 1820, Britain did not carry out assimilation of the colony but treated the colony as an outpost of the British Empire.<sup>76</sup> The British government also continued to enforce the law prevailing at the time, which was the Roman-Dutch law.<sup>77</sup> This was attributable to the British constitutional practice that until the king altered the laws of a conquered territory, the prevailing laws continued in force.<sup>78</sup> In addition, the British preferred, like in Ceylon and British Guiana, to gradually alter the law.<sup>79</sup> This was affirmed in the First Charter of Justice of 1827 and the Second Charter of Justice of 1832, which directed the courts to apply the law that was then in force in the colony.<sup>80</sup> However, after 1820, there was a gradual intrusion of English laws and institutions, and English was proclaimed as the official language of the colony.<sup>81</sup> A number of administrative changes were made to the courts, and some features of the trial process were abolished because they were repugnant to the law of England.<sup>82</sup> As a result of the two charters, the *Raad van Justitie* was replaced with a Supreme Court comprising professional judges while the judicial functions of the *landdrosts* and *heemraden* were given to resident magistrates.<sup>83</sup> The judges and advocates had to be members of the bar of either the Cape, England, Ireland or Scotland. In 1864 and 1880, two

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<sup>72</sup> RB Beck (n 1) 55, 62.

<sup>73</sup> Ordinance 50, *inter alia*, gave to the Khoikhoi the right to own land, removed the requirement of carrying passes, proscribed the administering of punishment for presumed vagrancy, and empowered the Khoikhoi when entering into labour contracts (T Keegan, *Colonial South Africa and the Origins of the Racial Order* (Leicester University Press 1996) 103-104.)

<sup>74</sup> GW Eybers *Select Constitutional Documents Illustrating South African History: 1795-1910* (George Routledge & Sons 1918) xli-xlii.

<sup>75</sup> *ibid* xxx.

<sup>76</sup> AB Edwards (n 49) 77.

<sup>77</sup> J Dugard (n 65). 49.

<sup>78</sup> E Fagan (n 36) 55-56, quoting *Campbell v Hall* (1774) 1 Cowp 204 at 209, and *Calvin* (1608) 7 Coke's Reports 1.

<sup>79</sup> CG Van der Merwe and others (n 58) 105.

<sup>80</sup> HR Hahlo and E Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (Stevens & Sons 1960) 17.

<sup>81</sup> CG Botha "The Early Influence of the English Law upon the Roman-Dutch Law in South Africa" (1923) 40 South African Law Journal 396; JW Wessels, *History of the Roman-Dutch Law* (African Book Company 1908) 386.

<sup>82</sup> HR Hahlo and E Kahn (n 39) 576.

<sup>83</sup> AC Cilliers, C Loots and HC Nel (n 42) 3.



divisions of the Supreme Court, Eastern District and Griqualand, were established respectively. Appeals from these two divisions went to the Cape Supreme Court and finally to the Judicial Committee of the Privy Council in England.<sup>84</sup>

The first publication of law reports with regard to the Cape was done in 1854 and the reports covered cases from 1828.<sup>85</sup> With the advent of law reporting, one would have expected that there would be an increase in the courts' reference to previous decisions. Remarkably, the courts were not consistent in their explicit consideration of various authorities. In some instances, the courts explicitly discussed the authorities that they had relied on in their judgment. Conversely, in other cases the courts did not explicitly refer to any authorities. For example, in *Queen v Berg*,<sup>86</sup> the accused was indicted for aiding a Portuguese sailor to escape trial for slavery, contrary to a statute that domesticated the treaty between Britain and Portugal on suppression of slavery. The accused cited English decisions and writers in challenging the variance of the language used in the charge with that of the statute. The prosecutor cited Dutch, English and Scottish writers, and English decisions. The court held that the anti-slavery treaty had been domesticated and consequently the court's duty was to determine whether the statute, not the treaty, had been breached.<sup>87</sup> The judges, albeit briefly, referred to Dutch and English writers and English decisions on interpretation of penal statutes.<sup>88</sup>

One would have expected that the courts would have over time increased their explicit consideration of authorities. The converse was true as demonstrated in a case decided in 1895. In *Cook Brothers v The Colonial Government*,<sup>89</sup> the plaintiffs claimed that a paramount chief had made concessions of mineral rights in his territory to them. After the British annexed the territory to the Cape Colony, and refused to acknowledge the concessions, the plaintiffs sued the Cape government. The plaintiffs quoted an American writer on international law as well as Cape and

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<sup>84</sup> SD Girvin "The architects of the mixed legal system" in R Zimmermann and DP Visser (eds) (n 36) 96. Appeals from the territories of South Africa and South-West Africa to the Privy Council were removed in 1950 by the *Privy Council Appeals Act*, Act No. 16 of 1950.

<sup>85</sup> JP Van Niekerk "An introduction to South African law reports and reporters, 1828 to 1910" (2013) 19(1) *Fundamina* 106, 111, fn 28. Prior to 1910, law reporting was largely through the private initiative of judges and lawyers compiling decisions for own use: *ibid.*

<sup>86</sup> (1851) 1 Searle 93.

<sup>87</sup> *ibid* 103.

<sup>88</sup> *ibid* 103-104.

<sup>89</sup> (1895) 12 SC 86; 5 CTR 107 140.

English decisions on a similar issue.<sup>90</sup> The defendant's advocates quoted a decision from the Orange Free State on an almost similar issue.<sup>91</sup> The judge, without citing any authorities but quoting a statement often made by the U.S. Chief Justice Marshall, held that the new government took over the chief's obligations but that since the chief could not enforce those obligations, then the new government was not bound by them.<sup>92</sup>

Similar to the period under the Dutch, during the early period of British colonisation, the courts did not give reasons for their decisions. It is difficult therefore to determine how the courts relied on the Roman-Dutch law.<sup>93</sup> The available material, in the absence of law reports prior to 1828, shows that the legal practitioners extensively cited Roman and Roman-Dutch jurists, as well as a few English and European writers.<sup>94</sup> For example, in *Smith v Davis*,<sup>95</sup> a British ship anchored at sea drifted and collided with another British ship. The plaintiff cited Dutch and English authorities, and English decisions. To that end the defendant cited an English authority. At the outset the court declared that the applicable law was the Roman-Dutch law. The court briefly compared both the English and Roman-Dutch laws on ship collisions, but decided the case on Roman-Dutch principles.<sup>96</sup>

The Constitution of the Cape of 1852 did not mention international law.<sup>97</sup> Therefore, the application of international law in the Cape would have been through the common law that is, Roman-Dutch law. As discussed earlier, the Roman-Dutch law treated international law and municipal law as part of the same system such that international law was applicable in the municipal domain without the requirement for domestication. Theoretically, British occupation of the Cape would have brought an added monist tradition, under which customary international law

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<sup>90</sup> *ibid* 92-93.

<sup>91</sup> *ibid* 94.

<sup>92</sup> *ibid* 95, 97. The appeal was dismissed by the Judicial Committee of the Privy Council while citing its previous decisions: *Cook v Sprigg* [1899] AC 572; 9 CTR 701.

<sup>93</sup> L Van Huyssteen "Some Notes on Roman-Dutch Law at the Cape under British Rule - Evaluation of a Few General Principles of the Law of Contract as Applied by the Court of Justice between 1806 and 1827" (1994) 62 *Tijdschrift voor Rechtsgeschiedenis* 357, 357, fn 4.

<sup>94</sup> NJJ Olivier "Developments in the Cape Libel Law 1806-1828" (1996) 2(2) *Fundamina* 204, 205.

<sup>95</sup> (1878) 8 *Buch* 66.

<sup>96</sup> *ibid* 69-74. Following this case, the Cape government passed Act No. 8 of 1879 that directed the Supreme Court to apply English law in cases concerning maritime and shipping, in the same way as the Vice-Admiralty Court did (JP Van Niekerk (n 85) 184)

<sup>97</sup> For the Constitution, see GW Eybers (n 74) 45-55.

formed part of the English common law.<sup>98</sup> Therefore, following the Roman-Dutch and English common law traditions, customary international law was applicable in the colony as part of the common law. In the few reported cases touching on international law, the courts did not discuss the relationship between international law and municipal law but went ahead to apply customary international law as if it was part of municipal law.<sup>99</sup> However, the application of customary international law was subject to some qualifications emanating from British tradition. For example, the courts would apply legislation over customary international law when there was a conflict between the two.<sup>100</sup> Still, the courts would presume that the legislature did not intend to derogate from customary international law.<sup>101</sup>

On the other hand, the applicability of treaties to the Cape would have depended on their domestication. For instance, the British enacted the Extradition Acts of 1870<sup>102</sup> and 1873<sup>103</sup> in order to domesticate extradition treaties concluded with other states. The Cape legislature likewise, in 1877, enacted an Act<sup>104</sup> to give effect to those imperial Acts since the respective extradition treaties were applicable to British colonies, including the Cape.<sup>105</sup>

The Cape also entered into various agreements with other colonies as well as with the Boer Republics. For instance, the Cape concluded extradition agreements with the Orange Free State and the South African Republic.<sup>106</sup> The Cape enacted legislation in order to give effect to these extradition agreements.<sup>107</sup> In addition, the Cape entered into a customs union agreement with the Orange Free State.<sup>108</sup> Also, the Cape, Natal and South African Republic entered into a telegraph

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<sup>98</sup> 4 BI Comm. 67.

<sup>99</sup> RP Schaffer “The Inter-relationship between Public International Law and the Law of South Africa” (1983) 32 International Comparative Law Quarterly 277, 296-297, referring to *Ncumata v Matwa and Others* (1882) 2 EDC 272, 279.

<sup>100</sup> AJGM Sanders “The Applicability of Customary International Law in South African Law – the Appeal Court Has Spoken” (1978) 11(2) Comparative and International Law Journal of Southern Africa 198, 199, referring to *Ncumata v Matwa and Others* (1882) 2 EDC 272, 279.

<sup>101</sup> *ibid* referring to *Irvine v Hughes* (1880-1881) 1 EDC 156, 173.

<sup>102</sup> Cape of Good Hope (Colony), *South African Treaties, Conventions, Agreements and State Papers subsisting on the 1<sup>st</sup> day of September 1898* (WA Richards & Sons 1898) 256-265.

<sup>103</sup> *ibid* 265-267.

<sup>104</sup> *ibid* 279-280.

<sup>105</sup> JA Kalley “A chronological and subject analysis of South Africa's multilateral and bilateral treaties, 1806 – 1979” (MA dissertation, University of the Witwatersrand 1985) 24-25.

<sup>106</sup> *ibid* 25.

<sup>107</sup> Cape of Good Hope (Colony) (n 102) 280-284.

<sup>108</sup> *ibid* 238-243.

convention in 1886. Moreover, the Cape also entered into a postal union convention with Natal, the Orange Free State and the South African Republic in 1897.<sup>109</sup> Similarly, the Cape entered into agreements on the administration of the railway connecting with the Orange Free State<sup>110</sup> and the South African Republic.<sup>111</sup>

There are very few cases that touched on the applicability of treaties in the Cape during this period. The issue arose in *Greenberg v Williams, N.O.*,<sup>112</sup> where a resident of Griqualand (located in the Cape Colony) was summoned as a witness to a criminal trial in the Orange Free State. The summons had been countersigned by the Griqualand magistrate as required under the 1854 Bloemfontein Convention between the British and the Orange Free State. While the judges admitted that the treaty had not been domesticated, two of the judges decided that the magistrate had been correct in adhering to the treaty's requirement.

## ii. Natal

The British disruption to the socio-political set-up at the Cape drove some of the Dutch-speaking frontier farmers to escape further inland in what is known as the Great Trek.<sup>113</sup> In 1836, the Trekkers (*voortrekkers*) settled at Pietermaritzburg. There was already a small British settlement at Port Natal (now Durban) but this settlement had no connection with the British Government.<sup>114</sup> The Trekkers formed a people's council (*Burgerraad*) which doubled as a court (of *landdrost* and *heemraden*) as well as a council of policy. The following year, they adopted a constitution (*grondwet*) that established a people's representative council (*Volksraad*).<sup>115</sup> The British settlers in the area eventually submitted to the *Volksraad* when the British troops left Port Natal in 1839.<sup>116</sup> However, only the Dutch-speaking Europeans that had trekked from the Cape enjoyed full citizenship.<sup>117</sup> Other Trekkers settled at Winburg and Potchefstroom (in areas that in time would

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<sup>109</sup> *ibid* 101-141.

<sup>110</sup> *ibid* 155-165.

<sup>111</sup> *ibid* 165-170.

<sup>112</sup> (1885) 3 HCG 336.

<sup>113</sup> D Fairbridge, *A History of South Africa* (Oxford University Press 1918) 205-208.

<sup>114</sup> GW Eybers (n 74) xlv.

<sup>115</sup> HJ Mandelbrote "Constitutional Development, 1834-1858" in AP Newton and EA Benians (eds), *The Cambridge History of the British Empire: Volume VIII (South Africa, Rhodesia and the High Commission Territories)* (Cambridge University Press 1963) 384.

<sup>116</sup> GW Eybers (n 74) xlvii-xlviii.

<sup>117</sup> L Thompson, *A History of South Africa* (Yale University Press 2000) 92.

form part of the Republic of the Orange Free State and the South African republic respectively), each with a subordinate legislature (*Adjunkraad*) whose decisions had to be submitted to the Natal *Volksraad*.<sup>118</sup>

The Republic of Natalia was somewhat a *de facto* state as its *Volksraad* exercised legislative, executive and judicial functions, and it is said that it could enter into treaties and alliances.<sup>119</sup> However, there do not appear to be official records of any such treaties. The closest reference to a particular treaty was a claim made in 1842 by the Trekkers that they had concluded a treaty of protection with the Netherlands.<sup>120</sup> In fact, no such treaty had been concluded but the Trekkers made the claim in order to ward off the British from annexing the territory.<sup>121</sup> The Trekkers rejected the British laws applied at the Cape and instead applied the Roman-Dutch law that had existed prior to the British occupation of the Cape.<sup>122</sup> Some of the judges had at their disposal copies of the works of Roman-Dutch jurists and of other European writers.<sup>123</sup> Indeed, the *Volksraad*, which exercised judicial and legislative functions, quoted these books when deciding cases.<sup>124</sup> Therefore, theoretically speaking, international law would have been applied as part of the municipal law. Still, the Trekkers applied some elements of English law, such as trial by jury, and the judges consulted English and Cape decisions.<sup>125</sup> However, it is unlikely that this eclectic application of English elements would have modified the application of international law.

The independent status of Natal lasted only three years or so before British colonisation and Natal was never explicitly recognized as a republic by any state.<sup>126</sup> The British annexed Natal as a protectorate in 1843 and the British official that oversaw the annexation stipulated that all races were to equally enjoy the protection of the law.<sup>127</sup> From 1844 onwards, Natal was administered as

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<sup>118</sup> E Kahn “The History of the Administration of Justice in the South African Republic” (1958) 75 *South African Law Journal* 294, 295.

<sup>119</sup> GW Eybers (n 74) xlvii; HJ Mandelbrote (n 115) 384.

<sup>120</sup> GM Theal, *History of the Boers in South Africa* (Swan Sonnenschein, Lowrey & Co. 1887) 157.

<sup>121</sup> *ibid* 159.

<sup>122</sup> E Fagan (n 36) 55.

<sup>123</sup> I Farlam (n 61) quoting HB Thom, *Die lewe van Gert Maritz* Nationale Pers 1974) 116.

<sup>124</sup> *ibid* 400, quoting GS Preller, *Voortrekkerwetgewing: Notule van die Natalse Volksraad 1839-1845* (Van Schaik 1924) 275-276.

<sup>125</sup> GW Eybers (n 74) xlvii; CG Van der Merwe (n 58) 97.

<sup>126</sup> GW Eybers (n 74) xlvii-xlix.

<sup>127</sup> L Thompson (n 117) 93.

a District of the Cape Colony.<sup>128</sup> In 1846, the British established a District Court and resident magistrates' courts for the Europeans and native tribunals for the Africans.<sup>129</sup> In 1856, Natal became a colony and it was granted representative government. The constitution, enacted in 1856, did not restrict voting rights on the basis of race but this was gradually changed through legislation.<sup>130</sup> A year after Natal became a colony the British transformed the District Court into a Supreme Court with a Chief Justice and two judges.<sup>131</sup> Appeals from the District (and later Supreme Court) went to the Cape Supreme Court and finally to the Privy Council in England.<sup>132</sup> In 1893, the colony was granted responsible government.

Law reporting in Natal began in 1858 but the reports were rather brief.<sup>133</sup> Prior to 1856, the Cape governor and legislature made laws for the District. One of the statutes stated that the Roman-Dutch law, as applied in the Cape Colony, was to be the law of the Natal District.<sup>134</sup> This continued to be the case even after Natal was granted a Charter and became a Crown Colony.<sup>135</sup> However, in practice, the sources of law that the courts applied in the Colony were so varied that it was described as “romodutchyafricanderenglander”.<sup>136</sup> First, the courts applied the Roman-Dutch law as the primary legal system.<sup>137</sup> There were few judges that had a thorough grasp of the Roman-Dutch law and that made use of the works of jurists. The other judges, especially the English ones, did not have a solid grounding in Roman-Dutch law and they often made little reference to it.<sup>138</sup> The Natal courts were bound to apply the Roman-Dutch law as administered by the Cape Colony's courts.<sup>139</sup> Since the Roman-Dutch law that applied at the Cape was modified by English law, it is likely that international law would have applied in Natal with the same qualifications as in the

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<sup>128</sup> GW Eybers (n 74) xlix.

<sup>129</sup> P Spiller, *A History of the District and Supreme Courts of Natal 1846-1910* (Butterworths 1986) 1-8.

<sup>130</sup> I Loveland, *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855-1960* (Hart Publishing 1999) 90.

<sup>131</sup> *ibid* 1.

<sup>132</sup> *ibid* 9.

<sup>133</sup> JP Van Niekerk (n 85) 128.

<sup>134</sup> HR Hahlo and E Kahn (n 80) 576, fn 52.

<sup>135</sup> *ibid*.

<sup>136</sup> P Spiller “The ‘Romodutchyafricanderenglander’ Law of Nineteenth-century Natal” (1985) 48 *Tydskrif vir hedendaagse Romeins-Hollandse Reg* 164.

<sup>137</sup> P Spiller (n 129) 83.

<sup>138</sup> *ibid* 83-88.

<sup>139</sup> Section 1 of Ordinance 12 of 1845.

Cape. Customary international law would have been subject to the primacy of legislation while treaties would have required domestication.

Second, the courts relied on English law where either local legislation expressly demanded it or where the local legislation was drafted in the exact terms of English statutes.<sup>140</sup> However, the courts went further by applying English decisions on the interpretation of the English statutes and by relying on English law when the Roman-Dutch law was inconclusive or silent on an issue.<sup>141</sup> For example, in *Bishop of Natal v Rev JH Wills*,<sup>142</sup> the applicant sought a perpetual interdict against the respondent to prevent the respondent from practicing as a bishop until he had been licenced. In discussing whether an interdict must be accompanied by an action, the court discussed Dutch writers and English decisions and writers.<sup>143</sup> The reliance on English law would have influenced the approaches that the Natal judges used to decide cases.

Third, the courts applied local legislation, case law and judicial discretion.<sup>144</sup> Fourth, the courts relied on decisions from the Cape Colony, Eastern Districts, Griqualand West, Orange Free State and South African Republic.<sup>145</sup> The Natal judges would often cite decisions from the other courts out of a sense of unified South African identity.<sup>146</sup> In this way, the Roman-Dutch law that was applied to Natal would have been modified by the local influences in those territories.

British colonisation of Natal meant that Natal automatically became party to treaties concluded previously between the British and other states.<sup>147</sup> Natal enacted a law in order to give effect to British extradition treaties and the Extradition Acts of 1870 and 1873.<sup>148</sup> Natal also entered into extradition agreements with the Orange Free State and the South African Republic.<sup>149</sup> These

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<sup>140</sup> P Spiller (n 129) 88-89.

<sup>141</sup> *ibid* 90-93.

<sup>142</sup> (1867) N.L.R. 60.

<sup>143</sup> *ibid* 61.

<sup>144</sup> P Spiller (n 129) 93-99.

<sup>145</sup> *ibid* 100.

<sup>146</sup> *ibid* 102-104.

<sup>147</sup> JA Kalley (n 105) 39.

<sup>148</sup> Extradition Law (Natal), Law No. 6 of 1877 in *Natal Ordinances, Laws and Proclamations, Vol. II* (WM Watson 1891). This law was approved through the British Order in Council of 12<sup>th</sup> February 1878.

<sup>149</sup> JA Kalley (n 105) 40.



agreements were given force through enactment of legislation in 1871.<sup>150</sup> In 1898, Natal joined the customs union agreement that had been concluded between the Cape and the Orange Free State.<sup>151</sup>

### iii. South African Republic

After the annexation of Natal by the British, the Trekker community at Potchefstroom (part of the later South African Republic) and Winburg (part of the later Orange Free State) cut ties with Natal.<sup>152</sup> In 1844, the *Adjunkraad* became the *Burgerraad* and in the same year, the Trekkers drew up the “Thirty-three Articles” (*Drie en Dertig Artikelen*).<sup>153</sup> The Thirty-three Articles were a code of conduct for the community<sup>154</sup> but served as a constitution of the new state.<sup>155</sup> They were later adopted by the *Volksraad* in 1849.<sup>156</sup> The republic constantly suffered dissension and for the first six years was without a real constitution or a real executive.<sup>157</sup> Its independence was recognised by the British in 1852 through the signing of the Sand River Convention.<sup>158</sup> In 1853, the *Volksraad* resolved to name the state the South African Republic (*De Zuid-Afrikaansche Republiek*).<sup>159</sup> The settlements at Lijdenburg and Utrecht merged with the ZAR in 1859. Meanwhile, the seat of government was moved to Pretoria in 1860.<sup>160</sup> The republic was located between the Vaal River and the Limpopo River, and mostly to the west of the Drakensberg.

The drafting of the first constitution (*grondwet*) begun in 1855 and it was finally enacted in 1858.<sup>161</sup> The drafters of the constitution appear to have included some aspects similar to the constitutions of other states such as the United States.<sup>162</sup> The principal similarity was the separation of powers between the three arms of government but this separation was not absolute in the South

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<sup>150</sup> Law No. 6 of 1871 and Law No. 7 of 1871 in *Natal Ordinances, Laws and Proclamations, Vol. II* (n 148).

<sup>151</sup> Customs Union Convention of 1898 Cape of Good Hope (Colony) (n 102) 413-425.

<sup>152</sup> L Thompson (n 117) 93.

<sup>153</sup> L Wildenboer “The thirty-three articles and the application of law in the Zuid-Afrikaansche Republiek” (2015) 21(2) *Fundamina* 457, 457 quoting FAF Wichmann “Die wordingsgeskiedenis van die Zuid-Afrikaansche Republiek 1838-1860” in *Archives Year Book for South African History, vol 4* (Government Printer South Africa 1939) 24-25, 27-29, 37-38.

<sup>154</sup> JG Kotzé “The administration of justice in the South African Republic” (1919) 36 *South African Law Journal* 12, 129.

<sup>155</sup> E Kahn (n 118) 295.

<sup>156</sup> *ibid.*

<sup>157</sup> E Kahn (n 118) 302.

<sup>158</sup> GW Eybers (n 74) lxviii.

<sup>159</sup> E Kahn (n 118) 302.

<sup>160</sup> H Chisholm (ed), *Encyclopaedia Britannica* vol. 27 (Cambridge University Press 1911) 194.

<sup>161</sup> *ibid.*

<sup>162</sup> HJ Mandelbrote (n 115) 388-389.

African Republic.<sup>163</sup> In fact, the *Volksraad* was quite powerful and would often interfere in the affairs of the other branches of government.<sup>164</sup> The *Grondwet* contained provisions that authorized the state president to conclude treaties or enter into alliances but only with the consent of the *Volksraad*.<sup>165</sup>

While there was no further provision on whether treaties required domestication, it appears that the signed treaties were usually ratified by the *Volksraad*.<sup>166</sup> The treaties were then published either in the local law books<sup>167</sup> or by issuing a government notice.<sup>168</sup> The republic entered into treaties of extradition, and friendship and commerce with several European powers.<sup>169</sup> In 1894, the republic concluded a treaty with the British whereby the republic assumed administration of Swaziland but the conduct of foreign relations of Swaziland remained with the British.<sup>170</sup> This treaty was ratified by the *Volksraad* the following year.

The *Grondwet* was silent on customary international law and as a result by inference the Roman-Dutch law probably regulated the applicability of customary international law. However, the 1858

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<sup>163</sup> JV Bryce, *Studies in History and Jurisprudence* (Oxford University Press 1901) 375.

<sup>164</sup> *ibid.*, p. 381.

<sup>165</sup> *Grondwet* of the South African Republic, February 1858, in GW Eybers (n 74) 367.

<sup>166</sup> For example, the *Volksraad* Resolution of 29<sup>th</sup> July 1872 ratified the Treaty of friendship, commerce and extradition of criminals between South African Republic and the Orange Free State, signed 1<sup>st</sup> August 1872; the *Volksraad* Resolution of 2<sup>nd</sup> July 1889 ratified two treaties and one protocol: the Political treaty between the South African Republic and the Orange Free State, signed 9 March 1889, ratified 16 August 1890, and the Treaty of friendship and commerce between South African Republic and the Orange Free State and its Protocol, signed 9 March 1889, ratified 16 August 1890 [C Jeppe and JHG van Pittius, *Statute Law of the Transvaal 1839-1910*, vol 1 (Government Printer Pretoria 1910) 35-36, 175-177].

<sup>167</sup> For example, Treaty between the South African Republic and the New Republic (located in the northern part of Natal), published in Local Laws, 1888, 60 [SH Barber, WA MacFadyen and JHL Findlay (trs) *The Statute Law of the Transvaal* (Waterlow & Sons 1901) 327].

<sup>168</sup> For example, Government Notice No. 8 of 1897 regarding the Treaty for the extradition of criminals between the South African Republic and the Kingdom of the Netherlands; Government Notice No. 553 of 1897 regarding the Treaty for the extradition of criminals between the South African Republic and the Colony of Natal; Government Notice No. 572 of 1897 regarding the Appendix to the Treaty of friendship and commerce, political alliance and railway convention between the South African Republic and the Orange Free State [SH Barber, WA MacFadyen and JHL Findlay (trs) (n 167) 823, 826].

<sup>169</sup> For example, Treaty of friendship, commerce and boundaries between Portugal and the Transvaal Republic, signed 29 July 1869, in C Parry and BHW Hill, *The Consolidated Treaty Series*, vol 139 (Oceana Publications 1869) 415; Treaty of peace, friendship, commerce and borders between the ZAR and Portugal, signed 10 July 1871, in JA Kalley, *South Africa's Treaties in Theory and Practice, 1806-1998* (Scarecrow Press 2001) 224; Treaty of friendship, commerce and establishment between Belgium and the Transvaal Republic, signed 3 February 1876, ratified 19 August 1876, in Foreign and Commonwealth Office, *British and Foreign State Papers*, vol 67 (HM Stationery Office 1882) 82-88.

<sup>170</sup> Cape of Good Hope (Colony) (n 102) 48-51.

*Grondwet* did not specify the basic law of the republic and this situation caused uncertainty in the courts.<sup>171</sup> Previously, the Thirty-three Articles had specified that the *Hollandsche Wet* (Dutch law) was to be the basis of the law for matters not covered under the Articles but the *Hollandsche Wet* was to apply “in a modified way, and in conformity with the customs of South Africa and for the prosperity and welfare of the community”.<sup>172</sup> The situation was made clearer in 1859 when the *Volksraad* added three Appendices (*Bijlagen*) to the *Grondwet*. The first Appendix (*Bijlage I*) clarified that it was the Roman-Dutch law that applied and the Appendix set out the sources of the Roman-Dutch law that were to be relied upon by the courts.<sup>173</sup> These sources of Roman-Dutch law were to be applied in so far as they were not in conflict with the *Grondwet* or other law or resolutions of the *Volksraad*.<sup>174</sup>

This Appendix had the effect of creating a hierarchy of sources of law, with legislation being foremost, followed by custom and then the specified Roman-Dutch jurists.<sup>175</sup> This formulation restricted the courts in their reliance of Roman-Dutch jurists.<sup>176</sup> In practice, the courts often discussed other Roman-Dutch jurists as well as other European writers where the specified jurists were inconclusive.<sup>177</sup> In addition, the judges would refer to cases decided by the courts of the Cape Colony and Orange Free State.<sup>178</sup> However, the courts sometimes followed a more rigid approach by strictly adhering to the restriction contained in the Thirty-three Articles.<sup>179</sup> Since the Roman-Dutch law continued as the common law of the republic, this meant that international law was also applicable. However, since the Roman-Dutch law was subject to any express provisions of the domestic law and to local custom then international law would likely have faced the same qualifications.

Prior to the Thirty-three Articles, there do not appear to be published official documents relating to the establishment of courts in the Republic.<sup>180</sup> The Thirty-three Articles appear to assume that

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<sup>171</sup> E Kahn (n 118) 305.

<sup>172</sup> *ibid* 296.

<sup>173</sup> *ibid* 305.

<sup>174</sup> Article I of Appendix I to the *Grondwet*, No. I, 19 September 1859, in GW Eybers (n 74) 416-417.

<sup>175</sup> L Wildenboer (n 153) 467.

<sup>176</sup> I Farlam (n 61) 402.

<sup>177</sup> L Wildenboer (n 153) 469.

<sup>178</sup> *ibid* 470.

<sup>179</sup> *ibid* 476.

<sup>180</sup> JG Kotzé, (n 154) 129.

there was a court (*landdrost*) and a legislature (*Burgerraad*) in existence already.<sup>181</sup> The 1858 *Grondwet* established three courts: a court of *landdrost*; a court of *landdrost* and *heemraden*; and a High Court (*Hooggereghshof*).<sup>182</sup> After the British annexed the Republic in 1877, they set up a High Court of a single judge, with original and appellate jurisdiction, while certain appeals could fall to be dealt with by the Privy Council.<sup>183</sup> In 1880, the British expanded the High Court to three judges: a single judge in the first instance and two or more judges on appeal.<sup>184</sup> Following a successful insurrection against British rule in 1880-1881, (also known as the first Anglo-Boer War) the Boers regained self-government by concluding the Pretoria Convention with the British in 1881. The *Volksraad* amended the law to make the High Court into a court of first instance (at least two judges sitting) and of appeal (three judges sitting). Appeals to the Privy Council were removed.<sup>185</sup> The *Grondwet* of 1889 and that of 1896 established a High Court, a circuit court, and the courts of *landdrosts*.<sup>186</sup> When the British annexed the territory in 1902, the courts of *landdrosts* were replaced by magistrates while two superior courts were created.<sup>187</sup> The Supreme Court of the Transvaal sat in Pretoria and was presided over by two or three judges while Witwatersrand High Court sat at Johannesburg and was presided over by one judge. Appeals to the Privy Council were returned.<sup>188</sup>

Law reports for the republic were first published in 1885.<sup>189</sup> There was inconsistency in the quality of judgments, with some being brief while others quite extensive. For example, *Steenkamp v Leyds, N.O. and Minnar, N.O.*,<sup>190</sup> a case that should have dealt with the intricacies of state succession, was reported in a mere two pages and without reference to any authorities. The dispute arose in the New Republic (*De Nieuwe Republiek*), which was a small Boer settlement in Zululand that

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<sup>181</sup> *ibid*. This is probably because the Natal *Volksraad* had already appointed a magistrate in 1839 for the residents of Potchefstroom and Winburg (L Wildenboer (n 153) 463 fn 55).

<sup>182</sup> E Kahn (n 118) 304.

<sup>183</sup> *ibid* 397.

<sup>184</sup> *ibid* 399.

<sup>185</sup> *ibid* 401-402.

<sup>186</sup> Article 115 of *Grondwet* of the South African Republic, 19 November 1889, and *Grondwet* of the South African Republic, 13 June 1896 (Law No. 2 of 1896) in GW Eybers (n 74) 486 and 505 respectively.

<sup>187</sup> CG Van der Merwe and others (n 58) 101-102.

<sup>188</sup> SD Girvin (n 84) 115.

<sup>189</sup> JP Van Niekerk (n 85) 135.

<sup>190</sup> (1889) 3 SAR 67.

was proclaimed in 1884 and that was later incorporated into the South African Republic.<sup>191</sup> The government of the New Republic had successfully obtained a judgment cancelling all title transfers in respect of a certain farm made by a one Mr. Van Reenen. The new owner of the farm at the time of the judgment, Mr. Steenkamp, had never been served with summons for the case that cancelled the titles. When the New Republic was incorporated into the South African Republic through treaty, the treaty recognised and maintained all judgments of the New Republic. Mr. Steenkamp sought revision of the New Republic court's judgment but the High Court dismissed the case. The report does not record any citations by the parties or the court. This brief and skeletal judgment contrasts with the other cases below on the High Court's purported powers of judicial review, where the court extensively quoted various American and European jurists.

Judicial review of the *Volksraad*'s laws by the High Court ("right of testing" legislation against the constitution) was not explicitly provided for in the 1858 *Grondwet*. The assumption might have been that, since the *Volksraad* was the supreme authority and the legislative power of the country,<sup>192</sup> the judiciary was to apply the laws as promulgated by the *Volksraad*. This was affirmed in the 1859 Second Appendix (*Bijlage II*) to the *grondwet*.<sup>193</sup> However, between 1884 and 1897, High Court judges in a series of cases held that they had the power to test the validity of legislation and resolutions of the *Volksraad* against the *grondwet*.<sup>194</sup> The contentious issue between the courts and the *Volksraad* was the tradition of the *Volksraad* in enacting law through informal resolutions (*besluiten*), a procedure not contained in the *grondwet*. When the resolutions were challenged, the High Court judges gradually recognised the special status of the *grondwet* and the inherent right of the High Court to review legislation for conformity with the *grondwet*. The following section will discuss these cases.<sup>195</sup>

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<sup>191</sup> G Dominy "The new republicans: A centennial appraisal of the 'Nieuwe Republiek' (1884–1988)" (1984) 14 *Natalia* 87-97.

