

**APPLICATION OF INTERNATIONAL HUMAN RIGHTS
INSTRUMENTS (IHRIs) BY DOMESTIC COURTS:
A COMPARATIVE STUDY OF RWANDA AND GHANA**

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
OF THE DEGREE LLM (HUMAN RIGHTS AND DEMOCRATISATION
IN AFRICA) OF THE UNIVERSITY OF PRETORIA

BY

JEAN CHRYSOSTOME RUBAGUMYA

STUDENT NO: 11368358

PREPARED UNDER THE SUPERVISION OF PROFESSOR KOFI QUASHIGAH

AT

THE FACULTY OF LAW, UNIVERSITY OF GHANA, LEGON

28 OCTOBER 2011

DECLARATION

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

Student: Jean Chrysostome Rubagumya

Signature: _____

Date: 28 October 2011

Supervisor: Professor Kofi Quashigah

Signature: _____

Date: 28 October 2011

DEDICATION

This work is dedicated

To

My lovely wife Athanasie Manariyo, for your patience in the course of pursuing my studies.

Our lovely daughters Ange-Merveille Kunda and Igisingizo Marie Reine, for your love, prayers and encouragement.

My parents Fidèle Kanamugire and Marie Mukanyangezi for everything you sacrificed for my education.

My late brother Pierre Claver Muhanuka, it is unfortunate that you cannot share this joy with me, where you are stay in peace

ACKNOWLEDGMENT

Most importantly the Almighty God, without your constant and closest presence especially in the course of this program, nothing could have been accomplished.

I am deeply grateful to my supervisor Professor Kofi Quashigah. Despite your many responsibilities, you dedicated your precious time to guide me in writing this dissertation. Your patience and directions are invaluable. .

I owe special thanks to you my beloved wife Athanasie Manariyo for your invaluable efforts to take good care of our family in my absence. Special thanks also to our daughters Ange Merveille and Marie Reine Benita who despite my absence, always felt my love and support for the family. Your constant prayers, love and phone calls made me feel less far from you.

I am particularly grateful to the Centre for Human Rights at the University of Pretoria for the scholarship that enabled me to pursue the LLM in Human Rights and Democratization. For sure you made my dream come true. I sincerely appreciate the support I got from both the administrative as well as academic staffs of the Centre that made my life in Pretoria comfortable.

My sincere thanks also go to the members of our family. My mother Mary and my father Fidèle, my brothers Callixte, Jean Pierre and their wives, Fr J.Robert, Fr J.Nepo, my sisters Delphine, Beatrice and their husbands, Claire and Alice, Espérance and Chantal I appreciate your support to my family. Your calls reminding me about your constant prayers for me, contributed to a great extent to the success of my studies. .

I am greatly indebted to Karara Gilbert's family, my family in South Africa. I sincerely appreciate the time we spent together. For sure you made me feel home away from home. God bless you.

I am also grateful to all my friends Oswald, Odette, Yvonne, Christine, Toussaint and Frank to mention but a few. , We lived as a family and despite being far away from home I always felt at home because of your presence. God bless you too.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
AHRLR	African Human Rights Law Report
AU	African Union
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural
CIL	Customary International Law
CLADHO	Collectif des Leagues et Associations de Défense des Droits de l'Homme
CRC	Convention on the Rights of the Child
CS	Cour Supreme
EAC	East African Community
GLR	Ghana Law Report
GSL	Ghana School of Law
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILPD	Institute of Legal Practice and Development
MRND	Mouvement Révolutionnaire National pour le Développement
NGO	Non Governmental Organisation

OAU	Organisation of African Unity
RPF	Rwanda Patriotic Front
SC	Supreme Court
SCGLR	Supreme Court Ghana Law Report
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	United Nations Charter
UN Doc	United Nations Documents
VCLT	Vienna Convention on the Law of the Treaties

Contents

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGMENT	iv
LIST OF ABBREVIATIONS	v
CHAPTER I: Introduction	1
1.1 Background of the study.....	1
1.2 Statement of the Problem.....	2
1.3 Objective of the study.....	3
1.4 Significance of the study	3
1.5 Research questions.....	4
1.6 Methodology.....	4
1.7 Literature review.....	4
1.8 Limitations of study.....	7
1.9 Overview of chapters	7
CHAPTER II: Integration of international human rights into domestic law: general theoretical framework	9
2.1 Introduction.....	9
2.2 What is international law?.....	9
2.3 What are the sources of international law?.....	10
2.4 What are the subjects of international law?.....	11
2.5 Distinctiveness of international human rights law.....	11
2.6 States' obligation to apply International Human Rights Law.....	13
2.7 Process of integration of international human rights law at the domestic level 15	
Traditional distinction between dualism and monism	16
2.8 Perspective for a broader enjoyment of international human rights.....	18
2.8.1 Distinctive nature of International Customary International Law (CIL).....	19
2.8.2 The coercive force of <i>Jus Congens</i> norms and obligations <i>erga omnes</i>	20
2.8.3 Conclusion.....	22

CHAPTER III: Opportunities and challenges in the application of IHRIs in Rwanda and Ghana	23
3.1 Introduction.....	23
3.2 The place of international law in the constitutions	23
3.3 The place of international human rights in the constitutions.....	27
3.4 Procedure of reception of international instruments into domestic legal order in Ghana and Rwanda.....	30
3.5 Applicability of IHRIs before the court.....	35
3.5.1 Existence of provisions concerning the enforceability of IHRIs	35
3.5.2 Self-executing provisions.....	37
3.6 Attitude of the bar and bench vis-a-vis IHRIs.....	37
3.6.1 Underneath reasons of the reluctance to have recourse to IHRIs.....	44
3.6.2 Conclusion.....	46
CHAPTER IV: Conclusions and Recommendations.....	47
4.1 Conclusions	47
4.2 Recommendations.....	49
To the Government of Ghana.....	49
The Ghana Bar Association.....	50
Faculties of Law and Ghana School of Law (GSL)	50
Rwanda.....	50
Government of Rwanda.....	50
Rwanda Bar Association	50
Universities and the Institutes for Legal Practice and Development (ILPD).....	51
Bibliography	52

CHAPTER I: Introduction

1.1 Background of the study

The essence of human rights and their dimension goes beyond national level. It is universal because it is inherent to human kind.

The main source of human rights norms is international human rights instruments. The concern for human rights has grown worldwide and therefore they have been given priority by most nations. They are more and more integrated into national legal frameworks mainly in states constitutions with more or less enforcing mechanisms.

As far as the realization of rights is concerned various mechanisms are involved on different levels: international, regional and national. Each of the three levels has its advantages and disadvantages. Yet, the local mechanisms appear to be more effective and adequate given the fact that they are closer to the real subject of the rights (the individuals). In point of fact, human rights involve mainly the relationships between individuals and states but sometimes also between individuals living somewhere in a nation.¹

As a stage which precedes the realization, the integration of human rights in the national legal framework is an important step. A trigger mechanism for the realisation of human rights is the integration of these rights into the national legal framework. Each state, through the constitution's provisions, chooses the adequate way of accommodating the international instrument on a domestic level. The methods vary from one country to another. Those methods can be labelled according to monist and dualistic methods.² According to monism, international law and national law constitute a single conception of law within a domestic legal system with the superiority of international law to national law while the dualism separates

¹ N Jayawickrama *The judicial application of human rights law: National, Regional and International Jurisprudence* (2002) 95.

² M Killander & 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* (2010) 4.

international and national law.³ In the monism system domestic courts apply international law without any further procedure of adoption either judicial or by legislature.⁴ Using the dualist system, the court cannot apply international law if it is not yet transformed in domestic legal framework by legislature.⁵ 'African civil law countries have traditionally been seen as monist and common law countries as dualists'.⁶

1.2 Statement of the Problem

Beyond integration, the next most important phase is the realization mechanisms of the rights. Different mechanisms exist on the national level for implementation. One such mechanism and perhaps the most efficient, is the judicial mechanism⁷. Rawls as quoted by Heyns and Stefiszyn asserts, 'Principles of justice provide a way of assigning rights and duties in the basic institutions of the society and Human right are an end of justice'.⁸

Rwanda and Ghana, like most of African states are very dedicated to ratify international instruments, but when it comes to the implementation of the rights, especially through judicial mechanism, for various reasons, states become more or less reluctant. In this respect it Killander and Adjolohoun opined that

The limited use of international human rights law by national courts in Africa stems from a number of reasons: these include limited access to relevant international human rights documents, lack of adequate case reporting, both at the national and international level, attitudes of judicial officers and their lack of exposure to international human right law and poorly drafted pleadings that do not bring out the relevant issues. In addition, lack of

³ ME Adjami 'African Courts, International law and comparative case law: Chimera or emerging Human Rights Jurisprudence?' in C Heyns & K Stefiszyn (ed) *Human Rights, Peace and Justice in Africa: A Reader* (2006) 174.

⁴ J Dugard *International law: A South African perspective* (2005) 47.

⁵ As above.

⁶ M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An Introduction' in Killander (ed) (n 2 above) 4.

⁷ Its efficiency is related to the binding nature of the court decisions.

⁸ J J Shestack 'The philosophic foundations of Human Rights' in C Heyns and K Stefiszyn (ed)*Human rights, Peace and justice in Africa: A reader*, (2006) 7.

access to justice in many countries due to among others, the high cost of litigation and cumbersome procedural rules, hinders human rights litigation.⁹

1.3 Objective of the study

The objective of the study is:

- To assess how IHRIs become part of the legal source of human rights protection at domestic level in concerned countries
- To analyse how effective is IHRI in the domestic legal framework of the countries concerned by the study
- To assess the existing opportunities making easier and effective the application of IHRIs by domestic courts of countries concerned by the study
- To assess the challenges hindering the recourse to the IHRIs by domestic courts in the concerned countries
- Give recommendation susceptible to trigger the increase in recourse to IHRIs by domestic courts

1.4 Significance of the study

The two states that the paper intends to cover come from different legal family systems with different methods of integration of international instruments. Following the method of the legal family they belong to, international instruments have a certain place in their domestic system. Ghana belongs to the common law system while Rwanda traditionally belonged to civil law system, but since recently, the trend is to join common law system apparently without completely the civil law system¹⁰. It is likely going to use a mixed system. In addition to the legal family system each country belongs to, there exist various opportunities and challenges to apply IHRIs in domestic

⁹ M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An Introduction' in Killander (ed) (n 2 above) 18.

¹⁰ Rwanda regionally joined the East African Community (EAC) in 2007 (see article 2 of the Treaty of Accession of the Republic of Rwanda into the East African Community). On international integration, Rwanda became member of Commonwealth since 8 March 2010. However it is still member of Francophone organisation

courts. However, the scarcity of case-law in both countries, especially Rwanda implies that there may also be challenges. The study will highlight the opportunities and challenges and what each country can learn from another.

1.5 Research questions

The present paper attempts to answer to the following questions:

- 1) How do IHRIs become sources of human right protection on domestic level in the concerned countries?
- 2) How effective are IHRIs in the domestic legal framework of the concerned countries?
- 3) What are the opportunities capable to make more effective the application of IHRIs by domestic courts of the concerned countries?
- 4) What are the challenges faced by the concerned countries which obstruct the increasing recourse to IHRIs by domestic courts?

The questions will be answered following a comparative approach.

1.6 Methodology

The study will be conducted using a qualitative approach through deskwork and library research to gather data. Given the fact that the study deals with the implementation of law by court it will not be complete without the case-laws analysis. A number of interviews will also be conducted with magistrates and advocates from the countries of the study either telephonically or directly given the distance between the researcher and the sources of information.

1.7 Literature review

The subject of relationship between international human rights law and domestic judicial systems has attracted extensive studies. In a strict and semantic analysis, Fairweather presents international law as a matter dealing with the relationship

between states but not individuals.¹¹ To him international law creates rights, duties and obligations between states. However, the same scholar further argues that there exists the uniqueness of International human rights law that derives from the fact that they create obligations for the states to protect individual rights.¹² It is now well established that international human rights instruments may create individual rights. in his arguments Murphy notes in his study that this does not entails automatic vindication before any particular instance. It has to be assessed whether and in which circumstances the owner of the individual rights can vindicate them before domestic courts.¹³

Basing their arguments on the basic difference between the theories of dualism and monism, Killander & Adjolohoun presented countries with civil law background as applying the monist theory while common law countries follow the dualist theory as far as the domestication of international instrument is concerned.¹⁴ The countries concerned by the present study come from two different colonial traditions and therefore are supposed to follow different theories of domestication of international instruments.

Rwanda, from its colonial background, is traditionally classified among the civil law family despite the recent developments of joining regional and international organisations from common law background including the Commonwealth amongst others. Shabas and Imbleau assert that still, Rwanda is a monist country¹⁵ and Bibiane complement this assertion precisng that officially the direct application IHRIs is accepted.¹⁶

¹¹ CLR Fairweather 'Obstacles to the enforcing international human rights law in domestic courts' (1998) *U.C Davis Journal of International law & Policy* 122.

¹² Fairweather (n 11 above) 123.

¹³ See D Murphy 'Does International Law Obligates States to Open Their National Court ?' in D Sloss (ed) *The role of Domestic Courts in Treaty Enforcement* (2009) 83-85.

¹⁴ M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An Introduction' in Killander (ed) (n 2 above) 2.

¹⁵ WA Schabas & M Imbleau *Introduction to Rwandan Law* (1997) 186.

¹⁶ BM Gahamanyi 'Building Constitutional Order in the aftermath of Genocide' in An Na'im *Human Rights Under African Constitutions: Realizing the Promise for Ourselves* (2003) 269.

Having been a British colony Ghana was bequeathed the dualist tradition¹⁷ while Rwanda as a former Belgium colony, bequeathed the monist tradition. Describing the situation of Ghana, Appiagyei-Atua pointed out that for an international instrument to be part of domestic law it needs either to be incorporated or transformed. Thus, before Ghanaian courts use an international instrument as a substantive law they have to make sure that it has been properly domesticated.

Appiagyei-Atua¹⁸ in 2007 made an observation that it was still difficult to know the number of international treaties domesticated by Ghana. He lamented that despite the opportunities offered by different Constitutions of Ghana from the time of independence the courts have not used them when they dealt with a number of human rights cases. In fact, the procedure of domestication is very clear but still the Ghanaian courts do not have recourse to international instruments when dealing with human right cases. He further suggests that the courts should consider treaties which have been signed but and not yet ratified. This is view not shared with the author of the present study. The author recommends the implication state, manifesting its consent by ratifying human rights instruments. This will entails an effective enjoyment of the rights by its citizens. This view is shared with Dr Farooq Hassan in his contention using the example of the United States.¹⁹ Without domesticating the instruments ratified, the state does not manifest its intention and commitment to be definitely bound by it.

Besides the international customary law, Appiagyei-Atua strongly argues that 'based on the basic principle of *Pacta Sunt Servanda*, the courts should strive for an interpretation which is consistent with the legal commitment that Ghana made by ratifying international treaty'²⁰. The practice Appiagyei-Atua is advocating for may make Ghana shifting from dualism to monism in practice. It may be more efficient and constitute a way to bypass the reluctance of the legislative to formally domesticate.

¹⁷ K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al. (ed) Ghana law since independence: History, development and prospects* (2007) 183.

¹⁸ K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al. (ed)* (n17 above) 212.

¹⁹ F Hassan 'Panacea or miracle ? Domestic enforcement of international human rights law: recent cases' *Houston Journal of International law* (1981) 29.

²⁰ K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al. (ed)* (n 17 above) 208.

However the practice remains difficult in the environment described by Gibney and Franskowski as lack of confidence from the judiciary to exercise its authority.²¹The movement of Rwanda towards new legal zones will definitely affect its legal system and both countries might adopt a new system. The author proposes that it is advisable for Rwanda and Ghana to adopt a new system conferring minor importance to both theoretical perspectives (dualism & monism). Nijman and Nollkaemper support this new perspective²² with a relatively minor importance of both perspectives.

Different aspect of the issues have been deeply analysed but still there is a need to analyse the opportunities that Ghana and Rwanda legal systems can exploit and the challenges they face in the application of the different theories.

In addition, no study has been conducted in a comparative perspective between Rwanda and Ghana. It could have highlighted lessons that each of the countries can learn from the other. Also realistic and pragmatic approach could have been proposed in order to apply international human rights instruments in Ghana and Rwanda courts. This is what this study undertakes to achieve.

1.8 Limitations of study

The researcher will be based in Ghana, one of the three countries of the research and which is very far from the rest of the other country, Rwanda. Collection in Rwanda Data will not be easy because interview have to be conducted by telephone calls. The second limitation will be the scarcity of case studies in Rwanda. Another limitation may consist of the documentation which will more probably be from two different languages: French and English.

1.9 Overview of chapters

This paper will be structured in four chapters. **Chapter one** which is an introduction to the work will discuss the methodology used, the objectives, limitations of the study, gives a literature review and will outline the research question. **Chapter two** will

²¹ M Gibney & S Franswosky (ed) 'Judicial protection of human rights: Myth or Reality?' *Harvard Human rights Journals* (2000) 316.

²² J Nijman & A Nollkaemper 'Introduction' in J Nijman & A Nollkaemper (ed) *New perspective on the divide between National and International law* (2007) 10.

consist of a theoretical framework analyzing the different concepts used in the research. It will among other things show the different approaches of incorporation of international law in domestic legal systems in general and in the particular countries concerned by the study. A further discourse will focus on the different methods that domestic courts may adopt as recourse to it. **Chapter three** will analyse the different opportunities of each of the two countries (Rwanda and Ghana) which should facilitate the recourse to international human rights instruments. The same chapter will assess and examine the various challenges that face the legal system of each of the countries and which may justify the reluctance to rare recourse to international human rights instruments. All these will be done following a comparative approach. **Chapter four** will consist of the conclusion and recommendations concerning each of the countries for increasing recourse to IHRI by their respective domestic courts.

CHAPTER II: Integration of international human rights into domestic law: general theoretical framework

2.1 Introduction

Prior to the discussion and understanding of the application of IHRIs by Ghana and Rwanda courts one needs to have an overview of various concepts underpinning this branch of public international law. This chapter will analyse how diverse theories and principles attempted to explain international law in a human rights perspective and the subsequent legal effects. The latter includes among others its concerned actors or subjects, the nature of relations (from State-State to States-Individuals) as well as the nature of states obligations. The chapter will also elaborate on various theoretical attempts to explain how international law can be brought from international to domestic legal order and the subsequent states constitutional arrangement to make it effective.

2.2 What is international law?

It is firstly indispensable to clarify the particular international dimension of human rights.²³ In fact, the international nature of law sometimes misleads and discourages users and beneficiaries when human rights are concerned. This is due to the traditional characteristic of international law as a body of rules regulating the conduct of states.²⁴ This concept prevailed until 1949 when it was accepted that even international organisations may be considered as subjects of international law.²⁵ International law was considered as the law pertaining to international society, of which individuals were not regarded as members'.²⁶ International aspects of law have considerably developed these last years as a result of overwhelming pressure from

²³ It was possible to discuss constitutional human rights only or any other aspect of human rights setting aside the international aspect.

²⁴ G Gaja 'Dualism-a Review' in J Nijman & A Nollkaemper (ed) *New perspective on the divide between National and International law* (2007) 54. See also WA Schabas & M Imbleau (n 15 above) 185.

²⁵ Dugard (n 4 above) 174.

²⁶ G Gaja 'Dualism-a Review' in Nijman & Nollkaemper (ed) (n 24 above) 54.

humanity as a whole leading to the recognition of individuals as subjects of international law.²⁷

The adherence to international law is basically guided by the principle of freedom of choice and sovereignty of every state. For example, South Africa is one country famous for its progressive development of human rights. Until 1994 South Africa was party to only one instrument with human rights clauses which was not even incorporated into municipal law and thus could therefore not be the basis of human rights claims.²⁸

2.3 What are the sources of international law?

The traditional sources of international law are set by article 38(1) of the statutes of International Court of Justice.²⁹

For the purpose of this study the author will only focus on the first source of International law and slightly on the second source respectively treaties and customary international law. Actually, the issue of applicability of international instruments by domestic courts which is elaborated on in this work mostly concerns both sources than others. It is not uncommon for some scholars to use terms such as convention, others agreement, covenants, Charter etc.³⁰ In fact, in recent years, the trend is to internationalise the regulations of all kinds of relations through treaty norms concluded among states.³¹

²⁷ B Conforti *International Law and the role of domestic legal system* (1993) 3-8.

²⁸ Dugard (n 4 above) 336.