<sup>192</sup> Article 29 of the 1858 *Grondwet*.

<sup>193</sup> Articles I and II of Appendix II to the *Grondwet*, No. II, 19 September 1859, in GW Eybers (n 74) 417-418.

<sup>194</sup> E Kahn (n 118) 410-412.

<sup>195</sup> For an extensive account, see the following: D van de Merwe "*Brown v Leyds* NO (1897) 4 O.R. 17: A constitutional drama in four acts. Act one: the 1858 Constitution of the Zuid-Afrikaansche Republiek" (2017) 23(1) *Fundamina* 111; D van der Merwe "*Brown v Leyds* NO (1897) 4 or 17: A constitutional drama in four acts. Act two: the 1858 ZAR constitution, malleable instrument of Transvaal Realpolitik (1859-1881)" (2017) 23(2) *Fundamina* 118; D van der Merwe "*Brown v Leyds* NO (1897) 4 OR 17: A constitutional drama in four acts. Act three: The king's voice speaks through the 1858 ZAR constitution to President and Chief Justice (1884-1895)" (2018) 24(1) *Fundamina* 89; D van der Merwe "*Brown v Leyds* NO (1897) 4 OR 17: A constitutional drama in four acts. Act four:

In *McCorkindale's* case,<sup>196</sup> the executors of the estate of an insolvent challenged the *Volksraad's* resolution that ratified an Executive Council decision regarding the estate. The High Court judges, Kotzé CJ. and Burgers J. held that the *grondwet* had the same status as any other law and that the *Volksraad* was vested with supreme authority.<sup>197</sup> Kotzé also stated that the Supreme Court did not have the power to annul a law that the court deemed to be against the constitution.<sup>198</sup> A similar decision was reached by Kotzé CJ. and Esselen J. in *Dom's Trustees*.<sup>199</sup> The executors of an insolvent challenged *Volksraad* resolutions for not conforming to the *grondwet*. Kotzé CJ. and Esselen J. reiterated that the High Court did not have the “testing” power although they felt that it had become necessary.<sup>200</sup> The dissenting judge, Jorissen J., decided that the resolutions were unconstitutional because of the special status of the *grondwet*.<sup>201</sup> Several years later, this dissenting view was shared by Kotzé CJ in *Hess v The State*.<sup>202</sup> Hess had been charged with criminal libel and one of his defences was that the relevant law had been enacted in contravention of the *Grondwet*. Kotzé CJ, Ameshoff J. and Jorissen J. acquitted Hess on the basis that the relevant section of the law was vague. However, Kotzé stated *obiter* that the *grondwet* tacitly authorised the court to inquire whether legislation was in conformity with the *grondwet*.<sup>203</sup> Kotzé CJ. maintained this view in *Snuif v The State*,<sup>204</sup> where the full bench of the High Court invalidated the appointment of a circuit court judge for not conforming to the *grondwet*.

The most extensive exposition of the High Court's power of “testing” legislation against the constitution was done in *Brown v Leyds*,<sup>205</sup> where Kotzé, CJ. quoted American and European jurists, as well as several American cases,<sup>206</sup> the most prominent being *Marbury v Madison*.<sup>207</sup> Mr.

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Kotzé delivers his judgement, Kruger dismisses him, Milner prepares for war and Brown seeks international redress” (2018) 24(2) *Fundamina* 120-160.

<sup>196</sup> *Executors of McCorkindale v Bok NO* (1884) 1 SAR 202.

<sup>197</sup> *ibid* 215.

<sup>198</sup> *ibid* 210-211.

<sup>199</sup> *Trustees in the Insolvent Estate of Theodore Doms v Bok NO* (1887) 2 SAR 189.

<sup>200</sup> *ibid* 191-192.

<sup>201</sup> *ibid* 192-204.

<sup>202</sup> (1895) 2 O.R. 112.

<sup>203</sup> *ibid* 115.

<sup>204</sup> (1895) 2 OR 294. 297.

<sup>205</sup> (1897) 4 OR 17.

<sup>206</sup> *ibid* 28-33.

<sup>207</sup> 1 Cranch. 163.



Brown, a US citizen, had applied for gold prospecting licences in the republic. However, through a series of executive proclamations and *Volksraad* resolutions, he was denied the benefit of the licences. In January 1897, Kotzé CJ, Ameshoff J. and Morice J. decided in favour of Mr. Brown, holding that the *Volksraad* resolutions were not valid law. Kotzé and Ameshoff asserted that the *Grondwet* granted to the High Court the “testing” power implicitly<sup>208</sup> and through the spirit of the *Grondwet*.<sup>209</sup>

In response to the revolutionary attitude of the High Court, the *Volksraad* appended the 1859 *Bijlage II* to the 1896 *Grondwet* and simultaneously enacted a law<sup>210</sup> that extinguished the power of judicial review.<sup>211</sup> The resolution also penalised judges that purported to exercise the power of judicial review, and eventually Kotzé was dismissed.<sup>212</sup> These cases on judicial review had far reaching repercussions in the republic but their influence was also felt in other parts of South Africa.<sup>213</sup> In addition, the cases provided an opportunity for the courts to engage in a dialogue with other courts worldwide. Moreover, some of the judges showed immense respect for international law.<sup>214</sup> For instance, in *Maynard et al v The Field Cornet of Pretoria*,<sup>215</sup> Kotzé CJ. stated that municipal law should be interpreted in conformity with international law<sup>216</sup> while Jorissen J. held that international law was a higher law.<sup>217</sup> In that case, the respondent had ordered the applicants, five British citizens, to join a commando unit to suppress a rebellion by a tribal chief. The

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<sup>208</sup> (1897) 4 OR 17, 28.

<sup>209</sup> *ibid* 52-53. Kotzé CJ, Morice J. and Jorissen J. made a similar decision in August 1897 in *Elias Syndicate v Leyds* (1897) 4 OR 248.

<sup>210</sup> Law No. I, 1897, 1 March 1897 in GW Eybers (n 74) 508-513.

<sup>211</sup> E Kahn (n 118) 412-413.

<sup>212</sup> *ibid.*, pp. 413-414. The government curtailed Brown’s use of the licences. When Mr. Brown approached the High Court for damages in the same case, a different bench dismissed his claim. Mr. Brown then approached the U.S. to espouse his claim after Britain annexed the republic in 1902. In the international arbitration between Britain and the U.S., (*Robert E. Brown (United States v Great Britain)* (1923) 6 RIAA 120), the tribunal held that Mr. Brown had acquired substantial rights in the prospecting licences and that the republic government’s actions amounted to a denial of justice. However, the tribunal held that Britain, as the former suzerain and also as successor to the republic, was not liable because Britain had not assumed the liabilities incurred by the republic (see D van der Merwe “*Brown v Leyds NO* (1897) 4 OR 17: A constitutional drama in four acts. Act four: Kotzé delivers his judgement, Kruger dismisses him, Milner prepares for war and Brown seeks international redress” (n 195) 151-157).

<sup>213</sup> D van de Merwe “*Brown v Leyds NO* (1897) 4 O.R. 17: A constitutional drama in four acts. Act one: the 1858 Constitution of the Zuid-Afrikaansche Republiek” (n 195) 112.

<sup>214</sup> G Barrie, “Decisions of the extinct Appellate Committee of the House of Lords will continue to resonate in South African administrative, constitutional and international law” (2013) 28(2) Southern African Public Law 249, 251.

<sup>215</sup> *C.C. Maynard et alii v The Field Cornet of Pretoria* (1894) 1 SAR 214.

<sup>216</sup> *ibid* 223.

<sup>217</sup> *ibid* 232.



applicants objected on the ground that under international law, foreigners could not be compelled into military service. Both parties and the judges referred to American, English, German and Swiss writers on international law. In the end, the judges held that there was no settled international prohibition and that the statute was not in contravention of international law.

The High Court under Kotzé CJ. did not often refer to international law<sup>218</sup> but mostly made use of American, English, French and German decisions.<sup>219</sup> The opportunity for the republic's courts to engage in transnational judicial dialogue was only momentary as the executive and legislature curtailed the judiciary's powers. The *Volksraad* ran the affairs of the republic in such a haphazard manner that one commentator stated: "[T]he written Constitution was often ignored, the judiciary became the creature of the government of the day, and the legislature passed laws on any subject, including constitutional amendments, in the simplest possible way."<sup>220</sup> Racial and gender inequality were entrenched in the constitution as only white males enjoyed civil and political rights.<sup>221</sup> The republic's finances were mismanaged and the government was unstable.<sup>222</sup> Although the republic had concluded several agreements with African communities within and without its borders, the republic was in conflict with the neighbouring African communities and there was the danger of other European states annexing the Boer republics.<sup>223</sup>

The discovery of diamonds in the Orange Free State, discussed in the next section, aroused the interest of the British in Boer republics.<sup>224</sup> The British approached the Orange Free State and the South African Republic to form a federation with them but the Boers declined the offer.<sup>225</sup> As a result of all these circumstances, the British proclaimed the territory as a dependency of the Crown in 1877 and renamed it "the Transvaal".<sup>226</sup> The British did not make major constitutional changes

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<sup>218</sup> Cf *Steenkamp v Leyds, NO and Minnar, NO* (1889) 3 SAR 67 with *C.C. Maynard et alii v The Field Cornet of Pretoria* (1894) 1 SAR 214.

<sup>219</sup> For example, see *Rooth v The State* (1888) 2 SAR 259.

<sup>220</sup> LM Thompson, "Constitutionalism in the South African Republics" (1954) 49 South African Law Review 49, 72.

<sup>221</sup> S Patterson, *Colour and Culture in South Africa: A Study of the Status of the Cape Coloured People Within the Social Structure of the Union of South Africa* (Routledge 1953) 40-41.

<sup>222</sup> AP Newton and EA Benians (eds), *Cambridge History of the British Empire: Vol. VIII, South Africa, Rhodesia and the Protectorates* (Cambridge University Press 1936) 463.

<sup>223</sup> *ibid* 462-463.

<sup>224</sup> AH Hillier and FR Cana, "Orange Free State" in *Encyclopaedia Britannica*, vol 20 (Cambridge University Press 1911) 156.

<sup>225</sup> AP Newton and EA Benians (eds) (n 222) 460-461.

<sup>226</sup> *ibid*.

but they instituted several legal reforms.<sup>227</sup> In 1881, the Boers successfully defeated the British in the First Anglo-Boer war.<sup>228</sup> The British signed the Pretoria Convention in that year which granted the territory self-government under the old name of the South African Republic. However, the territory was subject to the suzerainty of the Crown and the British retained control over the territory's treaty making powers.<sup>229</sup> In 1884, the Pretoria Convention was superseded by the London Convention but the British still curtailed the territory's external relations.<sup>230</sup> Thus, between 1881 and 1899, the legal status of the republic was that of a self-governing suzerain of the Crown.<sup>231</sup> In fact, Britain declared as void the extradition treaties that the republic concluded with the Netherlands (in 1895) and Portugal (in 1893) because the republic had not submitted them for approval by Britain.<sup>232</sup>

The 1886 discovery of gold in Witwatersrand led to an influx of foreigners (*uitlanders*) into the republic.<sup>233</sup> Many of the foreigners were British and they constantly agitated for political and economic rights.<sup>234</sup> Some of these foreigners attempted an uprising in Johannesburg but they were captured by the Boers and tried by the British.<sup>235</sup> In addition, the British had strong intentions of annexing the Boer republics in order to control the gold mines.<sup>236</sup> There were attempts at a resolving these issues but the alliance between the South African Republic and the Orange Free State aggravated matters.<sup>237</sup> The South African Republic eventually declared war against the British in 1899.<sup>238</sup> In this Second Anglo-Boer War, the British carried out a scorched earth policy and moved Boer civilians into concentration camps.<sup>239</sup> As a result, thousands of civilians died in the internment camps and the economy major destruction.

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<sup>227</sup> E Kahn (n 118) 397-400.

<sup>228</sup> S Patterson (n 221) 41.

<sup>229</sup> JA Kalley (n 169) 45.

<sup>230</sup> *ibid.*

<sup>231</sup> *ibid.*

<sup>232</sup> *ibid.* 56-57.

<sup>233</sup> GW Eybers (n 74) lxxi-lxxiv.

<sup>234</sup> T Pakenham, *The Boer War* (Weidenfeld and Nicolson 1979) 1-5.

<sup>235</sup> PE Aston, *The Raid on the Transvaal by Dr. Jameson* (Dean & Son 1897) 171 ff.

<sup>236</sup> T Pakenham (n 234) lxxi-lxxiv.

<sup>237</sup> *ibid.*

<sup>238</sup> GW Eybers (n 74) lxxiv.

<sup>239</sup> A Wessels, *The Anglo-Boer War 1899-1902* (Sun Press 2011) 78-79.

British tactics during the war were in contravention of international law at the time. Britain ratified the 1864 Geneva Convention<sup>240</sup> in 1865; the South African Republic acceded to it in 1896, while the Orange Free State acceded to the treaty in 1897. This treaty protected civilians and soldiers that were no longer taking part in battle. In addition, Britain signed the 1899 Hague Convention on war<sup>241</sup> in that year and ratified it the following year. This treaty particularly forbade collective punishment of civilians. These treaties were reflective of the international customary law regulating armed conflict at the time. Therefore, both the Boers and the British would have been bound by the treaties.<sup>242</sup> The British officials that had taken part in the Hague conference leading to the adoption of the Hague Convention cautioned the government.<sup>243</sup> However, the British largely ignored these treaties in favour of quickly winning the war.<sup>244</sup> As the international system of enforcement was rather weak, the British did not face legal sanctions for breaching the treaties.<sup>245</sup> The Boers surrendered in 1902 and with the signing of the Treaty of Vereeniging the republic became a British colony. The colony lost the districts of Vryheid and Utrecht in 1903 when they were annexed to the Natal. Under colonial rule, British constitutional law and practice would determine the foreign relations of the territory.

#### iv. Orange Free State

After the British annexed Natal in 1843, some Trekkers migrated to the settlement between the Orange and Vaal rivers.<sup>246</sup> In 1845, some altercations arose between these settlers and other surrounding communities (the Griquas and the Basuto).<sup>247</sup> In response, the British governor of the Cape colony annexed the territory in 1848, calling it the Orange River Sovereignty.<sup>248</sup> The British enacted regulations for governing the territory. These regulations maintained that the Roman-Dutch law was to apply to all the inhabitants, apart from the native tribes who were to be subject

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<sup>240</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field adopted 22 August 1864, entry into force 22 June 1865).

<sup>241</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entry into force 4 September 1900) 22 Stat. 940.

<sup>242</sup> AWG Raath and HA Strydom, "The Hague Conventions and the Anglo-Boer War" (1999) 24 South African Yearbook of International Law 149.

<sup>243</sup> SB Spies, *Methods of Barbarism? Roberts and Kitchener and Civilians in the Boer Republics, January 1900–May 1902* (Human and Rousseau 1977) 14, 296-297.

<sup>244</sup> K Surridge, "An example to be followed or a warning to be avoided? The British, Boers, and guerrilla warfare, 1900–1902" (2012) 23(4-5) Small Wars & Insurgencies 608, 609.

<sup>245</sup> *ibid.*

<sup>246</sup> GW Eybers (n 74) p. lxi.

<sup>247</sup> Orange Free State Commission, *Sketch of the Orange Free State of South Africa* (Bloemfontein 1875) 18.

<sup>248</sup> *ibid* 19.

to their own laws.<sup>249</sup> Therefore, before and during British rule, Roman-Dutch law may have regulated the domestic applicability of international law.

The British eventually acceded to the territory's independence in 1854 through the signing of the Bloemfontein Convention.<sup>250</sup> The new republic, titled the Orange Free State, enacted a constitution (*grondwet*) that drew inspiration from the American, Dutch and French constitutions.<sup>251</sup> However, the *grondwet* was still the product of the Boers' circumstances and as a result it was not as liberal as the Constitutions that inspired its enactment.<sup>252</sup> The Orange Free State's *grondwet* specified that Roman-Dutch law was to be the principal law (*hoofdwet*) except where the *Volksraad* had made law on an issue.<sup>253</sup> This was affirmed through legislation in 1856 which clarified that the Roman-Dutch law that applied in the republic was the Roman-Dutch law that had applied in the Cape Colony prior to the replacement of Dutch judges with English judges (in 1828). It did not include any Dutch laws or institutions that were not based on or in conflict with certain old Roman-Dutch law texts.<sup>254</sup> This meant that the judges were restricted to relying on certain Dutch authorities.<sup>255</sup> However, the courts gradually threw off these restrictions, especially after the establishment of the High Court in 1874. Soon thereafter, the first law reports were published in 1879.<sup>256</sup> The republic's trained legal practitioners and judges freely referred to American, English, European and Scottish writers.<sup>257</sup> Thus, the dialogue between the courts was on comparative law rather than international law.

From the *grondwet*'s silence on customary international law, it is implicit that the Roman-Dutch law probably regulated the applicability of customary international law. Similar to the South African Republic's *grondwet*, the Orange Free State's *grondwet* contained a provision that

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<sup>249</sup> Proclamation by His Excellency Lieut.-General Sir Henry George Wakelyn Smith, 14 March 1849, in GW Eybers (n 74) 278.

<sup>250</sup> GW Eybers (n 74) lxiii-lxv.

<sup>251</sup> *ibid.*

<sup>252</sup> JV Bryce (n 163) 360.

<sup>253</sup> CG Van der Merwe and others (n 58) 97; Article LVI of Constitution of the Orange Free State, 10 April 1854, in GW Eybers (n 74) 295.

<sup>254</sup> Ordinance No. I, 1856, 12 February 1856, in GW Eybers (n 74) 305.

<sup>255</sup> I Farlam (n 61) 400 quoting GD Scholtz, *Die konstitusie en die staatsinstellings van die Oranje-Vrystaat: 1854-1902* (Swets en Zeitlinger 1937) 144.

<sup>256</sup> JP Van Niekerk (n 85) 132.

<sup>257</sup> HR Hahlo and E Kahn (n 80) 22, citing *Preller v Schultz* (1893) OFS; 10 CLJ 81.

authorized the state president to enter into treaties with the consent of the legislature.<sup>258</sup> The *Volksraad* passed legislation in 1856 which clarified that although the state president could conclude treaties without first obtaining the *Volksraad*'s consent, the treaties remained in force only until the *Volksraad* had approved or nullified the treaties.<sup>259</sup> Thus, similar to the South African Republic, the *Volksraad* would determine by resolution the applicability of the treaties that had been concluded by the executive. The treaties would then be published in the local law books or by issuing a government notice. The republic entered into treaties of extradition, and friendship and commerce with several European powers.<sup>260</sup> These treaties provided for reciprocal rights to citizens of either state on diverse matters including trade, industry, employment, taxes, and property.<sup>261</sup> However, the treaties did not give citizens of either state any political rights.<sup>262</sup> In addition, the republic also entered into treaties with British colonies in southern Africa.<sup>263</sup> These treaties mainly concerned extradition, but the republic also concluded treaties with the South African Republic on defence, free trade and the formation of a customs union.<sup>264</sup>

In contrast to the South African Republic, the Orange Free State's "written Constitution was rigid, the judiciary was in fact completely free and independent, and the legislature did not in fact exceed its proper power."<sup>265</sup> Whereas the *Volksraad* was not considered as supreme as the one in the South African Republic,<sup>266</sup> it still enjoyed a prominent status in the republic. For example, the *Volksraad*

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<sup>258</sup> Constitution of the Orange Free State, 10 April 1854, in GW Eybers (n 74) 293:

"Article XXXIX. The State President shall have the power to make conventions, subject to the consent of the Volksraad.

Article XL. The State President shall not have the power to conclude any treaty without the consent of the Volksraad."

<sup>259</sup> Ordinance No. I, 1856, 12 February 1856, in GW Eybers (n 74) p. 305.

<sup>260</sup> For example, Convention of friendship, commerce and extradition between the United States of America and the Orange Free State, signed 22 December 1871, ratified 18 August 1873, in Orange Free State, *Ordonnantie-Boek van den O.V.S., 1854-1877* (Snelpers-Drukkerij 1877); Convention between the Netherlands and the Orange Free State for the extradition of malefactors, signed 14 November 1874, ratified 20 November 1875, in Orange Free State, *Ordonnantie-Boek van den O.V.S., 1854-1877* (Snelpers-Drukkerij 1877); Accession of the Orange Free State to the Convention, signed at Geneva, 22 August 1864, for the amelioration of the condition of the wounded in armies in the field, acceded 28 September 1897, in Foreign and Commonwealth Office, *British and Foreign State Papers*, vol. 89 (HM Stationery Office 1901) 54.

<sup>261</sup> JA Kalley (n 105) 57-60.

<sup>262</sup> *ibid* 57.

<sup>263</sup> *ibid* 60.

<sup>264</sup> *ibid* 61-66.

<sup>265</sup> LM Thompson (n 220) 72.

<sup>266</sup> HR Hahlo and E Kahn (n 80) 73, citing *The State v Gibson* (1898) 15 CLJ 1, 5.

could amend the *Grondwet* by special procedure without recourse to a referendum.<sup>267</sup> The *Grondwet* implicitly entrenched judicial review by stating that the courts were to exclusively exercise judicial authority.<sup>268</sup> In addition, the *Volkraad* enacted a law that removed constitutional review from the subordinate courts, thereby implying that it was the High Court that possessed the power of judicial review.<sup>269</sup> However, the High Court judges used this power sparingly.<sup>270</sup> The only case in which the High Court “tested” a law against the constitution was in *Cassim and Solomon v The State*,<sup>271</sup> where the High Court upheld a law that discriminated against Asians. One of the reasons for the reluctance to exercise judicial review was that the judiciary was in a less powerful position than the *Volksraad*. The High Court had been established through legislation and consequently it was not entrenched in the *grondwet*.<sup>272</sup> The Constitution restricted most civil rights to the white male residents, while coloured males enjoyed a few rights regarding ownership of property.<sup>273</sup> The constitution was modified in 1864 and 1865, confirmed by the *Volksraad* in 1866, revised and published in 1868 and 1892.<sup>274</sup> Whereas the status of the South African Republic was that of a self-governing suzerain of the Crown, the Orange Free State remained an independent state until 1900.<sup>275</sup>

The discovery of diamonds at Kimberley in 1866 led to an influx of foreigners into the republic. In response, the *Volksraad* passed laws that restricted the civil rights of these foreigners.<sup>276</sup> For example, citizenship could be lost on several grounds while voting rights were confined to those previously domiciled or resident in the republic.<sup>277</sup> As mentioned earlier, the British were intent on taking control of the diamond mines. In order to secure her position, the republic concluded into a defence treaty with the South African Republic in 1897.<sup>278</sup> When the South African Republic

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<sup>267</sup> *ibid.*

<sup>268</sup> *ibid* 77, quoting M de Villiers, “The relation of the judicial to the legislative authority” (1897) 14 Cape Law Journal 38, 43-44.

<sup>269</sup> LM Thompson (n 220) 55.

<sup>270</sup> J Davidson, “The History of Judicial Oversight of Legislative and Executive Action in South Africa” (1985) 8(3) Harvard Journal of Law and Public Policy 687, 688.

<sup>271</sup> (1892) CLJ 58.

<sup>272</sup> HR Hahlo and E Kahn (n 80) 73 78.

<sup>273</sup> S Patterson (n 221) 40.

<sup>274</sup> GW Eybers (n 74) 285.

<sup>275</sup> JA Kalley (n 169) 30.

<sup>276</sup> HR Hahlo and E Kahn (n 80) 75.

<sup>277</sup> *ibid.*

<sup>278</sup> GW Eybers (n 74) lxxiv.

declared war on the British in 1899, the Orange Free State was drawn into the war.<sup>279</sup> As discussed in the previous section, the British conduct of the war was in contravention of the 1864 Geneva Convention and the 1899 Hague Convention on war. The British won the war in 1902 and they annexed the republic under the name of the Orange River Colony.<sup>280</sup> Similar to the Transvaal Colony, the British took over control of the foreign relations of the new colony.

## **5. Application of international law before the establishment of the Union**

As a concession to the Boers, the 1902 peace treaty between the Boers and the British included a clause that maintained racial inequality until the colonies received self-government.<sup>281</sup> The British administration intended to anglicise the four colonies (Cape, Natal, Orange River and Transvaal) and to unify them as one nation under British domination.<sup>282</sup> However, this failed as a result of Afrikaner resistance and the lack of an increase in English settlement.<sup>283</sup> The British established nominated executive and legislative councils in the Orange River Colony and in the Transvaal Colony.<sup>284</sup> In addition, the British enacted several statutes based on the English law, although Roman-Dutch law was preserved.<sup>285</sup> English was already the official language in the Cape and Natal colonies but this was extended to the Orange River and Transvaal colonies.<sup>286</sup> Still, the 1902 peace treaty allowed teaching of Dutch in schools and the use of Dutch in court proceedings in the interests of justice.<sup>287</sup> In 1902, a High Court was established at Pretoria while the Witwatersrand District Court was established at Johannesburg.<sup>288</sup> That same year, the two courts were transformed into a Supreme Court and a High Court respectively.<sup>289</sup> Still in 1902, a High Court was established at Bloemfontein with appeals going to the Transvaal Supreme Court, although from 1904 they went directly to the Privy Council.<sup>290</sup>

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<sup>279</sup> JA Kalley (n 169) 43.

<sup>280</sup> *ibid.*

<sup>281</sup> Article 8 of the Vereeniging Peace Treaty, in GW Eybers (n 74) 346.

<sup>282</sup> I Loveland (n 130) 62.

<sup>283</sup> *ibid.* 80.

<sup>284</sup> GW Eybers (n 74) lxxvii, lxxiv.

<sup>285</sup> CG Van der Merwe and others (n 58) 98.

<sup>286</sup> *ibid.*, pp. 102-103.

<sup>287</sup> *ibid.*

<sup>288</sup> AC Cilliers, C Loots and HC Nel (n 42) 4.

<sup>289</sup> *ibid.*

<sup>290</sup> *ibid.*



The Afrikaner leaders continuously agitated for self-government and in 1905 they formed political parties.<sup>291</sup> When the Liberal Party came to power in Britain in 1906, the new government was more inclined to granting self-government to the colonies.<sup>292</sup> The British Government granted Royal Letters Patent to the Transvaal and the Orange River Colony in 1906 and 1907 respectively, thereby establishing self-government.<sup>293</sup> In 1908, representatives from the four colonies convened a National Convention where they agreed to form a union. While the Cape colony wished to retain limited political rights for non-whites, the other three colonies were against granting any political rights to non-whites. The compromise reached was that only the Cape colony was allowed to maintain a non-racial right to vote but there were onerous qualifications for Black and Coloured people.<sup>294</sup>

Whereas prior to British colonisation the Roman-Dutch law remained the common law of the Boer republics, the Roman-Dutch law as applied was likely modified by English laws and court practices. This is because the Boer republics gradually modelled some of their institutions along similar lines to those of the Cape Colony.<sup>295</sup> In addition, the courts in the republics were often influenced by the decisions of the Cape Supreme Court.<sup>296</sup> From the 1820s onwards, the British imported various laws to the Cape that significantly reduced the operation of the Roman-Dutch law.<sup>297</sup> In addition, the British imposed English as the language of the courts, insisted on barristers and judges trained in Britain, and the Privy Council was declared the final court of appeal.<sup>298</sup> This English influence would have brought some changes to the Roman-Dutch law and by extension to the application of international law in the Boer republics. The major effect on international law would have been the requirement for domestication of treaties and the subordination of customary international law to legislation.

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<sup>291</sup> HR Hahlo and E Kahn (n 39) 111.

<sup>292</sup> *ibid.*

<sup>293</sup> GW Eybers (n 74) lxxvii, lxxiv.

<sup>294</sup> S Patterson (n 221) 34.

<sup>295</sup> E Fagan (n 36) 55.

<sup>296</sup> *ibid.*

<sup>297</sup> *ibid.* 57.

<sup>298</sup> *ibid.* Appeals from the territories of South Africa and South-West Africa to the Privy Council were removed in 1950 by the *Privy Council Appeals Act*, Act No. 16 of 1950.

Under British colonisation, the application of international law to the colonies would have greatly depended upon British constitutional practice. As mentioned in chapter 2, the British controlled the external relations of their colonies such that colonies could not enter into treaties with other states. On the other hand, treaties concluded by the Crown did not automatically alter the law in the colony.<sup>299</sup> In order to give domestic effect to a treaty concluded by the Crown, the colony had to enact the necessary legislation.<sup>300</sup> As discussed earlier, from the 19<sup>th</sup> century onwards, there evolved a practice of granting certain colonies the right of separate adherence to and withdrawal from treaties concluded by the imperial government.<sup>301</sup> Thus, the imperial government could expressly limit the territorial scope of treaties to British overseas territories, or alternatively, the imperial government could require that local legislation was passed in order to make a treaty apply to a self-governing colony.<sup>302</sup>

Conversely, British colonies were bound by treaties concluded by the imperial government prior to acquisition of those territories as colonies.<sup>303</sup> For example, in 1904, Britain communicated the accession of the Orange River and Transvaal colonies to the 1865 International Telegraph Convention, to which the British had acceded in 1871.<sup>304</sup> In addition, on annexation of the Boer republics in 1902, the British maintained that all treaties previously concluded by the Boer republics had lapsed.<sup>305</sup> This “clean slate” doctrine meant that Britain did not owe any obligations to those states that had entered into treaties with the Boer republics. Those states would have had to rely on other treaties concluded separately with the British. For example, in 1901, British law officers advised that the 1875 treaty between the South African Republic and Portugal had lapsed upon the republic’s annexation even though Britain had assented to the treaty’s conclusion.<sup>306</sup> Similarly, in 1903, Britain communicated to Belgium that the treaties of commerce and extradition concluded between Belgium and the Boer republics were no longer in force after annexation and that the colonies would be bound by Britain’s treaties on commerce and extradition.<sup>307</sup>

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<sup>299</sup> *Tsewu v Registrar of Deeds* [1905] TS 30.

<sup>300</sup> AB Keith, *Responsible Government in the Dominions*, vol. iii (Clarendon Press 1912) 1105.

<sup>301</sup> JA Kalley (n 169) 5-6.

<sup>302</sup> MN Shaw, *International Law* (6th edn, Cambridge University Press 2008) 94.

<sup>303</sup> AB Keith (n 300) 1105.

<sup>304</sup> JA Kalley (n 169) 225.

<sup>305</sup> *ibid* 31, 45-46.

<sup>306</sup> *ibid* 55.

<sup>307</sup> *ibid* 31.

The British also permitted the colonies to conclude agreements with each other such as the 1903 and 1906 agreements establishing a customs union.<sup>308</sup> However, such agreements did not have the status of treaties in international law as they only had an effect in the internal law of the British Empire.<sup>309</sup> This was according to the British *inter se* doctrine, where the relations between Commonwealth countries were governed by British constitutional law as opposed to international law.<sup>310</sup> The *inter se* doctrine was meant to ensure imperial unity but it lost significance in the 1930s when the self-governing territories of the Commonwealth asserted their independence in various ways.<sup>311</sup>

During this period, there appears to be only one court decision that expressly pronounced on the relationship between customary international law and municipal law. In the case of *In re "Mashona"*,<sup>312</sup> the Cape Supreme Court sat as an Admiralty Court to determine whether a British vessel that had been captured by the Cape authorities for carrying goods destined for the South African Republic was a prize. Laurence J. stated that the court was bound to apply English law but as far as the rights of belligerents and neutrals were concerned that law was based on (customary) international law.<sup>313</sup> Most of the cases touching on customary international law appeared to have taken it for granted that customary international law was part of the municipal law of the colonies.<sup>314</sup> For instance, in several cases arising from the Second Anglo-Boer War,<sup>315</sup> the courts affirmed that the Boers enjoyed belligerent rights during the war.<sup>316</sup> Other cases dealt with the confiscation of private property by the state for war purposes<sup>317</sup> and the seizure of enemy property

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<sup>308</sup> *ibid* 219, 221.

<sup>309</sup> RP Schaffer, "Succession to Treaties: South African Practice in the Light of Current Developments in International Law" (1981) 30 *International & Comparative Law Quarterly* 593, 613.

<sup>310</sup> RY Jennings, "The Commonwealth and international law" (1953) 30 *British Year Book of International Law* 320.

<sup>311</sup> See JES Fawcett, *The Inter Se Doctrine of Commonwealth Relations* (The Athlone Press 1958).

<sup>312</sup> *In re "Mashona"* (1900) 17 SC 135 (also reported as *In the Matter of the Prize "Mashona"* (1900) 10 CTR 163).

<sup>313</sup> *ibid* 152.

<sup>314</sup> J Dugard, "Consular immunity" (1966) 83 *South African Law Journal* 126, 131.

<sup>315</sup> *Van Deventer v Hancke and Mossop* 1903 TS 401, 419, 424; *Lemkuhl v Kock* 1903 TS 405, 454; *Olivier v Wessels* 1904 TS 235, 241; *R v Louw* (1904) 21 SC 36, 40-41, 46-47.

<sup>316</sup> RP Schaffer (n 99) 297.