²⁹ These sources include :

- 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. See also K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al. (ed)* (n 17 above) 180. For the same subject see also Schabas & Imbleau (n 15 above) 187.

³⁰ See F Viljoen *International Human Rights Law in Africa* (2007) 20. See Schabas & Imbleau (as above).

³¹ Conforti (n 27 above) 3.

2.4 What are the subjects of international law?

Basically from the definition of International law it can be seen that the main subjects of International law are states. Nijman excludes individuals among the subjects of international law because they can only be considered as beneficiaries through domestic legislation.³² This opinion is also shared with Dugard.³³ As time went on international organisations joined states to qualify as subjects of international law. The first one has been the United Nations described by the International Court of Justice in its Advisory Opinion as a “super-State”.³⁴

To remove ambiguity about the place of the individual in international law it is important to remind ourselves that the concern of the study is not about Private International Law but Public International Law. The former regulates the legal issues arising from the situation of two individuals whose legal relations are governed by the laws of different states while the latter governs the relations between states.³⁵

2.5 Distinctiveness of international human rights law

Though international human rights law is principally created by treaties it has its own particular features. As can be inferred from the preamble of the Universal Declaration of Human Rights, human rights are inherent to the dignity of all members of the human family³⁶ and their international protection can be justified by the fact that they stem from the attitude of human beings.³⁷

One of the aims of international human rights law is the protection of the rights of individuals against the state and what's more, human rights treaties try to cover the main aspect of human life. It is also organised in three main generations: the first generation consists of freedoms including civil and political rights, the second generation deals with equality rights and includes socio-economic rights; the third

³² G Gaja 'Dualism-a Review' in Nijman & Nollkaemper (ed) (n 24 above) 54.

³³ Dugard (n 4 above) 2.

³⁴ Reparation for injuries suffered in the service of the United Nations 1949 ICJ Report 174 at 179.

³⁵ Dugard (n 4 above) 2.

³⁶ Universal Declaration of Human Rights, Preamble, Paragraph 6.

³⁷ African Charter, Preamble paragraph 6

generation is made up of solidarity rights or collective rights.³⁸

Another feature of human rights instruments is that they create two relations of obligation and application. They create obligations for the state to take action or to refrain from taking action in respect of the rights of the citizens. This is the vertical application. But also, they create obligation for the state to take measures to guarantee the respect of individual rights by others. It is a horizontal obligation. However in spite of that the state stays the main duty bearer with regards to the rights.³⁹

It must be highlighted that over the last few decades, human rights have been considered as a concern of civil society but now they have become important aspect of state's economic and social life.⁴⁰

A further facet of human rights is that they are naturally relational because from the concept of human rights' itself one may infer the existence and interaction of humans.⁴¹ Given that humans are organized in the social political structure called 'the state', their human rights have to be guaranteed and protected by the state. Nonetheless, paradoxically, the state on which individuals depend as guarantor of their rights becomes the potential violator against which these same rights have to be defended.⁴²

The above noted paradox is linked to the particular nature of human rights. It can be seen that it appears necessary to have another body which is beyond the state to guarantee the protection of citizen against the potential violation of their rights by the state. It justifies the involvement of international dimension of human rights' law.

International human rights law differs from national human rights law as to its source, in that its concretized content is found mainly in provisions of international human rights treaties. It goes beyond the state level.⁴³

³⁸ Viljoen (n 29 above) 6.

³⁹ As above

⁴⁰ K Hayes 'Judicial implementation of international human Rights Norms' in International Commission of Jurists *Human Rights Litigation and the domestication of Human rights standards in sub-Saharan Africa* (2007) 18.

⁴¹ Viljoen (n 30 above) 4.

⁴² Viljoen (n 30 above) 5-6.

⁴³ As above

The extra value of international human rights is their universality, their binding force and their external aspect. 'In other words, international human rights law provides an independent frame of reference for ensuring the fundamental rights and freedoms of all persons subject to the jurisdiction of a state.'⁴⁴

2.6 States' obligation to apply International Human Rights Law

Apart from the commitment that a state freely undertakes when ratifying a specific treaty to comply with it, it is worth mentioning the existence of general obligation for states to promote and protect human rights. This obligation derives among others from the treaty obligation to comply with it and to execute it in good faith.⁴⁵ As far as human rights are concerned, through various articles from the basic human rights instruments, states commit themselves to comply with them. In addition, states members of United Nations commit themselves not to defeat the aim and purpose of the United Nations.⁴⁶

One of the purposes and principles of the United Nations is 'to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'⁴⁷ In the Preamble of the Universal Declaration of Human Rights, the declaration has been proclaimed as a common standard for all nations. By progressive measures, national and international, member states are requested to secure their universal and effective recognition and observance, both among the peoples of the respective member states as well as among the people of territories under their jurisdiction.⁴⁸

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in their preambles consider the obligation of States under the United Nations Charter (UN

⁴⁴ AA An-Na'im Expanding Legal Protection of Human Rights in Africa Contexts' in An-Na'im *Human Rights Under African Constitutions* (2003) 1.

⁴⁵ Art. 26 of the Vienna Convention on the law of the treaties.

⁴⁶ Art. 14 of the United Nations Charter.

⁴⁷ Art. 2 of the UN Charter.

⁴⁸ Preamble of the Universal Declaration of Human Rights.

Charter) to promote universal respect for, and observance of, human rights and freedoms.⁴⁹ In fact, as Hayes argues the obligation for the states is clarified by the UN Charter that in the modern age the treatment of its citizens is no longer a private and purely internal affair but is rather a matter of international concern.⁵⁰

As a matter of fact the main reference for human rights is the Universal Declaration of Human Rights. It is no longer a relevant debate on its binding or non binding character but rather it has assumed the character of a compulsory statement of the international community.⁵¹ Thus, states as members of the so called 'international community' bear the obligation to guarantee and respect international human rights.

The new tendency for national courts to have recourse to international norms regardless of whether they have been incorporated or not into their domestic system has been highlighted by The Bangalore Principles.⁵²

Domestic courts on their side tried to develop this new approach of recourse to international law no matter whether the integration process has been respected by the state. In *Naba case*, Prakash J, held⁵³

The basic tenet of all human rights instruments dealing with prisoners, which must be heeded, even in the absence of ratification pursuant to article 43(2) of the Constitution clearly reaffirms the principle that prisoners retain fundamental rights.... Therefore, certain minimum standards regarding conditions of detention must be observed regardless of state's level of development and budgetary considerations. These include,

⁴⁹ Preamble of the ICCPR and the preamble of the ICESCR.

⁵⁰ K Hayes 'Judicial implementation of international human Rights Norms' in International Commission of Jurists (n 40 above) 19.

³⁵ As above.

⁵² Bangalore Principles state: In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community. (Bangalore Principles, *Concluding statement of the judicial Colloquium held in Bangalore, India from 24-26 February 1988, principles 4&5*).

⁵³ *Naba & Ors v The State* 2001 No. HAC0012 of 2000L 2nd & 3rd.

in accordance with rules 10,12,17,19 and 20 of the Standards Minimum Rules of the treatment of Prisoners.

2.7 Process of integration of international human rights law at the domestic level

Due to its state to state relationship international human rights cannot reach the individuals if it is not domesticated into municipal legal framework.

In the general comment 9 concerning the domestic effect of the International Covenant on Economic, social and Cultural Rights (ICESCR) the Committee on Economic, Social and Cultural Rights (Committee) stated that although the covenant may not stipulate the precise way it has to be implemented in the national system and may not oblige the state to accord it a specific status, there are some principles which should be followed to give it effect. The members of the committee proposed firstly to use means which guarantee the fulfilment of the obligations under the covenant. The second principle is to choose the most effective means which suit the country. The third one is to use direct incorporation to avoid problems which would arise when the international instrument is being translated into national law.⁵⁴ Further, the Committee realized that states use various methods to give effect to the covenant in the domestic sphere. The integration method is guided by the principle of freedom of choice by each state. Two main theories have been developed by scholars concerning the method of integration of international law into domestic law.

There exist various methods of incorporation, for example in the United Kingdom where the method of implied or no reference to the treaty a legislative Act can be passed which refers to the treaty but implement it in part. There can also be the statute which refers to the treaty but enacts its terms independently. It can also consist of an independent enactment, with the treaty referred to, included as a schedule. The most usual practice perhaps is the statute which expressly gives effect to the treaty as such, the substance of the law being the full content of the treaty.⁵⁵

⁵⁴ UN Doc E/C.12/1998/24

⁵⁵ R Higgins 'United Kingdom' in FG Jacobs & S Roberts (ed) *The effect of treaties in domestic law* (1987)127-129.

Traditional distinction between dualism and monism

The relationship between international law and domestic law is often described in terms of the monism-dualism difference. As Killander and Ajolohoun noted African civil law countries have traditionally been considered as monist while common law countries are considered as dualist. Nonetheless, in some cases the practice in courts has contradicted the theory as will be shown later. In fact courts in most civil law countries oppose the direct applicability of international law and make little use of international law in interpreting constitutional provisions.⁵⁶

Monist theory provides that international law and national law are manifestation of a single conception of law. Municipal courts are bound to directly apply international law without any recourse to adoption by courts or transformation by the legislature. Upon ratification and publication at the domestic level, international treaties become part and parcel of the law of the land.⁵⁷

Thus, there is no need for any further step beyond the steps taken at the international level (either by ratification or acceptance or accession) which upshot is state becoming a party to a treaty to make an international treaty applicable into domestic jurisdiction.⁵⁸ Once ratified, the court can resort to binding norm of international instrument exactly like any other norm of domestic law.⁵⁹ Moreover, concerning the hierarchy of norms international law takes precedent to national law in the situation of conflict between them.⁶⁰

Some constitutions, following French constitutional law system, make the international instrument applicable at the domestic level after the publication.⁶¹ At

⁵⁶ M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An Introduction' in Killander (ed) (n 2 above) 4.

⁵⁷ M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An Introduction' in Killander (ed) (n 2 above) 5.

⁵⁸ K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al.* (ed) (n 17 above) 182.

⁵⁹ MPV Alstine 'The role of Domestic Courts in Treaty Enforcement' in D Sloss (ed) *The role of Domestic Courts in treaty Enforcement* (2009) 564.

⁶⁰ ME Adjami 'African Court, International law and comparative case law: Chimera or emerging human rights jurisprudence?' in Heyns & Stefiszyn (n 3 above) 173.

⁶¹ Article 55 of the French Constitution states: 'Treaties or accords duly ratified or approved have, from the moment of their publication, an authority superior to those of laws, on condition, for each accord or treaty on the part of the other party'. (The translation is ours). The content of this article has been copied

least theoretically, there is no need for a particular legislation to lower international instrument on the floor level of municipal law. The international instrument may be integrated through the preamble or any other provision of the constitution or in both of them.⁶²

The ways those instruments are considered in judicial practice vary from one country to another.

Dualist conception was developed by Hans Triepel and Dionisio Anzilotti considering the basis of international law as the collective or common will of States.⁶³ According to this conception, international law and national law are fundamentally different, and the reception of international law requires the transformation process by the domestic law-making organ (by amending the existing legislation or adopting new ones) or the incorporation of the whole instrument in national law.⁶⁴ International instrument cannot be operational on domestic level unless domestic legislature organ adapts or adopts municipal law in conformity with domestic procedures.⁶⁵ Both legal orders are so different that even when an act of parliament implements a treaty, it is that Act, and not the treaty itself, that functions as domestic law.⁶⁶

The national integration of international law raises the issue of the place of international law in the hierarchy of norms. This issue is settled by the state's constitution but as Viljoen noted this aspect is not often covered.⁶⁷

The main characteristic of dualism seems to be that international law and municipal laws are considered detached legal systems, which may be defined as self

by article 190 of the Constitution of the Republic of Rwanda. Let's remind that International instrument is ratified through a Presidential Order. According to article 201 of the constitution: 'Laws, Orders and other regulations of public interest can only enter into force after they have been duly published in accordance with procedures determined by the law. Ignorance of the law which has been duly published shall not be a defense.' Like any other law, The Official Gazette is a government official document used for publication as provided by article 201. Citizens start being bound at the time of publication in the Official Gazette.

⁶² Viljoen (n 30 above) 531.

⁶³ G Gaja 'Dualism-a Review' in Nijman & Nollkaemper (ed) (n 24 above) 57.

⁶⁴ Viljoen, (n 30 above)58.

⁶⁵ MPV Alstine 'The role of Domestic Courts in Treaty Enforcement' in Sloss (ed) (n 59 above) 564.

⁶⁶ MPV Alstine 'The role of Domestic Courts in Treaty Enforcement' in Sloss (ed) (n 59 above) 606.

⁶⁷ As above.

contained, because within each system the only existing rules are those that are part of the system.⁶⁸

Discussing the monism Viljoen observes that it promises more than it offers. In spite of the place given to international law in domestic sphere where as an integral part of municipal law it is placed beyond the ordinary national law there is still a need of a local law for its application. The exception is made on the instrument with self-executing provisions.⁶⁹ In his discussion about the African situation, Viljoen gives the example of Senegal where despite the integration of the Convention Against Torture by Senegal the *Cour de Cassation* held that Senegal should make legislation prior to the application of the Convention.⁷⁰ Yet Senegal is a monist country.

2.8 Perspective for a broader enjoyment of international human rights

Although any state is compelled to be party to treaty, it is difficult to contemplate the full enjoyment of human rights as long as international human rights conventions are not universally ratified or accessed on by states.⁷¹

Still, the full enjoyment of rights guaranteed by international instruments need the existence of human rights norms which are not subjected to the total free will of states to comply with them and apply them. Customary international law, *erga omnes* norms and *Jus Cogens* obligations may easily help to bypass or to lighten the obstacle of state consent.⁷²

⁶⁸ G Gaja 'Dualism-a Review' in Nijman & Nollkaemper (ed) (n 24 above) 52.

⁶⁹ Viljoen (n 30 above) 533.

⁷⁰ As above.

⁷¹ Article 3 (2) of the Vienna Convention on the Law of Treaties states: "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on *the international plane* its *consent* to be bound by a treaty' (the emphasis of the author).

⁷² Viljoen (n 30 above) 26.

2.8.1 Distinctive nature of International Customary International Law (CIL).

A purely textual reading of article 38 of the Statutes of the International Court of Justice reveals that treaties constitute along with customary international law the main sources of international law. Both sources differ however one from another as the former strongly depends on the free consent and choice of the states that are party to the treaty while the latter is based on the implicit consent of the whole international community. While for the former the states have to openly express their consent to be bound by the treaty, for the latter, the choice or individual consent of the state matters less. Suffices that the instrument has acquired a general practice of states and therefore *opinion Juris*, meaning that states have accepted that the practices constitute a law that they are compelled to respect.⁷³

It is important to highlight this distinction since it is determinative when dealing with the application of international law by domestic courts. Using one of the methods of integration of international human rights instruments (either dualism or monism) any state can welcome or hinder the rights protected by an international instrument. Yet one can wonder to which extent the state can exploit this latitude. Can a state completely avoid human rights entrenched in international instruments? Can the courts obstruct all rights which are not formally integrated into national legal framework?

To the above questions Professor Murphy reminds us about the lack of any general principle of law obliging states to open their courts and allow individuals to take cases before the court evoking the treaties.⁷⁴ However, despite the non existence of such principle, states, through their constitutions and other legislations can facilitate or hinder individuals to use international human rights instruments before local courts.

As regards international customary law, states are bound, regardless of their consent. In the view of the author, there should not be any prerequisite for individuals to evoke norms of customary international law before domestic courts. In the face of

⁷³ ME Villiger (ed) *Customary International law and Treaties* (1997) 48.

⁷⁴ D Sloss, 'Treaty Enforcement in Domestic Courts' in Sloss (ed) (n 13 above) 43.

their fluidity, uncertainty⁷⁵ and limited accessibility,⁷⁶ the practice of local courts in some countries shows that customary international law constitutes a reliable and efficient source of human rights protection. In fact, some states like Australia, Canada, the United Kingdom, United States but particularly India, all following common law tradition, have progressively developed the direct effect of customary international law through the courts practices.⁷⁷

In the same vein, *Jus cogens* and obligations *erga omnes* constitute another way by which humans can enjoy their rights despite the passivity of states to formally integrate international human rights instruments in their domestic legal system.

2.8.2 The coercive force of *Jus Congens* norms and obligations *erga omnes*.

According to Law and Martin

Jus cogens is ‘a rule or principle of international law that is so fundamental that it binds all states and does not allow any exceptions. Such rules (sometimes called peremptory norms) will only amount to *jus cogens* rules if they are recognized as such by the international community as a whole.’⁷⁸

Erga omnes obligations are obligations in whose fulfillment all states have a legal interest because their subject matter is of importance to the international community as a whole.⁷⁹

Both types of rules run counter to the traditional consideration of all international legal norms as equal. Peremptory norms and obligation *erga omnes* are considered as superior to other rules.⁸⁰

⁷⁵ Sometimes, it becomes difficult to know which instrument amount to be qualified of customary international law. The International Law Commission (ILC) Special Rapporteur Hudson listed in the working paper on article 24 of the ILC-Statute, the following criteria for the establishment of a customary rule: (a) concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required, or consistent with prevailing international law; and (d) general acquiescence in the practice by other states. See in Villiger, (n 75 above) 15.

⁷⁶ Viljoen (n 30 above) 27.

⁷⁷ MPV Alstine ‘The role of Domestic Courts in Treaty Enforcement’ in Sloss (ed) (n 59 above) 582.

⁷⁸ J Law & E A Martin, Dictionary of Law (2009) 309.

⁷⁹ Law & E A Martin (n 78 above) 205.

Jus cogens norms have been authenticated by article 53 of the Vienna Convention on the Law which states that

‘a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’

Though a certain opinion argues that *jus cogens* norms are generally classified in the category of customary international norms⁸¹ the author prefers to consider both concepts separately. In addition, it is worth mentioning the existing opinion that considers all human rights as falling under the scope of obligation *erga omnes* while others consider obligation *erga omnes* limited to some rights.

It needs to be noted that article 53 of Vienna Convention talks about *jus cogens* norms without indicating their nature. In addition, nothing is clarified as to how peremptory norms can be identified. There is not even a unanimous opinion among scholars on basic criteria to identify norms as *Jus Cogens*.⁸² On the contrary some specific rights are qualified as peremptory. To be specific one can mention among others prohibition against slavery, genocide, racial discrimination, torture and denial of the right to self-determination.⁸³ In the RM case the court rejected parental responsibility as one of the *jus cogens* norms.⁸⁴

In the light of the above, the respect of the rights which acquired the qualification of *Jus cogens* escapes the control of states taken individually. Besides, the beneficiaries of the rights will not be obliged to test out whether the process of integration of those rights have been respected in order to raise them before the judge. Everybody is compelled to comply with them.

⁸⁰ Dugard (n 4 above) 43. See also Viljoen, (n 29 above) 27.

⁸¹ ID Seiderman *Hierarchy in International Law, The human Rights dimension* (2001) 35.

⁸² Conforti (n 27 above) 119.

⁸³ Dugard (n 4 above) 43.

⁸⁴ RM v Attorney-General (2006) AHRLR 256 (KeHC 2006).

2.8.3 Conclusion

From a global perspective, human rights have to reach human beings in their respective states where they live. Instruments containing human rights are devised by states on international level. Still the commitment to comply with them is guided by the principle of free choice, except for customary international law. In order to take effect within the state the constitution designs the method of reception. Moreover, it assigns to each of the three branch of the Government (the executive legislative and judiciary) the role to play in the process of reception and the application. Thus the way the instruments is received and the way it takes affect varies from one country to another.

CHAPTER III: Opportunities and challenges in the application of IHRIs in Rwanda and Ghana

3.1 Introduction

Rwanda and Ghana come from different legal system backgrounds and this has an impact on the way IHRIs are applied. The country, following various factors will have ease or difficulty in applying international instruments. The factors include the process of reception of international instruments in the domestic legal system. It further depends on the place it is given in the hierarchy of norms and the process on national level. The nature of the provisions of the instruments will also make it easy or not to apply. Furthermore, the attitude of actors involved in the adjudication of human rights will contribute to the development of the IHRI in the country.

These factors will be discussed in this chapter and will be identified as opportunities and challenges to apply IHRIs. Given the fact that both country systems are analysed in a comparative perspective the opportunities of one may constitute a challenge to another. Moreover the opportunities may constitute a lesson for other country.