<sup>317</sup> *Alexander v Pfau* 1902 TS 155, 159-161, 163-164, 166; *Achterborg v Glinister* 1903 TS 326;

during war.<sup>318</sup> In all these cases, the courts relied on customary international law without questioning its place in the municipal legal order.<sup>319</sup>

Legal practitioners continued their extensive citation of international law authorities. For example, in the 1907 case of *Colonial Treasurer (Natal) v Potgieter*,<sup>320</sup> the appellant had purchased land in an area that was part of the Transvaal Colony. Afterwards, the British annexed the area to the Colony of Natal. The appellant paid transfer duty to the Colony of Natal at the lower amount than that required at the time of the purchase. The magistrate decided in favour of the Colonial Treasurer. The appellant appealed stating that the Government of Natal did not have the title to sue for taxes that were due to the Transvaal Government prior to the annexation of the territory to Natal. The appellant's advocate quoted Dutch jurists and decisions from the Cape and South African Republic.<sup>321</sup> The respondent's advocate quoted several British writers on international law.<sup>322</sup> However, the judges decided not to determine the case on its merits but to return the case for retrial as the Transvaal law had not been proved in court.<sup>323</sup>

## 6. Application of international law during the Union period

In 1909, the British Parliament passed the *South Africa Act, 1909*<sup>324</sup> that united Britain's southern African colonies (Cape, Natal, Orange River and Transvaal) as the Union of South Africa.<sup>325</sup> The Union had legislative powers but was still subordinate to Britain. The government of the Union was modelled on the Westminster system, but with some modifications.<sup>326</sup> The *South Africa Act, 1909* established an executive: the governor-general was head of state while the prime minister was head of government; a bi-cameral legislature; and a unified court system. Parliamentary

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<sup>318</sup> *Mshwakezele v Guduza* (1901) 18 SC 167, 171; *Maree v Conradie* 1903 O.R.C. 23 at 25-26; *Du Toit v Kruger* (1905) 22 SC 234, 238-239.

<sup>319</sup> J Dugard, "The place of public international law in South African law" in C Visser (ed), *Essays in honour of Ellison Kahn* (Juta & Co. 1989) 113.

<sup>320</sup> *Colonial Treasurer (Natal) v Potgieter* (1907) 28 NLR 602.

<sup>321</sup> *ibid* 605.

<sup>322</sup> *ibid* 65-66.

<sup>323</sup> *ibid* 66.

<sup>324</sup> 9 Edw. VII c. 9.

<sup>325</sup> G Carpenter, "Public Law: Constitutional Law" in WJ Hosten and others, *Introduction to South African Law and Legal Theory* (Butterworths 1995) 952-953.

<sup>326</sup> *ibid* 953.

sovereignty was so entrenched that the courts vilified for challenging legislation.<sup>327</sup> The colonies became provinces each headed by an administrator who was appointed by the central government. Each province had a provincial council (local legislature) and an executive committee (comprising the administrator and four members of the provincial council). The supreme courts of the colonies became divisions of the new Supreme Court of South Africa while the Appellate Division of the Supreme Court became the highest court in the Union.<sup>328</sup>

The Act did not confer on the Union power to enter into treaties; instead section 8 of the Act vested in the Crown all executive power.<sup>329</sup> Therefore, British constitutional practice prevailed in the circumstances. The imperial government retained exclusive responsibility for conclusion of treaties, and for determining the territorial application of those treaties.<sup>330</sup> As a result, the Union was still bound by treaties that the imperial government concluded with other states.<sup>331</sup> However, similar to the colonial period, the Union would have had to enact legislation to give effect to those treaties. The *South Africa Act, 1909* did not address the issue of domestication of treaties. Interestingly, the courts did not express themselves on this issue during the Union period.<sup>332</sup> It appears that the Union still domesticated treaties whenever they were concluded by the British. For instance, the Union's legislature enacted the *Treaties of Peace Act*<sup>333</sup> to give effect to peace treaties concluded between the British and other European states following the end of the First World War.

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<sup>327</sup> CG Van der Merwe and JE Du Plessis (n 44) 57.

<sup>328</sup> HR Hahlo and E Kahn (n 39) 146-163.

<sup>329</sup> *South Africa Act, 1909*:

8. The Executive Government of the Union is vested in the King, and shall be administered by His Majesty in person or by a Governor-General as his representative.

<sup>330</sup> JA Kalley (n 169) 63.

<sup>331</sup> *ibid* 63-64. For example, the International agreement for the institution of an international office of public health, signed 9 December 1907, entered into force 15 November 1908, Foreign and Commonwealth Office, *British and Foreign State Papers*, vol 100 (HM Stationery Office 1882) 46 and vol. 154, p. 335; Agreement for the repression of obscene publications, signed 4 May 1910, entered into force 15 September 1912, Foreign and Commonwealth Office, *British and Foreign State Papers*, vol 103 (HM Stationery Office 1882) 251; International convention for the suppression of the White Slave Traffic (signed 4 May 1910, entered into force 5 July 1920) 98 UNTS 101.

<sup>332</sup> JW Bridge, "The Relationship between International Law and the Law of South Africa" (1971) 20 *International and Comparative Law Quarterly* 746, 746. In *L. & H. Policansky v. Minister of Agriculture* (1946) CPD 860 the judge merely stated (at 865) that a customs union treaty between South Africa and Northern Rhodesia had been domesticated through legislation (*ibid* 747).

<sup>333</sup> Act No. 32 of 1921 G.1167 GoN.

Section 148(1) of the *South Africa Act, 1909* Act extended the application of treaties that had been binding on the colonies to the Union.<sup>334</sup> This provision ensured the continuity of treaties concluded by the imperial government which were binding on the colonies as a result of British constitutional practice.<sup>335</sup> This succession of treaties was in contrast to the “clean slate” doctrine that was usually followed at the time.<sup>336</sup> Meanwhile, section 148(2) extended the application of railway agreements concluded between the colonies to the Union.<sup>337</sup> As mentioned in chapter 2, according to the *inter se* doctrine, these agreements did not have the status of treaties. Section 148(2) of the Act was meant to ensure continuity under British constitutional law and not to confer international personality on the Union.<sup>338</sup> The Union’s executive also entered into agreements with other British colonies and subjected them to approval by the legislature. For instance, the 1924 customs union agreement between the Union, Northern Rhodesia and Southern Rhodesia was approved by the legislature through the *Union and Rhodesia Customs Agreement Act, 1925*.<sup>339</sup>

Also, the Act did not address the applicability of customary international law. Under these circumstances, Roman-Dutch law as the Union’s common law but as modified by English common law, applied. Therefore, while customary international law was applicable in the Union, it was subject to contrary legislation, judicial precedent and acts of state.<sup>340</sup> This situation was similar to that prior to the establishment of the Union, when the Union’s member territories were British colonies.

After the First World War, the British Dominions (Australia, Canada, Irish Free State, New Zealand and South Africa) and India gradually gained an elevated status. Although the imperial government maintained formal unity of the Empire under the Crown, these territories gained legal

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<sup>334</sup> South Africa Act, 1909:

148. (1) All rights and obligations under any conventions or agreements which are binding on any of the Colonies shall devolve upon the Union at its establishment.

<sup>335</sup> For example, the International agreement for the suppression of the “White Slave Traffic” (signed 18 May 1904, entered into force 18 July 1905) 1 LNTS 83.

<sup>336</sup> Schaffer, R.P. (1981), *supra*, at 612.

<sup>337</sup> South Africa Act, 1909:

148. (2) The provisions of the railway agreement between the Governments of the Transvaal, the Cape of Good Hope, and Natal, dated the second of February, nineteen hundred and nine, shall, as far as practicable, be given effect to by the Government of the Union.

<sup>338</sup> RP Schaffer (n 309)613.

<sup>339</sup> Act No. 7 of 1925, G. 1472 GoN.

<sup>340</sup> AJGM Sanders (n 52) 149 ff.

personality under international law.<sup>341</sup> South Africa was a signatory to the peace treaty of 1919 and it was among the founder members of the League of Nations in 1920.<sup>342</sup> The League of Nations granted to South Africa a mandate over South West Africa,<sup>343</sup> and from 1950 South West Africa was represented in the Union's Parliament.<sup>344</sup> The Union was granted a mandate over South West Africa (present-day Namibia) directly by the League of Nations, and not through the UK. The Union's legislature then enacted the *Treaty of Peace and South West Africa Mandate Act*<sup>345</sup> in order to give effect to the mandate over South West Africa. In addition, South Africa became a member of the International Labour Organization and it was designated as a state under the Statute of the Permanent Court of International Justice.<sup>346</sup> However, these developments only highlighted the treaty-making powers of the Dominions

In the 1931, the British Parliament enacted the *Statute of Westminster, 1931*,<sup>347</sup> which granted to the Dominions autonomy and equal status, and removed dependence on the imperial government.<sup>348</sup> The Union of South Africa enacted the *Status of the Union Act, 1934*,<sup>349</sup> in order to give effect to the British legislation.<sup>350</sup> The Act stated that executive power could be exercised either by the King or by the governor-general.<sup>351</sup> This section was later affirmed by another piece of legislation.<sup>352</sup> Section 2 of the *Status of the Union Act, 1934* asserted that British legislation

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<sup>341</sup> JA Kalley (n 169) 64.

<sup>342</sup> *ibid* 66.

<sup>343</sup> *ibid*.

<sup>344</sup> V Jabri, *Mediating Conflict: Decision-making and Western Intervention in Namibia* (Manchester University Press 1990) 38-39.

<sup>345</sup> Act No. 49 of 1919.

<sup>346</sup> V Jabri (n 344) 66-67.

<sup>347</sup> 22 & 23 Geo. 5 c. 4.

<sup>348</sup> JA Kalley (n 169) 70-71.

<sup>349</sup> Act No. 69 of 1934.

<sup>350</sup> JA Kalley (n 169) 71.

<sup>351</sup> Status of the Union Act:

4. (1) The Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative.

(2) Save where otherwise expressly stated or necessarily implied, any reference in the South Africa Act and in this Act to the King shall be deemed to be a reference to the King acting on the advice of his Ministers of State for the Union.

(3) The provisions of sub-sections (1) and (2) shall not be taken to affect the provisions of sections twelve, fourteen, twenty and forty-five of the South Africa Act and the constitutional conventions relating to the exercise of his functions by the Governor-General under the said sections.

<sup>352</sup> *Royal Executive Functions and Seals Act*, Act No. 70 of 1934.



would not extend to the Union unless it was given effect by the Union's Parliament.<sup>353</sup> The purport of these provisions was that the Union was no longer bound by treaties concluded by the imperial government, and that the Union could conclude treaties without consulting the imperial government.

Meanwhile, the issue of the domestic applicability of customary international law appears to have depended on the Roman-Dutch common law as modified by English common law. For example, in cases concerning state immunity, the courts stated that customary international law was subject to contrary legislation.<sup>354</sup> The courts continued to apply customary international law whenever it was relevant on diverse matters such as confinement of an alien enemy;<sup>355</sup> statelessness;<sup>356</sup> immigration of aliens;<sup>357</sup> status of foreigners resident in a conquered state,<sup>358</sup> treason;<sup>359</sup> transactions with proscribed persons or firms;<sup>360</sup> and prize claims.<sup>361</sup>

In the early part of this period, the judiciary often referred to English law and the Union's parliament tended to model legislation on English ones. Later, however, there was a backlash against English law as a result of a rift between those who favoured the English common law and those who sought a return to the application of Roman-Dutch law.<sup>362</sup> The former were called *pollutionists* and were mostly English while the latter were called *purists* and were mostly Afrikaners. However, those jurists that sought to make South African law more civil law oriented were more appropriately described as either *purists* or *antiquarians*. "Purists" were more concerned with making the law coherent as opposed to devoutly following Roman-Dutch sources.

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<sup>353</sup> Status of the Union Act:

2. The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.

<sup>354</sup> *De Howorth v The S.S. "India"*; *Mann, George and Co. (Delagoa) Ltd v The S.S. "India"* 1921 CPD 451; *Ex parte Sulman* 1942 CPD 407.

<sup>355</sup> *Ex parte Belli* 1914 CPD 742.

<sup>356</sup> *Ex parte Lowen* 1938 TPD 504.

<sup>357</sup> *Mahomed and Minor Son v Immigrants Appeal Board* (1918) 39 NLR 7.

<sup>358</sup> *Marburger v Minister for Finance* 1918 CPD 183.

<sup>359</sup> *R. v Holm, R. v Pienaar* 1948 (1) S.A. 925 (AD); *R v Newmann* 1949 (3) SA 1238 (T).

<sup>360</sup> *R. v Lionda* 1944 AD 348.

<sup>361</sup> *Crooks and Company v Agricultural Co-operative Union Ltd* 1922 AD 423.

<sup>362</sup> AS Mathews and JRL Milton, "An English Backlash?" (1965) 82 South African Law Journal 31-41; R Zimmermann and DP Visser, "Introduction: South African Law as a Mixed Legal System" in R Zimmermann and DP Visser (eds) (n 36) 22-23.

On the other hand, “antiquarians” were primarily focussed on ensuring that South African law reflected 17<sup>th</sup> century Roman-Dutch law.<sup>363</sup> The following two cases will demonstrate the diverging approaches followed by the provincial divisions and the Appellate Division of the Supreme Court.

In the 1921 case of *De Howorth*, the Cape Provincial Division of the Supreme Court had to determine whether a Portuguese ship owned by the government enjoyed immunity from attachment as a result of a debt owed.<sup>364</sup> Gardiner J. clarified that he was not dealing purely with maritime and shipping law and as a result the court was not bound by the 1879 English law on maritime and shipping. This law would have restricted him to rely only on English decisions.<sup>365</sup> In addition to the English writers on international law cited by the petitioners and the respondent, the court also considered English decisions as well as American, Dutch, English, Italian and Swiss writers on international law.<sup>366</sup> The court emphasised that the extreme opinion of one of the Dutch jurists was too archaic to be applicable to the modern period.<sup>367</sup> The court concluded that vessels used by the state for trade were immune from attachment.<sup>368</sup> This case was emblematic of some of the court decisions that considered a wide variety of authorities on international law matters.

The Cape Supreme Court’s approach to international law in the previous case is in contrast to the Appellate Division’s approach in the 1923 case of *Rex v Christian*.<sup>369</sup> Here, the appellant challenged his conviction for treason on the basis that the indictment was defective as it made reference to the Union of South Africa as a mandatory over South-West Africa. The point at issue was whether the Union of South Africa, as a mandatory over South-West Africa, possessed sovereignty so as to sustain an indictment of the Roman-Dutch crime of high treason. The appellant’s advocate and the prosecutor made references to American, British and Swiss writers on international law as well as to Roman-Dutch jurists.<sup>370</sup> The court unanimously, but on differing grounds, agreed that the Union possessed sovereignty and upheld the conviction. Innes, CJ. held

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<sup>363</sup> CG Van der Merwe and others (n 58) 207-208.

<sup>364</sup> *De Howorth v The S.S. “India”*; *Mann, George and Co. (Delagoa) Ltd v The S.S. “India”* 1921 CPD 451.

<sup>365</sup> *ibid* 457.

<sup>366</sup> *ibid* 458-464.

<sup>367</sup> *ibid* 458, 464.

<sup>368</sup> *ibid* 464.

<sup>369</sup> 1924 AD 101.

<sup>370</sup> *ibid* 101-103.

that the Union did not possess external sovereignty but that it possessed internal sovereignty which was enough to sustain the indictment.<sup>371</sup> De Villiers, JA. held that the mandate was conferred on the Union of South Africa, which for purposes of the mandate, was not subject to other members of the League of Nations in the South-West Africa territory.<sup>372</sup> Kotzé, JA. held that the mandate conferred on the Union the full power of administration and legislation in the territory and consequently the crime of treason could be committed against the Union's government.<sup>373</sup> Wessels, JA. held that since the Allied Powers and the League did not constitute states, the Union was the only state that could exercise sovereignty in the territory of South-West Africa.<sup>374</sup> This case showed the great lengths that the Appellate Division went to preserve the state's racial policies. Since the *South Africa Act 1909* did not authorise the Union's Parliament to legislate extra-territorially,<sup>375</sup> the court could have struck down the law on treason for being *ultra vires* the Act. Again, while the court acknowledged that the Mandate contained limitations to the legislative power,<sup>376</sup> the court did not discuss the compatibility of the treason charges with the Mandate. Thus, the judiciary did not fashion for itself a power of judicial review. This was due to, in part, the negative attitude towards the courts' powers of judicial review as displayed in the Boer republics.<sup>377</sup> Additionally, the English concept of parliamentary sovereignty became established in the Union.<sup>378</sup>

A positive development during this period was the Cape Provincial Division's explicit consideration of diverse authorities. For example, in *Labuschagne v Maarburger*,<sup>379</sup> the respondent, a German trader at the Cape had been interned after the outbreak of the First World War. While interned, he sued the appellant on a promissory note and obtained judgment in his favour in the magistrate's court.<sup>380</sup> On appeal to the Cape Supreme Court, the appellant contended that the respondent had lost the right to sue on account of his enemy status. The appellant cited

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<sup>371</sup> *ibid* 104-114. Solomon, JA. concurred with Innes, CJ.

<sup>372</sup> *ibid* 115-122.

<sup>373</sup> *ibid* 122-134.

<sup>374</sup> *ibid* 135-137.

<sup>375</sup> W Pollak, "The legislative competence of the Union Parliament" (1931) 48 South African Law Journal 269, 273-275.

<sup>376</sup> *Rex v Christian* 1924 AD 101, 111-112.

<sup>377</sup> J Davidson (n 270) 689.

<sup>378</sup> CG Van der Merwe and JE Du Plessis (n 44) 57.

<sup>379</sup> 1915 CPD 423.

<sup>380</sup> *ibid* 424.

Dutch authorities and an English decision on a similar issue. The respondent cited English writers on international law, and Cape and English decisions. The judges relied on English decisions, opining that constitutionally the courts of the Union were part of the English courts and consequently were bound to apply English decisions.<sup>381</sup> Also, the judges held that the respondent's internment meant that he did not have tacit permission from the Crown to sue upon a debt contracted before the outbreak of war.<sup>382</sup> They also referred to the 1907 Hague Convention on the Laws and Customs of War on Land, which the UK had ratified in 1909 and as a result was binding on the colonies. Article 23(h) of the treaty proscribed the denial of enemy nationals the right to institute legal proceedings. Citing Dutch and English writers on international law, the court interpreted that article to mean that it was only soldiers in the field that were restricted but not the Crown's courts.<sup>383</sup>

Marburger later approached the Cape Provincial Division to challenge the appointment of a receiver over his business by the Cape government in *Marburger v Minister of Finance*.<sup>384</sup> He contended that he was not an enemy subject but that he had in fact become a naturalised *burgher* of the Transvaal. Marburger cited English decisions and writers on international law to show that upon annexation of the Transvaal he had become a British subject. The respondent cited American and English writers on international law in response. The Cape Provincial Division discussed the diverging opinions of American, English and German writers on international law.<sup>385</sup> In the end, the court dismissed the appeal, holding that the appellant had not provided evidence that he had actively opted to become a British subject.<sup>386</sup>

## **7. The use of international law after establishment of the republic**

Although racial laws had existed for much of the history of the territory, when the National Party came into power in 1948, the government institutionalized racism by adopting *apartheid* as the

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<sup>381</sup> *ibid* 428.

<sup>382</sup> *ibid*.

<sup>383</sup> *ibid* 433.

<sup>384</sup> 1918 CPD 183.

<sup>385</sup> *ibid* 189-192.

<sup>386</sup> *ibid* 192.

official policy.<sup>387</sup> Parliament passed apartheid laws that restricted interaction between whites and blacks; blacks were denied access to public services; and blacks were kept out of the cities.<sup>388</sup> In the 1950s, Parliament passed legislation that denationalised blacks and created “independent” Bantustan states for them.<sup>389</sup> These “states” (Bophuthatswana, Ciskei, Transkei and Venda) were never given international recognition.<sup>390</sup> However, the South African government entered into “treaties” with these “states”<sup>391</sup> and the South African courts treated them as sovereign entities.<sup>392</sup> Appeals to the Privy Council were abolished in 1950.

In 1960, the white populace took part in a referendum to determine whether the Union should become a republic.<sup>393</sup> The republicans won and as a result the Union of South Africa was transformed into the Republic of South Africa in 1961 through the promulgation of a new constitution.<sup>394</sup> The constitutional framework was basically retained but there were some changes. For instance, the Crown was no longer the head of state but was replaced by a state president. The state president was largely ceremonial and the prime minister was still head of government.<sup>395</sup> In the same year South Africa withdrew from the Commonwealth as a result of objections by other members to South Africa’s segregationist policies.<sup>396</sup> In 1977, South West Africa was no longer represented in Parliament<sup>397</sup> and in 1981 the Senate was abolished, making Parliament unicameral.<sup>398</sup> A new constitution was promulgated in 1983.<sup>399</sup> The bicameral legislature was replaced by a tri-cameral one, which represented only whites, coloureds and Asians.<sup>400</sup> The post

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<sup>387</sup> D Black, “The Long and Winding Road: International Norms and Domestic Change in South Africa” in T Risse, SC Ropp and K Sikkink, (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999) 78-108.

<sup>388</sup> RB Beck (n 1) 58.

<sup>389</sup> *ibid.*

<sup>390</sup> J Dugard, “The South African Judiciary and International Law in the Apartheid Era” (1998) 14 *South African Journal on Human Rights* 110, 121, 124.

<sup>391</sup> See the “treaties” listed in JA Kalley, *South Africa by Treaty 1806-1986* (South African Institute of International Affairs 1987) 352-420.

<sup>392</sup> J Dugard (n 390) 121, 124.

<sup>393</sup> RB Beck (n 1) 146-147.

<sup>394</sup> Republic of South Africa Constitution Act, Act No. 32 of 1961.

<sup>395</sup> RB Beck (n 1) 54.

<sup>396</sup> P Murphy, *Monarchy and the End of Empire: The House of Windsor, the British Government, and the Postwar Commonwealth* (Oxford University Press 2013) 74.

<sup>397</sup> R Dale, *The Namibian War of Independence, 1966-1989: Diplomatic, Economic and Military Campaigns* (McFarland 2014) 46.

<sup>398</sup> CR Hill, *Change in South Africa: Blind Alleys or New Directions?* (Rex Collings 1983) 157.

<sup>399</sup> Republic of South Africa Constitution Act, Act No. 110 of 1983.

<sup>400</sup> RB Beck (n 1) 168.

of prime minister was abolished and the state president became the head of both the state and government.<sup>401</sup>

One issue that determined South Africa's relationship with international law was the dispute over South-West Africa (present-day Namibia). In 1884 the Germans declared a protectorate over the area north of the Orange River, except for Walvis Bay which the British placed under the administration of the Cape Colony.<sup>402</sup> The Germans practiced political and social discrimination against the native population, a policy that resembled *apartheid*.<sup>403</sup> As a result, several native tribes revolted against German rule. The Germans responded to the 1904 uprising of the Hereros and Namas through extermination and concentration camps such that the war is widely considered to be a genocide.<sup>404</sup> In order to ensure its security and that of the British Empire, the Union of South Africa supported the British in the war against Germany by invading South-West Africa.<sup>405</sup> When the German troops in South-West Africa surrendered in 1915, the Union of South Africa declared a protectorate over the territory.<sup>406</sup> After the First World War, the Union of South Africa hoped that South-West Africa would be granted to it in view of the international condemnation of Germany's colonial policy.<sup>407</sup> In fact, the Union first campaigned for a mandates system that excluded German colonies; if this failed, then the Union would concede to being appointed as a mandatory over South-West Africa.<sup>408</sup> In 1919, the Union was confirmed as the mandatory over

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<sup>401</sup> *ibid.*

<sup>402</sup> W Eveleigh, *South-West Africa* (T Maskew Skiller 1915) 122 ff.

<sup>403</sup> H Bley, *Namibia Under German Rule* (LIT Verlag Münster 1996) 141.

<sup>404</sup> M Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge University Press 2005) 100-101; J Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908* (Praeger, Westport 2009) 63 ff; J Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers* (James Curry 2011). The German government acknowledged that the massacre was a war crime and genocide in 2015 but the government has ruled out reparations (J Zimmerer, "Protected areas outside the danger of war" 7 August 2015, Spiegel, Hamburg, <<https://www.spiegel.de/>> accessed 20 December 2019). A class-action lawsuit filed by representatives of the Herero and Nama peoples based on the *Alien Tort Claims Act* was dismissed in 2019 by a New York court due to Germany's sovereign immunity ("US judge dismisses Namibian genocide claims against Germany" *Deutsche Welle* (Bonn, 7 March 2019) <<https://www.dw.com/>> accessed 20 December 2019).

<sup>405</sup> J Ewing, "South Africa in the World War" in AP Newton, EA Benians and EA Walker (eds), *The Cambridge History of the British Empire*, vol viii (Cambridge University Press 1968) 712-721.

<sup>406</sup> *ibid* 661.

<sup>407</sup> J Dugard, *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (University of California Press 1973) 23.

<sup>408</sup> WR Louis, "The South West African origins of the 'Sacred Trust', 1914-1919" 1967) 66(262) *African Affairs* 20,31-32.

South-West Africa and accepted to annually report on its administration of the territory.<sup>409</sup> However, the Union envisaged annexation of South-West Africa in time as a fifth province.<sup>410</sup> The Union extended apartheid to South-West Africa despite condemnation from the League of Nations.<sup>411</sup> Even so, South Africa did not face any sanctions because the Mandate was vague and the League of Nations lacked effective mechanisms of control.<sup>412</sup>

While the white population in South Africa and South-West Africa repeatedly called for the incorporation of South-West Africa, the government did not take active steps until 1946 when it made the request to the United Nations (UN).<sup>413</sup> Instead of approving the request, the UN General Assembly (UNGA) resolved that South-West Africa be placed under the trusteeship system.<sup>414</sup> South Africa refused to enter into a trusteeship agreement but continued to submit annual reports to the UN.<sup>415</sup> In 1949, the National Party government discontinued the submission of annual reports to the UN and enacted legislation that brought South-West Africa close to annexation.<sup>416</sup> The UNGA then sought an advisory opinion from the International Court of Justice (ICJ) on the question of the status of South-West Africa.<sup>417</sup> The ICJ held that the mandate over South-West Africa had not lapsed with the dissolution of the League of Nations and as a result the territory still enjoyed international status.<sup>418</sup> As a consequence, South Africa could not unilaterally alter the status of South-West Africa without the consent of the UN.<sup>419</sup> However, the court held that South Africa was not obligated to place South-West Africa under the trusteeship system.<sup>420</sup> The UN accepted the court's decisions and attempted to negotiate with South Africa on placing South-West Africa under the trusteeship system.<sup>421</sup> However, South Africa rejected the court's decision and

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<sup>409</sup> *ibid* 36.

<sup>410</sup> WR Louis, *Ends of British Imperialism: The Scramble for Empire, Suez and Decolonization* (IB Tauris 2006) 261.

<sup>411</sup> J Dugard (n 407) 82-88.

<sup>412</sup> N Matz, "Civilization and the Mandate System under the League of Nations as Origin of Trusteeship" (2005) 9(1) *Max Planck Yearbook of United Nations Law* 47, 74, 77-78.

<sup>413</sup> A Vandebosch, *South Africa and the World: The Foreign Policy of Apartheid* (University Press of Kentucky 1970) 208.

<sup>414</sup> *ibid* 210.

<sup>415</sup> J Dugard (n 407) 89-91.

<sup>416</sup> *ibid* 119, 122.

<sup>417</sup> *ibid* 128.

<sup>418</sup> *International Status of South West Africa* [1950] ICJ Rep 143. One of the judges (McNair at 146-158) relied on part of the reasoning in *Rex v Christian* [1924] AD 101, 121 and 136.

<sup>419</sup> *ibid* 144.

<sup>420</sup> *ibid*.

<sup>421</sup> J Dugard (n 407) 162.



refused to negotiate with the UN on the basis of the decision.<sup>422</sup> In 1957, the UN established a good offices committee to engage with South Africa. South Africa insisted on partitioning South-West Africa into two: one part to be administered by the UN and the other to be annexed by South Africa. However, the UN rejected this proposal, insisting that the entire South West Africa should come under the UN's supervision.<sup>423</sup>

In 1958, the UN requested former members of the League of Nations to consider taking legal action against South Africa for violating its mandate.<sup>424</sup> Ethiopia and Liberia instituted such a case before the ICJ in 1960. Initially, the court rejected South Africa's contention that Ethiopia and Liberia did not have legal standing to bring the case.<sup>425</sup> In the final judgment, the court held that it was the UN that had an interest in South Africa's compliance with its mandate. However, the court stated that the UN, an international organisation, was precluded by the ICJ Statute from instituting such a case.<sup>426</sup> Meanwhile, the UN continued its condemnation of South Africa. In 1966, the UNGA purported to terminate South Africa's mandate over South-West Africa.<sup>427</sup> Soon thereafter, the UNGA labelled apartheid as a crime against humanity<sup>428</sup> and in 1973 the UN adopted a treaty against apartheid.<sup>429</sup> During the 1967-1968 Pretoria trial of 35 Africans for terrorism offences under the draconian and retroactive *Terrorism Act*,<sup>430</sup> the UN Security Council (UNSC) actively became involved in the South-West Africa issue.<sup>431</sup> The UNSC resolved that the presence of South Africa in South-West Africa was illegal under international law.<sup>432</sup> This position was confirmed

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<sup>422</sup> A Vandebosch (n 413) 214. In 1955, when South Africa rejected the voting procedure used by the UNGA when considering a report on South-West Africa, the UNGA requested an advisory opinion from the ICJ. The ICJ held that the UNGA voting procedure was compatible with the 1950 Advisory Opinion as the procedure did not constitute a greater degree of supervision than that under the League of Nations: *South-West Africa-Voting Procedure, Advisory Opinion of June 7th, 1955* [1955] ICJ Rep 67, 77-78. Again, in 1956, the UNGA requested another advisory opinion on whether the UNGA could grant oral hearings to petitioners on South-West Africa. The ICJ held that the oral hearings were compatible with the 1950 Advisory Opinion: *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956* [1956] ICJ Rep 23, 24-32.

<sup>423</sup> J Dugard (n 407) 198-204.

<sup>424</sup> *ibid* 214.

<sup>425</sup> *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment of 21 December 1962 [1962] ICJ Rep 321 ff.

<sup>426</sup> *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase [1966] ICJ Rep 6 ff.

<sup>427</sup> Resolution 2145 (XXI) of 27 October 1966.

<sup>428</sup> Resolution 2202 A (XXI) of 16 December 1966.

<sup>429</sup> Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entry into force 18 July 1976) 1015 UNTS 243.

<sup>430</sup> *S v Tuhadeleni* 1967 (4) SA 511 (T); *S v Tuhadeleni* 1969 (1) SA 153 (AD).

<sup>431</sup> A Vandebosch (n 413) 224.

<sup>432</sup> S/RES276 (1970) of 30 January 1970.

by the ICJ when the UNSC requested for an advisory opinion.<sup>433</sup> In 1974, the UNGA resolved to exclude South Africa from taking part in its activities.<sup>434</sup>

Consequently, South Africa became isolated from the international community and refused to sign up to many international law treaties, especially on human rights. During the apartheid era, the “purists” and “antiquarians” appear to have defeated the “pollutionists”. This period saw a return to the application of Roman-Dutch law free of English influences,<sup>435</sup> but which, as mentioned above, integrated international law and municipal law. Ironically, the judiciary treated international law antagonistically (particularly with regard to politically sensitive matters) and ambiguously (with regard to politically neutral matters).<sup>436</sup> The constitutions of 1961 and 1983 did not deal with the relationship between municipal law and international law. Therefore, the courts had to resort to the Roman Dutch law in order to ascertain the relationship between international law and municipal law.

The courts applied a stringent test for proving the applicability to South Africa of a rule of customary international law.<sup>437</sup> By requiring evidence of the rule’s universal acceptance, the courts reduced the number of instances in which customary international law was applied in South Africa. However, this approach was relaxed in later cases.<sup>438</sup> Similar to the Union period, after South Africa became a republic, the courts continued to apply customary international law without expressly determining its status in the South African legal order.<sup>439</sup> Judicial affirmation of the fact that a particular rule of customary international law was part of the law of South Africa only came in 1940<sup>440</sup> and again in 1970.<sup>441</sup> A more general statement regarding the applicability of customary

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<sup>433</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 ff.

<sup>434</sup> N Matz (n 412) 81.

<sup>435</sup> J Dugard (n 390) 113.

<sup>436</sup> *ibid.*

<sup>437</sup> *ibid* 57 – 58, citing *Du Toit v. Kruger* (1905) 22 SC 234 and *Nduli and Another v. Minister of Justice and Others* (1978) (1) SA 893 (A).

<sup>438</sup> J Dugard (n 65) 58, citing *Inter-Science Research and Development Services (Pty.) Ltd. v. Republica Popular de Mozambique* 1980(2) SA Ill (T) 125 and *S v. Petane* (1988) (3) SA 51 (C) 56 - 57.

<sup>439</sup> See the cases discussed in RP Schaffer (n 99) 299 – 308.

<sup>440</sup> *ibid* 303 referring to *ex parte Schumann* (1940) WPD 251.

<sup>441</sup> J Dugard, “International Law is Part of our Law” (1971) 88 South African Law Journal 13, 13 citing *S. v. Ramotse* (Transvaal Provincial Division, 14 September 1970).

international law was made in 1971.<sup>442</sup> South African courts applied customary international law with the exceptions that originated from English law that is, that customary international law was subject to contrary legislation, judicial precedent and acts of state.<sup>443</sup> However, the courts sometimes interpreted legislation in conformity with customary international law.<sup>444</sup> Also, there was a case where the courts disregarded judicial precedent in favour of customary international law.<sup>445</sup>

Both the 1961 and 1983 Constitutions retained a provision on the continued application of treaties that had been binding upon the Union.<sup>446</sup> In addition, the constitutions contained a provision that vested the power of concluding treaties on the executive.<sup>447</sup> Conversely, judicial pronouncement on the requirement that treaties had to undergo statutory transformation in order to become applicable domestically only came in 1965.<sup>448</sup> The courts' insistence on the domestication of treaties led to a restrictive use of ratified treaties. For example, the courts held that the administration of South West Africa was a domestic constitutional issue.<sup>449</sup> Because the statute that domesticated the Mandate over South West Africa did not contain restrictions on the powers of the South African government, the instruments granting a Mandate over South West Africa could not be used in interpreting or challenging the validity of South African legislation that was extended to South West Africa.<sup>450</sup> Also, the courts declined to use the UN Charter's human rights provisions in interpreting legislation.<sup>451</sup> On the other hand, the courts treated non-ratified treaties with indifference. For example, the courts held that international human rights treaties were merely ideals and could not be used in interpreting legislation.<sup>452</sup> There were some cases in which the courts gave serious consideration to international law and others where judgments were made in

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<sup>442</sup> JW Bridge (n 332) 746-747 citing *Parkin v. Government of the République Démocratique du Congo and Another* (1971) (1) SA 259 (W), and *South Atlantic Islands Development Corporation v. Buchan* (1971) (1) SA 234 (C).