3.2 The place of international law in the constitutions

International law, from its main role of regulating relationships between sovereign states, reaches national field through the constitution as the supreme law of the land. It is the same national constitution that integrates international law instrument into the hierarchy of norms on domestic level. Through this process international instrument becomes effective within domestic legal framework.

From the time of independence of Ghana and Rwanda,⁸⁵ both countries have adopted different constitutions at different periods. This was mostly the result of the regime changes. The current Ghanaian Constitution (1992) is the fifth after the 1957,

⁸⁵ The Republic of Ghana gained its independence from British on 6 March 1957 while the Republic of Rwanda got its independence from Belgium 1 July 1962.

1960, 1969 and 1979 Constitutions. Until the current Constitution of the Republic of Rwanda (2003 Constitution) had adopted five constitutions from the 1962, 1978, 1991 and 1994 Basic Acts⁸⁶. All of the constitutions integrate international law onto domestic legal system. The following lines will briefly highlight how international law has reached the legal systems of Ghana and Rwanda through their various constitutions.

As far as Rwanda is concerned, apart from the conventions that were bequeathed by the colonizer its first constitution of 24 November 1962 referred to international law by mentioning the authority conferred on the Executive through the President of the Republic to negotiate, sign and ratify international treaties.⁸⁷ Indeed, ratification is enough indication of commitment to give effect to the international law ratified.

Under the Constitution of 20 December 1978 no improvement was made by the country vis-à-vis international law. Only one article made reference to international instruments concerning attribution of the President of the Republic to negotiate, sign and ratify international treaties and conventions.⁸⁸ It is worth noting that this constitution was adopted by the military regime resulting from the 1973 coup d'état. Though the state is qualified as a "democratic Republic"⁸⁹ it was a dictatorship which instituted one single party⁹⁰ system of ruling. This may explain its attitude toward international law.

The Constitution of 10 June 1991 was the result of a strong pressure from different sides besides the civil war launched by the Rwanda Patriotic Front (RPF) in October 1990. The pressure from international donors and opposition elements constrained the regime to write a new constitution guaranteeing democracy and

⁸⁶ The Basic Act was adopted on 5 May 1995 including the 1991 Constitution, the Arusha Peace Agreement between the former Government of Rwanda and The RPF, the RPF's Declaration relating to the establishment of Institutions of 17 July 2004 and the Protocol Agreement concluded by all the political parties except the *Mouvement Revolutionnaire National pour le Developpement (MRND)* on the establishment of national institutions. See the Official Gazette of the Republic of Rwanda no 11 of 1 June 1995.

⁸⁷ Article 56(i) states as follows: 'Le Président de la République négocie et conclut tout les traits, accords et conventions et peut les communiquer à l'Assemblée Nationale'.

⁸⁸ The Constitution of the Republic of Rwanda of 20 December 1978 on article 44 (8°).

⁸⁹ Art. 1 of the Constitution.

⁹⁰ Art. 7 of the Constitution.

eliminating single party system.⁹¹ What is striking is that despite the circumstances under which the constitution was written the international law regime did not change much. In fact the only article 44 could show the relationship between the international law and the domestic legal framework. Its content is almost the same as article 44 of the previous constitution.

The current Constitution seems to be the most innovative. Throughout the Constitution several articles illustrate that International law is considered along with national law in different issues. The constitutional provision concerning the criminal qualification of acts takes into account international law besides municipal law.⁹² International conventions that Rwanda has ratified are taken into consideration before deciding on the extradition.⁹³ It also takes account of International law when it provides special measures to protect of the child by his/her family, society and the state.⁹⁴ The jurisdiction of the Supreme Court is provided for in this Constitution and includes, *inter alia* hearing petitions on the constitutionality of organic laws, laws, decree-laws and International treaties and agreements;⁹⁵

It is important to appreciate how the 2003 Constitution quite clearly integrates international law into the hierarchy of norms. It states as follows: ‘the President of the Republic negotiates international treaties and agreements and ratifies them. The Parliament is notified of such treaties and agreements following their conclusion.’⁹⁶ Regarding the hierarchy of domestic norms

Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of parties.⁹⁷

The compatibility with the constitution is regulated as follows:

⁹¹ B M Gahamanyi ‘Building Constitutional Order in the aftermath of Genocide’ in An Na’im (n 16 above) 257.

⁹² Art. 20 the Constitution of the Republic of Rwanda (2003).

⁹³ Art. 25 of the Constitution.

⁹⁴ Art. 28 of the Constitution.

⁹⁵ Art. 145 (3o) of the Constitution.

⁹⁶ Art. 189 if the Constitution.

⁹⁷ Art. 190 of the Constitution.

Where an international treaty contains provisions which are inconsistent with the Constitution, the authorization to ratify the treaty or agreement cannot be granted until the Constitution is amended.⁹⁸

Regarding Ghana the 1992 Constitution does not respectively spell out in clear terms the relationship between international law and national law.⁹⁹ Among the different sources of Ghanaian law enumerated by the constitution international law is not mentioned.¹⁰⁰

The state undertakes to enact appropriate laws to ensure the right to effective enjoyment of effective participation in development processes and the protection and promotion of all other basic human rights and freedoms. The state accepts to be led by IHRI.¹⁰¹

In addition, the state commits itself to promote respect for international law when dealing with other nations.¹⁰² In the conduct of its international affairs the state accepts to observe accepted principles of public international law.¹⁰³

Though article 11 does not mention international law among the sources of law of Ghana one may be tempted to think that international law is definitively kept outside national legal sphere. It is not noteworthy that article 75 indicating the way international law can come into the domestic normative framework.¹⁰⁴

⁹⁸ Art. 192 of the Constitution.

⁹⁹ E Quansah 'An examination of the use of international law as in interpretative tool in human rights litigation in Ghana and Botswana' in Killander (ed) (2010) 37.

¹⁰⁰ According to article 11 (1) the laws of Ghana shall comprise-

- (a) this Constitution;
- (b) enactments made by or under the authority of the Parliament established by this Constitution;
- (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.
- (d) the existing law; and
- (e) the common law.

¹⁰¹ Article 37 (2)&(3)

¹⁰² Article 40 (c)

¹⁰³ Article 73

¹⁰⁴ Article 75 states as follow:

- (1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.

3.3 The place of international human rights in the constitutions

As explained in previous paragraphs there exists a particular category of international instrument: those dealing with human rights. When a state becomes party to an IHRI it commits itself to protect the rights of their citizens as humans.

Concerning Rwanda, by the time of independence the very first IHRI Rwanda became party to was the Universal Declaration on Human Rights (UDHR). When becoming the member state of the United Nations by 18 September 1962 Rwanda adhered to the Universal Declaration. In its subsequent constitution (24 November 1962 Constitution) it recognized the rights listed in the UDHR. However it needs to be noted that the enjoyment of the rights enshrined in that constitution were in a way undermined by the limitation provision. In fact, article 13 (2) provided that the exercise of certain rights was limited by Rwanda law and regulation. This limitation by regulation is conducive to a lot of potential abuses especially from the executive authority.¹⁰⁵ The 1962 Constitution stayed in force until the military coup d'état of 1973.

A new constitution was adopted in 1978 as a way of legitimizing of the 1973 coup d'état. During the period between the two constitutions the authors of the coup d'état were ruling under decrees because the former constitution was abolished and the new one was not yet written and the Parliament was dismissed.

Unlikely, it is during this transitional period that the core IHRI were ratified. These include the ICCPR and its optional Protocol, the ICESCR and the Convention on the Elimination of All forms of Racial Discrimination (CERD).¹⁰⁶In addition, under 1978 Constitution on the one side the direct application of the UDHR in domestic court was eliminated but on the other, the limitation of rights were restricted. It was

(2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by-

(a) Act of Parliament; or

(b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament.

¹⁰⁵ See BM Gahamanyi 'Building Constitutional Order in the aftermath of Genocide' in *An Na'im* (n 16 above) 254.

¹⁰⁶ Accessed by the Decree No 8/75 of 12 February 1975 published in the Official Gazette No 5 of March 1, 1975.

determined only by the law but not with regulation. Nonetheless, as Gahamanyi noted, the prevalent political environment was not favourable to the enjoyment of rights enshrined in these instruments.¹⁰⁷

As it has been stated above, the 1991 Constitution came into being as a result of a strong pressure from inside and outside including the civil war launched by the RPF. One of the grounds of the pressure was the lack of democracy and good governance as well as human rights abuses. The Preamble reads in part that ‘convinced of the imperative to realize effectively national unity, peace, social justice and *human rights respect* based on freedom, equality and fraternity among all Rwandans’.¹⁰⁸ With reference to international human rights instruments, in addition to the UDHR, the 1991 Constitution mentioned its commitment to guarantee fundamental freedoms in compliance with African Charter on Human and Peoples’ Rights (ACHPR).¹⁰⁹

Under the 1995 Basic Act¹¹⁰, besides the other three international human rights instruments mentioned in 1978 Constitution, the UDHR and ACHPR constituted international human rights instruments susceptible to protect and promote human rights in the country. However, the remaining question was the silence of the constitutions about their integrations in domestic legal order, their place in the hierarchy as well as their applicability. This became the concern of the drafters of the 2003 Constitution as mentioned in previous paragraphs.

The current Constitution (2003) is very innovative in terms of human rights in general and particularly IHRIs. In the preamble the state reiterates its adherence to the principles of human rights enshrined in the UN Charter, the Convention on the Prevention and Punishment of the crime of Genocide of 9 December 1948, the UDHR of 10 December 1948, the ICRD of 21 December 1965, the ICESCR of 19 December 1966, the ICCP of 19 December 1966, the Convention on the Elimination of all Forms of Discrimination against Women (CEDEW) of 1 May 1980, the ACHPR of 27 June

¹⁰⁷ BM Gahamanyi ‘Building Constitutional Order in the aftermath of Genocide’ in An Na’im (n 16 above) 255.

¹⁰⁸ Para. 7 of the the Preamble of the Constitution of 1991. The translation and emphasis are ours.

¹⁰⁹ Para. 5 of the Preamble of the Constitution of 1991.

¹¹⁰ The Basic Act was a compilation of different text issued as a result of the negotiations between RPF and the Government of Rwanda. These documents complemented the 1991 Constitution.