<sup>443</sup> AJGM Sanders (n 52) 149 ff.

<sup>444</sup> See the cases cited in AJGM Sanders (n 100) 200, fn 4.

<sup>445</sup> *ibid.*, citing *Leibowitz and Others v Schwartz and Others* (1974) (2) SA 661 (T) at 662A.

<sup>446</sup> Section 112 of the 1961 Constitution, and section 94 of the 1983 Constitution.

<sup>447</sup> Section 7 of the 1961 Constitution and section 6 of the 1983 Constitution.

<sup>448</sup> JW Bridge (n 332) 746-747 citing *Pan American World Airways Inc. v. S.A. Fire and Accident Insurance Co. Ltd* (1965) (3) SA 150 AD.

<sup>449</sup> J Dugard (n 390) 117.

<sup>450</sup> *S v. Tuhadeleni* (1969) (1) SA 153 (A), *Binga v. The Administrator-General for South West Africa and others* (1984) (3) SA 949 and *Binga v. Cabinet for South West Africa* (1988) (3) SA 155 (A).

<sup>451</sup> *ibid* citing *S v. Werner* (1980) (2) SA 313 (W); *S v. Adams*; *S v. Werner* (1981) (1) S.A. 187 (A).

<sup>452</sup> *ibid* citing *S v. Rudman* (1989) (3) SA 368 (E); *S. v. Rudman* (1992) (1) SA 343 (A); *Sobukwe v. Minister of Justice* (1972) (1) SA 693 (A) and *Tutu v Minister of Internal Affairs* (1982) (4) SA 571 (T).

accord with international law. However, these cases were decided in the early 1990s as the country moved towards ending apartheid.<sup>453</sup>

## 8. Conclusion

This chapter has provided a historical outline of South Africa's legal developments in order to provide the context for discussing the place of international law in South Africa. When the Cape was colonised by the Dutch, the Cape administration imported the law of Holland. The Cape courts applied Dutch statutes and the Roman-Dutch law became the common law of the land. Since Roman-Dutch jurists treated international law and municipal law as part of the same system, the Cape courts would likely have applied international law domestically without the need for domestication. Because the civil law tradition did not give prominence to the doctrine of judicial precedent, there was not likely an interaction between the Cape courts and the Dutch courts. This makes it difficult to fit the (lack of) interaction between courts as either reception or dialogue. However, because the Cape courts relied on Dutch sources and may not have modified these according to the circumstances of the colony, it is possible to classify this relationship as "reception" as opposed to "dialogue".

When the British colonised the Cape, they retained Roman-Dutch law as the common law. However, the British gradually made significant changes to the law by introducing English inspired statutes and English law trained judges. Thus, Roman-Dutch law continued to apply in the Cape colony but with some modification. Following the English tradition, customary international law was applicable domestically but it was subject to certain qualifications. Similarly, English tradition dictated that treaties had to be domesticated in order to apply domestically. In addition, the English introduced the doctrine of judicial precedent and as a result, the Cape courts were bound by English decisions. Since the Privy Council was the final court of appeal for matters emanating from the colonies, uniformity of judicial decisions was maintained throughout the British empire. Therefore, the relationship between the Cape courts and English courts would be classified as "reception" as opposed to "dialogue".

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<sup>453</sup> *ibid* 123-124.

When some Cape settlers migrated to other parts of the territory and set up independent settlements, they continued to apply the Roman-Dutch law that applied at the Cape. However, they qualified this by asserting that the Roman-Dutch law applied while taking into account the customs and circumstances of the settlers. This was probably an attempt at removing any English influence that might have modified the Roman-Dutch law while at the Cape. Still, this can also be interpreted as modifying the Roman-Dutch law to suit their needs. In practice, the Boer republic courts often relied on decisions of the Cape's Supreme Court. This appears to change the relationship between the Boer republic courts and English courts to one of dialogue. The Boer republic courts asserted their independence from the Cape and the British but did not completely ignore the Cape's court decisions, which were usually based on English decisions.

After the annexation of the Boer republics by the British, the relationship between the new colonies' courts and English courts changed to reception. This was primarily because of the doctrine of judicial precedent. This continued to be the scenario even after the formation of the Union. With the enactment of the Statute of Westminster, 1931, and after South Africa became a republic, there appeared to be a separation from English law. The last ties were severed in 1950 after appeals to the Privy Council were removed. However, there were several South African court decisions that relied on English decisions or that followed the English approach to international law.<sup>454</sup> There was, therefore, a dialogic relationship between South African courts and English courts. Concomitantly, the judges were indifferent to international fora and the English decisions were relied upon in order to restrict the application of international law domestically. Therefore, during the apartheid era, South African courts did not associate with other courts in maintaining an international rule of law.

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<sup>454</sup> RP Schaffer (n 99) 311.

## Chapter 5

### Transnational judicial dialogue in South Africa's legal system

#### 1. Introduction

The purpose of this chapter is to illustrate the extent to which the superior courts in South Africa have engaged in a transnational judicial dialogue with other courts and tribunals since the enactment of the 1993 and 1996 Constitutions to date. This will entail an analysis of the changes to South Africa's legal framework after the year 1993 and how these changes affected the application of international law domestically. In addition, this chapter will analyse some of the court decisions that have interpreted these provisions in order to highlight the general approach of the courts to international law. The chapter will then highlight the main elements of transnational judicial dialogue. At the same time, this chapter will set out the aspects of South Africa's legal system that have a bearing on the courts' abilities to engage in transnational judicial dialogue.

#### 2. The place of international law during the struggle for a democratic constitution

When South Africa became a republic in 1961, there was an increase in opposition to apartheid and a proportionate increase of state repression.<sup>1</sup> The South African Government began facing pressure from diverse directions: militant mass struggle and youth activism domestically, boycotts from the international community, and small-scale military attacks from neighbouring states. In 1989, the Organisation for African Unity (OAU) adopted the Harare Declaration, a statement to the South African Government to initiate negotiations towards ending apartheid.<sup>2</sup> The Declaration was concerned with securing the human rights of all South Africans and it was based on earlier

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<sup>1</sup> In particular, a 1976 student protest in Soweto was violently quelled by police, resulting in 500 deaths and thousands of arrests. L Segal, and S Cort, *One Law, One Nation: The Making of the South African Constitution* (Jacana Media 2011) 30-42.

<sup>2</sup> H Deegan, *Politics South Africa* (Routledge 2014) 74.

African National Congress (ANC) documents.<sup>3</sup> The United Nations (UN) General Assembly (GA) and the Commonwealth of Nations also endorsed the Harare Declaration.<sup>4</sup>

As mentioned in the previous chapter, South Africa became isolated from the international community and refused to sign up to many international law treaties, especially on human rights. The judiciary treated international law antagonistically (particularly with regard to politically sensitive matters) and ambiguously (with regard to politically neutral matters).<sup>5</sup> The courts increasingly applied a stringent test for proving the applicability to South Africa of a rule of customary international law.<sup>6</sup> Similarly, the courts' insistence on the domestication of treaties led to a restrictive use of ratified treaties.<sup>7</sup> In addition, the courts rarely considered non-ratified treaties and held that international human rights treaties were merely ideals and could not be used in interpreting legislation.<sup>8</sup>

In the 1980s, the government began secret talks with the black African movements while abolishing some petty apartheid legislation.<sup>9</sup> The government began releasing several political prisoners in 1989 and the first formal negotiations between the government and black African organisations started in 1990.<sup>10</sup> The various political parties met at the Convention for a Democratic South Africa (CODESA) in 1991 but the negotiations broke down in 1992.<sup>11</sup> In 1993, the political parties initiated the Multi-Party Negotiating Process (MPNP) in order to resolve the stalemate.<sup>12</sup> The MPNP produced an Interim Constitution that was adopted by Parliament that same year and the first democratic elections were held the following year.<sup>13</sup> A Bill of Rights was introduced in the Interim Constitution in order to signify the country's renouncement of apartheid

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<sup>3</sup> These documents were the 'Bill of Rights in the Africans Claims of 1943' and the 'Freedom Charter of 1955': KAR Phala, "Celebrating and commemorating twenty-years of the Harare declaration" <<http://www.sahistory.org.za/>> accessed 26 July 2017.

<sup>4</sup> H Deegan (n 2) 74; PD Williams, "Blair's Britain and the Commonwealth" (2005) 94(380) *The Round Table* 381.

<sup>5</sup> *ibid* 113.

<sup>6</sup> J Dugard, *International Law: A South African Perspective* (4th edn, Juta & Company 2011) 57 – 58.

<sup>7</sup> J Dugard, "The South African Judiciary and International Law in the Apartheid Era" (1998) 14 *South African Journal on Human Rights* 110, 117.

<sup>8</sup> *ibid*.

<sup>9</sup> L Segal and S Cort (n 1) 43-44.

<sup>10</sup> *ibid* 52, 57.

<sup>11</sup> H Deegan (n 2) 78-79.

<sup>12</sup> *ibid* 80.

<sup>13</sup> *ibid* 85.



and to come up with an internationally respectable constitution.<sup>14</sup> This Bill contained justiciable rights and it derived many of its provisions from international human rights law instruments. In some instances the constitution recognised certain rights that were not in international instruments e.g. the right of access to information held by the state, and the right to lawful and procedurally fair administrative justice.<sup>15</sup> South Africa has since 1994 become a party to numerous international human rights treaties.

The Interim Constitution<sup>16</sup> was intended to govern the transition to a constitutional state.<sup>17</sup> It mandated the Constitutional Assembly, which was made up of both houses of Parliament, to draw up the Final Constitution. In addition, the Interim Constitution contained thirty-four principles with which the Final Constitution was required to conform.<sup>18</sup> Also, the Interim Constitution established a Constitutional Court that, amongst others, was to determine whether the Final Constitution adhered to the thirty-four principles. The Final Constitution was enacted in 1996<sup>19</sup> and it made minor changes to the already international law friendly provisions of the Interim Constitution.<sup>20</sup> This chapter shall discuss primarily the Final Constitution and only highlight the divergences with the Interim Constitution.

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<sup>14</sup> L du Plessis, "International law and the evolution of (domestic) human-rights law in post-1994 South Africa" in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 316.

<sup>15</sup> ME Olivier, "International Law in South African Municipal Law: Human Rights Procedure, Policy and Practice" (LL.D thesis, University of South Africa 2002) 174 .

<sup>16</sup> Constitution of the Republic of South Africa, 1993, Act 200 of 1993, date of assent: 25 January 1994.

<sup>17</sup> ME Olivier, "International Law in South African Municipal Law (n 15) 174.

<sup>18</sup> R Goldstone, "The South African Bill of Rights" (1997) 32 *Texas International Law Journal* 451.

<sup>19</sup> Constitution of the Republic of South Africa, 1996, date of assent: 16 December 1996; date of commencement: 4 February 1997.

<sup>20</sup> E de Wet, "South Africa" in D Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford University Press 2011) 568; R Keightley, "Public International Law and the Final Constitution" (1996) 12 *South African Journal on Human Rights* 405: Some of the changes in the 1996 Constitution include the omission of the word "binding" in Section 232 on customary international law; the distinction between treaties that need approval by Parliament and those that do not in section 231(2) and (3); the introduction of self-executing provisions of treaties and the requirement that incorporation of treaties is to be done through national legislation in section 231 (4).

### 3. General overview of constitutional provisions on international law

South Africa is categorised as a “mixed jurisdiction” that is, a jurisdiction in which “civilian jurisprudence has ... survived within a common law environment.”<sup>21</sup> As a result of successive Dutch and British colonisation, South Africa’s substantive law is a blend of Roman-Dutch law and English law, while the procedural law is mostly of English origin.<sup>22</sup> The 1996 Constitution does not list the sources of South African law but mentions them in various sections.<sup>23</sup> Thus, these include: the Constitution,<sup>24</sup> legislation,<sup>25</sup> the common law,<sup>26</sup> customary law,<sup>27</sup> international law,<sup>28</sup> and foreign law.<sup>29</sup>

Unlike the previous constitutions, the 1996 Constitution expressly mentions international law and sets out various roles for international law. First, there are several provisions on the application of international law in South Africa. Chapter 14 of the 1996 Constitution, titled “General Provisions”, has a sub-chapter titled “International Law” that elaborates on two sources of international law: treaties and custom.

Section 231 states as follows:

#### 231. International agreements

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds

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<sup>21</sup> R Zimmerman and DP Visser, “Introduction: South African Law as a Mixed Legal System” in R Zimmerman (ed), *Southern Cross: Civil Law and Common Law in South Africa* (Juta & Company 1996) 3.

<sup>22</sup> F du Bois, “Chapter 2, Sources of Law: Overview and Constitution” in F du Bois (ed), *Wille’s Principles of South African Law* (Juta & Company 2007) 33.

<sup>23</sup> F du Bois, “Chapter 1, Introduction: History, System and Sources” in CG van der Merwe and JE du Plessis (eds), *Introduction to the Law of South Africa* (Kluwer Law International 2004) 36.

<sup>24</sup> S 2.

<sup>25</sup> S 43.

<sup>26</sup> Ss 8(3), 39(2), 39(3) and 173.

<sup>27</sup> S 39(2), 39(3) and 211.

<sup>28</sup> Ss 231, 232 and 233, among others.

<sup>29</sup> S 39(1).

the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; 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.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 232 states as follows:

**232. Customary international law**

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

In addition, specific international law rules are made applicable in certain circumstances, such as in the detention of persons during armed conflict.<sup>30</sup> However, where the rule is not binding, then section 39(1)(b) would provide another means of referring to the rule. Section 39(1)(b) provides that when “interpreting the Bill of Rights, a court, tribunal or forum must consider international law.” The equivalent provision in the Interim Constitution was section 35(1), which stated that when interpreting the provisions of the chapter on fundamental rights, the court shall “where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter...”

These provisions have been the basis for transnational judicial dialogue in South Africa as they have enabled the courts to use even non-binding international instruments when interpreting the constitution and legislation. In fact, the courts stated early that non-binding instruments were useful guides in interpreting the provisions on fundamental rights.<sup>31</sup> For instance, the courts relied on provisions of the European Convention for the Protection of Human Rights and Fundamental

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<sup>30</sup> S 37: ...

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

<sup>31</sup> *S v Makwanyane* (CCT3/94) [1995] ZACC 3 [35], [39].

Freedoms (European Convention), the Universal Declaration of Human Rights (UDHR), UN General Assembly (UNGA) resolutions, and General Comments of UN human rights bodies when discussing the constitutionality of the death penalty.<sup>32</sup> When dealing with corporal punishment of juveniles, the court relied on the European Convention and cases decided under it.<sup>33</sup> The courts also relied on General Comments of human rights bodies when discussing the rights to housing,<sup>34</sup> health<sup>35</sup> and water.<sup>36</sup> Also, when discussing the constitutionality of minimum sentencing guidelines for minors, the court relied on UNGA resolutions.<sup>37</sup> In addition to the above instruments that South Africa cannot ratify, the courts have also relied on signed but not ratified instruments,<sup>38</sup> and ratified but non-domesticated instruments.<sup>39</sup>

Second, there are provisions that are geared towards ensuring that South African legislation is in conformity with international law. Section 27(4)(b)(i) provides that “any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the legislation is consistent with the Republic’s obligations under international law applicable to states of emergency.” Also, section 233 provides as follows:

**233. Application of international law**

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Third, the 1996 Constitution also ensures that the conduct of public officers is in conformity with international law. Section 198 states that national security “must be pursued in compliance with the law, including international law.” Section 199(5) states that the “security services must act, and must teach and require their members to act, in accordance with the Constitution and the law,

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<sup>32</sup> *ibid* [412] - [435].

<sup>33</sup> *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11.

<sup>34</sup> *Government of South Africa v Grootboom* (CCT11/00) [2000] ZACC 19.

<sup>35</sup> *Minister of Health v Treatment Action Campaign* (CCT 8/02) [2002] ZACC 16.

<sup>36</sup> *Lindiwe Mazibuko v City of Johannesburg* (CCT 39/09) [2009] ZACC 28.

<sup>37</sup> *Centre for Child Law v Minister for Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18 [60] - [62].

<sup>38</sup> *S v. Makwanyane* (CCT3/94) [1995] ZACC 3 [412] - [435], referring to the International Covenant on Civil and Political Rights (ICCPR), which South Africa had not ratified at the time of the case.

<sup>39</sup> *De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2007 (5) SA 184 (SCA) [11] - [12], referring to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption which had not yet come into effect at the time of the case.

including customary international law and international agreements binding on the Republic.” In addition, section 200 states that the “primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.”

The 1993 and 1996 Constitutions only mention customary international law and international agreements; they do not mention other sources of international law. Therefore, the constitution does not provide guidance on the status of general principles of law, international judicial decisions, and resolutions of international organisations, in the South African legal system.<sup>40</sup>

#### **4. Treaties**

This section will highlight the differences between the 1993 and 1996 Constitutions with regard to treaties. In addition, this section will discuss the requirements for ratification, domestication, direct applicability and withdrawal from treaties. Also, the section will discuss the hierarchy between treaties and domestic law. Lastly, this section will discuss the various roles that treaties play in the South African legal system.

##### **i. Definition, ratification and withdrawal**

The 1993 Constitution used the term “international agreement” instead of treaty but the constitution did not elaborate on what the term “international agreement” meant. This lack of clarity did not arise in court proceedings until the 1996 Constitution was enacted. The 1993 Constitution contained a sub-section on succession to “rights and obligations under international agreements ... unless provided otherwise by an Act of Parliament.”<sup>41</sup> This provision ensured that the previously ratified and domesticated treaties continued in force. The power given to the President to negotiate and sign treaties was maintained,<sup>42</sup> but the legislature had to agree to the ratification of or accession to those treaties.<sup>43</sup> It was not clear whether Parliament had to pass a resolution or an Act in order for a treaty to become law. However, as a result of the bureaucracy

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<sup>40</sup> ME Olivier, “International Law in South African Municipal Law (n 15) 263 – 264.

<sup>41</sup> S 231(1), Constitution of the Republic of South Africa, 1993 (n 15).

<sup>42</sup> *ibid* S 100(1)(i).

<sup>43</sup> *ibid* Ss 231(2) and (3).

within the executive and the legislature, there was often a delay in the ratification and domestication of treaties.<sup>44</sup>

The 1996 Constitution likewise uses the term “international agreement”. This has caused uncertainty because the term could be interpreted to include legally binding and non-binding agreements.<sup>45</sup> At the moment, it appears that “international agreement” in section 231 refers to “legally binding agreements creating enforceable rights and duties.”<sup>46</sup> The 1996 Constitution has placed upon the *national* executive the responsibility to negotiate and sign treaties.<sup>47</sup> Thus, this power is shared between the President and the cabinet. Ratification of treaties requires approval by resolution of the legislature<sup>48</sup> but the 1996 Constitution also recognises international agreements “of a technical administrative or executive nature” or that do “not require ratification or accession.”<sup>49</sup> These do not require Parliament’s approval but they must be tabled in Parliament after executive approval. The 1996 Constitution does not provide guidance on the sort of international agreements that come into force upon signature or that do not require ratification or accession.<sup>50</sup> However, the executive has continued with the practice of distinguishing between “formal” and “informal” international agreements that developed after the 1993 Constitution.<sup>51</sup> Therefore, where it is clear that an international agreement is “formal” or where there is doubt, then that agreement is to be submitted to the legislature.<sup>52</sup>

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<sup>44</sup> J Dugard (n 6) 54.

<sup>45</sup> M Olivier, “Informal International Agreements under the 1996 Constitution” (1996) 22 South African Yearbook of International Law 63, 77 – 78.

<sup>46</sup> J Schneeberger, “A labyrinth of tautology: the meaning of the term 'international agreement' and its significance for South African law and treaty making practice” (2006) 26 South African Yearbook of International Law 1, 32 - 40, discussing *S v Harksen*; *Harksen v President of the Republic of South Africa and Others*; *Harksen v Wagner NO and Another* 2000 (1) SA 1185 (C); *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29.

<sup>47</sup> Section 231(1), Constitution of the Republic of South Africa, 1996 (n 19).

<sup>48</sup> *ibid* S 231(2).

<sup>49</sup> *ibid* S 231(3).

<sup>50</sup> J Schneeberger (n 47) 5 -7.

<sup>51</sup> W Scholtz, “A Few Thoughts on s 231 of the South Africa Constitution” (2004) 29 South African Yearbook of International Law 202, 209.

<sup>52</sup> M Olivier (n 46) 64.

The 1996 Constitution does not provide express guidance on the withdrawal from treaties. This issue was tackled in the North Gauteng High Court, when in response to the *al-Bashir cases*,<sup>53</sup> the government expressed its intention to withdraw from the Rome Statute of the International Criminal Court.<sup>54</sup> The government argued that the decision to withdraw from a treaty was akin to concluding and signing a treaty, which is exclusively in the executive's domain and for that reason parliamentary approval was only required after the executive had issued the withdrawal.<sup>55</sup> The court disagreed, holding that issuing a notice of withdrawal was equivalent to ratification of a treaty; hence the withdrawal required prior parliamentary approval.<sup>56</sup> In addition, the court held that since it was Parliament that determined whether South Africa should be bound by a treaty then Parliament also determined whether South Africa should no longer be bound by a treaty.<sup>57</sup> The court also held that *ex post facto* approval by Parliament would have no effect.

## ii. Domestication

In addition, ratified treaties require to be domesticated in order to become law in South Africa but a self-executing provision of a treaty is law unless it is inconsistent with the constitution or an Act of Parliament.<sup>58</sup> Unlike under the 1993 Constitution, this provision makes it clear that a treaty is to be domesticated through national legislation, which includes subordinate legislation and previous legislation.<sup>59</sup> Thus, the previous methods of domesticating a treaty still apply *that is*, an Act of Parliament could repeat the text of the treaty in the Act itself, or refer to the treaty in part, or contain a schedule that repeated the treaty in whole or part, or authorise the executive to issue regulations which gave effect to the treaty.<sup>60</sup> The courts have held that the domestication of a treaty “creates ordinary domestic obligations”<sup>61</sup> meaning that the courts would be enforcing the domesticating statute and not the treaty itself. Thus, the Constitutional Court recently held that it

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<sup>53</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17.

<sup>54</sup> *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53.

<sup>55</sup> *ibid* [46].

<sup>56</sup> *ibid* [47].

<sup>57</sup> *ibid* [51].

<sup>58</sup> S 231(4), Constitution of the Republic of South Africa, 1996 (n 19).

<sup>59</sup> *ibid* S 239; *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16 [26].

<sup>60</sup> *Hugh Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 [99].

<sup>61</sup> *ibid* [181].



was the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act),<sup>62</sup> and not the treaty, that granted a power to, and imposed a duty upon, the South African Police Service to investigate international crimes committed outside South Africa.<sup>63</sup>

### iii. Hierarchy between treaties and domestic law

Where there is a conflict between a treaty and the domesticating law, then the conflict would be resolved in favour of the Act,<sup>64</sup> unless the Act provides otherwise.<sup>65</sup> In addition, where there is a conflict between a domesticated treaty and other legislation, then the conflict should be resolved using principles of statutory interpretation and superseding legislation.<sup>66</sup> This position was contradicted by the Supreme Court of Appeal in *Tradehold*,<sup>67</sup> where the court stated that because a double taxation treaty modifies domestic law, then the treaty should prevail in case there is a conflict between the two.<sup>68</sup>

Also, the courts have established that legislation that domesticates a treaty would enjoy a status superior to other national legislation only where that domesticating legislation expressly so provides.<sup>69</sup> In addition, in the *al-Bashir case*,<sup>70</sup> the Supreme Court of Appeal noted that the Diplomatic Immunities and Privileges Act<sup>71</sup> (DIPA) generally dealt with immunity of heads of state but that the ICC Act dealt with the specific issue of immunity from international crimes. Thus, the ICC Act took precedence consistent with the “*maxim generalia specialibus non derogant* (general words and rules do not derogate from special ones).”<sup>72</sup>

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<sup>62</sup> Act 27 of 2002.

<sup>63</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30 [53] – [62].

<sup>64</sup> *A M Moolla Group Limited and Others v Commissioner for SARS and Others* (139/2002) [2003] ZASCA 18 [15].

<sup>65</sup> *Hugh Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 [100].

<sup>66</sup> *ibid* [101].

<sup>67</sup> *Commissioner for the South African Revenue Service v Tradehold Ltd* (132/11) [2012] ZASCA 61.

<sup>68</sup> *ibid* [17].

<sup>69</sup> *Hugh Glenister v President of the Republic of South Africa* (CCT 48/10) [2011] ZACC 6 [100].

<sup>70</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17.

<sup>71</sup> Act 37 of 2001.

<sup>72</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17 [102].

#### iv. Direct applicability

The introduction of the concept of self-executing provisions has created uncertainty in South African law.<sup>73</sup> As mentioned earlier, jurisdictions that allow direct applicability of treaty provisions require three conditions to be met: intention to confer rights on individuals;<sup>74</sup> the provision is clear enough such that there is no need for implementing legislation;<sup>75</sup> and there is no conflict between the treaty provision and legislation.<sup>76</sup> The South African Constitution does not provide guidance on the criteria for determining the self-executing status of a provision of a treaty, and the courts have not been decisive on this issue.<sup>77</sup> This creates the risk that a self-executing treaty provision may not be given its proper effect domestically.<sup>78</sup> For instance, whereas several national courts in other jurisdictions deem article 9<sup>79</sup> of the ICCPR as self-executing,<sup>80</sup> the

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<sup>73</sup> N Botha, “Extradition, Self-Execution and the South African Constitution: A Non-Event” (2008) 33 South African Yearbook of International Law 25; E Ngolele, “The Content of the Doctrine of Self-Execution and its Limited Effect in South African Law” (2006) 31 South African Yearbook of International Law 141 - 172; M Olivier, “Exploring the Doctrine of Self-Execution as Enforcement Mechanism of International Obligations” (2002) 27 South African Yearbook of International Law 99; W Sholtz (n 52) 210 – 211.

<sup>74</sup> A Nollkaemper, “The direct effect of public international law” in JM Prinszen and A Schrauwen (eds), *Direct effect. Rethinking a classic of EC legal doctrine* (Europa Law Publishing 2004) 169.

<sup>75</sup> P Craig and G de Búrca, *EU Law. Text, Cases and Materials* (6th edn, Oxford University Press 2011) 190.

<sup>76</sup> E de Wet, “The reception of international law in the South African legal order: An introduction” in E de Wet, H Hestermeyer and R Wolfrum (eds), *The Implementation of International Law in Germany and South Africa* (PULP 2015) 34.

<sup>77</sup> *President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* (CCT 24/08, CCT 52/08) [2009] ZACC 9; *Claassen v Minister of Justice and Constitutional Development* (A238/09) [2010] ZAWCHC 190.

<sup>78</sup> H Woolaver, “The Influence of International Law on the Constitutional Jurisprudence of South Africa” 12 <[www.nylslawreview.com/](http://www.nylslawreview.com/)> accessed 13 August 2017.

<sup>79</sup> Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

<sup>80</sup> M Killander, “Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision: *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC): notes and comments” (2010) 26(2) South African Journal on Human Rights 386, 391, fn 31, referring to C Harland, “The

Constitutional Court merely used it as an interpretive aid while the High Court held that it was not self-executing.<sup>81</sup>

It has been argued that, with regard to fulfilling international obligations, what matters at the international level is that the result is achieved at the municipal level, irrespective of the approach used.<sup>82</sup> Thus, a South African court could either directly apply a self-executing treaty provision without requiring implementing legislation, or it could interpret municipal law in conformity with the treaty.<sup>83</sup> This still leaves unresolved how to guard against the direct application of non-self-executing treaty provisions that have not been domesticated.<sup>84</sup> Because section 231(4) allows a judge to give effect to a self-executing provision of an unincorporated treaty, there is a risk of a judge going further to give effect to the rest of the treaty.<sup>85</sup> However, this rendered unlikely for two reasons. First, the 1996 Constitution is *prima facie* dualist, and so the default position of a court is to rely on its provisions. Second, the cautious approach taken by the courts and Parliament so far is likely to be the trend in future.<sup>86</sup>

#### v. Role of treaties

The 1996 Constitution establishes several roles for treaties. First, treaties are applicable as law in South Africa, subject to the procedure laid down in section 231 of the 1996 Constitution. Second, the treaties can be used when interpreting legislation. As mentioned earlier, section 233 of the 1996 Constitution provides that courts must give legislation a reasonable interpretation that is consistent with international law. The Constitutional Court has previously referred to *binding* international law.<sup>87</sup> It is still not clear whether this is restricted to domesticated treaties or whether

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Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents” (2000) 22(1) Human Rights Quarterly 187,196.

<sup>81</sup> *ibid* 390, referring, respectively, to *Zealand v Minister for Justice and Constitutional Development* 2008 (CCT54/07) [2008] ZACC 3 [52], and *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC) [36].

<sup>82</sup> *ibid* 391.

<sup>83</sup> *ibid* 392.

<sup>84</sup> H Woolaver (n 79) 12.

<sup>85</sup> N Botha, “Treaties After the 1996 Constitution: More Questions than Answers” (1997) 22 South African Yearbook of International Law 95, 99.

<sup>86</sup> AO Enabulele and E Okojie, “Myths and Realities in ‘Self-Executing Treaties’” (2016) 10(1) Mizan Law Review 1, 11-12.

<sup>87</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30 [77].

it includes ratified but non-domesticated treaties. In practice, this provision has been used by the courts to give effect to non-domesticated treaties.<sup>88</sup> In the *Progress Office Machines* case,<sup>89</sup> the Supreme Court of Appeal held that a notice by the Minister of Finance extending the duration of an anti-dumping duty was unreasonable because the extension went beyond the period contained in a ratified but undomesticated treaty,<sup>90</sup> even though the relevant legislation was silent on the duration. Thus, the court took a wide view as to what constitutes “interpretation” since the court was actually reading clauses into legislative provisions.<sup>91</sup> The court also implicitly endorsed the view that international law in section 233 includes non-domesticated treaties.<sup>92</sup>

In the *SCAW* case,<sup>93</sup> the Constitutional Court relied on a ratified but undomesticated treaty to interpret legislation on anti-dumping. However, the court did not actually discuss the relevant legislation nor clarify which provision required interpretation.<sup>94</sup> The court based its decisions substantially on the undomesticated treaty and ignored another relevant domesticated treaty.<sup>95</sup> Because little reference was made to the relevant legislation, the court was in effect applying the undomesticated treaty as if it was law in South Africa.<sup>96</sup> The Supreme Court of Appeal, in the related but later *Bridon* case,<sup>97</sup> did not refer to the *SCAW* case, presumably because the *SCAW* case had been incorrectly decided.<sup>98</sup> The court correctly noted that the ratified but undomesticated treaty was not law in South Africa but that the treaty could be used in interpreting the relevant legislation

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<sup>88</sup> H Woolaver (n 79) 4 and 14.

<sup>89</sup> *Progress Office Machines CC v South African Revenue Services and Others* (532/06) [2007] ZASCA 118.

<sup>90</sup> *ibid* [11].

<sup>91</sup> H Woolaver (n 79) 15.

<sup>92</sup> *ibid* 13.

<sup>93</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6.

<sup>94</sup> EC Schlemmer, “International Economic Law in South Africa” in E de Wet, H Hestermeyer and R Wolfrum (eds) (n 77) 231.

<sup>95</sup> *ibid* 226-227. The court heavily relied on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (1868 UNTS 201, “Antidumping Agreement”), which South Africa had not domesticated. The court also did not realise that a certain interpretation of the Antidumping Agreement permits longer periods for antidumping duties. Instead, the court should have considered the relevance of the Southern African Customs Union Agreement, 2002 (“SACU Agreement”), especially since the court relied on the International Trade Administration Act (Act. No. 71 of 2002), which had domesticated this treaty. Still, it appears that the end result would have been the same had the court done so since the SACU Agreement was restrictive on antidumping duties (EC Schlemmer (n 94) 224).

<sup>96</sup> *ibid*.

<sup>97</sup> *Bridon International GmbH v International Trade Administration Commission* (538/2011) [2012] ZASCA 82.

<sup>98</sup> EC Schlemmer (n 94) 235.

as per section 233 of the 1996 Constitution.<sup>99</sup> The Supreme Court of Appeal made a similar decision in the *Association of Meat Exporters and Importers* case.<sup>100</sup>

Conversely, there are instances where the courts have relied on a domesticated treaty to interpret legislation. In the Zimbabwe torture case, the court referred to the Rome Statute when determining whether the presence of an accused was necessary for the SAPS to commence an investigation under the ICC Act.<sup>101</sup> Similarly, in the *al-Bashir* case, the High Court noted that the ICC Act excluded immunity for heads of state in the same manner as the Rome Statute and therefore South Africa was legally bound to arrest and surrender al-Bashir to the ICC.<sup>102</sup> The Supreme Court of Appeal held that South Africa's obligations under the ICC Act had to be interpreted in light of South Africa's international law obligations. Consequently, "the National Director of Public Prosecutions [had] the power not only to prosecute perpetrators before [South African] Courts, but, to that end, to bring them before [South African] Courts."<sup>103</sup> Here, the court interpreted the ICC Act in light of the Rome Statute to find that head of state immunity was excluded. However, it is also possible to argue that personal immunity under customary international law goes against the spirit, purport and object of the Bill of Rights in the 1996 Constitution and so South African courts do not have to uphold the immunity.<sup>104</sup>

Third, treaties can be used when interpreting the Bill of Rights. As mentioned earlier, section 39(1)(b) states that the courts are to *consider* international law when interpreting the Bill of Rights. This is a somewhat lesser obligation than that found in section 233 because the courts are not bound to *follow* international law when interpreting the Bill of Rights, as was held by the courts when discussing the equivalent section 35(1) of the 1993 Constitution.<sup>105</sup> Section 35(1) of the 1993

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<sup>99</sup> *ibid.*

<sup>100</sup> *Association of Meat Exporters and Importers v International Trade Administration Commission* (769, 770, 771/12) [2013] ZASCA 108 [61].

<sup>101</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30 [46].

<sup>102</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 [28.8].

<sup>103</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17 [95].

<sup>104</sup> C Gevers, "International criminal law in South Africa" in E de Wet, H Hestermeyer and R Wolfrum (eds) (n 77) 418-419.

<sup>105</sup> *S v Makwanyane* (CCT3/94) [1995] ZACC 3 [39]; *S. v. Williams and Others* (CCT 20/94) [1995] ZACC 6 [50].

Constitution restricted the application of international law to that which was “applicable to the protection of rights” that is, international human rights law. Section 39(1)(b) of the 1996 Constitution does not contain this restriction. As mentioned earlier, the courts have interpreted section 35(1) of the 1993 Constitution to mean that even non-binding international law is to be considered when interpreting the Bill of Rights.<sup>106</sup> This position has been maintained with regards to section 39(1)(b) of the 1996 Constitution.<sup>107</sup> As discussed earlier, the courts have used this provision to engage in transnational judicial dialogue. In the process, South African courts’ use of international human rights law has had an influence in other jurisdictions.<sup>108</sup>

In the early post-1993 cases, the courts did not clarify on the authoritative nature of the binding and non-binding international law that they considered when interpreting the Bill of Rights.<sup>109</sup> The position was later rectified by the Constitutional Court.<sup>110</sup> There has been a neglect of African human rights instruments and decisions in favour of non-African ones<sup>111</sup> but recently the courts are making more use of African jurisprudence.<sup>112</sup> It is questionable for the courts to rely on non-binding international law since this could amount to usurping the decision that the executive or the legislature has made in not approving certain international commitments.<sup>113</sup> Non-domesticated treaties raise similar concerns as their use by the judiciary encroaches on the legislature’s purview.

Fourth, treaties can be used in terms of section 39(2) of the 1996 Constitution. Section 39(2) obliges courts to “promote the spirit, purport and object of the Bill of Rights” when interpreting legislation or developing the common law or customary law. The equivalent section 35(3) of the

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<sup>106</sup> *S v Makwanyane* (CCT3/94) [1995] ZACC 3 [39]; *S v Williams and Others* (CCT 20/94) [1995] ZACC 6 [50].

<sup>107</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 [26].

<sup>108</sup> L Chenwi, “International Human Rights Law in South Africa” in E de Wet, H Hestermeyer and R Wolfrum (eds) (n 77) 364-365.

<sup>109</sup> *S v Makwanyane* (CCT3/94) [1995] ZACC 3; *S v Williams and Others* (CCT 20/94) [1995] ZACC 6.

<sup>110</sup> *Government of the Republic of South Africa v Grootboom* (CCT 11/00) [2000] ZACC 19 [26].

<sup>111</sup> *Minister of Health v Treatment Action Campaign* (CCT 8/02) [2002] ZACC 16; *Minister of Home Affairs & Another v Fourie & Another, Lesbian and Gay Equality Project v Minister of Home Affairs* (CCT 60/04) [2005] ZACC 19; *Lindiwe Mazibuko v City of Johannesburg* (CCT 39/09) [2009] ZACC 28.

<sup>112</sup> *Centre for Child Law v Minister of Home Affairs and Others* 2005 6 SA 50 (T) [24]; *De Gree and Another v Webb and Others* (Centre for Child Law, University of Pretoria, Amicus Curiae) 2007 (5) SA 184 (SCA) [12]; *AD and Another v DW and Others* (Centre for Child Law as amicus curiae; Minister of Social Development as intervening party) (CCT48/07) [2007] ZACC 27 [47]; *S v M* (Centre for Child Law as amicus curiae) (CCT 53/06) [2007] ZACC 18 [16], [17], [31].

<sup>113</sup> H Woolaver (n 79) 18.



1993 Constitution referred to the “spirit, purport and objects” of the chapter on the Bill of Rights. These provisions do not mention international law but they implicitly create a role for it since many of the provisions in the Bill of Rights are drawn from international human rights instruments. The approach followed by the courts so far has been rather liberal in their choice of international instruments. For instance, in the *Carmichele case*, the Constitutional Court considered whether the common law of delictual liability had to be developed beyond existing precedent.<sup>114</sup> The court drew parallels between the South African Constitution and the European Convention on Human Rights, and relied on two decisions of the European Court of Human Rights.<sup>115</sup> The court also referred to a General Recommendation of the CEDAW Committee in stressing the international law obligations relevant to the issue.<sup>116</sup> Similarly, in the *Fick case*, the Constitutional Court decided to develop the common law so as to give effect to decisions of international courts or tribunal.<sup>117</sup> The court was motivated by the fact that SADC was established partly with the aim of guaranteeing human rights. However, the instruments that the court relied upon – the SADC treaty, the protocol establishing the SADC Tribunal, and the agreement that amended the SADC treaty - were never domesticated by South Africa. The court was comfortable with the *ex post facto* approval of Parliament in 1995.<sup>118</sup>

## 5. Customary international law

This section will highlight the differences between the 1993 and 1996 Constitutions with regard to customary international law. In addition, the section will discuss the methodology used by the courts to identify custom, the direct applicability of custom, and the role of custom in the South African legal system.

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<sup>114</sup> *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22 [40].

<sup>115</sup> *ibid* [45] – [48].

<sup>116</sup> *ibid* [62].

<sup>117</sup> *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22 [62] – [64]. The legal effect of decisions of judicial and quasi-judicial bodies is dealt with *infra*.

<sup>118</sup> *ibid* [30].



### **i. Definition**

An advantage of section 232 of the 1996 Constitution is that it does not ambiguously refer to the phrase “general rules of international law” which is found in the Kenyan Constitution. Unlike the Kenyan situation, the language in section 232 makes it unnecessary for South African courts to differentiate customary international law from other possibly analogous sources of international law such as general principles of law.

Section 232 does not contain the phrase “binding on the Republic” that was present in the Interim Constitution.<sup>119</sup> The use of the phrase in the Interim Constitution had elicited varied opinions. There was the view that the language in the Interim Constitution was clearer as it ensured that the state was bound by the same rule both domestically and internationally.<sup>120</sup> However, there was an opposing view that the phrase was tautologous and unnecessary since a state could not be bound by a rule that it consistently opposed.<sup>121</sup> The omission of the phrase in the Final Constitution has also elicited different opinions. There is the view that the omission of the phrase, having regard to the overall significance given to public international law by the South African legal system, means that all rules of customary international law are applicable.<sup>122</sup> Conversely, there is the view that indeed the phrase was unnecessary.<sup>123</sup> While the issue of the change in wording has not arisen in the courts, the Constitutional Court recently stated in the *Southern Africa Litigation Centre*<sup>124</sup> case that the courts are “required to interpret all national laws in accordance with *binding* international law as prescribed by section 233 of the Constitution.”<sup>125</sup> The court’s use of the word “binding” appears to be an effort to emphasise that customary international law was binding on South Africa.

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<sup>119</sup> 231. Continuation of international agreements and status of international law

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(3) The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.

<sup>120</sup> DJ Devine, “The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993” (1995) 44 *International and Comparative Law Quarterly* 1, 12.

<sup>121</sup> N Botha, “International Law and the South African Interim Constitution” (1994) 9 *SA Public Law* 245, 255.

<sup>122</sup> R Keightley, “Public International Law and the Final Constitution” 12 *South African Journal on Human Rights* 405 407-408.

<sup>123</sup> J Dugard (n 6) 58.

<sup>124</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30.

<sup>125</sup> *ibid* [77].

## ii. Hierarchy between custom and municipal law

Section 232 makes it clear that customary international law is subject to the constitution and to legislation. This means that custom has a status lower than the constitution and legislation. The decisions in the *al-Bashir cases* essentially affirmed the position that customary international law was subject to legislation.<sup>126</sup> In addition, section 232 affirms the common law position regarding the applicability of customary international law without the requirement of domestication.<sup>127</sup> This means that custom could be directly applied by the courts where there is no legislation on the particular issue. However, before custom can be directly applied there are three conditions that need to be met: intention to confer rights on individuals;<sup>128</sup> the rule is clear enough such that there is no need for implementing legislation;<sup>129</sup> and there is no conflict between the rule and legislation.<sup>130</sup> The vagueness of customary rules makes it difficult to meet these conditions.

Section 232 places customary international law above judicial precedent and common law.<sup>131</sup> This means that a later rule of customary international law could be used to overrule a judicial decision that recognises an earlier customary international law rule.<sup>132</sup> As mentioned in the previous chapter, during the apartheid years, South African courts tended to strictly follow the doctrine of *stare decisis*, with the result that the courts would uphold a decision that reflected an old customary rule.<sup>133</sup> The courts later relaxed this approach and accepted the contemporary customary rule.<sup>134</sup> This approach is supported by a plain interpretation of section 232.<sup>135</sup>

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<sup>126</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 [28.7]; *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17 [103].

<sup>127</sup> J Dugard (n 6) 56.

<sup>128</sup> A Nollkaemper (n 75) 169-179.

<sup>129</sup> P Craig and G de Búrca (n 76) 190.

<sup>130</sup> E de Wet (n 77) 34.

<sup>131</sup> J Dugard (n 6) 56-57.

<sup>132</sup> H Strydom and K Hopkins, "International Law" in S Woolman and M Bishop (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2006) 30-8.

<sup>133</sup> See *Kavouklis v Bulgaria* (1943) NPD 190; *Parkin v Government of the Republique Democratique du Congo and Another* (1971) 1 S. 259 (W); *Lendalease Finance Co (Pty) Ltd v Corporacion de Mercadeo Agricola and Others* (1975) 4 SA 397 (C).

<sup>134</sup> See *Leibowitz and Others v Schwartz and Others* (1974-2) SA 661 (T); *Inter-Science Research and Development Services (Pty.) Ltd. v. Republica Popular de Mozambique* 1980 (2) SA 111 (T); *Kaffraria Property Co (Pty) Ltd. v. Government of the Republic of Zambia* 1980 (2) SA 709 (E).

<sup>135</sup> A Stemmet, "The Influence of Recent Constitutional Developments in South Africa on the Relationship between International Law and Municipal Law" (1999) 33 *The International Lawyer* 47, 55.

### iii. Identifying custom

The significance of the change in wording could arise in two instances: when the existence or the type of custom in issue. First, the courts have differed on the test to be used when determining whether a practice or rule has attained the status of custom. As mentioned in the Chapter 4, prior to the enactment of the 1993 Constitution, some South African judges insisted on the “universal” practice of a rule before they applied it.<sup>136</sup> This was a more stringent standard than that required under international law. Later decisions were in accord with the international law requirement of “general” practice of a rule.<sup>137</sup> South African scholars agree that the international law approach is more appropriate.<sup>138</sup> The Constitutional Court in the *Kaunda* case also relied on the “general” practice standard.<sup>139</sup> Second, customary international law could either be universal, general, regional or particular.<sup>140</sup> Determining under which category a customary international law rule falls and whether the rule has received the assent of South Africa could have a bearing on whether South African courts are bound to follow the rule.<sup>141</sup> However, since section 232 does not make a distinction between the different types of custom then all kinds are thereby incorporated.<sup>142</sup> Overall, it appears that the wording in section 232 is meant to resurrect the relevance of customary international law in South Africa, which had been rendered useless through the restrictions previously imposed by the courts during the apartheid years.<sup>143</sup> Still, the relevance of custom is minimised by the fact that custom is subject to conflicting legislation.

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<sup>136</sup> J Dugard (n 6) 57 – 58, citing *Du Toit v. Kruger* (1905) 22 SC 234 and *Nduli and Another v. Minister of Justice and Others* (1978) (1) SA 893 (A).

<sup>137</sup> *ibid* 58, citing *Inter-Science Research and Development Services (Pty.) Ltd. v. Republica Popular de Mozambique* 1980(2) SA 111 (T) 125 and *S v. Petane* (1988) (3) SA 51 (C) 56 - 57.

<sup>138</sup> H Strydom and K Hopkins (n 132) 30-9.

<sup>139</sup> *Kaunda v President of the Republic of South Africa* [2004] ZACC 5 [29].

<sup>140</sup> D Devine, “What International Law is part of South African Law?” (1987) 13 South African Yearbook of International Law 119. The International Law Commission (ILC) prefers the terms “general” and “particular” customary international law. There are still several aspects of particular custom that are not settled e.g. whether particular custom should be dependent on the geographical proximity of the states concerned: International Law Commission, *Third Report on Identification of Customary International Law*, UN Doc. A/CN.4/682 (27 March 2015) 54-58.

<sup>141</sup> D Devine (n 140) 121.

<sup>142</sup> DJ Devine (n 120) 12.

<sup>143</sup> N Botha, “The coming of age of public international law in South Africa” (1992) 18 South African Yearbook of International Law 36, 42, 46.

Another issue that arises is that the courts' methods when looking for the relevant customary international law are subject to criticism.<sup>144</sup> Ideally, when making such an examination, South African courts would have to consult the decisions of international tribunals and courts, decisions of other domestic courts, executive acts of other states, and treaties.<sup>145</sup> However, in practice, South African courts have merely referred to a single source such as an international decision or academic work.<sup>146</sup> In *Kaunda v President of the Republic of South Africa*,<sup>147</sup> the Constitutional Court considered whether there was a legally binding duty, as opposed to a mere right, upon the state to extend diplomatic protection over its nationals. In concluding that there was no such customary international legal duty,<sup>148</sup> the court only examined a report by the International Law Commission (ILC) on the issue of diplomatic protection.<sup>149</sup> The ILC report had made reference to comparative constitutional provisions and case law in which individuals had sued their governments seeking diplomatic protection.<sup>150</sup> However, since the ILC report was made several years before the court's decision, the court should have actually examined the contemporary state practice.

The *Kaunda* case was followed in the *Van Zyl* case.<sup>151</sup> The *Van Zyl* case involved a request for diplomatic protection by companies incorporated in Lesotho and their South African shareholders as a result of expropriation by the Lesotho Government. The High Court held that the South African Government's discretion whether to exercise diplomatic protection is prescribed by

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<sup>144</sup> However, the process of finding customary international law rules is made difficult by the different approaches to formation and identification of customary international law: Report of the International Law Commission on the work of its sixty-third session, 26 April to 3 June and 4 July to 12 August 2011, Annex A (A/66/10), para. 3; International Law Commission, *Fifth Report on Identification of Customary International Law*, UN Doc. A/CN.4/717 (14 March 2018) 54 [124]. The aim of the ILC Special Rapporteur on Identification of Customary International Law is to come up with an authoritative, collective and practical approach: M Wood, "The present position within the ILC on the topic "Identification of customary international law": in partial response to Sienho Yee, Report on the ILC Project on "Identification of Customary International Law" (2016) 15(1) Chinese Journal of International Law 3, 6-7.

<sup>145</sup> H Strydom and K Hopkins (n 132) 30-8.

<sup>146</sup> H Woolaver (n 79) 8, referring to *Koyabe and Others Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23 [41] and [45]; *Richtersveld Community and Others v Alexkor Ltd and Another* (448/2001) [2003] ZASCA 14 [46]; *S v Basson* (CCT30/03A) [2005] ZACC 10 [177] and [225]; *National Commissioner of the South African Police Service v Southern African Litigation Centre (485/2012)* [2013] ZASCA 168 [39].

<sup>147</sup> [2004] ZACC 5.

<sup>148</sup> *ibid* [29].

<sup>149</sup> Report of the International Law Commission on the work of its fifty-second session, 1 May to 9 June and 10 July to 18 August (2000) A/55/10.

<sup>150</sup> *ibid* 30-32.

<sup>151</sup> *Van Zyl and Others v Government of the Republic of South Africa & Others* (20320/02) [2005] ZAGPHC 70; *Van Zyl and Others v Government of the Republic of South Africa & Others* (170/06) [2007] ZASCA 109.

customary international law.<sup>152</sup> The Supreme Court of Appeal affirmed this decision but did not evaluate the customary international law on the issue.<sup>153</sup> More recently, the High Court had to consider whether the decision by the Minister of International Relations to grant Grace Mugabe immunity as the spouse of a head of state was constitutional.<sup>154</sup> The parties cited a few decisions of domestic and international courts, a memorandum by the ILC and a resolution by an international law institute. The judge held that the cases relied upon by the Minister were not sufficient to establish a customary rule that spouses of heads of state enjoyed immunity *rationae personae*.<sup>155</sup>

One of the most extensive examination of customary international law was in the *American Soda Ash* case.<sup>156</sup> Here, the Competition Appeals Court relied on international decisions, comparative case law and legislation when determining the scope of the “effects doctrine” under customary international law.<sup>157</sup> A more recent instance where the courts carried out an elaborate survey of customary international law was in the *al-Bashir cases*. In 2015, when Sudanese President Omar Hassan al-Bashir attended the African Union (AU) summit in South Africa, a case was filed to compel the South African Government to arrest and surrender Al Bashir to the International Criminal Court (ICC).<sup>158</sup> The government argued that it could not arrest Al-Bashir because he enjoyed immunity under customary international law and by virtue of an agreement with the AU. The High Court did not carry out a survey of the customary international law on head of state immunity but made a sweeping statement that al-Bashir did not enjoy immunity under customary international law.<sup>159</sup> On appeal,<sup>160</sup> the government maintained that al-Bashir enjoyed immunity

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<sup>152</sup> *Van Zyl and Others v Government of the Republic of South Africa & Others* (20320/02) [2005] ZAGPHC 70 [93].

<sup>153</sup> *Van Zyl and Others v Government of the Republic of South Africa & Others* (170/06) [2007] ZASCA 109 [84]. The judge only made a passing reference to *The Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* [1970] ICJ Rep 3 and *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Preliminary Objections [2007] ICJ Rep 582.

<sup>154</sup> *Democratic Alliance v Minister of International Relations and Co-operation and Others; Engels and Another v Minister of International Relations and Co-operation and Another* (58755/17) [2018] ZAGPPHC 534.

<sup>155</sup> *ibid* [31], [32], [35].

<sup>156</sup> *American Soda Ash Corp CHG Global (Pty) Ltd v. Competition Commission of South Africa* (12/CAC/DEC01) [2003] ZACAC 6.

<sup>157</sup> E de Wet (n 20) 585-586.

<sup>158</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402.

<sup>159</sup> *ibid* [30].

<sup>160</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17.

under customary international law. The Supreme Court of Appeal extensively discussed international decisions and scholarly commentaries on the issue of head of state immunity.<sup>161</sup> The court concluded that customary international law did not restrict the immunity of heads of state in cases of international crimes.<sup>162</sup> While the Supreme Court of Appeal acknowledged that the DIPA reflected the customary immunity of heads of state, the court relied on the restriction to immunity contained in the ICC Act.

#### **iv. Role of customary international law**

The 1996 Constitution establishes several roles for customary law. First, customary international law could be directly applied by the courts where there is no legislation on a particular issue. However, there are several difficulties that arise when applying customary international law. Customary international law is basically unwritten, which makes it difficult to ascertain the particular rule. Again, in order to assert the direct applicability of a customary rule, the rule must meet be clear and precise, it must confer individual rights, and it must not require implementing legislation.

Second, the 1996 Constitution assigns customary international law a role in interpreting legislation. Section 233 provides that courts must give legislation a reasonable interpretation that is consistent with international law. The reference to “international law” obviously includes customary international law. Thus, customary international law has a role to play when interpreting all legislation, and not only when there is ambiguity in the legislation.<sup>163</sup> This provision is also an affirmation of the courts’ presumption, even during the apartheid era, that the legislature did not intend to violate international law.<sup>164</sup> The role of customary international law in interpreting legislation was forcefully put forward by the Constitutional Court in the Zimbabwe torture case.<sup>165</sup> The High Court and the Supreme Court of Appeal had held that the South African Police had a duty under the South African Constitution, the South African Police Service Act (SAPS Act) and the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act) to

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<sup>161</sup> *ibid* [66] – [83].

<sup>162</sup> *ibid* [84].

<sup>163</sup> H Woolaver (n 79) 14.

<sup>164</sup> J Dugard (n 6) 64.

<sup>165</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30.

investigate allegations of torture.<sup>166</sup> The Constitutional Court went further to hold that the customary international law nature of the crime of torture underscored the duty to investigate allegations of torture.<sup>167</sup>

Conversely, in the *al-Bashir case*, the Supreme Court of Appeal relied on the limitations placed on customary international law by treaty and legislation. The High Court had held that al-Bashir did not enjoy immunity under customary international law.<sup>168</sup> In addition, the court held that al-Bashir's immunity had been stripped away by the Rome Statute and the ICC Act.<sup>169</sup> On appeal,<sup>170</sup> the government argued that al-Bashir enjoyed immunity under both customary international law and the DIPA. The Supreme Court of Appeal noted that al-Bashir still enjoyed immunity under customary international law.<sup>171</sup> Thus, the court did not take seriously the effect of the UN Security Council resolution on al-Bashir's immunity arising from customary international law.<sup>172</sup> However, the court held that the ICC Act excluded all forms of immunity and that the government's decision not to arrest al-Bashir was inconsistent with the South African Constitution and unlawful.<sup>173</sup> The court noted that while the government's obligations under the ICC Act conflicted with those under customary international law as reflected in the DIPA, the ICC Act's exclusion of immunity was the more progressive direction.<sup>174</sup> In addition to upholding the *lex specialis* over the *lex generalis*, the court appears to have disregarded a literal interpretation<sup>175</sup> of sections 4(2) and 10(9) of the ICC Act in favour of a purposive approach.<sup>176</sup>

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<sup>166</sup> *ibid* [18].

<sup>167</sup> *ibid* [60].

<sup>168</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 [30].

<sup>169</sup> *ibid* [28.8].

<sup>170</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17.

<sup>171</sup> *ibid* [84].

<sup>172</sup> E de Wet, "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law" (2015) 13(5) *Journal of International Criminal Justice* 1049, 1069.

<sup>173</sup> *ibid* [103].

<sup>174</sup> *ibid*.

<sup>175</sup> D Tladi, "The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law; Attempting to make a Collage from an Incoherent Framework" (2015) 13(5) *Journal of International Criminal Justice* 1027, 1038-1039.

<sup>176</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17 [95], [101].



Third, section 39(1)(b) obliges courts to consider international law when interpreting the Bill of Rights, and this creates another role for customary international law in South Africa. This is a less obligatory provision than section 233 as the courts are not required to follow international law. In addition, the courts are not required to prefer an interpretation that is consistent with international law over one that does not.<sup>177</sup> However, when using this provision, the courts have tended to rely on international instruments as opposed to customary international law.<sup>178</sup>

Fourth, the requirement in section 39(2) to promote the spirit, purport and object of the Bill of Rights when interpreting legislation or developing the common law invites the consideration of customary international law. Many of the rights in the Bill are similar to those in international human rights instruments, and these instruments have also codified some customary rules.<sup>179</sup> However, the role of custom is diminished because it is unwritten, in contrast to the express provisions of treaties and legislation.

The language of section 232 means that the South African Constitution has a monist approach to customary international law. Notwithstanding the constitution's monist approach to customary international law, the courts have been reluctant to apply it.<sup>180</sup> Customary international law rarely forms the basis of the court's decision even when it would clearly have been relevant.<sup>181</sup> In such cases, the courts prefer to rely on treaty provisions as reflected in the domesticating statute. Even where customary international law is analysed this is usually done cautiously.<sup>182</sup> In fact, the courts tend to refer to state practice for comparative purposes and not for establishing the existence of a customary international law rule.<sup>183</sup> In cases involving a potential conflict between the constitution

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<sup>177</sup> H Woolaver (n 79) 15.

<sup>178</sup> L Chenwi (n 108) 364.

<sup>179</sup> Human rights treaties are now considered as sources of customary international law: A D'Amato, Human Rights as Part of Customary International Law: A Plea for Change of Paradigms" (1995) 25 Georgia Journal of International and Comparative Law 47; JJ Paust, "The Complex Nature, Sources and Evidences of Customary Human Rights" (1995) 25 Georgia Journal of International and Comparative Law 147.

<sup>180</sup> E de Wet, "The 'friendly but cautious' reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks" (2005) 28 Fordham International Law Journal 1529, 1557 ff.

<sup>181</sup> *S v Makwanyane* (CCT3/94) [1995] ZACC 3; *S v Williams and Others* (CCT20/94) [1995] ZACC 6; *National Commissioner of the South African Police Service v Southern African Litigation Centre* (485/2012) [2013] ZASCA 168; *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6.

<sup>182</sup> *Harksen v. President of the Republic of South Africa* (1998) (2) SA 1011; *S v. Basson* (CCT 30/30A) [2005] ZACC 10.

<sup>183</sup> H Woolaver (n 79) 8.

and customary international law, the courts are unlikely to seriously consider customary international law.<sup>184</sup>

## 6. General principles of law

This section will discuss whether the South African Constitution permits the application of general principles of law and the implications that flow therefrom. As mentioned chapter 1, this study will work with three common meanings of this source of international law. First, the phrase could refer to legal principles common to municipal legal systems such as estoppel. Second, the phrase could refer to general principles applicable directly to international legal relations (e.g. consent, reciprocity and the equality of states). Third, it could refer to principles applicable to legal relations generally (e.g. the finality of agreements and the legal validity of agreements).<sup>185</sup>

Both the 1993 and 1996 Constitutions do not expressly refer to general principles of law but there is the possibility of relying on this source of international law when interpreting legislation. Section 35(1) of the 1993 Constitution referred to “public international law”, while sections 39(1)(b) and 233 of the 1996 Constitution refer to “international law”. In comparison, the phrases “general rules of public international law” in the Namibian Constitution<sup>186</sup> and “general rules of international law” in the German Constitution<sup>187</sup> are considered to be wide enough to refer to general principles of law. Thus, it is possible to argue that since section 35(1) of the 1993 Constitution implicitly included general principles of law, then sections 39(1)(b) and 233 of the 1996 Constitution do the same. In *S. v Makwanyane*,<sup>188</sup> the Constitutional Court held that courts must consider non-binding international when interpreting legislation or the bill of rights. It has been argued that general principles of law can be used in this interpretive role.<sup>189</sup>

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<sup>184</sup> See *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* (CCT 17/96) [1996] ZACC 16 [27].

<sup>185</sup> H Thirlway, “The Sources of International Law” in MD Evans (ed), *International Law* (Oxford University Press, 2010) 108-109.

<sup>186</sup> A Stemmet (n 135) 53.

<sup>187</sup> R Wolfrum, H Hestermeyer and S Voneky, “The Reception of International Law in the German Legal Order: An Introduction” in E de Wet, H Hestermeyer and R Wolfrum (eds) (n 77) 5.

<sup>188</sup> *S v. Makwanyane* (CCT3/94) [1995] ZACC 3 [35] and [39].

<sup>189</sup> H Booysen, “The administrative law implications of the customary international law is part of our law doctrine” (1997) 22 South African Yearbook of International Law 46, 51

Whereas treaties enjoy the same status as legislation, it is likely that general principles of law, similar to custom, would rank below legislation. This is especially because general principles of law are not explicitly mentioned in the South African Constitution. However, because general principles of law are not rules *per se* but more of standards, it is possible for them to override legislation. A commonly used principle is that of proportionality,<sup>190</sup> whose elements are prescribed in the South African Constitution.<sup>191</sup> The Constitutional Court has used this principle to strike down legislative provisions that impinge on the bill of rights.<sup>192</sup> Again, due to their nature, general principles of law cannot be directly applicable like treaty or customary rules.

## 7. Judicial decisions

This section will discuss whether the domestic law provides a framework for the implementation and use of international decisions. The Final Constitution does not provide guidance on the

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<sup>190</sup> AS Sweet and J Mathews, “Proportionality balancing and global constitutionalism” (2008) 47(1) Columbia Journal of Transnational Law 72,124-131.

<sup>191</sup> S 33(1) of the 1993 Constitution:

### 33. Limitation

- (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-
- (a) shall be permissible only to the extent that it is-
    - (i) reasonable; and
    - (ii) justifiable in an open and democratic society based on freedom and equality; and
  - (b) shall not negate the essential content of the right in question, and provided further that any limitation to-
    - (aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or
    - (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.

Section 36(1) of the 1996 Constitution:

### 36. Limitation of rights

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
- a. the nature of the right;
  - b. the importance of the purpose of the limitation;
  - c. the nature and extent of the limitation;
  - d. the relation between the limitation and its purpose; and
  - e. less restrictive means to achieve the purpose.

<sup>192</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; *S v Williams and Others* (CCT20/94) [1995] ZACC 6; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; *Prince v President of the Law Society of the Cape of Good Hope and Others* (220/98) [2000] ZASCA 172; *S v Mello* (CCT5/98) [1998] ZACC 7.

applicability of decisions of international courts and tribunals. This is despite the fact that South Africa is a party to several treaties that provide for dispute settlement mechanisms and which could issue binding decisions against the state. The lack of a legal framework for giving effect to such decisions could give rise to the state's international responsibility.<sup>193</sup>

As mentioned in chapter 4, the Union of South Africa was a founder member of the League of Nations and signed the treaty establishing the League.<sup>194</sup> The Union's mandate contained a clause that gave to the court jurisdiction over the interpretation or implementation of the mandate.<sup>195</sup> There does not appear to be any dispute that was submitted to the PCIJ with regard to the Union of South Africa. The Union joined the League's replacement, the UN, in 1945,<sup>196</sup> and made a declaration accepting the compulsory jurisdiction of the International Court of Justice (ICJ) in 1955.<sup>197</sup> South Africa was thus bound by and required to implement the court's decisions in cases where South Africa was a party. However, in 1967, partly in reaction to the international community's use of the ICJ to address apartheid, the South African Government withdrew its acceptance of the ICJ's compulsory jurisdiction.<sup>198</sup> Thus, the only contentious cases that the ICJ has determined with regard to South Africa are the *South West Africa* cases.<sup>199</sup>

South Africa signed the UN Convention on the Law of the Sea (UNCLOS) in 1984 and ratified it in 1997.<sup>200</sup> At the time of signing the treaty, the South African Government made two declarations. In the first one, the government indicated that it would make further declarations with regard to

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<sup>193</sup> E de Wet (n 77) 520.

<sup>194</sup> MO Hudson, "Membership in the League of Nations" (1924) 18(3) *American Journal of International Law* 436, 437, 440-441. Signature and ratification was done by the United Kingdom as special representative.

<sup>195</sup> MO Hudson, "The First Year of the Permanent Court of International Justice" (1923) 17(1) *Harvard Law Review* 15, 25.

<sup>196</sup> Signature on 26 June 1945 and ratification on 7 November 1945. When the Union became the Republic of South Africa on 31 May 1961, this change of name was also reflected at the UN.

<sup>197</sup> Declaration of the Union of South Africa recognizing as compulsory the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, New York, 12 September 1955, 216 UNTS 115.

<sup>198</sup> Notice of 12 April 1967 terminating the Declaration of the Union of South Africa recognizing as compulsory the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, New York, 12 September 1955, 595 UNTS 363.

<sup>199</sup> *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment of 21 December 1962 [1962] ICJ Rep 321; *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase [1966] ICJ Rep 6.

<sup>200</sup> P Vrancken, "The International Law of the Sea in South Africa" in E de Wet, H Hestermeyer and R Wolfrum (eds) (n 77) 151.

dispute settlement in due course but it does not appear to have done so.<sup>201</sup> It is, therefore, not clear whether South Africa has expressly chosen a dispute settlement mechanism under the UNCLOS. However, there is an indication that South Africa has opted for arbitration under Annex VII of the UNCLOS since the government has nominated an arbitrator.<sup>202</sup> The second declaration that the South African Government made stated that it did not recognise the UN Commissioner for Namibia<sup>203</sup> but this declaration was revoked upon ratification of the treaty.<sup>204</sup>

South Africa signed the treaty<sup>205</sup> establishing the International Criminal Court (ICC) in 1998 and ratified it in 2000. The country then domesticated the treaty in 2002 by enacting the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act).<sup>206</sup> The ICC Act contains provisions for the implementation of the ICC's decisions on various matters. However, unlike other international (quasi-)judicial bodies, the ICC is concerned with individual criminal responsibility and not state responsibility. Therefore, the domestic procedures for implementing the ICC's decisions are not ideal for issues of state responsibility.<sup>207</sup> South Africa's compliance with the ICC's decisions arose in regard to al-Bashir's visit to the country in 2015. The government did not adhere to the ICC Prosecutor's request for the arrest and surrender of al-Bashir to the ICC. Thereafter, the South African courts held that the failure of the government to arrest and surrender al-Bashir to the ICC was a violation of the state's domestic obligations.<sup>208</sup> The South African Government then sent a notification of the state's intention to withdraw from the

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<sup>201</sup> "The Government of the Republic of South Africa shall, at the appropriate time, make declarations provided for in articles 287 and 298 of the Convention relating to the settlement of disputes."

<sup>202</sup> South Africa nominated Judge Albertus Jacobus Hoffmann, who at the time was the Vice-President of the International Tribunal for the Law of the Sea (See Nomination of arbitrator under Article 2 Annex VII of the Convention, 25 April 2014, Depository Notification C.N.227.2014.TREATIES-XXI.6).

<sup>203</sup> "Pursuant to the provisions of Article 310 of the Convention the South African Government declares that the signature of this Convention by South Africa in no way implies recognition by South Africa of the United Nations Council for Namibia or its competence to act on behalf of South West Africa/Namibia." The Council had been appointed by the UNGA to administer South West Africa after the UNGA revoked South Africa's mandate (General Assembly Res. A/RES/2145(XXI); General Assembly Res. A/RES/2248; General Assembly Res. A/RES/2372(XXII)).