1981 and the Convention on the Rights of the Child (CRC) of 20 November 1989.¹¹¹

In the recent report to the Human Rights Council Rwanda asserted that it has effectively integrated by ratification all the eight key human rights instruments and other international and regional instruments. The report reminded that the ratified instruments are more binding than domestic law.¹¹²

Throughout the Constitution, different provisions deal with the commitment of the state to comply with IHRIs in particular and the compliance with treaties (they include IHRIs) which Rwanda is party to. Those provisions include among others article 20 regarding the non-retroactivity of criminal actions, article 88 (8) regarding the legislative power of the senate with regards to treaties, article 25 dealing with the consideration of international treaties when deciding on extradition, article 28 concerning the special treatment owed to the child, article 109 and 192 regulating the issues concerning the inconsistency with the Constitution, article 189 and 190 dealing respectively with the process of adoption and the reception and hierarchy of international treaties.

As far as Ghana is considered, like any other country coming from colonization, Ghana inherited a number of treaties from its former colonial power, Britain, but only few of them dealt with human rights such as the convention for the Suppression of the traffic in Persons and of the Exploitation of the Prostitution of Others.¹¹³ During the Nkrumah regime Ghana had ratified three major IHRIs in addition to UN declaration and resolutions, such as the UDHR, the UN Charter, and the Organisation of African Union (OAU) Charter.¹¹⁴

As mentioned in previous points, the Ghanaian 1992 Constitution referred to international instruments. Those provisions include among others article 37, 40, 73 and 75. Only article 37 refers specifically to human rights while other remaining

¹¹¹ Para. 9 of the Preamble of the Constitution of the Republic of Rwanda of 2003.

¹¹² National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council Rwanda. Human Rights Council Working Group on the Universal Periodic Review Tenth session Geneva, 24 January–4 February 2011, A/HRC/WG.6/10/RWA/1 8 November 2010.

¹¹³ This was approved by General Assembly resolution 317 (IV) of 2 December 1949 and entered into force 25 July 1951 in accordance with article 24. See K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al.* (ed) (n 17 above) 188.

¹¹⁴ As above.

articles concern treaties in general. However, the later comprise also human rights. International law does not even appear on the list of laws of Ghana as enumerated on article 11. Nevertheless, the recognition of international law has been inferred from other sections like article 33(5)¹¹⁵ which offers a very broad interpretation, of human rights protected by the constitution.

The major reason for any state to trigger the process of receiving an international instrument in domestic legal order aims at implementing and applying its content. Its implementation and application vary from one country to another depending among others on the process of reception and the role assigned to each of the three bodies of the State (Executive, legislative and judiciary).

3.4 Procedure of reception of international instruments into domestic legal order in Ghana and Rwanda

There exists various ways for a state to receive an international instrument into its domestic legal order. It depends on the manner the constitution organises and assigns the executive, legislature and judicial powers. During the process of reception of international instruments the role of the legislature and the Judiciary can vary. However, scholars agree on the key role of the executive in the process of negotiation, signing, ratification or accession of the instrument.¹¹⁶

In British constitutional tradition for example, though it is a parliamentary system, the prerogative to bind the state internationally belongs to the executive without even subsequent consent of the legislature.¹¹⁷ Thus, even in a purely dualist state the state is internationally bound by the action of the executive. However, the formal effect requires in municipal law the action of the Legislature to make the treaty take effect.¹¹⁸ Strictly speaking, in a strict dualist system the Judiciary will require the

¹¹⁵ Article 35 (5) states as follows : The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

¹¹⁶ MPV Alstine 'The role of Domestic Courts in Treaty Enforcement' in Sloss (ed) (n 59 above) 570.

¹¹⁷ MPV Alstine 'The role of Domestic Courts in Treaty Enforcement' in Sloss (ed) (n 59 above) 567.

¹¹⁸ As above.

action of the legislature before applying an international instrument resulting from the action of the Executive. In a strict monist system, the Judiciary (court) does not require the action of the Legislature to apply international instruments.

The Constitution of Rwanda confers on the Executive the power to internationally bind the state. The Legislature is simply informed after the conclusion.¹¹⁹ Generally, the authority that can participate in this process of treaty making can either be the Heads of State or Heads of Government and Minister for Foreign Affairs; the Head of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited.¹²⁰

The purely textual reading of article 189 of the Constitution may lead to the conclusion that the role of the Legislature in the process of treaty making is very small and passive. Articles 109¹²¹ and 192¹²² of the same Constitution talk about the inconsistency with the Constitution without clarifying when and how is done the control of the constitutionality. Moreover, one can wonder where does appear the control of conformity of the international instrument with the constitution and other laws.

The reading of the above mentioned articles implies the requirement of the conformity of the convention with the constitution before the authorization of ratification by the Executive. The instrument seems more likely to pass through the legislative process for scrutiny¹²³to check among others the compliance of its

¹¹⁹ Art. 189 of the Constitution of the Republic of Rwanda of 2003.

¹²⁰ Art. 7 of the Vienna Convention on the Law of Treaties (1969).

¹²¹ Article 109 reads as follow: 'Upon the proposal of the Cabinet and after receiving an advisory opinion of the Supreme Court, the President of the Republic may call a referendum on issues of general national interest, on a bill of an ordinary Law, on a bill of an Organic Law or Decree relating to the signature of an international treaty or agreement which is not inconsistent with the Constitution but has repercussions on functioning of state institutions.

¹²² Article 192 stipulates : 'Where an international treaty contains provisions which are inconsistent with the Constitution, the authorisation to ratify the treaty or agreement cannot be granted until the Constitution is amended.'

¹²³ the following examples of laws clarify that there is a step undertaken by the legislature prior to the last step of ratification undertaken by the executive through a Presidential Decree : Law n° 001/2008 of 14/01/2008 authorizing the accession to the convention on protection of children and cooperation in respect of intercountry adoption, adopted at the Hague in Nedherland on 29 may 1993; Law n° 002/2008

provisions with the Constitution and other domestic laws. The active role of the Legislature can also be inferred from the attribution the Constitution assigns to the Senate and the Chamber of Deputies to deliberate and pass laws including international agreements and treaties.¹²⁴

Seen in the lights of the above, before the law relating to the international instrument is passed, it goes through the analysis of the Committees of the Chamber of Deputies and the Senate.¹²⁵ At the end of the reception process of the IHRI, when it is duly ratified by the Executive it becomes then, part of national legal order, inferior to the constitution but superior to other laws.¹²⁶

From the above explanations, the author opines that this procedure should make IHRI's trustworthy in order to be applied by the Judiciary as it is for other laws. As can be seen, the participation of the legislature prior to the ratification of the instrument gives good reasons for the lack of further need of an Act of the legislature to make the instrument applicable by the judiciary as it is in the dualist system. This role played by the Rwanda's Legislature can be considered as an advance endorsement which permits international treaties to function in the monist fashion, as directly applicable domestic law without further legislative action.¹²⁷

Thus, according the Bibiane's view which the author subscribes to, judges are obliged to enforce the provisions of the conventions when these are

of 14/01/2008 authorizing the ratification of the convention against torture and other cruel, inhuman or degrading treatments or punishments, adopted in New York on 10 December 1984.

¹²⁴ Art. 62 of the 2003 Constitution assigns to the Parliament the task of deliberating and passing laws while article 88 (8) stipulates in the legislative matters, the Senate shall be competent to vote among others on the laws relating to international agreement and treaties.

¹²⁵ See art. 38 (4) (f) of the organic law n°06/2006 of 15/02/2006 establishing internal rules of procedure of the Chamber of Deputies in the Parliament as modified and complemented to date which provides that The Committee on Foreign Affairs, Cooperation and Security shall be responsible for issues relating to matters regarding the international agreements signed by Rwanda. See also article 38 (c) (2) of the Organic law n° 02/2005 of 18/02/2005 establishing rules of procedure of the Senate which provides that The Standing Committee on Foreign Affairs, Cooperation and Security shall deal with bills and issues related to international conventions.

¹²⁶ Art. 190 of the Constitution of 2003.

¹²⁷ MPV Alstine 'The role of Domestic Courts in Treaty Enforcement' in Sloss (ed) (n 59 above) 570.

enforceable without the need of enforcement measures in all cases brought before them.¹²⁸

Although the position of international instruments does not appear *prima facie* in the article regarding the sources of Ghana law,¹²⁹ its binding power requires the contribution of the Executive and the legislature.¹³⁰ Thus, on the face of it, international law was not, and cannot directly be deemed to be part of the law of Ghana by reference to the Constitution. It only becomes part of the laws after incorporation or transformation.¹³¹ Article 75 of the Ghanaian Constitution highlights the differentiation between the Executive and Legislative. According to this approach the Executive will make the instrument binding while the legislature will make it susceptible of application.¹³²

If this approach is strictly followed, an IHRI may be binding to the state of Ghana by the act of the Executive¹³³ but not yet applicable by courts as long as a further step has not been undertaken by the legislature. Strictly speaking,

¹²⁸ See BM Gahamanyi 'Building Constitutional Order in the aftermath of Genocide' in An Na'im (n 16 above) 269.

¹²⁹ (1) The laws of Ghana shall comprise-

- (a) this Constitution;
- (b) enactments made by or under the authority of the Parliament established by this Constitution;
- (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.
- (d) the existing law; and
- (e) the common law.

¹³⁰ (1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.

(2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by-

- (a) Act of Parliament; or
- (b) a resolution of Parliament supported by the votes of more than on-half of all the members of Parliament.

¹³¹ K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al. (ed)* (n 17 above) 189.

¹³² See also Alstine 'The role of Domestic Courts in Treaty Enforcement' in Sloss (ed) (n 59 above) 568.

¹³³ Also with respect to article 7 and 11 of the Vienna Convention on the Law of Treaties.

in the dualist perspective, before the legislative act, the international instrument does not exist in Ghanaian domestic legal system especially for potential litigants. Hence, despite the individual rights it creates, individuals cannot sue in the court based on the violation of the rights enshrined in the instrument. The judge cannot have recourse to such instrument to find remedy when there has been violation of the right. One may think that the reason is that the whole process lacked the step of ordinary lawmaker's expertise to scrutinize the content of the IHRI.

It is however important to draw attention to the contradiction between this procedure and the concept of state consent. The state consent is expressed through the Act of ratification.¹³⁴ Moreover, the content of the consent deems to be the rights contained in the instrument. It is inappropriate to divorce the international instrument from the rights it contains. The author strongly supports the action of the legislature aiming at scrutinizing the instrument in order to qualify as a legal instrument as any other law. Nonetheless, he is of the view that it is wrong to pretend that the rights do not exist the step of ratification.