<sup>204</sup> See Depository Notification C.N.532.1997.TREATIES-11/8 of 30 January 1998.

<sup>205</sup> Rome Statute of the International Criminal Court (adopted: 17 July 1998; entry into force: 1 July 2000) 2187 UNTS 90 (hereinafter "Rome Statute"). South Africa signed the treaty on 17 July 1998 and ratified it on 27 November 2000.

<sup>206</sup> Act No. 27 of 2002.

<sup>207</sup> E de Wet (n 77) 520.

<sup>208</sup> *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17.

Rome Statute.<sup>209</sup> The ICC also held that the failure of the government to arrest and surrender al-Bashir to the ICC was a violation of the state's international obligations.<sup>210</sup> South Africa's notification of its intention to withdraw from the Rome Statute was successfully challenged at the High Court,<sup>211</sup> and the government eventually withdrew the notification.<sup>212</sup>

South Africa signed and ratified both the protocol establishing the African Court on Human and Peoples' Rights (ACtHPR)<sup>213</sup> and the protocol creating the Court of Justice of the African Union (CJAU).<sup>214</sup> While these two courts were merged into the African Court of Justice and Human Rights (ACtJHR),<sup>215</sup> South Africa has not yet ratified the protocol establishing the new court. Article 30 of the protocol establishing the ACtHPR directs state parties to comply with and execute the court's judgments.<sup>216</sup> Since the Court's rules state that the Court's decision is binding on the parties to the case,<sup>217</sup> this means that it is only the parties to the case that are bound by and required to implement the Court's decisions. However, there are currently no decisions of the ACtHPR that could test the applicability of international judicial decisions in South Africa. Before the African Commission on Human and Peoples' Rights (ACmHPR) made its decision in *Luke Munyandu Tembani*,<sup>218</sup> two non-governmental organisations requested an advisory opinion from the ACtHPR.<sup>219</sup> The ACtHPR dismissed the request without going into the merits because there was

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<sup>209</sup> Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court, 19 October 2016, Depository Notification C.N.786.2016.TREATIES-XVIII.10.

<sup>210</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302, 06 July 2017.

<sup>211</sup> *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53.

<sup>212</sup> Withdrawal of notification of withdrawal, 7 March 2017, Depository Notification C.N.121.2017.TREATIES-XVIII.10.

<sup>213</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of African Court of Human and Peoples' Rights (adopted: 10 June 1998; entered into force: 25 January 2004) (hereinafter "ACtHPR Protocol"). South Africa signed the treaty on 9 June 1999 and ratified it on 3 July 2002.

<sup>214</sup> Protocol of the Court of Justice of the African Union (adopted: 1 July 2003 entry into force: 11 February 2008). South Africa signed the treaty on 16 March 2004 and ratified it on 17 December 2004.

<sup>215</sup> Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights (adopted: 1 July 2008; not yet in force).

<sup>216</sup> ACtHPR Protocol, article 30: "The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."

<sup>217</sup> Rules of Court of the African Court of Human and Peoples' Rights, adopted on 2 June 2010, rule 61(5): "The judgment of the Court shall be binding on the parties."

<sup>218</sup> *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others*, Communication 409/12.

<sup>219</sup> *The Pan African Lawyers' Union (PALU) and Southern African Litigation Centre (SALC)*, Request No. 002/2012.



already a similar application pending before the ACmHPR. The ACtHPR has also dismissed two cases<sup>220</sup> against South Africa on grounds of lack of jurisdiction because South Africa has not accepted the competence of the Court to receive cases filed by non-governmental organizations and individuals.<sup>221</sup>

South Africa signed the 2000 protocol establishing the Southern African Development Community (SADC) Tribunal and the 2001 agreement amending the protocol but South Africa did not ratify those instruments.<sup>222</sup> The 2000 protocol provided that the Tribunal's decisions were binding on the parties to a dispute before it and were enforceable in the states concerned.<sup>223</sup> In addition, the protocol directed state parties to ensure execution of the Tribunal's decisions. In 2008, the SADC Tribunal issued an adverse judgment against Zimbabwe.<sup>224</sup> Unable to register and enforce the judgment in Zimbabwe, the applicants were successful in registering the judgment in South Africa.<sup>225</sup> As a result, the applicants were able to attach property in South Africa belonging to Zimbabwe and that was being used for commercial purposes. The Zimbabwe Government's appeal against this decision went up to the Constitutional Court, which affirmed the lower courts'

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<sup>220</sup> *Delta International Investments SA and Others v. Republic of South Africa*, Application 002/2012; *Emmanuel Joseph Uko and Others v. Republic of South Africa*, Application 004/2012.

<sup>221</sup> ACtHPR Protocol, article 5(3): ... "The Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol."

ACtHPR Protocol, article 34(6): ... "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration."

<sup>222</sup> Only 5 of the 15 member countries of SADC ratified the 2000 protocol establishing the SADC Tribunal.

Consequently, it has been argued that the Tribunal begun operating irregularly: JT Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge University Press 2011) 290-291.

<sup>223</sup> Protocol on Tribunal in the Southern African Development Community and Rules of Procedure of the Southern African Development Community Tribunal signed: 7 August 2000; entry into force: 14 August 2011, in S Ebobrah and A Tanoh (eds), *Compendium of African Sub-Regional Human Rights Documents* (PULP 2010) 375:

#### ARTICLE 32

##### ENFORCEMENT AND EXECUTION

1. The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the State in which the judgement is to be enforced shall govern enforcement.
2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.

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<sup>224</sup> *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe* (2008) AHRLR (SADC 2008).

<sup>225</sup> E de Wet, "The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa" (2013) 28(1) ICSID Review-Foreign Investment Law Journal 45, 55-57.



decisions.<sup>226</sup> The Constitutional Court found that the legislation for enforcing foreign judgments was not appropriate for international decisions.<sup>227</sup> Instead, the court decided to develop the common law so as to construe “foreign courts” to include the SADC Tribunal, and to give effect to the Tribunal’s judgment.<sup>228</sup> While the use of the common law to enforce international decisions is a significant development, there are concerns that equating international decisions with foreign decisions could render international decisions subject to the restrictions placed on foreign decisions.<sup>229</sup> In response to these cases, the SADC Summit suspended the Tribunal in 2010 and in 2012 the Summit decided that the Tribunal’s mandate shall be limited to disputes between SADC member states.<sup>230</sup>

South Africa became a member of the General Agreement on Tariffs and Trade (GATT)<sup>231</sup> in 1964 and a member of the World Trade Organisation (WTO)<sup>232</sup> in 1995. Decisions of the WTO’s panels, Appellate Body and arbitrators become binding upon parties to the disputes when the Dispute Settlement Body adopts those bodies’ reports.<sup>233</sup> South Africa has also faced potential disputes before the WTO Dispute Settlement Body (DSB). Brazil,<sup>234</sup> India,<sup>235</sup> Indonesia,<sup>236</sup> Pakistan<sup>237</sup> and

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<sup>226</sup> *Government of the Republic of Zimbabwe v. Fick and Others* (657/11) [2012] ZASCA 122; *Government of the Republic of Zimbabwe v. Fick and Others* (CCT 101/12) [2013] ZACC 22.

<sup>227</sup> E de Wet, “The case of *Government of the Republic of Zimbabwe v Louis Karel Fick*: First step towards developing a doctrine on the status of international judgments within the domestic legal order” (2014) 17 Potchefstroom Electronic Law Journal 554, 557.

<sup>228</sup> Ibid 558-559.

<sup>229</sup> E de Wet (n 77) 524-525.

<sup>230</sup> AK Abashidze and others “Judicial Body of the Southern African Development Community: Problem of Jurisdiction” (2015) 6(5) Mediterranean Journal of Social Sciences 259, 261. In 2019, the South African Constitutional Court held that the President’s participation in the SADC Summit’s decisions to suspend the Tribunal and to adopt a protocol limiting the Tribunal’s jurisdiction was unconstitutional (*Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51). The Tanzanian High Court also held that the suspension of the SADC Tribunal went against the rule of law and that in the meantime, the High Court would hear disputes filed by individuals against Tanzania arising from the SADC treaty (*Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania*, Miscellaneous Civil Cause No. 23 of 2014 (unreported)).

<sup>231</sup> General Agreement on Tariffs and Trade, adopted: 30 October 1947; entry into force: 1 January 1948, 55 UNTS 194. South Africa signed the treaty on 13 June 1948.

<sup>232</sup> Marrakesh Agreement Establishing the World Trade Organization (adopted: 15 April 1994, entry into force: 1 January 1995) 1867 UNTS 154 (hereinafter “WTO Agreement”). South Africa signed the treaty on 15 April 1994 and ratified it on 2 December 1994.

<sup>233</sup> World Trade Organisation, *A Handbook on the WTO Dispute Settlement System* (2nd edn, Cambridge University Press 2017) 12.

<sup>234</sup> *South Africa – Anti-dumping duties on frozen meat of fowls from Brazil*, DS439.

<sup>235</sup> *South Africa – Anti-dumping Duties on Certain Pharmaceutical Products from India*, DS168

<sup>236</sup> *South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper*, DS374.

<sup>237</sup> *South Africa – Provisional anti-dumping duties on portland cement from Pakistan*, DS500.

Turkey<sup>238</sup> have complained against South Africa's anti-dumping duties on products emanating from those states. The complaints by Brazil, India, Pakistan and Turkey have not proceeded because consultations were requested but no panel was established nor any settlement notified.<sup>239</sup> Conversely, the complaint by Indonesia was withdrawn because South Africa amended the relevant legislation on anti-dumping measures with retrospective effect.<sup>240</sup> This means that the South African courts do not yet have to consider the applicability of WTO decisions.

## 8. Declarations, resolutions, and non-binding instruments and decisions

South Africa is a member of several international organisations which issue binding resolutions. Binding resolutions of international organisations would need to be implemented domestically. However, the South African Constitution does not provide guidance on this issue. Since international organisations are usually formed through treaties,<sup>241</sup> it appears that resolutions of international organisations have to be domesticated through legislation.<sup>242</sup> As far as UN Security Council resolutions are concerned, South Africa relies on issue specific legislation as opposed to a single general legislation.<sup>243</sup> While South Africa enacted the Application of Resolutions of the Security Council of the United Nations Act<sup>244</sup> which provides for the domestication and implementation of UN Security Council resolutions, the Act has never come into force.<sup>245</sup> In order to implement UN Security Council resolutions on terrorism, South Africa enacted the Protection of Constitutional Democracy Against Terrorism and Related Activities Act (POCDATARA Act).<sup>246</sup> Other measures that are not linked to terrorism offences would have to be implemented

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<sup>238</sup> *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey*, DS288.

<sup>239</sup> L Ndlovu, "An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa's dumping and anti-dumping Law" (2010) 5(1) *Journal of International Commercial Law and Technology* 29, 29.

<sup>240</sup> *ibid.*

<sup>241</sup> Obligations arising directly from the organisation's founding treaty have to be domesticated. For instance, the immunities of staff of international organisations are implemented through the Diplomatic Immunities and Privileges Act (DIPA).

<sup>242</sup> N Botha, "Municipal Application of Annex 14 to the Chicago Convention: The Role of Recommended International Practices and Procedures in South African Municipal Law" (1997) 22 *South African Yearbook of International Law* 112, 118 – 119.

<sup>243</sup> E de Wet (n 20) 575-576; D Tladi "The United Nations Charter and the South African Legal Order" in E de Wet, H Hestermeyer and R Wolfrum (eds) (n 77) 104.

<sup>244</sup> Act 172 of 1993.

<sup>245</sup> H Strydom and T Huarka "South Africa" in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Martinus Nijhoff Publishers 2004) 430.

<sup>246</sup> Act 33 of 2004.

through several unrelated legislation.<sup>247</sup> Thus, like treaties, UN Security Council resolutions, once domesticated, give rise to domestic obligations.

Non-binding decisions of international organisations do not need to be implemented domestically. However, such decisions have a moral force and South Africa would find it difficult to hold other states accountable while it is in default. These decisions could be implemented by enacting legislation or through executive directives. South Africa is a party to several UN human rights treaties<sup>248</sup> that create quasi-judicial bodies.<sup>249</sup> As mentioned earlier, these bodies regularly consider state reports, issue concluding observations and recommendations on those reports, publish general comments on the interpretation of provisions of the parent treaties, and consider complaints from individuals concerning state violations of the parent treaties. South Africa has accepted some of those bodies' individual complaints procedures.<sup>250</sup> However, there are very few decisions that have been made against South Africa. After an adverse decision by the African Commission on Human and Peoples' Rights (ACmHPR), the complainant in *Prince*<sup>251</sup> approached the UN's Human Rights Committee (HRC).<sup>252</sup> However, the HRC also decided in favour of South Africa after finding that,

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<sup>247</sup> D Tladi (n 244) 106-107.

<sup>248</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted: 21 December 1965, entry into force: 4 January 1969) 660 UNTS 195 (hereinafter "ICERD"); International Covenant on Civil and Political Rights (adopted: 16 December 1966, entry into force: 23 March 1976) 999 UNTS 171 (hereinafter "ICCPR"); International Covenant on Economic, Social and Cultural Rights (adopted: 16 December 1966, entry into force: 3 January 1976) 993 UNTS 3 (hereinafter "ICESCR"); Convention on the Elimination of All Forms of Discrimination against Women (adopted: 18 December 1979, entry into force: 3 September 1981) 1249 UNTS 13 (hereinafter "CEDAW"); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted: 10 December 1984, entry into force: 26 June 1987) 1465 UNTS 85 (hereinafter "CAT"); Convention on the Rights of the Child (adopted: 20 November 1989, entry into force: 2 September 1990) 1577 UNTS 3 (hereinafter "CRC"); Convention on the Rights of Persons with Disabilities (adopted: 24 January 2007, entry into force: 3 May 2008) 2515 UNTS 3 (hereinafter "CRPD"). South Africa has not signed or ratified the International Convention for the Protection of All Persons from Enforced Disappearance (adopted: 20 December 2006, entry into force: 23 December 2010) 2176 UNTS 3 (hereinafter "ICPPED") and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted: 18 December 1990, entry into force: 1 July 2003) 2220 UNTS 3 (hereinafter "CMW"). The individual complaints procedure under the CMW is not yet in operation.

<sup>249</sup> South Africa signed the ICERD and ICCPR on 3 October 1994 and ratified them on 10 December 1998; signed the ICESCR on 3 October 1994 and ratified it on 12 January 2015; signed the CEDAW on 29 January 1993 and ratified it on 15 December 1995; signed the CAT 29 January 1993 and ratified it on 10 December 1998; signed the CRC 29 January 1993 and ratified it on 16 June 1995; and signed the CRPD on 30 March 2007 and ratified it on 30 November 2007.

<sup>250</sup> South Africa accepted the procedure under the CAT and the ICERD on 10 December 1998; acceded to the Optional Protocol to the ICCPR on 28 August 2002; acceded to the Optional Protocol to the CEDAW on 18 October 2005; and signed the Optional Protocol to the CRPD on 30 March 2007 and ratified it on 30 November 2007.

<sup>251</sup> *Gareth Anver Prince v South Africa*, Communication No. 255/2002 (discussed below with regard to the ACmHPR).

<sup>252</sup> *Prince v. South Africa*, Communication No 1474/2006, UN Doc. CCPR/C/91/D/1474/2006 (2007).

in the circumstances of the case, there was no violation of the ICCPR.<sup>253</sup> The HRC has also considered another complaint against South Africa, namely *McCullum*.<sup>254</sup> In that case complainant alleged that South Africa had violated the ICCPR by subjecting him to mistreatment during detention. South Africa refused to cooperate with the Committee. The HRC found that South African authorities had acted in contravention of the ICCPR and required South Africa to provide the complainant with several remedies. However, South Africa has only partially implemented this decision.<sup>255</sup> This decision is non-binding and South Africa does not have to give effect to this decision.<sup>256</sup> However, there is room for South African courts to use the decisions through section 39(1)(b) of the 1996 Constitution. In addition, the overall international law friendly approach of the Final Constitution could be interpreted to require South Africa to cooperate with non-binding international judicial bodies.<sup>257</sup>

Decisions of the African Commission on Human and Peoples' Rights (ACmHPR) are not considered to be legally binding.<sup>258</sup> The ACmHPR has decided two applications with regard to South Africa. Some of the applicants in the earlier mentioned cases against Zimbabwe at the SADC Tribunal approached the ACmHPR, arguing that the decision to suspend the Tribunal denied them the right to a fair trial.<sup>259</sup> The ACmHPR ruled that the African Charter imposes an obligation to ensure the right to a fair trial at the national level but not the international level. As a result, the African Charter does not impose an obligation upon the SADC member states to guarantee a right of appeal to the SADC Tribunal.<sup>260</sup> However, the ACmHPR stated that the applicants could appeal

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<sup>253</sup> L Chenwi (n 108) 369-370.

<sup>254</sup> *Bradley McCullum v. South Africa*, Communication No. 1818/2008, U.N. Doc. CCPR/C/100/D/1818/2008 (2010).

<sup>255</sup> The government initiated an investigation in 2011 but there had been no prosecution as at 2016. A civil claim instituted by McCullum and his fellow inmates was dismissed by the High Court in 2015 and leave to appeal was denied by the High Court in 2016. (J Heard, "UN alerted to systemic flaws at St Albans 8 years ago", City Press, 29 December 2016 <<https://city-press.news24.com/>> accessed 13 May 2020.

<sup>256</sup> E de Wet (n 77) 528.

<sup>257</sup> *ibid.*

<sup>258</sup> C Okoloise, "Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights" (2018) 48(1) African Human Rights Law Journal 27, 31; African Commission on Human and Peoples' Rights, *Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights 04 - 06 September 2018*, Zanzibar, Tanzania, 2, 6 and 9, <<https://www.achpr.org/>> accessed 21 November 2019.

<sup>259</sup> *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others*, Communication 409/12.

<sup>260</sup> AK Abashidze and others (n 231) 263.

to the Commission in case the relevant national courts decided against them.<sup>261</sup> The ACmHPR also considered another application against South Africa, namely *Prince*.<sup>262</sup> In this case, which was already discussed above, the complainant was a Rastafarian and he contested the government's restriction on the use of cannabis. The ACmHPR found that the restriction was reasonable and a legitimate limitation to the rights protected in the African Charter.<sup>263</sup>

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), another quasi-judicial body,<sup>264</sup> has neither received an application nor made any decision with regard to South Africa. The ACERWC issued guidelines on ensuring that a state implements the Committee's decisions. The guidelines on communications require a state to submit a report on measures taken to implement the decision and the Committee also appoints a rapporteur to monitor the implementation.<sup>265</sup> The guidelines on implementing decisions provide for an implementation hearing where the state's report is not satisfactory.<sup>266</sup> Therefore, whereas the Committee's decisions are not legally binding, South Africa may be compelled to implement the decisions due to the Committee's assertiveness.

Since non-binding resolutions do not have to be implemented, their role domestically is mostly in interpretation of the Constitution and legislation.<sup>267</sup> Despite the absence of a constitutional provision regulating their role, the courts have increasingly relied on resolutions of international organisations and instruments from other regions. While the courts often set out the non-binding nature of the instruments, the courts place heavy reliance on these instruments when interpreting the constitution and legislation.<sup>268</sup>

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<sup>261</sup> *ibid.*

<sup>262</sup> *Gareth Anver Prince v South Africa*, Communication No. 255/2002.

<sup>263</sup> L Chenwi (n 108) 368-369.

<sup>264</sup> The ACERWC is established under Article 32 of the African Charter on the Rights and Welfare of the Child (adopted: 11 July 1990, entry into force: 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990). South Africa signed the treaty on 10 October 1997 and ratified it on 7 January 2000.

<sup>265</sup> Section XXI of the Revised Guidelines for the Consideration of Communications, adopted during the 1<sup>st</sup> Extra-Ordinary Session of the ACERWC on October 2014, <<https://www.acerwc.africa/>> accessed 21 November 2019.

<sup>266</sup> Guidelines for implementation of decisions on communications, no date of adoption, <<https://www.acerwc.africa/>> last visited on 21 November 2019.

<sup>267</sup> D Tladi (n 244) 93.

<sup>268</sup> See text to n 107, on section 39(1)(b) of the Constitution.

## 9. Transnational judicial dialogue in South Africa

This section will discuss the extent to which South African courts have engaged in transnational judicial dialogue. This will be done by analysing certain areas that have been addressed by both South African court and international judicial and quasi-judicial bodies. These areas are the right to be free from cruel, inhuman or degrading treatment or punishment; the right to equality and dignity; and socio-economic rights.

As discussed in chapter 1, transnational judicial dialogue is a co-constitutive process in which domestic and international legal norms shape each other through the medium of courts and tribunals. This process involves courts and tribunals articulating legal norms at the domestic or international level such that those norms are adopted, modified and rearticulated at the domestic or international level. The end result is the convergence on dominant norms both at the international and domestic levels. However, the process is a continuum as courts and tribunals are constantly communicating with each other and rearticulating domestic and international norms. As will be demonstrated below, South African courts have at times epitomised transnational judicial dialogue compared to Kenyan courts. This was exhibited when South African courts discussed international legal norms, modified them domestically, and then the modified norms were adopted by international courts or tribunals.

South Africa's legal development has provided certain conditions that have enabled the courts to engage in transnational judicial dialogue. First, throughout the history of South Africa, the courts have played an active role in the discourse on domestic legal norms. Relatedly, the courts have enjoyed formal independence in the law for several centuries. In addition, while the courts were biased in their articulation of international legal norms during the years under apartheid, this had the unintended effect of international courts and tribunals articulating other contrary norms. Moreover, the long history of the legal system has provided litigants with innumerable opportunities to submit issues of public interest, particularly human rights, to the courts. Finally, the unique interaction between English law and Roman-Dutch law has encouraged the courts to make use of comparative law and international law. The previous chapter demonstrated that the South African courts' interaction with international law waned or increased throughout history and for various reasons. Even during periods when the constitution did not expressly mention



international law, the courts still relied on it. However, the courts did not exhibit a sense of membership to a community of global courts until after the enactment of the 1993 Constitution.

The inclusion in the 1993 Interim Constitution and 1996 Final Constitution of a directive to use international law when interpreting the Bill of Rights or domestic law influenced post-apartheid courts to liberally refer to international law.<sup>269</sup> While interpreting domestic law, South African courts have contributed to the reshaping of international law. Through the use of international law, the courts were able to determine the substantive scope of certain human rights provisions of the constitution and in the process to elaborate on the corresponding international human rights. This has been through “reconciling indigenous and international normative concepts in revolutionary ways that advance human dignity.”<sup>270</sup> A major approach of South African courts when interpreting international human rights is that the domestic context matters.<sup>271</sup>

**i. The right to be free from cruel, inhuman or degrading treatment or punishment**

The right to be free from cruel, inhuman or degrading treatment or punishment was tested in several cases concerning different state conduct. In *S v Makwanyane*,<sup>272</sup> the judges highlighted the similarities between the African concept of *Ubuntu* and the values underlying international human rights.<sup>273</sup> Despite the fact that the death penalty was not prohibited under international law, the judges concluded that capital punishment went against the right to be free from cruel, inhuman or degrading treatment or punishment because it took away a person’s dignity and life. Thereafter, in *Mohamed v President of the Republic of South Africa*.<sup>274</sup> The court not only held that the death penalty amounted to cruel, inhuman or degrading treatment or punishment, but the court also ordered the South African authorities remedy the harm caused by their actions or to ameliorate the prejudice consequently occasioned on the applicant. This last duty placed upon the South African authorities was affirmed in *Kaunda v President of the Republic of South Africa*.<sup>275</sup>

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<sup>269</sup> R Blake, “The World’s Law in One Country: The South African Constitutional Court’s Use of Public International Law” (1998) 115 South African Law Journal 668, 669, 684.

<sup>270</sup> ER George, “International Law and African Judiciaries: The Example of South Africa” (Proceedings of the Annual Meeting (American Society of International Law), 24 – 27 March 2010), 329, 329.

<sup>271</sup> D Howell and G Williams, “A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa” (2005) 29 Melbourne University Law Review 95, 120-121.

<sup>272</sup> *S v Makwanyane* (CCT3/94) [1995] ZACC 3.

<sup>273</sup> ER George (n 271) 331.

<sup>274</sup> *Mohamed v President of the Republic of South Africa and Others* CCT 17/01 [2001] ZACC 18.

<sup>275</sup> [2004] ZACC 5.



These cases have been used in briefs presented before the European Court of Human Rights (ECtHR) concerning the compatibility of the death penalty with the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), particularly article 3 on prohibition of torture or inhuman or degrading treatment.<sup>276</sup> Although references to the South African cases are only contained in the summaries of the parties' submissions, it is highly likely that the European Court of Human Rights were influenced by those cases.<sup>277</sup> In *Öcalan v Turkey*,<sup>278</sup> the applicant challenged the conventionality of the death penalty. He cited the *Mohamed* case for the proposition that he had been deprived of his liberty unlawfully and the *Makwanyane* case for the proposition that the death penalty was contrary to international law.<sup>279</sup> The majority decision held that it was the imposition of the death penalty after an unfair trial that was contrary to the Convention's article 3.<sup>280</sup> The dissenting judge held that imposition of the death penalty *per se* amounts to inhuman and degrading treatment.<sup>281</sup>

In *Boumediene and Others v. Bosnia and Herzegovina*,<sup>282</sup> the applicants had been transferred to Guantanamo Bay<sup>283</sup> despite a decision ordering the government of Bosnia and Herzegovina to protect them. The brief for the applicants cited the *Mohamed* and the *Kaunda* cases for the proposition that the government authorities ought to remedy the harm occasioned on a wrongfully transferred person.<sup>284</sup> The court, while dismissing the application, did not mention the South African cases but noted that the government authorities had obtained assurances and taken all possible steps to ensure that the applicants would not be subjected to inhuman or degrading treatment or punishment.<sup>285</sup> Similarly, in the ongoing case of *Al Nashiri v Romania*,<sup>286</sup> a terrorist suspect had also been transferred to Guantanamo Bay. In his brief, the applicant relied on the

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<sup>276</sup> L van den Eynde, "The South African Constitutional Court's Death Penalty and Rendition Cases as Tools for Litigants Abroad" (2016) XLIX (3) Comparative and International Law Journal of Southern Africa 369.

<sup>277</sup> *ibid* 377.

<sup>278</sup> *Öcalan v Turkey* [GC], no. 46221/99 [79] and [159], ECHR 2005-IV.

<sup>279</sup> L van den Eynde (n 277) 377.

<sup>280</sup> *ibid*.

<sup>281</sup> *ibid*.

<sup>282</sup> *Boumediene and Others v Bosnia and Herzegovina*, no. 38703/06 (decision of 18 November 2008).

<sup>283</sup> Guantanamo Bay detention centre is a US military facility in Cuba that gained notoriety for torture and indefinite detention.

<sup>284</sup> *ibid* 378.

<sup>285</sup> *ibid* 379.

<sup>286</sup> *Al Nashiri v Romania*, no. 33234/12.

*Mohamed* case when stating that Romania had an obligation to ensure that he was not subjected to the death penalty or an unfair trial.<sup>287</sup>

**ii. The rights to equality and dignity**

Another instance in which South African courts influenced international law was on the right to equality. Section 9 of the 1996 Constitution expressly proscribes unfair discrimination on several grounds, including sexual orientation. Conversely, international treaties do not expressly mention sexual orientation as a prohibited ground for discrimination. Still, the HRC,<sup>288</sup> the European Committee of Social Rights (ECSR),<sup>289</sup> the ECtHR<sup>290</sup> and the Inter-American Court of Human Rights (IACtHR)<sup>291</sup> have held that discrimination on the grounds of “sex” or “other status” included sexual orientation. However, these courts and quasi-judicial bodies did not think that the non-recognition of homosexual unions as marriages amounted to discrimination.<sup>292</sup> In contrast, South African courts went further to interpret the provision on non-discrimination as mandating equal rights for homosexual unions as those granted to heterosexual marriages.

In *Minister of Home Affairs v Fourie*,<sup>293</sup> a lesbian couple challenged their inability to marry under the common law and statutory law. In arguing that international law recognised and protected heterosexual marriages only, the state relied on the language used in article 16 of the Universal Declaration of Human Rights (UDHR) and a decision of the HRC.<sup>294</sup> The HRC had found that the text of article 23, paragraph 2 of the ICCPR recognised marriage as between a man and a woman, and held that New Zealand’s failure to recognise same-sex marriages did not violate article 23 of the ICCPR.<sup>295</sup> Despite the constitutional directive to consider international law, the Constitutional Court did not discuss other international decisions on the issue, and it only discussed the UDHR provision and the HRC decision quoted by the state. The court held that article 16 paragraph 1 of

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<sup>287</sup> *ibid* [355].

<sup>288</sup> *Toonen v Australia*, Communication 488/1992 (31 March 1994).

<sup>289</sup> *INTERRIGHTS v Croatia*, Complaint No. 45/2007, Merits, 30 March 2009.

<sup>290</sup> *Salgueiro da Silva Mouta v Portugal*, no. 33290/96, ECHR 1999-IX.

<sup>291</sup> *Case of Atala Riffo and Daughters v Chile*. Merits, Reparations and Costs, Judgment of February 24, 2012. Series C No. 239 [95].

<sup>292</sup> *Rees v United Kingdom* [1986] ECHR 11 [49]; *Cossey v United Kingdom* [1990] ECHR 21 [43]; *Sheffield and Horsham v United Kingdom*, no. 22985/93 and 23390/94 [66], ECHR 1998-V.

<sup>293</sup> [2005] ZACC 19.

<sup>294</sup> *ibid* [99].

<sup>295</sup> *Joslin v New Zealand*, Communication No. 902/1999, 17 July 2002 [8.2].

the UDHR, which is drafted in similar terms to article 23 paragraph 2 of the ICCPR, was merely descriptive and not normatively prescriptive of a particular type of marriage.<sup>296</sup> Also, the court held that article 16 paragraph 3 of the UDHR was not definitional of a particular type of family.<sup>297</sup> The court distinguished the HRC decision by erroneously stating that the HRC had held that there was no provision in the ICCPR that forbade discrimination on the ground of sexual orientation.<sup>298</sup> The Constitutional Court concluded that even though international law expressly protected heterosexual marriages, homosexual unions were not barred from equal recognition as marriages.<sup>299</sup>

Here, the court gave an expanded and inclusive interpretation of the international rights to equality, marriage and family life that was lacking at the international level. Several human rights treaties contain a right to marry and to form a family life.<sup>300</sup> However, international courts and quasi-judicial bodies have held that the specific words “men” and “women” used in the text of the treaties meant that only heterosexual unions were recognised as marriages under the relevant treaty.<sup>301</sup> The HRC also reasoned that conceptions of families vary and that variation in their legal treatment was not *per se* a violation of the ICCPR.<sup>302</sup> Therefore, it would not be a violation of the ICCPR for homosexual families to be treated differently from heterosexual ones. The court in *Fourie* held that the international protection given to heterosexual marriages did not exclude equal recognition being given to same-sex couples.<sup>303</sup> In addition, the court in *Fourie* held that the failure of the law to allow same-sex couples to enjoy the same marriage rights as different-sex couples amounted to

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<sup>296</sup> *Minister of Home Affairs v Fourie* [2005] ZACC 19 [100].

<sup>297</sup> *ibid* [101].

<sup>298</sup> *Ibid* [103].

<sup>299</sup> *ibid* [105].

<sup>300</sup> ICCPR article 23 para 2; European Convention article 12.

<sup>301</sup> *Joslin v New Zealand*, Communication No. 902/1999, 17 July 2002 [8.2]. In their concurring individual opinion, Committee members Mr. Rajsoomer Lallah and Mr. Martin Scheinin stated that differential treatment between married couples and same-sex couples that were not allowed under the law to marry could amount to a violation of article 26 (on equal protection of the law) of the ICCPR; *Schalk and Kopf v Austria*, no. 30141/04 [107], ECHR 2010-IV.

<sup>302</sup> *Hopu v France*, Communication No. 549/1993, 29 July 1997 [10.3]; *Aumeeruddy-Cziffra v Mauritius*, Communication No. 35/1978, 9 April 1981 [9.2(b)2(ii)]; General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23) (1982) at para 2.

<sup>303</sup> *Minister of Home Affairs v Fourie* [2005] ZACC 19 [104].

a violation of the constitutional rights to equal protection of the law and not to be unfairly discriminated.<sup>304</sup>

The court added another ground for holding that the non-recognition of homosexual unions was unconstitutional: human dignity. The court, while referring to its previous decisions,<sup>305</sup> asserted that the discrimination faced by homosexuals denied them their inherent dignity, which was a violation of section 10 of the South African Constitution.<sup>306</sup> This reference to dignity was in consonance with other domestic and international courts that are increasingly using the concept to justify better treatment of homosexuals.<sup>307</sup> Courts worldwide refer to dignity to signify that there is now a socio-cultural consensus that homosexuals should be treated in the same manner as heterosexuals.<sup>308</sup> The court in *Fourie* remarked:

“[R]ights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity... Similarly, though many of the values of family life have remained constant, both the family and the law relating to the family have been utterly transformed.”<sup>309</sup>

These decisions of domestic and international courts based on human dignity could have contributed to the inclusion of sexual orientation as a prohibited ground for discrimination under international instruments. In 2000, the Council of Europe adopted a protocol that expanded the scope of the non-discrimination provision of the European Convention.<sup>310</sup> That same year, the

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<sup>304</sup> *Minister of Home Affairs v Fourie* [2005] ZACC 19, [114] referring to sections 9(1) and 9(3) respectively of the Constitution.

<sup>305</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; *Satchwell v President of the Republic of South Africa and Another* [2002] ZACC 18; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* [2002] ZACC 20; *J and Another v Director General, Department of Home Affairs, and Others* [2003] ZACC 3.

<sup>306</sup> *Minister of Home Affairs v Fourie* [2005] ZACC 19 [114].

<sup>307</sup> M Fink, “The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective” (2016) 14(1) *International Journal of Constitutional Law* 26.