That being said and despite the controversy about the existence or non existence of rights, the human rights have been received into domestic legal order from international perspective. The next step deems to be the realization of the rights by the application of the instrument.

It is the view of the author that the Ghana technique of reception of international instrument is restrictive as far as the application of the content is concerned. The lack of active action the legislature undermines the effectiveness of the rights despite the state consent. However the Rwandan method seems conducive to the realization of rights because the ratification is the achievement of the action of both legislative and executive. The action of the judiciary can follow without any impediment.

¹³⁴ Art. 14 of the Vienna Convention on the Law of Treaties. See also Seiderman (n 82 above) 17.

3.5 Applicability of IHRIs before the court

It is through the constitution that international law is received into domestic legal system and is made applicable. In this regard, the constitution can contain an express provision clarifying the category of rights that are enforceable and in some cases the court competent for adjudication of the rights. Yet, the constitutional provision can also preclude the enjoyment of the rights by expressly stating the rights which cannot be enforced. Moreover, the enforceability of a right can also depend on its nature which makes it or not directly applicable.

3.5.1 Existence of provisions concerning the enforceability of IHRIs

The Constitution of the Republic of Rwanda does not contain any provision which provides, in clear terms, that international human rights are enforceable. However, article 44 (which is the last article of the Bill of Rights) stipulates: 'The judiciary as the guardian of rights and freedoms of the public shall ensure respect thereof in accordance with procedures determined by Law'.

In fact, the author is of the opinion that human rights and freedom provided in article 44 include those enshrined in the IHRIs given the fact that IHRIs themselves are part of national legal order from the date they are duly ratified. Thus, Rwanda courts are definitely competent to apply IHRIs and to use them to find remedies in the case of violation.

The constitution assigns the jurisdiction to any court to deal particularly with purely human rights violations. This silence may mislead potential complainant in the case of human rights violations. Nonetheless when the case concerns the constitutionality of an international instrument the constitution accords the competence to the Supreme Court.¹³⁵ The enforceability of human rights provided by international instruments can be deduced from the adherence¹³⁶ to

¹³⁵ Art. 145 (3) state provides that the jurisdiction of the Supreme Court shall include: hearing petitions on the unconstitutionality of International Treaties and agreements, Organic Laws, laws and Decree-laws

the principles of human rights enshrined in the United Nations Charter of 26 June 1945, the Convention on the Prevention and Punishment of the crime of Genocide of 9 December 1948, the Universal Declaration of Human Rights of 10 December 1948, the International Convention on the Elimination of All forms of Racial Discrimination of 21 December 1965, the International Covenant on Economic, Social and Cultural Rights of 19 December 1966, the International Covenant on Civil and Political Rights of 19 December 1966, the Convention on the Elimination of all Forms of Discrimination against Women of 1 May 1980, the African Charter of Human and Peoples' Rights of 27 June 1981 and the Convention on the Rights of the Child of 20 November 1989;

Concerning the invocation of the rights provided in the preamble, the French precedent followed by Cameroon shows that preambular rights can be enforceable.¹³⁷

Unlike the Constitution of the Republic of Rwanda, the Ghanaian constitution's provisions are clearer with regards to the enforceability of rights and the jurisdiction of the court to enforce them. In fact article 12 of the constitution of Ghana resembles more or less to article 44 of Rwanda Constitution. The Ghanaian Constitution makes things clearer concerning the enforceability of rights with precision about the competent court. Thus, under article 33 (1) the High Court is competent to hear cases concerning the allegation contravention to human rights contained in chapter 5 of the constitution.¹³⁸ When they involve the constitutional interpretation the competence belongs to the Supreme Court.¹³⁹ It is essential to remind that article 33 (1) does not resolve the problem of international human rights law because the rights concerned are the constitutional rights while it is known that the Constitution does not set international law as one source of law. However, the purposive interpretation of article 33 (5) can make IHRIs applicable before Ghanaian courts. Moreover, it is important to

¹³⁶ Preamble of Rwandan's constitution of 2003.

¹³⁷ Viljoen (n 30 above) 8.

¹³⁸ Article 33 (1) and article 140 (2) of Ghanaian Constitution. See also S Y Bimpong-Buta 'The role of the Supreme Court in the Development of Constitutional Law in Ghana' Unpublished PhD thesis, University of South Africa, (2005) 346.

¹³⁹ Article 130 (1).

appreciate the efforts made by the judiciary to find a way out and make IHRIs litigated before courts as it will be seen later.

3.5.2 Self-executing provisions

Despite the fact that an international instrument has been duly domesticated a question may still need to be answered to whether its particular provisions can directly be relied upon by the judge.¹⁴⁰

Scholar did not yet reach an agreement on the exact meaning of the concept 'self executing'. Yet, for the sake of this paper it will be described as an IHRI or its provisions that are enforceable directly by domestic courts. The provisions must be clear enough to serve as objective law, drafted in a complete manner, allowing its use as an exclusive legal basis for resolving an individual case or controversy. In other words, there is no need of a further domestic legislation to implement or concretize the provisions.¹⁴¹

For some scholars, the self-executing constitutes a requirement for an international instrument to have effect on domestic court. Describing the process of domestication in Rwanda legal system and the application of international instruments, Gahamanyi is of the view that 'Rwanda, in the purest tradition of constitutional law, judges are obliged to "enforce the provisions if the conventions when these are enforceable in all cases brought before them".¹⁴²

3.6 Attitude of the bar and bench vis-a-vis IHRIs

Rwanda and Ghana come from two different colonial backgrounds. Rwanda having been under Belgian colonial authority was bequeathed the monist constitutional legal system while Ghana, having been colonized by England follows the dualist system as far as the integration of international law into domestic law is concerned.

A strict application of the 'monism – dualism' approach will entail the following consequences: IHRIs duly ratified by Rwanda constitute part of legislation and can be

¹⁴⁰ Nollkaemper *National court and international rule of law* (2011) 131.

¹⁴¹ MPV Alstine 'The role of Domestic Courts in Treaty Enforcement' in Sloss (ed) (n 59 above) 601. See also M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An Introduction' in Killander (ed) (n 2 above) 12.

¹⁴² BM Gahamanyi 'Building Constitutional Order in the aftermath of Genocide' in An Na'im (n 16 above) 269.

used by Rwandan courts without any compulsory further requirement,¹⁴³ while IHRIs ratified by Ghana cannot be used before Ghanaian court as long as any legislative Act has not yet been passed.¹⁴⁴

However the empirical evidences show that the practice has countered the theory. As Killander & Adjolahoun contended we find less cases of international law use in traditionally monist states than in traditionally dualist states. Monist African Francophone countries, including Rwanda prefer to use international law as constitutional interpretative tool.¹⁴⁵

In the report presented to the Human Rights Council in 2010 Rwanda asserted that it has effectively ratified all the eight key human rights instruments and most of their additional protocols and others were in the process of ratification.

Many other international and regional human rights conventions were ratified by Rwanda or were in the process of ratification. Rwanda has always been devoted to the ratification of international law.¹⁴⁶ Once ratified, all the treaties and conventions are integrated into domestic legal system. As per the Constitution, ratified treaties have precedence over domestic laws. Rwanda had withdrawn all its reservations on International human rights treaties. Furthermore, the courts play a role in the protection and promotion of human rights. Judgments of the Supreme Court increasingly refer to international human rights treaties ratified by Rwanda. The Supreme Court regularly compiles these cases and avails them to courts for reference.¹⁴⁷

Actually, for so long time it was not possible to have access to jurisprudence where the court had recourse to international instruments. The reasons were amongst

¹⁴³ Schabas & Imbleau (n 15 above) 167.

¹⁴⁴ E Quansah 'An examination of the use of international law as in interpretative tool in human rights litigation in Ghana and Botswana' in Killander (ed) (n 99 above) 39.

¹⁴⁵ M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An Introduction' in Killander (ed) (n 2 above) 4.

¹⁴⁶ BM Gahamanyi 'Building Constitutional Order in the aftermath of Genocide' in An Na'im (n 16 above) 269.

¹⁴⁷ National Report submitted in accordance with paragraph 15 (A) of the annex to Human Rights Council, Rwanda, UN Doc A/HRC/WG.6/10/RWA/1 (2010).

others the fact that the case laws were not compiled.¹⁴⁸ In fact, in the Francophone monist system the basis of complaint are firstly the provisions of statutory laws. It is when the law does not provide remedy that the court can have recourse to precedent. In addition, Fundamental human rights and freedoms seemed not to constitute a source of claim. Even now, despite the existence of the current case law compilation, any case concerning purely human rights violation has not yet been reported. All the cases compiled by the Supreme Court from all courts deal exclusively with: Constitutional matters, Civil special matters, commercial matters, administrative matters labour law, genocide, civil matters and criminal matters.¹⁴⁹

Although those various domains of law can involve the violation of human rights, it is not easy to bring the case before the court for the violation of rights not provided by those statutory laws but provided by an international instrument. To confirm the assertion of Killander & Ajoulohoun the few cases that we can find in Rwanda recent jurisprudence where international law is used concern the constitutional interpretation.

In the case of *Uwimana Jeannette v Attorney General*¹⁵⁰, the Applicant challenged article 106 of the Organic Law N° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts which stipulate as follows:

The High Court hears appealed civil cases heard on the first instance by an Intermediate Court. It also hears appealed civil cases heard on the second instance by the Intermediate Court when such cases: 1° do not set out whatsoever the basis for decisions, are based on non existing laws or were pronounced by incompetent court; 2° were rendered on proof, document or conclusions presented after the trial and when there is no resumption of the hearing; 3° were rendered by a jury that is not constituted as provided; 4° were pronounced by a judge who did not take part in hearings; 5° were

¹⁴⁸ The Supreme Court cases' compilation started in 2010. See <http://www.supremecourt.gov.rw/sc/Jurisprudence.aspx> (accessed on 02 September 2011)

¹⁴⁹ As above.

¹⁵⁰ The violation of article 106 alleged by the Applicant originated from the case which was ongoing before the high court as a court of Appeal. The Appellant before the High Court requested the suspension of the debate to allow her to challenge the article 106 before the Supreme Court.

not tried in public and no hearing in camera was ordered. It hears also appeals on decisions taken by Arbitration Committees.