<sup>308</sup> *ibid* 38.

<sup>309</sup> *ibid* 102.

<sup>310</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.177 (adopted 4<sup>th</sup> November 2000, entry into force 1<sup>st</sup> April 2005). The text of the protocol does not expressly mention sexual orientation but the explanatory report to the protocol asserts that such an inclusion was unnecessary since it is already covered: Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, para 20.

Parliament, Council of Ministers and Commission of the European Union adopted a charter on human rights which expressly mentions sexual orientation as a prohibited ground for unfair discrimination.<sup>311</sup> Between 2008 and 2013, the Organisation of American States approved several resolutions that proscribed unfair discrimination on the basis of sexual orientation.<sup>312</sup> In 2011, the UN Human Rights Council adopted a resolution that addressed fair treatment irrespective of one's sexual orientation.<sup>313</sup>

### iii. Socio-economic rights

The other instance in which South African courts have influenced the development of international law is when dealing with economic, social and cultural rights. In such cases, the courts have deviated from a wholesale adoption of the international law approach. The Committee on Economic, Social and Cultural Rights (CESCR) developed the concept of “minimum core” in determining the minimum legal content of rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CESCR had commented that state parties to the ICESCR have an obligation to ensure the provision of a minimum essential level of socio-economic rights.<sup>314</sup> Therefore, states would be in contravention of their international law obligations by not meeting the minimum core content of a right contained in the ICESCR.<sup>315</sup> The CESCR appears to establish that everyone in desperate need has a right to basic socio-economic entitlements.<sup>316</sup>

The African Commission on Human and Peoples' Rights has also adopted the minimum core approach under the African Charter on Human and Peoples' Rights (African Charter). The African Commission has stated that states parties to the African Charter have the obligation to ensure a

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<sup>311</sup> Charter of Fundamental Rights of the European Union, 18 December 2000, 2000 OJ C 364/01, article 21.

<sup>312</sup> General Assembly Res. AG/RES. 2435 (XXXVIII-O/08); General Assembly Res. AG/RES. 2504 (XXXIX-O/09); General Assembly Res. AG/RES. 2600 (XL-O/10); General Assembly Res. AG/RES. 2653 (XLI-O/11); General Assembly Res. AG/RES. 2721 (XLII-O/12); General Assembly Res. AG/RES. 2807 (XLIII-O/13).

<sup>313</sup> Resolution 17/19 Human Rights, Sexual Orientation and Gender Identity, A/HRC/RES/17/19 (2011).

<sup>314</sup> General Comment No 3: The Nature of State Parties' Obligations (1990) at para 10.

<sup>315</sup> General Comment No 4: The Right to Adequate Housing (1991) at paras 8-10 and 13; General Comment No 12: The Right to Adequate Food (1999), E/C.12/1999/5, at paras 8, 14 and 17; General Comment No 14: The Right to the Highest Attainable Standard of Health (2000), E/C.12/2000/4, at paras 43-44; General Comment No 15: The Right to Water (2003), E/C.12/2002/11, at para 37(a)-(i).

<sup>316</sup> O Fuo and A du Plessis, “In the face of judicial deference: Taking the ‘minimum core’ of socio-economic rights to the local government sphere” (2015) 19 Law, Democracy and Development 1, 6.

minimum essential level of a socio-economic right contained in the African Charter.<sup>317</sup> The African Commission has also stated that this obligation exists irrespective of the availability of resources and that states cannot derogate from this obligation.<sup>318</sup> In addition, states are supposed to use legislation and policy to prioritise the provision of minimum essential levels of each right to the vulnerable and disadvantaged groups in society.<sup>319</sup> This position appears to give the poorest people in society an absolute right to enjoy minimum essential services under the socio-economic rights in the African Charter.<sup>320</sup> The African Commission uses the minimum core obligation in relation to the minimum duties of states.<sup>321</sup> In *SERAC v Nigeria*, the African Commission held that the Nigerian Government had violated the Ogoni people's right to food by destroying and contaminating food sources and by allowing private parties to do the same.<sup>322</sup>

In several cases, South African courts have decided against applying the minimum core concept. The right of access to healthcare in section 27 of the Constitution presented the first opportunity for South African courts to modify the interpretation of the international law on socio-economic rights. In *Soobramoney v Minister of Health, Kwa-Zulu Natal*,<sup>323</sup> a terminally ill patient sought renal dialysis at a state-funded institution. The judges stated that the courts did not have the institutional capacity to decide matters touching on resource allocation.<sup>324</sup> While the court did not refer to international law or the minimum core concept, the court indicated that certain rights contained in the South African Constitution, in particular sections 26 and 27, were to be progressively realised subject to the availability of resources.<sup>325</sup>

The minimum core concept was discussed in *Government of the Republic of South Africa v Grootboom*,<sup>326</sup> dealing with the right of access to adequate housing found in section 26 of the

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<sup>317</sup> Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights (2010) at 13.

<sup>318</sup> *ibid.*

<sup>319</sup> *ibid.*

<sup>320</sup> O Fuo and A du Plessis (n 316) 6.

<sup>321</sup> L Chenwi "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance" (2013) 39 *De Jure* 742, 754.

<sup>322</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60.

<sup>323</sup> [1997] ZACC 17.

<sup>324</sup> *ibid* [29] (Chaskalson P.) and [58] (Sachs J.).

<sup>325</sup> *ibid* [43].

<sup>326</sup> [2000] ZACC 19.

South African Constitution. The respondents were evicted from their informal homes in order for the government to develop formal low-cost housing. The Constitutional Court held that it could not rely on the minimum core concept because the needs regarding housing in South Africa were too diverse and that there was insufficient comparative information for the court to determine the minimum core content of the right.<sup>327</sup> In addition, the court stated that conditions for enjoyment of a right were too varied and that the court lacked the institutional capacity to determine the minimum core content of the right.<sup>328</sup> Instead, the court decided to analyse whether the government had taken reasonable legislative and other measures to progressively realise the right within the available resources, as formulated in the South African Constitution.<sup>329</sup>

The minimum core concept was again considered in *Minister of Health v Treatment Action Campaign (No. 2)*,<sup>330</sup> also dealing with the right of access to healthcare. Several civil society organisations challenged the government's restriction on the provision of anti-retroviral drugs to HIV-positive pregnant women. The court declined to follow the minimum core approach for the same reasons enumerated in *Grootboom*.<sup>331</sup> In addition, the court stated that the text of the constitution did not create a minimum core entitlement under section 26(1) of the South African Constitution.<sup>332</sup> Instead, the court held that the minimum core, if any, would be relevant only when determining the reasonableness of legislative and other measures undertaken by the government under section 26(2) of the South African Constitution.<sup>333</sup> The court preferred that decisions on resource allocation be made by the legislature and executive, and that the court's role was limited to ensuring the reasonableness of those decisions.<sup>334</sup>

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<sup>327</sup> *ibid* [31] – [32] (Yacoob J.).

<sup>328</sup> *ibid* [33].

<sup>329</sup> *ibid* [38] ff.

<sup>330</sup> [2002] ZACC 15.

<sup>331</sup> *ibid* [28], [36] – [39].

<sup>332</sup> *ibid* [26] – [29].

<sup>333</sup> *ibid* [34].

<sup>334</sup> *ibid* [36]. In two subsequent cases, neither the parties nor the Constitutional Court referred to the minimum core concept but instead queried the reasonableness of state action: see *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5 and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1.



Lastly, in *Mazibuko v City of Johannesburg*,<sup>335</sup> the respondents had, among other things, installed pre-paid water meters in order to rehabilitate the water distribution network in Phiri, Soweto. The appellants, who were poor residents of Phiri, challenged the plan on the basis that it violated their right of access to water under section 27 of the South African Constitution. While the appellants did not actually refer to the minimum core obligation, the High Court and the Supreme Court of Appeal used the concept to quantify the minimum amount of water that would be sufficient for a dignified life.<sup>336</sup> Conversely, the Constitutional Court held that the respondents only had a duty to take reasonable measures to ensure the progressive realisation of the right of access to water.<sup>337</sup>

The Constitutional Court's methodology in *Grootboom*, *Treatment Action Campaign* and *Mazibuko*, has been criticised for deferring too much to the legislature and executive.<sup>338</sup> However, the cases demonstrate that the minimum core concept is difficult to define and apply uniformly in the domestic context.<sup>339</sup> The cases have initiated a conversation regarding the interpretation of the minimum core concept as well as its appropriateness. The Constitutional Court's approach also shows that socio-economic rights play different roles in the international and domestic contexts. The rights are more aspirational at the international level but should be made more concrete and measurable in the domestic context.<sup>340</sup> By progressively achieving certain standards of the rights in the domestic context, the changes in socio-economic conditions would lead to governments setting new standards. Over time the new levels achieved will influence the international content of the rights.

Interestingly, the CESCR has now adopted the reasonableness standard as formulated by the South African Constitutional Court.<sup>341</sup> The Optional Protocol to the ICESCR directs the CESCR, when

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<sup>335</sup> [2009] ZACC 28.

<sup>336</sup> *ibid* [44] – [61].

<sup>337</sup> *ibid* [57].

<sup>338</sup> O Fuo and A du Plessis (n 316) 10-12.

<sup>339</sup> K Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale Journal of International Law* 113.

<sup>340</sup> KS McLean, *Constitutional Difference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press 2009) 186.

<sup>341</sup> B Griffey, "The 'reasonableness' test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2011) 11(2) *Human Rights Law Review* 275, 315-317; B Porter, "Reasonableness and Article 8(4)" in R Brown and others, (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 186.

examining a communication, to consider the reasonableness of steps taken by a state.<sup>342</sup> There is uncertainty regarding the manner in which the CESCR will be able to merge its previous “minimum core” approach with the “reasonableness” standard.<sup>343</sup> In its jurisprudence, the CESCR has either relied on the reasonableness standard only,<sup>344</sup> or referred to both the reasonableness and minimum core approaches.<sup>345</sup>

## 10. Conclusion

Both Kenya’s and South Africa’s experiences with international law have been shaped by racial domination and political expediency. Kenya had a relatively short period of colonialism but this period witnessed rapid social, political and economic changes. These changes were driven by, on the one hand, tensions between the metropole government and the colonial government, and on the other, tensions between the various races in the protectorate and colony. The British colonised Kenya at a time when the metropole government was advocating for the abolition of slavery and racial oppression, but at the same time it condoned such practices in its colonies. These practices were justified on the understanding that the native population were not capable of forming sovereign polities that could be subjects of international law. After independence, the new leaders viewed international law with suspicion and they tended to shield their oppressive policies from international scrutiny by asserting “domestic jurisdiction”. It is only after decades of opposition politics that the national space opened up for the use of international law.

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<sup>342</sup> Article 8(4): “When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”

<sup>343</sup> L Forman, “Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2015) 47(2) *Ottawa Law Review* 561, 571.

<sup>344</sup> See *IDG v Spain*, Communication No. 2/2014 (17 June 2015) (right to adequate housing); *Mohamed Ben Djazia and Naouel Bellili v Spain*, Communication No. 5/2015 (20 June 2017) (right to adequate housing); *SC and GP v Italy*, Communication No. 22/2017 (7 March 2019) (right to sexual and reproductive health); *Maribel Viviana López Albán v Spain*, Communication No. 37/2018 (11 October 2019) (right to adequate housing).

<sup>345</sup> See *Miguel Ángel López Rodríguez v Spain*, Communication No. 1/2013 (4 March 2016) (right to social security); *Marcia Cecilia Trujillo Calero v Ecuador*, Communication No. 10/2015 (26 March 2018) (right to social security).

Conversely, South Africa's experience with foreign domination was much longer. The Dutch settlers continued to apply international law at the Cape for several centuries before the British colonists arrived. Even after the British took over, international law continued in application. It was only after the Union's formation that South Africa became increasingly hostile to international law. The apartheid government managed to resist international pressure and internal opposition for several decades before relenting. With the end of apartheid and the promulgation of a new constitution, South Africa has developed its jurisprudence beyond conformity with international law requirements.

The 1993 and 1996 Constitutions signified the country's detachment from apartheid by their explicit reference to international law. As a result, the number of cases in which international law features has risen exponentially over time.<sup>346</sup> The use of both binding and non-binding international law in the interpretation of legislation and development of the common law provides a rich source of jurisprudence for the courts. However, the use of non-binding international law and non-domesticated treaties risks blurring the separation of powers.

Still, several decided cases show that South African courts are involved in transnational judicial dialogue. Initially, South African courts were "receivers" or "importers" of international norms. However, through interpreting international norms and analysing them for their appropriateness in the domestic context, South African courts have modified the international norms. In this way, the courts have reshaped international law and "exported" those international norms to other jurisdictions.

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<sup>346</sup> N Botha and M Olivier, "Ten Years of International Law in the South African Courts" (2004) 29 *South Africa Yearbook of International Law* 42.

## Chapter 6

### Concluding Observations

#### 1. Introduction

This chapter will first summarise the findings made in the previous chapters. Second, this chapter will highlight the main approaches that the courts in Kenya and South Africa follow when engaging with international law. Third, this chapter will situate these approaches within the doctrine of transnational judicial dialogue.

#### 2. Constitutional development

Kenya and South Africa have differing experiences with development of the legal framework. The development of these two states' legal frameworks began during the colonial period. Kenya was only colonised by the British and the period of colonisation lasted about 80 years. The British imposed English laws, procedures and systems on the East African territory.<sup>1</sup> However, the laws were not purely English as the British often extended the application of legislation from the Indian colony.<sup>2</sup> Still, the legal system that was brought to Kenya was fundamentally the Common Law. The British maintained some of the indigenous legal systems with the intention of eventually replacing them with English common law. However, at the time of independence, Kenya's statutory law (predominantly based on English common law) co-existed with indigenous laws and systems.<sup>3</sup>

On the other hand, South Africa was first colonised by the Dutch and then later by the British.<sup>4</sup> The cumulative period of colonisation for South Africa is over 250 years. The Dutch East India Company applied Roman-Dutch law at the Cape and whenever former employees of the Company

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<sup>1</sup> JF Scotton, "Judicial Independence and Political Expression in East Africa – Two Colonial Legacies" (1970) 6 East African Law Journal 1, 3.

<sup>2</sup> *ibid.*

<sup>3</sup> SF Joireman, "The Evolution of the Common Law: Legal Development in Kenya and India" (2006) 44(2) Commonwealth & Comparative Politics 190, 201.

<sup>4</sup> A Wilmot and JC Chase, *History of the Colony of the Cape of Good Hope from its discovery to the year 1819 and from 1820 to 1868* (JC Juta 1869) 10 ff.

moved inland, they too applied the same law to the rest of the territory.<sup>5</sup> The legal system that the Dutch brought with them was the Western European Civil Law. Later, the British conquered the Dutch and took over administration of the Cape colony.<sup>6</sup> The British initially maintained the substantive law that was based on the Civil Law legal system while the procedural law was mostly Common Law. However, during the course of British administration, the English based Common Law legal system exerted tremendous influence on the territory's common law.<sup>7</sup> At the same time, indigenous legal systems were also allowed to continue, although with severe restrictions. In sum, South Africa's legal system is a mixed legal system.<sup>8</sup>

### **i. Kenya**

During the early part of the colonial period, Kenya's legal framework consisted of British Orders-in-Council. This was legislation passed in England giving British administrators the authority to govern the territory. Since the British usually administered a new territory as a district of an existing colony, the colony of Kenya was administered as part of the colony of India.<sup>9</sup> In addition, the British extended the application of the laws of the colony of India to the colony of Kenya. This law comprised English statutes and legislation that had been passed in India. Where these did not apply then English common law applied.<sup>10</sup> The legislation did not expressly mention international law and, according to British constitutional law, the colony did not have a status separate from the United Kingdom.<sup>11</sup> Therefore, judges in the colony of Kenya would have followed the British practice on the relationship between international and municipal law.

Towards the end of the colonial period, the British Government enacted several constitutions for the colony. The 1959, 1962 and 1963 Constitutions however did not contain express provisions on international law. The closest reference to international law was in the 1963 Constitution. Section

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<sup>5</sup> AB Edwards, *The History of South African Law – An Outline* (Butterworths 1996) 65-66.

<sup>6</sup> HR Hahlo and E Kahn, *The South African Legal System and Its Background* (Juta & Company 1973) 576.

<sup>7</sup> CG van der Merwe and others "The Republic of South Africa" in VV Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2<sup>nd</sup> edn, Cambridge University Press 2012) 96.

<sup>8</sup> *ibid.*

<sup>9</sup> JER Stephens, "The Laws of Zanzibar" (1913) 13(3) *Journal of the Society of Comparative Legislation* 603, 603.

<sup>10</sup> *ibid.*

<sup>11</sup> JES Fawcett, "Treaty Relations of British Overseas Territories" (1949) 26 *British Year Book of International Law* 86, 91.

68 of the Kenyan Constitution gave Parliament the power to domesticate treaties.<sup>12</sup> The inference from this provision is that Kenya had adopted a dualist approach to treaties. However, this provision's wording was discretionary, meaning that Parliament was not obliged to domesticate every treaty concluded by the Executive. In addition, the initiative of introducing a Bill for an Act of Parliament to domesticate a treaty was placed upon the Executive; Parliament could not domesticate a treaty *suo moto*. This situation meant that Government Ministers could enter into treaties without legislative oversight. It also meant that the Executive could implement the terms of a treaty without the treaty having undergone domestication.

The new constitution that was enacted in 1964<sup>13</sup> did not contain a provision that mentioned international law. Similarly, when another constitution was enacted in 1969,<sup>14</sup> there was no provision that regulated the relationship between international and municipal law. Therefore, for over 40 years after independence, Kenya presumably followed British practice on the relationship between international and municipal law.<sup>15</sup> Like other former British colonies, the practice was to require domestication of treaties before they could apply internally while customary international law was applicable without the need for domestication as long as it did not conflict with municipal law.<sup>16</sup> During this period, domestication of treaties in Kenya was done through three main ways. First, legislation that expressly mentioned the treaties intended for domestication; second, legislation that adopted in its text the language used in the treaties intended for domestication; and third, some treaties were brought into force by certain acts of the Executive. However, not many treaties were domesticated during this period.<sup>17</sup> Also, the closest connection between Kenya's law and customary international law was the enactment of legislation to domesticate treaties that had codified custom.

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<sup>12</sup> Section 68 of both the Kenya Order in Council, 1963, S.I. 791 ("Internal Self-government Constitution") and Kenya (Independence) Order in Council, 1963, S.I. 1968 ("Independence Constitution").

<sup>13</sup> Constitution of Kenya (Amendment) Act, 1964, Act No. 28 of 1964.

<sup>14</sup> Constitution of Kenya, 1969, Act No. 5 of 1969.

<sup>15</sup> DM Isabirye, "The Status of Treaties in Kenya" (1980) 20 *Indian Journal of International Law* 63.

<sup>16</sup> PF Gonidec, "The Relationship of International Law and National Law in Africa" (1998) 10 *African Journal of International and Comparative Law* 244, 245-46.

<sup>17</sup> JB Ojwang' and L Franceschi, "Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment" (2002) 46(1) *Journal of African Law* 43,56.

The new constitution<sup>18</sup> of 2010 contains numerous references to international law. First, there are several provisions on the applicability of international law. Customary international law is now part of the law of Kenya.<sup>19</sup> Treaties ratified after the enactment of the 2010 Constitution are also part of the law of Kenya and do not require domestication.<sup>20</sup> Second, there are provisions on the implementation of international law. State officers and agencies are required to implement Kenya's international obligations.<sup>21</sup> Third, there are provisions that are geared towards ensuring that Kenyan legislation is in conformity with international law.<sup>22</sup> Fourth, the Kenyan Constitution also requires that the conduct of public officers is in conformity with international law.<sup>23</sup>

## ii. South Africa

When the Dutch settled at the Cape, they applied Roman-Dutch law to the territory.<sup>24</sup> Although the Cape Parliament passed local legislation and the courts passed judgments, these did not make substantial changes to the Roman-Dutch law applied to the Cape.<sup>25</sup> While the Cape was under Dutch rule, international law was directly applicable by the courts as part of the common law without the need for statutory incorporation.<sup>26</sup> The administration of the colony was taken over by the British after about 140 years of Dutch rule. The Cape colony enacted a constitution in 1852.<sup>27</sup> This constitution did not expressly mention international law. Since Roman-Dutch law was the common law of the territory, international law would have been applicable as part of the common law. However, the application of English common law would have altered this position such that international law would have applied with some restrictions.

The disruption of the social life at the Cape led to some Dutch settlers moving further inland and forming their own independent settlements. While the Roman-Dutch law remained the common

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<sup>18</sup> Constitution of Kenya, 2010, Legal Notice 133 of 2010, Schedule, Kenya Gazette Supplement No. 55 of 2010.

<sup>19</sup> *ibid* article 2(5). The exact meaning of the phrase "general rules of international law" in Kenya's Constitution is not clear, as there are various opinions that it could refer to either customary international law or general principles of law.

<sup>20</sup> *ibid* article 2(6). Parliament enacted the Treaty Making and Ratification Act to ensure that it retains oversight over the executive's power to enter into treaties but there is no role for Parliament after treaty ratification.

<sup>21</sup> *ibid* articles 21(4), 59(2)(g), 132(1)(iii) and 132(5).

<sup>22</sup> *ibid* articles 50(2)(n)(iii), 51(3)(b) and 58(6)(a)(ii).

<sup>23</sup> *ibid* articles 143(4), 145(1)(b), 150(1)(b)(ii), 152(6)(b) and 181(1)(b).

<sup>24</sup> AB Edwards (n 5) 65-66.

<sup>25</sup> HR Hahlo and E Kahn (n 6) 573-575.

<sup>26</sup> J Dugard, *International Law: A South African Perspective* (4th edn, Juta & Company 2011) 49.

<sup>27</sup> For the Constitution, see GW Eybers, *Select Constitutional Documents Illustrating South African History: 1795-1910* (George Routledge & Sons 1918) 45-55.



law of the Boer republics, the republics modelled some of their institutions along similar lines to those of the Cape Colony. In addition, the courts in the republics were often influenced by the decisions of the Cape Supreme Court.<sup>28</sup> Therefore, the Roman-Dutch law as applied in the Boer republics was likely modified by English traditions such that international law may not have applied domestically without some qualification.

The Boer republics were annexed by the British in 1902.<sup>29</sup> Under British rule, the four colonies (Cape, Natal, Orange River and Transvaal) were subject to British laws and procedures. The British enacted several statutes based on the English law, although Roman-Dutch law was preserved.<sup>30</sup> In 1909, the British Parliament passed the *South Africa Act, 1909*<sup>31</sup> that united Britain's southern African colonies (Cape, Natal, Orange River and Transvaal) as the Union of South Africa.<sup>32</sup> The only reference to international law in the *South Africa Act, 1909* was in section 148 of the Act which extended the application of treaties that had been binding on the colonies to the Union. Under these circumstances, Roman-Dutch law as the Union's common law but as modified by English common law, applied. Therefore, while customary international law was applicable in the Union, it was subject to contrary legislation, judicial precedent and acts of state.<sup>33</sup> On the other hand, treaties probably required domestication in order to have validity domestically.<sup>34</sup>

In the 1931, the British Parliament enacted the *Statute of Westminster, 1931*,<sup>35</sup> which granted to the Dominions autonomy and equal status, and removed dependence on the imperial government.<sup>36</sup> The Union of South Africa enacted the *Status of the Union Act, 1934*,<sup>37</sup> in order to give effect to

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<sup>28</sup> E Fagan, "Roman-Dutch Law in its South African Historical Context" in R Zimmermann and DP Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press 1996) 55.

<sup>29</sup> A Wessels, *The Anglo-Boer War 1899-1902* (Sun Press 2011) 78-79.

<sup>30</sup> CG van der Merwe and others (n 7) 98.

<sup>31</sup> 9 Edw. VII c. 9.

<sup>32</sup> G Carpenter, "Public Law: Constitutional Law" in WJ Hosten and others, *Introduction to South African Law and Legal Theory* (Butterworths 1995) 952.

<sup>33</sup> AJGM Sanders, "The Applicability of Customary International Law in Municipal Law – South Africa's Monist Tradition" (1977) 40 *Tydskrif vir Hedensdaagse Romeins-Hollandse Reg* 147, 149 ff.

<sup>34</sup> JW Bridge, "The Relationship between International Law and the Law of South Africa" (1971) 20 *International and Comparative Law Quarterly* 746, 747.

<sup>35</sup> 22 & 23 Geo. 5 c. 4.

<sup>36</sup> JA Kalley, *South Africa's Treaties in Theory and Practice, 1809-1998* (Scarecrow Press 2001) 70-71.

<sup>37</sup> Act No. 69 of 1934.

the British legislation.<sup>38</sup> The Union was no longer bound by treaties concluded by the imperial government, and the Union could conclude treaties without consulting the imperial government. Still, the issue of the domestic applicability of international law appears to have depended on the Roman-Dutch common law as modified by English common law.

In 1961, the Union became a republic after a successful referendum and a new constitution was enacted.<sup>39</sup> Another constitution was enacted in 1983. Both the 1961 and 1983 Constitutions retained a provision on the continued application of treaties that had been binding upon the Union.<sup>40</sup> In addition, the constitutions contained a provision that vested the power of concluding treaties on the executive.<sup>41</sup> The constitutions did not deal with the relationship between municipal law and international law. Therefore, the common law would have regulated the relationship between international law and municipal law.<sup>42</sup>

After decades of apartheid rule, South Africa enacted an “interim” constitution in 1994<sup>43</sup> to govern the transition to a constitutional state.<sup>44</sup> That constitution contained several references to international law. The current constitution was enacted in 1996<sup>45</sup> and it made few changes to the provisions on international law in the previous constitution.<sup>46</sup> First, there are provisions on the applicability of international law. Customary international law is applicable in South Africa as long as it is not inconsistent with the constitution or legislation.<sup>47</sup> Ratified treaties require to be domesticated in order to become law in South Africa but a self-executing provision of a treaty is law unless it is inconsistent with the South African Constitution or an Act of Parliament.<sup>48</sup> Second,

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<sup>38</sup> JA Kalley (n 44) 71.

<sup>39</sup> RB Beck, *The History of South Africa* (2nd edn, Greenwoond 2013) 146-147.

<sup>40</sup> S 112 of the 1961 Constitution, and s 94 of the 1983 Constitution.

<sup>41</sup> S 7 of the 1961 Constitution and s 6 of the 1983 Constitution.

<sup>42</sup> J Dugard (n 26) 55.

<sup>43</sup> Constitution of the Republic of South Africa, 1993, date of assent: 25 January 1994.

<sup>44</sup> ME Olivier, “International Law in South African Municipal Law: Human Rights Procedure, Policy and Practice” (LL.D thesis, University of South Africa, 2002) 168.

<sup>45</sup> Constitution of the Republic of South Africa, 1996, date of assent: 16 December 1996; date of commencement: 4 February 1997.

<sup>46</sup> R Keightley, “Public International Law and the Final Constitution” (1996) 12 *South African Journal on Human Rights* 405: Some of the changes in the 1996 Constitution include the omission of the word “binding” in Section 232 on customary international law; the distinction between treaties that need approval by Parliament and those that do not in section 231(2) and (3); the introduction of self-executing provisions of treaties and the requirement that incorporation of treaties is to be done through national legislation in section 231 (4).

<sup>47</sup> S 233, Constitution of the Republic of South Africa, 1996 (n 55).

<sup>48</sup> *ibid* S 231(4).

there are provisions that require the use of international law when interpreting the Bill of Rights or legislation.<sup>49</sup> Third, there are provisions that require the conduct of the president and the defence force to be in accordance with international law.<sup>50</sup>

### **3. Judicial interaction with international law**

The colonial history of Kenya and South Africa had a bearing on the two states' constitutional development. In turn, the two states' constitutional development played a role in their respective judiciaries' approach to international law.

#### **i. Kenya**

During the colonial period, the judicial system was racially segregated. Europeans were subject to courts that were presided over by judicial officers, while Africans were subject to courts that were staffed by administrative officers. The judicial and administrative officers were predominantly European while the lawyers were either European or Indian.<sup>51</sup> The European judicial officers and lawyers had studied in England while the Indian lawyers had either been trained in England or the colony of India.<sup>52</sup> Since the applicable law in the colony comprised English statutes and common law, and Indian legislation based on English law, the judicial officers and lawyers relied heavily on English decisions. In addition, these judicial officers and lawyers appeared indifferent to, or ignorant of, international law.<sup>53</sup>

After independence, the 1963, 1964 and 1969 Constitutions did not expressly regulate the relationship between international and municipal law. Therefore, the presumption was that Kenya, being a former colony of the United Kingdom, would follow the British approach. However, this was a presumption and without more the courts did not have a solid basis for relying on international law. In fact, there was only an ambiguous judicial pronouncement of the relationship

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<sup>49</sup> *ibid* Ss 39(1)(b) and 233.

<sup>50</sup> *ibid* Ss 37(8), 198(c), 199(5), 200(2) and 201(2)(c).

<sup>51</sup> YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Oxford University Press 1970) 384.

<sup>52</sup> SE Joireman (n 3) 198, 200.

<sup>53</sup> WE Beckett, "International Law in England" (1938) 50 *Law Quarterly Review* 257.

between municipal law and international law in 1970.<sup>54</sup> As mentioned earlier, the Common Law tradition places some restrictions on the domestic applicability of international law. The courts found it difficult to rely on treaties because in practice treaties ratified by the government were not always domesticated.<sup>55</sup> In addition, the eroding of the independence of the judiciary and the subservience of the legal profession further prevented the liberal interpretation of the human rights contained in the Kenyan Constitution.<sup>56</sup> It is for these reasons that, during colonialism and much afterwards, the courts in Kenya did not make reference to international law.

Between 1963 and 2002, the courts adopted two main approaches to transnational judicial dialogue. First, the courts relied on English decisions and procedures to the exclusion of decisions from other jurisdictions. This was because Parliament simply adopted and modified the previous colonial legislation that was based on English common law and Indian legislation. Also, section 3 of the *Judicature Act* contained the old “reception clause” that imported English statutes, common law and equity as some of the laws to be applied by Kenyan courts in default of the constitution and legislation. Therefore, the courts were more likely to rely on English decisions with which they were familiar.

Second, the courts often deferred to the executive in human rights cases that were likely to antagonise the government.<sup>57</sup> As mentioned earlier, the colonial state machinery was concerned with limiting African dissent; as a result, the judiciary legitimized the colonial government’s racial laws and policies. Africans had been excluded from the legal profession and the European and Asian judges and lawyers did not prioritise defending the civil liberties of Africans.<sup>58</sup> Most of those serving in the legal profession after independence had also done so during the colonial period. Therefore, a culture of suppressing human rights was prevalent in the post-colonial state. Successive governments made numerous constitutional amendments that severely restricted the

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<sup>54</sup> *Charles Okunda Mushiyi and Donald Meshack Ombisi v Republic* [1970] EA 453 (High Court, Nairobi) 455.

<sup>55</sup> JB Ojwang’ and L Franceschi (n 17) 56.

<sup>56</sup> M Mutua, “Justice under siege: The rule of law and judicial subservience in Kenya” (2001) 23(1) *Human Rights Quarterly* 96.

<sup>57</sup> JB Ojwang and JA Otieno-Odek, “The judiciary in sensitive areas of public law: Emerging approaches to human rights litigation in Kenya” (1988) 35 *Netherlands International Law Review* 29.

<sup>58</sup> YP Ghai, “Law and Lawyers in Kenya and Tanzania: Some political economy considerations” in CJ Dias and others (eds), *Lawyers in the Third World: comparative and developmental perspectives* (Scandinavian Institute of African Studies and the International Center for Law in Development 1981) 144.

human rights provisions.<sup>59</sup> In addition, the courts' judicial review powers were limited through constitutional amendments and legislation that reserved extensive powers to the executive.<sup>60</sup> The judiciary was also subject to interference from the executive, meaning that judges and magistrates acted at the mercy of the executive.<sup>61</sup> In addition, the legal profession was also subservient to the executive until the 1990s when lawyers reacted to the arbitrary arrests of their colleagues.<sup>62</sup> Under these circumstances, the courts could not make use of the potentially emancipatory international law rules in their decisions.

From 2003 up to 2010, the courts began to consider international law in their decisions. In the absence of constitutional or legislative authorisation, the courts considered international law more liberally than before. It appears that the references to international law in the various constitutional drafts influenced the courts to consider international law in their decisions.<sup>63</sup> While the increased reliance on international law was a positive step, the methodology used by the courts was at times questionable. Often the courts did not appreciate the differences in the sources of international law. They also failed to appreciate the relevant British approach to those sources of international law. When it came to international instruments, the courts sometimes did not highlight that they were either legally binding or merely persuasive. Still, the courts displayed more of an engagement with international law than in the years following Kenya's independence.<sup>64</sup>

With the enactment of the 2010 Constitution, Kenyan courts received express authorisation to use international law in their decisions. The effect of expressly recognising international law as part of Kenya's law appears to be an increase in the number of judges that considered international law. However, the courts continued to make fundamental errors in their analysis of international law. First, there were judges who did not appreciate what qualified as international law as they held that some institutional rules and guidelines were international law. Second, while the 2010

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<sup>59</sup> PLO Lumumba, "A Journey Through Time in Search of a New Constitution" in PLO Lumumba, MK Mbondenyi and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (LawAfrica 2011) 31-35.

<sup>60</sup> M Mutua (n 66).

<sup>61</sup> L Hannan, "Bias and Judicial Outrage" (1991) 141 *New Law Journal* 900.

<sup>62</sup> SD Ross, "The Rule of Law and Lawyers in Kenya" (1992) 30(3) *Journal of Modern African Studies* 421, 435-438.

<sup>63</sup> A Nyarango, "Customary International Law and Its Status in the Constitution of Kenya" <<http://ssrn.com/>> accessed July 2016.

<sup>64</sup> *ibid.*

Constitution made a distinction between treaty and custom, many judges still did not appreciate the differences between the various sources of international law. For example, some judges used the constitutional provision on custom to justify their use of treaties. There is still disagreement between judges as to whether treaties ratified after the enactment of the 2010 Constitution still require domestication. Also, the courts have not yet settled the issue of the hierarchy between international law and municipal law.

The courts are taking a more active role in transnational judicial dialogue, even though their approach is more of reception than dialogic. Kenyan judges are using international law in several ways. First, they are using international law to reinforce their interpretation of the constitution and legislation. Second, they are using international law to promote human rights. In addition, Kenyan judges appear to appreciate that they are not making decisions in isolation of the world community and that they are contributing to a common global jurisprudence.

## **ii. South Africa**

When the Dutch East India Company administered the Cape, jurisdiction was initially exercised over only the Company's employees. The indigenous inhabitants were considered aliens and not subject to the Company's jurisdiction.<sup>65</sup> Eventually, the indigenous inhabitants were brought under Dutch jurisdiction but not as foreigners who would have enjoyed the protection of international law.<sup>66</sup> Since the law applied at the Cape was the Roman-Dutch law of Holland, the Cape courts followed the same approach as Dutch courts. Dutch courts applied international law together with municipal law without distinguishing the two.<sup>67</sup> Similarly, while the Cape was under Dutch rule, international law was directly applicable by the courts as part of the common law without the need for statutory incorporation.<sup>68</sup>

The courts in Natal, Orange Free State and South African Republic applied the Roman-Dutch law where the relevant *grondwet* or legislation did not apply.<sup>69</sup> However, the judges also consulted

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<sup>65</sup> CG van der Merwe and JE du Plessis, *Introduction to the Law of South Africa* (Kluwer Law International 2004) 9.

<sup>66</sup> E Fagan (n 36) 38.

<sup>67</sup> AJGM Sanders (n 41) 147 – 148.

<sup>68</sup> J Dugard (n 26) 49.

<sup>69</sup> E Fagan (n 36) 55.

English and Cape decisions.<sup>70</sup> This means that the courts would have also relied on international law, albeit in a modified form. When the British annexed these territories, the Roman-Dutch law was maintained. However, the British enacted several statutes based on the English law.<sup>71</sup> As a result, the courts were still able to rely on international law in their decisions but there were now added restrictions. Customary international law was subject to the primacy of legislation while treaties required domestication. During the Union period, the supreme courts of the colonies became divisions of the new Supreme Court of South Africa while the Appellate Division of the Supreme Court became the highest court in the Union.<sup>72</sup> Since the *South Africa Act, 1909* did not expressly regulate the relationship between international law and municipal law, it is probable that the courts followed the British approach.

After the Union of South Africa became a republic, the application of international law was moderated by the apartheid system. While the courts resorted to applying the Roman-Dutch law without British influence, the judiciary treated international law antagonistically (particularly with regard to politically sensitive matters) and ambiguously (with regard to politically neutral matters).<sup>73</sup> The courts increasingly applied a stringent test for proving the applicability to South Africa of a rule of customary international law.<sup>74</sup> Similarly, the courts' insistence on the domestication of treaties led to a restrictive use of ratified treaties.<sup>75</sup>

The judiciary's hostile attitude towards international law began to change in the early 1990s. As the end of apartheid neared, the courts appeared to consider international law more than previously.<sup>76</sup> The trend was buttressed further when new constitutions were enacted in 1993 and 1996.<sup>77</sup> These constitutions explicitly set out that international law was applicable and that the courts were to consider international law in their decisions. The courts in post-apartheid South

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<sup>70</sup> GW Eybers (n 27) xlvii; CG van der Merwe and others (n 7) 97.

<sup>71</sup> CG van der Merwe and others (n 7) 98.

<sup>72</sup> HR Hahlo and E Kahn (n 6) 146-163.

<sup>73</sup> J Dugard, "The South African Judiciary and International Law in the Apartheid Era" (1998) 14 *South African Journal on Human Rights* 110, 113.

<sup>74</sup> J Dugard (n 26) 57 – 58.

<sup>75</sup> Dugard, J. (1998), *supra*, p. 117.

<sup>76</sup> *ibid* 123-124.

<sup>77</sup> Constitution of the Republic of South Africa, 1993 (n 53); Constitution of the Republic of South Africa, 1996 (n 55).



Africa were initially cautious in their application of international law.<sup>78</sup> However, intime the use of international law, particularly on human rights, by South African courts was exponential.<sup>79</sup> Still, there have been some concerns regarding the courts' use of international law. For example, the courts have concentrated more on some international law norms and neglected others, especially when interpreting the Bill of Rights.<sup>80</sup> In addition, the courts have rarely considered customary international law as they rely more on treaties. Also, the courts have been rather liberal in considering non-binding human rights instruments.<sup>81</sup>

#### **4. The relevance of monism versus dualism**

After independence, African states adopted the legal systems of their former colonial masters. African states that were colonised by Belgium, France, Italy and Portugal embraced the Civil Law tradition while those African states that were colonised by the British adopted the Common Law tradition. Some African states, having been colonised by both the British and the Dutch, combined both traditions in what is referred to as a mixed legal system. The Civil Law tradition does not place many restrictions on the domestic applicability of international law. The only restriction appears to be that treaties, after ratification, have to be published in the official gazette in order to have effect domestically. International law and municipal law are treated as part of the same legal system. Since international law does not need to be domesticated, courts can base their decisions on both international law and municipal law. On the other hand, the Common Law tradition places several restrictions on the domestic applicability of international law. In particular, ratified treaties are supposed to be domesticated before they can be relied upon in the courts. While customary international law does not need to be domesticated, it still has to be in conformity with the domestic law. Therefore, international law and municipal law are treated as separate legal orders.

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<sup>78</sup> E de Wet, "The 'friendly but cautious' reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks" (2005) 28 *Fordham International Law Journal* 1529, 1557 ff.

<sup>79</sup> N Botha and M Olivier, "Ten Years of International Law in the South African Courts" (2004) 29 *South Africa Yearbook of International Law* 42.

<sup>80</sup> E de Wet, "South Africa" in D Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford University Press 2011) 581.

<sup>81</sup> E de Wet (n 88) 1534-1535.

Traditionally, it is common to refer to African states that follow the Civil Law tradition as monist while African states that follow the Common Law tradition are often referred to as dualist.<sup>82</sup> The many restrictions on international law imposed by dualism at first appear to impede domestic courts from referring to international law. However, empirical studies have shown that courts in dualist African states tend to overlook the restrictions of dualism and to use international law more than courts in monist African states.<sup>83</sup> In fact, domestic courts in most monist African states avoid direct application of international law while courts in dualist African states actively make use of non-domesticated treaties.<sup>84</sup> Therefore, domestic courts in Africa do not strictly adhere to the monist or dualist legal framework. This situation makes the monism-dualism doctrines insufficient to explain the actual practice of domestic courts in Africa.

## 5. Transnational judicial dialogue

Since the 1990s, some domestic courts in dualist African states have been making reference to non-domesticated international law in their decisions, particularly in constitutional and statutory interpretation. The reference to international law by domestic courts, particularly in constitutional and statutory interpretation, is a form of informal communication between national and international courts. This interaction between courts worldwide through comparative analysis of international law has been termed as transjudicial communication.<sup>85</sup> Domestic courts make reference to international law in two main ways. First, domestic judges refer to international law in order to support their interpretation of the domestic law. This is especially the case where domestic law is uncertain or ambiguous.<sup>86</sup> Second, domestic courts use international law in order to determine the substantive scope of rights contained in the domestic law. In this way, domestic

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<sup>82</sup> M Killander, "The Role of International Law in Human Rights Litigation in Africa" in EK Quansah and W Binchy (eds), *Judicial Protection of Human Rights in Botswana: Emerging Issues* (Clarus Press 2009) 6.

<sup>83</sup> M Killander and H Adjolohoun, "International Law and Domestic Human Rights Litigation in Africa: An Introduction" in M Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (PULP 2010) 4.

<sup>84</sup> *ibid.*

<sup>85</sup> A-M Slaughter, "A Typology of Transjudicial communication" (1994) 29 *University of Richmond Law Review* 99, 101-102.

<sup>86</sup> ME Adjami, "African Courts, International Law and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?" (2002) 24(103) *Michigan Journal of International Law* 103, 130.

courts rely on international law in order to promote democracy and human rights in the domestic sphere.<sup>87</sup>

The reference to international law by domestic courts when interpreting constitutions has several effects. First, such a reliance on international law aids in understanding the content and scope of rights contained in constitutions. Second, the domestic discussion of those rights increases the understanding of the content and scope of those rights at the international level.<sup>88</sup> Thus, transjudicial communication is said to result in “cross-fertilization of international law”.<sup>89</sup> Third, the use of comparative analysis by domestic courts results in harmonization of domestic legal frameworks on particular issues. Fourth, the reference to international law helps in clarifying issues and highlighting new solutions to those issues.<sup>90</sup>

In African domestic courts, this communication has often been in the form of reception that is, African courts usually followed international law as it had been expounded by international forums. They did not engage in modifying the international law rules concerned. More recently, domestic courts worldwide appear to be communicating under new circumstances. First, domestic courts have gained a sense of unity, particularly in the area of human rights. Domestic courts are referring to international law with the understanding that they are part of a global enterprise. Second, domestic courts are no longer simply norm importers but they are also becoming norm exporters. Domestic courts take note of emerging international law rules and then offer their own opinion regarding the scope and relevance of those rules. In this way, domestic courts influence the formation of international law rules. This co-constitutive process is referred to as transnational judicial dialogue.

### **i. Kenya**

For many years since independence, Kenya’s legal framework did not contain an express provision on the application of international law. Conversely, the *Judicature Act* directed Kenyan courts to

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<sup>87</sup> *ibid* 131.

<sup>88</sup> M Killander (n 92) 21.

<sup>89</sup> M Adjami (n 96) 113; A-M Slaughter, “Judicial Globalization” (2000) 40 *Vancouver Journal of International Law* 1103, 1116-1119.

<sup>90</sup> M Waters, “Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law” (2004) 93 *Georgetown Law Journal* 487, 494.

apply English laws where appropriate. As a result, the courts often referred to English decisions but rarely made reference to international law or even to comparative law from other jurisdictions. There was a change in this trend during negotiations for a new constitution as courts began to take note of the references to international law contained in the various draft constitutions. The courts have been more liberal in their engagement with international law and other courts under the 2010 Constitution than under the previous constitution.

This engagement with international law and other courts arises from a sense of membership to a community of global courts. Kenya's Constitution encourages the courts to interact with other courts.<sup>91</sup> While this interaction should be in the form of "dialogue" as opposed to simply "reception", Kenyan courts rarely analyze international and national norms in order to develop a convergence of those norms.<sup>92</sup> The approach followed by most Kenyan judges when relying on international law does not quite reach the level of dialogue. The judges refer to international law for two main reasons. First, judges often rely on international law when trying to fill a gap in Kenyan law. For instance, judges usually refer to international law when trying to define a particular term<sup>93</sup> or to where there is no particular legislation on an issue.<sup>94</sup>

Second, judges rely on international law to reiterate a position in the domestic law. However, the judges are not usually methodical in their use of international law. For example, the judges do not usually analyse state practice when asserting that a particular international rule has attained the status of customary international law.<sup>95</sup> Also, when relying on a non-binding treaty, judges do not usually assess the extent to which the treaty reflects international consensus.<sup>96</sup>

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<sup>91</sup> W Mutunga, "Human rights states and societies: A reflection from Kenya" (2015) 2 *Transnational Human Rights Review* 63, 82-84.

<sup>92</sup> *Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR (Supreme Court, Nairobi) [82] – [84].

<sup>93</sup> *David Njoroge Macharia v Republic* [2011] eKLR (Court of Appeal, Nairobi); *Gabriel Nyabola v Attorney General and 2 others* [2014] eKLR (High Court, Nairobi).

<sup>94</sup> *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others* [2013] eKLR (Industrial Court, Nairobi).

<sup>95</sup> *Kituo Cha Sheria and others v Attorney General* [2013] eKLR (High Court, Nairobi) [71].

<sup>96</sup> *Joseph Njuguna Mwaura and 2 Others v Republic* [2013] eKLR (Court of Appeal, Nairobi); *Jackson Maina Wangui and Another v Republic* [2014] eKLR (High Court, Nairobi).

## ii. South Africa

The inclusion in the 1993 Interim Constitution and 1996 present Constitution of a directive to use international law when interpreting the Bill of Rights or domestic law influenced post-apartheid courts to liberally refer to international law. However, the use of international law by the courts has not been as pervasive as would have been expected.<sup>97</sup> The number of cases in which international law was referred to was disproportionately lower to the cases that did not.<sup>98</sup> In addition, the courts used international law more when interpreting the Bill of Rights than when interpreting domestic law.<sup>99</sup> Also, the courts refer to international law on an *ad hoc* basis. In most cases, the courts only made a passing reference to the relevant treaty provision without further analysis.<sup>100</sup> Again, when dealing with the same issue at different times, the same courts have not uniformly relied on international law.

The trend in the courts' use of international law shows that international law is used in two particular situations. First, the courts use international law in the initial stages when a provision of the constitution or domestic law comes for interpretation. Here, the courts use international law in order to elaborate on a particular approach but once the approach becomes consistent, the courts rely less on international law.<sup>101</sup> Second, the courts rely on international law only for normative guidance on basic principles but not for factual guidance on issues that require balancing between rights and public policy.<sup>102</sup> In such situations, the courts preferred to refer to comparative law dealing with the matter at hand.

While the use of international law by South African courts has not been stringently methodical and pervasive, the courts have contributed to the reshaping of international law. Through the use of international law, the courts were able to determine the substantive scope of certain human rights provisions of the constitution and in the process to elaborate on the corresponding international

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<sup>97</sup> R Blake, "The World's Law in One Country: The South African Constitutional Court's Use of Public International Law" (1998) 115 South African Law Journal 668, 669, 684.

<sup>98</sup> D Hovell and G Williams, "A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa" (2005) 29 Melbourne University Law Review 95, 114-116.

<sup>99</sup> *ibid* 115.

<sup>100</sup> *ibid*.

<sup>101</sup> *ibid* 118.

<sup>102</sup> *ibid*.

human rights.<sup>103</sup> For example, the right to be free from cruel, inhuman or degrading treatment or punishment was tested in several cases concerning different state conduct. In *S. v Makwanyane*,<sup>104</sup> the judges highlighted the similarities between the African concept of *Ubuntu* and the values underlying international human rights.<sup>105</sup> Despite the fact that the death penalty was not prohibited under international law, the judges concluded that capital punishment went against the right to be free from cruel, inhuman or degrading treatment or punishment because it took away a person's dignity and life. The court reiterated its decision in the case of *Mohamed v. President of the Republic of South Africa*.<sup>106</sup> In addition, the court ordered the South African authorities remedy the harm caused by their actions or to ameliorate the prejudice consequently occasioned on the applicant. This last duty placed upon the South African authorities was affirmed in *Kaunda v President of the Republic of South Africa*.<sup>107</sup>

These two cases have been used in briefs presented before the European Court of Human Rights (ECtHR) concerning the compatibility of the death penalty with the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), particularly article 3 on prohibition of torture or inhuman or degrading treatment.<sup>108</sup> Although references to the South African cases are only contained in the summaries of the parties' submissions, it is highly likely that the European Court of Human Rights were influenced by those cases.<sup>109</sup>

Another instance in which South African courts influenced international law was on the right to equality. International judicial bodies do not think that the non-recognition of homosexual unions as marriages amounts to discrimination.<sup>110</sup> In contrast, South African courts went further to interpret the provision on non-discrimination as mandating equal rights for homosexual unions as

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<sup>103</sup> ER George, "International Law and African Judiciaries: The Example of South Africa" (Proceedings of the Annual Meeting (American Society of International Law) 24 – 27 March 2010) 329, 329.

<sup>104</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

<sup>105</sup> ER George (n 113) 331.

<sup>106</sup> *Mohamed v President of the Republic of South Africa and Others* CCT 17/01 [2001] ZACC 18.

<sup>107</sup> [2004] ZACC 5.

<sup>108</sup> L van den Eynde, "The South African Constitutional Court's Death Penalty and Rendition Cases as Tools for Litigants Abroad" (2016) XLIX (3) Comparative and International Law Journal of Southern Africa 369.

<sup>109</sup> *ibid* 377.

<sup>110</sup> *Rees v United Kingdom* [1986] ECHR 11 [49]; *Cossey v United Kingdom* [1990] ECHR 21 [43]; *Sheffield and Horsham v United Kingdom*, no. 22985/93 and 23390/94 [66], ECHR 1998-V.

those granted to heterosexual marriages. In *Minister of Home Affairs v Fourie*,<sup>111</sup> the Constitutional Court concluded that even though international law expressly protected heterosexual marriages, homosexual unions were not barred from equal recognition as marriages.<sup>112</sup> The court added another ground for holding that the non-recognition of homosexual unions was unconstitutional: human dignity. This reference to dignity was in consonance with other domestic and international courts that are increasingly using the concept to justify better treatment of homosexuals.<sup>113</sup>

The other instance in which South African courts have influenced the development of international law is when dealing with economic, social and cultural rights. In such cases, the courts have deviated from a wholesale adoption of the international law approach. The Committee on Economic, Social and Cultural Rights (CESCR) developed the concept of “minimum core” in determining the minimum legal content of rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>114</sup> The African Commission on Human and Peoples’ Rights has also adopted the minimum core approach under the African Charter on Human and Peoples’ Rights (African Charter). The African Commission has stated that states parties to the African Charter have the obligation to ensure a minimum essential level of a socio-economic right contained in the African Charter.<sup>115</sup>

In several cases, South African courts have decided against applying the minimum core concept. While interpreting the right of access to water,<sup>116</sup> healthcare<sup>117</sup> and adequate housing<sup>118</sup> under sections 26 and 27 respectively of the South African Constitution, the judges stated that the courts did not have the institutional capacity to decide matters touching on resource allocation. In addition, the court stated that the text of the 1996 Constitution did not create a minimum core entitlement and that the minimum core, if any, would be relevant only when determining the

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<sup>111</sup> [2005] ZACC 19.

<sup>112</sup> *ibid* [105].

<sup>113</sup> M Fink, “The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective” (2016) 14(1) *International Journal of Constitutional Law* 26.

<sup>114</sup> General Comment No 3: The Nature of State Parties’ Obligations (1990) [10].

<sup>115</sup> Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights (2010) 13.

<sup>116</sup> *Mazibuko v City of Johannesburg* [2009] ZACC 28.

<sup>117</sup> *Soobramoney v Minister of Health, Kwa-Zulu Natal* [1997] ZACC 17; *Minister of Health v Treatment Action Campaign (No. 2)* [2002] ZACC 15.

<sup>118</sup> *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19.



reasonableness of legislative and other measures undertaken by the government under the constitution.

The Constitutional Court's approach shows that socio-economic rights play different roles in the international and domestic contexts. The rights are more aspirational at the international level but should be made more concrete and measurable in the domestic context.<sup>119</sup> By progressively achieving certain standards of the rights in the domestic context, the changes in socio-economic conditions would lead to governments setting new standards. Over time the new levels achieved will influence the international content of the rights.

## **6. Normativity and transnational judicial dialogue**

The above discussion shows that Kenyan and South African courts are taking part in transnational judicial dialogue, albeit in different ways. Domestic courts worldwide are increasingly viewing their role as being to mediate between domestic and international legal norms.<sup>120</sup> These courts are motivated to take part in this dialogue for various reasons.<sup>121</sup> First, the constitution may contain an invitation to consider international law in their decisions. Second, domestic courts may resort to considering international law in order to gain the same level of influence as other judiciaries. Third, domestic courts refer to international law so as to give their decisions more legitimacy nationally. Fourth, domestic courts make reference to international law in order to gain power in the domestic political context. Fifth, domestic courts appear to share a “sense of common judicial purpose in adjudicating similar issues of individual human rights.”<sup>122</sup>

This shared sense of a common judicial enterprise is instrumental in the emergence of new international legal norms. First, when domestic courts refer to international decisions in support of a particular legal norm, they influence state practice to in a particular direction. This harmonised state practice gradually results in the development of a new customary international legal norm.<sup>123</sup>

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<sup>119</sup> KS McLean, *Constitutional Difference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press 2009) 186.

<sup>120</sup> M Waters (n 100) 517.

<sup>121</sup> *ibid* 517-518.

<sup>122</sup> *ibid* 519.

<sup>123</sup> *ibid* 526.

Second, the courts themselves are able to declare that a new customary international legal norm has arisen from the harmonized state practice.<sup>124</sup>

However, the reference to international law by Kenyan and South African courts has received opposition from some judges. Some judges state that while international law has a role to play in interpretation of domestic legal norms, there should not be an uncritical wholesale adoption of international legal norms. The immediate former Chief Justice of Kenya once stated:

“Kenya’s jurisprudence should be grown with local needs in mind, without unthinking deference to other jurisdictions and courts, however distinguished.”<sup>125</sup>

Similarly, one South African judge stated that:

“where applicable, public international law in the field of human rights must be considered, ... But that is a far cry from blithe adoption of alien concepts or inapposite precedents.”<sup>126</sup>

A final example is one South African judge stating that “the weight to be attached to any particular principle or rule of international law will vary.”<sup>127</sup> Such comments seem to question the normative guidance that international legal norms can offer. As mentioned earlier, domestic courts make use of international law in order to support their interpretation of domestic law as well as to determine the substantive scope of rights in the domestic law.<sup>128</sup> However, there needs to be justification for resorting to a consideration of international legal norms where these are not binding. This is especially pertinent since, as has been mentioned earlier, domestic courts in Africa do not strictly adhere to the restrictions on the domestic application of international law placed by the doctrines of monism and dualism.<sup>129</sup>

One way to determine between domestic and international legal norms is by assessing the strength of the conflicting norms.<sup>130</sup> When determining the primacy of a domestic legal norm, domestic courts could gauge the norm’s historical, cultural and contemporary context. On the other hand,

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<sup>124</sup> *ibid.*

<sup>125</sup> W Mutunga (n 101) 82-84.

<sup>126</sup> *Bernstein v Bester* (CCT23/95) [1996] ZACC 2 [133] (per Kriegler J).

<sup>127</sup> *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 [235].

<sup>128</sup> M Adjami (n 96) 130-131.

<sup>129</sup> M Killander (n 92) 6.

<sup>130</sup> M Waters (n 100) 559.

when assessing the appropriateness of an international legal norm, domestic courts could take into account the universal character of the norm as well as whether the norm has been adopted through political or judicial means.<sup>131</sup>

For Kenya, because of the history of authoritarian government and the marginalisation of certain social groups, the 2010 Constitution contains a list of national values and principles. Article 10 reads as follows:

- “10. National values and principles of governance
- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
    - (a) applies or interprets this Constitution;
    - (b) enacts, applies or interprets any law; or
    - (c) makes or implements public policy decisions.
  - (2) The national values and principles of governance include—
    - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
    - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
    - (c) good governance, integrity, transparency and accountability; and
    - (d) sustainable development.”

These national values and principles have acquired significance in Kenya’s contemporary socio-political context. Therefore, this provision means that when applying international law, the courts would have to take into account the national values and principles.

South Africa’s history with apartheid led to a constitution that includes a distinct right to dignity. The courts have highlighted that the right to dignity is of paramount importance.<sup>132</sup> The right to dignity has been relied upon by the courts on cases upholding various rights, from the right to be free from cruel, inhuman or degrading treatment or punishment, to the right to be free from discrimination.

Second, domestic courts need to take into account the “countermajoritarian difficulty”.<sup>133</sup> The traditional countermajoritarian difficulty refers to the conflict between democracy based on the

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<sup>131</sup> *ibid* 560.

<sup>132</sup> M Fink (n 123) 37.

<sup>133</sup> *ibid*.

will of the majority and the need to protect the minority from the whims of the majority. In the domestic context, the constitutional system of checks and balances ensures that courts play their proper role as countermajoritarian institutions.<sup>134</sup> Conversely, the international countermajoritarian difficulty arises when domestic courts refer to international legal norms that have not arisen from a direct involvement of the domestic polity.<sup>135</sup> Domestic courts could be at risk of imposing undesirable alien norms on a reluctant domestic polity. However, the arguments that the domestic sphere is more democratic than the international level are increasingly inaccurate.<sup>136</sup> This is because participatory decision-making at the domestic level is no longer confined to the legislature but is now shared by administrative agencies and constitutional courts. In addition, international institutions are gradually developing more accountable, participatory and transparent procedures.<sup>137</sup> Therefore, where there is a choice between international and national legal norms, domestic courts should weigh of the two would be accepted more by the domestic polity.<sup>138</sup>

For example, in Kenya the right to equality has gained prominence lately, especially on the equality of the sexes. The 2010 Constitution directs the State to implement measures that ensure the numerical proportionality in elective or appointive bodies.<sup>139</sup> Therefore, an international legal norm that proposes a more egalitarian approach would likely meet little opposition. Conversely, the right of homosexuals to be treated with equality is still faced with opposition. While sexual orientation is not listed as a prohibited ground of discrimination in the 2010 Constitution, the language used in article 27(4) intimates that the list of grounds is not exhaustive. Only recently did the High Court order the registration of an association of homosexuals after the government had declined to do so.<sup>140</sup> However, the government's appeal against this decision is still pending before the Court of Appeal. Therefore, it seems that the international move towards equal treatment of homosexuals would not be easily accepted by the domestic polity.

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<sup>134</sup> B Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy" (1998) 73 *New York University Law Review* 333.

<sup>135</sup> RP Alford, "Misusing International Sources to Interpret the Constitution" (2004) 98 *American Journal of International Law* 57, 58-61.

<sup>136</sup> M Kumm, "Democratic Constitutionalism Encounters International Law: Terms of Engagement" in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 269.

<sup>137</sup> *ibid* 272.

<sup>138</sup> M Waters (n 100) 561-562.

<sup>139</sup> Articles 27(8), 81(b), 175(c), 177(1)(b) and 197(1).

<sup>140</sup> *Eric Gitari v Non-Governmental Organisations Co-ordination Board and 4 others* [2015] eKLR.

Conversely, the South African Government's international position appears to be in conflict with the hitherto progressive domestic jurisprudence on sexual orientation. In June 2016, the UN Human Rights Council adopted a resolution that appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.<sup>141</sup> South Africa abstained from the vote on the basis that the preferable option was to build consensus on the issue.<sup>142</sup> In November 2016, the UN General Assembly's (UNGA) Third Committee (Social, Humanitarian and Cultural) met to send, *inter alia*, a draft resolution on sexual orientation and gender identity to the UNGA.<sup>143</sup> South Africa supported a statement by the UN African Group that sexual orientation and gender identity were not and should not be linked to existing international human rights instruments.<sup>144</sup> However, South Africa then voted against the African Group's proposal to defer sending the draft resolution to the UNGA.<sup>145</sup> This confirms that while South Africa's judiciary accepts the domestic and international norms on sexual orientation and gender identity, the executive adopts an inconsistent position on the same.<sup>146</sup> Such a conflict could have a significant impact on the acceptance of international norms on sexual orientation and gender identity by the domestic polity.

Third, domestic courts could assess their structural capacity to mediate between domestic and international legal norms.<sup>147</sup> Where the domestic law expressly authorises the courts to refer to international law, the domestic courts could extensively apply international legal norms. Conversely, where the domestic law does not expressly authorise a consideration of international law then the courts can rely on implicit authorisation to apply international legal norms but to a limited extent.<sup>148</sup>

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<sup>141</sup> Resolution 32/2 of 30 June 2016 (A/HRC/32/L.2/Rev.1).

<sup>142</sup> R Bejoy, "South Africa abstains from UN vote to protect human rights" Ground Up, Cape Town, 5 July 2016, <<http://www.groundup.org.za/>> accessed 19 July 2017.

<sup>143</sup> United Nations, "Intense Debate, Close Voting as Gender Identity, Sexual Orientation, Digital-age Privacy Take Centre Stage in Third Committee", <<https://www.un.org/>> accessed 19 July 2017.

<sup>144</sup> Collison, C., "SA backs Africa Group's view that LGBTI rights have no place in international law" Mail & Guardian, Johannesburg, 8 November 2016 <<https://mg.co.za/>> accessed 19 July 2017.

<sup>145</sup> Third Committee (Social, Humanitarian and Cultural), "Recorded vote on A/C.3/71/L.46 - Report of the Human Rights Council", UN, New York, 21 November 2016 <<http://www.un.org/>> accessed 19 July 2017.

<sup>146</sup> J Eduard "South Africa and sexual orientation rights at the United Nations: Batting for both sides" [2017] Politikon 1.

<sup>147</sup> M Waters (n 100) 562.

<sup>148</sup> *ibid.*

Kenya's Constitution now contains an express recognition of international law as part of domestic legal framework.<sup>149</sup> In addition, the state is directed to that domestic law and the conduct of state officers complies with international law.<sup>150</sup> These constitutional provisions enable the courts to engage with and rely on international law in their decisions. However, the shortcoming in the constitutional provisions is that the 2010 Constitution does not expressly or articulately regulate the hierarchy between municipal law and international law. This situation has presented difficulties for the courts when trying to give normative preference for treaties over domestic legislation.<sup>151</sup>

South Africa's Constitution extensively regulates the relationship between municipal law and international law. First, the 1996 Constitution recognises international law as part of the domestic law. Second, the South African Constitution elaborates on the procedure required for treaties to become part of the domestic legal framework. Third, the 1996 Constitution provides normative guidance by limiting the applicability of customary international law where it is in conflict with domestic law. Through this framework, the courts have been able to determine the normative hierarchy between treaties and legislation. This extensive regulation of the relationship between municipal and international law has, however, led to an overly eager judiciary giving prominence to non-binding or non-domesticated treaties.<sup>152</sup>

Fourth, domestic courts should take into account the general duty to obey international law.<sup>153</sup> There is generally a presumption that where there is a rule of international law governing a specific issue, then states are *prima facie* obliged to follow it. This duty is derived first from the nature of international law; international law deals with issues that affect the international community. As a result, international law could not achieve its purpose without receiving such a commitment to obedience.<sup>154</sup> Second, there is the general rule that where there is a conflict between international

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<sup>149</sup> Articles 2(5) and (6) and 21(4).

<sup>150</sup> Articles 50(2)(n)(iii), 51(3)(b), 58(6)(a)(ii), 145(1)(b), 150(1)(b)(ii), 152(6)(b) and 181(1)(b).

<sup>151</sup> Cf the decisions in *Re Zipporah Wambui Mathara* [2010] eKLR, *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa* [2010] eKLR, and *David Njoroge Macharia v Republic* [2011] eKLR, with the decision in *Beatrice Wanjiku and Another v Attorney-General and Another* [2012] eKLR.

<sup>152</sup> *S v Makwanyane* (CCT3/94) [1995] ZACC 3; *S v Williams and Others* (CCT 20/94) [1995] ZACC 6.

<sup>153</sup> M Kumm (n 146) 261.

<sup>154</sup> *ibid* 262-263.

obligations and national law then the international obligations prevail.<sup>155</sup> However, this formal legality does not enjoy substantive legitimacy.<sup>156</sup> Therefore, domestic courts have to take into account the other considerations discussed here when deciding whether to follow international law or national law.

Fifth, domestic courts should consider whether there are persuasive reasons for relying on international law as opposed to national law.<sup>157</sup> The most compelling reason for deferring to international law would be that an issue requires collective action. Thus, issues that affect the international community are better dealt with under international law. In addition, there must be a consideration of the advantages and disadvantages of relying on one body of law over the other.<sup>158</sup> Thus, where there are structural deficiencies in the international or domestic system, then the domestic courts would be able to determine the appropriate body of law. For example, if relying on national law to determine an issue that affects the international community would lead to absurd results then the courts ought to rely on international law instead.

Sixth, domestic courts should consider whether relying on international law or national law achieves reasonable outcomes.<sup>159</sup> Traditionally, international law concerned itself with achieving compliance with international obligations but left the method of national implementation to the domestic authorities. However, international law has become increasingly intrusive as evidenced by the detailed and specific requirements placed on national law by human rights and international criminal law treaties.<sup>160</sup> Domestic courts need to assess whether relying on either international law requirements or on national law achieves a just result. This consideration is connected to the others above; where relying on one body of law over another is justified by compelling reasons and is also more procedurally fair, then it is assumed that a just result would be achieved.<sup>161</sup>

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<sup>155</sup> E Denza, “The Relationship Between International and National Law” in M Evans (ed), *International Law* (Oxford University Press 2010) 413.

<sup>156</sup> M Kumm (n 146) 263.

<sup>157</sup> *ibid* 264.

<sup>158</sup> *ibid* 265.

<sup>159</sup> *ibid* 273.

<sup>160</sup> E Denza (n 165) 415-416.

<sup>161</sup> M Kumm (n 146) 273.



## **7. The future of transnational judicial dialogue**

This study has analysed the applicability of the traditional doctrines on the relationship between international law and national vis-à-vis the contemporary practice of domestic superior courts in Kenya and South Africa. Whereas the constitutions of both states reflect a commitment to the traditional doctrines of monism and dualism, actual court practices have rendered these doctrines inaccurate. In addition, the contemporary legal environment is more dispersed across state borders and involves more actors than the traditional court system. This dispersal of norm producing sites results in an interaction between different and competing norms. To moderate the potential conflicts between national and international legal norms, courts need to cooperate through doctrines that reflect legal practice and that are still philosophically sound.

The doctrine of transnational judicial dialogue is more relevant to the contemporary legal context. Through formal and informal dialogue, courts and quasi-judicial bodies communicate their legal norms and negotiate for the appropriate norms to address particular issues. An important aspect of transnational judicial dialogue is that the process of communicating legal norms is co-constitutive. International legal norms influence the development of domestic legal norms and the domestic legal norms in turn affect the further development of international law. In order to address the potential conflicts that could arise from this exchange, the relevant actors (that is, domestic judicial organs) need to perform several cost-benefit analyses of relying on either international law or national law. The end result would be normative stability and legitimacy of judicial decisions.

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