The Counsel of the Applicant submitted that article 106 of the Organic Law is in violation of article 190¹⁵¹ of the Constitution and international instruments that Rwanda has ratified. He also contended that article 106 set up a list of impossible requirements and contrary to international instrument Rwanda has ratified which are more binding than organic and ordinary laws. The Counsel of Applicant further submitted that by requesting the appellant in the High Court to fulfill impossible requirements the article violates notably article 8 of the UDHR which stipulates that ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’ It also violates article 2 (3) of the International Covenant on civil and Political Rights which stipulates that

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;
- (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.

In his contention, the Attorney General noted that the arguments of the Applicant show how article 106 is contrary to international instrument but not to the constitution and thus, the case should be brought before the High Court which deals with the substantial matter of the case.

The judges, referring to another case (RPAA 0067/08/CS) showed that the court ruled on how the requirements requested in article 106 are possible. Giving the example of practices in other countries like Australia and Canada the rights to appeal is exercised under certain restrictive conditions. In the arguments of the court the fact of setting

¹⁵¹ Article 190 stipulate that upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of the parties.

special condition for the second level of appeal does not amount to discrimination. The court argued that there is discrimination when the individuals are in the same conditions is treated differently. Thus one could talk about discrimination if the same individual before the court of appeal were put in different conditions and if the differentiation were based on sex, colour, region, culture.....The Court further argued that from the above mentioned arguments article 106 does not violate the right to an effective remedy as guaranteed by article 8 of the UDHR and article 2 (3) of the ICCPR.

As much as the Applicant lost the case it can be considered as a noteworthy achievement concerning the advancement of rights enshrined in IHRIs.

In another case *Nzaramba Martin v Attorney General* before the Supreme Court the applicant tried also to challenge the same article 106 of the Organic Law N° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts. Apart from the discriminatory aspect of article 106 the applicant contended that article 106 was in breach of article 141 of the Constitution which stipulates that: 'Every court decision shall indicate the grounds of its basis, be written in its entirety, delivered in public together with the reasons and orders taken therein'.

The Court, in its decision gave the same argument as in the previous case concerning the discrimination. Concerning the violation of international instruments ratified by Rwanda the court argued that the fact that the appellant at the second level are subjected to special conditions is not in conflict with article 14 of the ICCPR as long as all persons are equally treated before the same court.

To explain the limitation of right to appeal the court referred to other countries where that right has been limited like in South Africa where according to the Supreme Court Act 59 of 1959

No appeal shall lie against judgment or order of the court of provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except.....in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.

The court also mentioned article 4 of the Namibia Supreme Court Act, °15 of 1990.

Though the cases are still scarce, one can commend how the judicial system in Rwanda endeavours to integrate international law. Both samples of cases presented above show that international instruments ratified by Rwanda can be applied by Rwandan Courts. Furthermore, they confirm the theory of direct domestication of

international instrument once ratified by Rwanda.

For long time, jurisprudence has not been given importance by litigants and judges in Rwandan courts during the proceedings. In the civil law family the laws are embedded in the codes of laws which attempt to regulate most of the aspect of social life. Judges and litigants use primarily codes of law to substantiate their arguments. Needless to mention that even IHRI's duly ratified are also embedded in the codes of laws.

Currently, Rwandan litigants and judges start slowly having recourse to jurisprudence. Cases are being made available by the Supreme Court for an easier access to the public. Since 2010 when the compilation of cases started until now more than ten volumes, comparable to Law reports, have been produced and made available at Supreme Court website.¹⁵² In the light of this recent evolution it is right to expect soon for more recourse to international human rights law without relying on the constitution interpretation.

The evolution of the situation in Ghana seems to divorce a little bit from the Rwanda experience. Ghana is a dualist state and as such international instruments which have not yet undergone the legislative process cannot be useful for litigation. Basing our argumentation on the strict respect of dualist theory, rights enshrined in international instruments simply ratified do not yet exist for litigants.¹⁵³ Concerned about that, E Dankwa, Ghanaian, former Commissioner at the African Commission on Human and Peoples' Rights made a plea in 1991 for the incorporation of international human rights instruments into domestic law.¹⁵⁴ As a former British colony, Ghana was bequeathed the legacy of the dualist tradition. Ghana is State party to the major international human rights instruments. However, as lamented by Appiagyei, it is even difficult to know the number of international treaties generally that Ghana has signed, those that have been ratified and those have been incorporated into local laws.¹⁵⁵

¹⁵² The cases are available at the Supreme Court website: The Supreme Court cases' compilation started in 2010. See <http://www.supremecourt.gov.rw/sc/Jurisprudence.aspx> (accessed on 02 September 2011).

¹⁵³ K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al. (ed)* (n 17 above) 189.

¹⁵⁴ F Viljoen (n 30 above) 546.

¹⁵⁵ K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al. (ed)* (n 17 above) 212.

Despite the described situation and contrary to Rwanda, a lot of cases concerning human rights violations have been litigated before Ghanaian courts though rarely invoking international human rights instruments.

It is important to appreciate how the activism of the bench coupled with the interpretation of article 33 (5)¹⁵⁶ of the Constitution has constituted a way through for international human rights instruments to reach the domestic legal system. The term ‘others’ used in article 33 (5) has been interpreted by the court as including rights which are ‘crystallized into widely or generally accepted rights, duties, declarations and guarantees through treaties, conventions, international or regional accords, norms and usages.’¹⁵⁷ The application of IHRIs, ratified or simply signed by Ghana has been also applied on the basis of implied commitment of Ghana to comply and to guarantee the rights they contain.¹⁵⁸ Another way out from inapplicability of international law has been the principle of *Pacta Sunt Servanda* from the Vienna Convention on the Law of Treaties placing an obligation to state parties to an international instrument not to invoke their domestic law as an excuse for the failure to perform the obligations from the instruments.¹⁵⁹

It is striking to notice how despite the constitutional obstacle, the court succeeded into making international instruments applicable in Ghanaian domestic legal order. There is a way to hope that the existing jurisprudence will serve a more active and progressive resort to international law in human rights litigation before Ghana courts. This effort and activism of judges aiming at making human rights enjoyment more effective is inspiring especially for Rwanda where despite the automatic reception of IHRIs the application before the court does not follow.

¹⁵⁶ Article 35 (5) provides as follows : The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

¹⁵⁷ *Adjei-Ampofo v A-G* (2003-2004) SCGLR 411 at 418-419.

¹⁵⁸ *New Patriotic Party v Inspector General of Police* (1993-1994) 2 GLR 459.

¹⁵⁹ K Appiagyei-Atua ‘Ghana at 50: The place of International Human rights norms in the courts’ in Bonsu *et al. (ed)* (n 17 above) 197.

3.6.1 Underneath reasons of the reluctance to have recourse to IHRIs

In an attempt to retrace the root causes of the reluctance to have recourse to IHRIs as source of individual rights one can briefly point out the following:

Regarding Rwanda, there is first the historical problem of shortage of qualified judicial personnel and the scarcity of lawyers. Rwanda's judicial system has never had professional staffs with legal training in the past. Until 1993 only 45 magistrates out of 708 were jurists.¹⁶⁰ This situation slightly changed until the judicial reform of 2004 when new qualified judges were recruited. Until the judicial reform of 2004, out of 702 judicial personnel only 74 were qualified judges, which corresponded to 11 per cent, while at present, all the 281 judges in the judiciary have at least a degree in law.¹⁶¹

The number of lawyers has also considerably increased, from 37 in 1997 to 619 members in 2010.

In order to help the current and future law practitioners to have practical skills, an Institute of Legal Practice and Development (ILPD) has been established to provide practical training and tools in legal practice to law graduates prior to effective employment in the profession.¹⁶²

Despite the above noted developments the attitude of the judiciary and the bench vis-à-vis IHRIs did not change much until recent cases mentioned above from the Supreme Court. The underlying reasons may be the importance conferred to international law in general and human rights in particular during the course of training. During the academic training at the National University of Rwanda Public International Law is given 75 hours while Human Rights (called public Liberties and rights of Persons) are taught for only 30 hours.¹⁶³ The ILPD does not provide any

¹⁶⁰ BM Gahamanyi 'Building Constitutional Order in the aftermath of Genocide' in An Na'im (n 16 above) 270.

¹⁶¹ BM Gahamanyi 'Building Constitutional Order in the aftermath of Genocide' in An Na'im (n 16 above) 271.

¹⁶² National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council Rwanda. Human Rights Council Working Group on the Universal Periodic Review Tenth session Geneva, 24 January–4 February 2011, A/HRC/WG.6/10/RWA/1 8 November 2010.

¹⁶³ The Modules taught at the faculty of Law of the National University of Rwanda can be found at <<http://www.law.nur.ac.rw/spip.php?article>> (Accessed on 02 October 2011)

particular module on human rights or international law.¹⁶⁴

The legal and judicial system can also obstruct the resort to IHRIs. The tradition on which the legal system is based is mainly Roman law bequeathed from Belgium. In this system the first source of law to rely on is the codes of laws of Rwanda. Even though they contain IHRIs, the constitution does not make human rights justiciable in clear terms.

Besides that, the language and rules of interpretation can constitute obstacles. IHRIs are adopted in foreign languages while the language used before the courts is the local language (Kinyarwanda). In spite of some commendable initiatives taken by the Rwandan National Commission of Human Rights and the local NGO named CLADHO¹⁶⁵ to translate some important IHRIs all instruments are not translated and this translation contained in booklets is not an authentic document. This entails also the problem of interpretation of international instruments because their rules of interpretation differ from the interpretation of domestic law and require a further more step.¹⁶⁶ For treaties, the courts may be obliged to go back to ‘the drafting history of the treaty, (for example records of debates in the United General Assembly) or the subsequent practice of the state parties in order to determine the intend of the drafter, is much the same way as domestic court interpret a contract between two individuals’.¹⁶⁷

As for Ghana, the greatest challenge seems to have been the lack of domestication of IHRIs in order to be applied by courts. As has been discussed an international instrument which is not formally domesticated through an Act of Parliament is deemed inexistent. This has contributed to the scarcity of jurisprudence to rely on. Unlike Rwanda, courts started dealing with human rights cases long ago. One can mention the famous *Re Akoto* case¹⁶⁸ in 1961. After a long period of hesitation, as a result of the activism of the courts the obstacle has been bypassed. As

¹⁶⁴ The list of modules taught at ILPD is available

at<http://www.ilpd.ac.rw/ilpd/Post_Graduate_Programmes.aspx> (Accessed on 02 October 2011).

¹⁶⁵ CLADHO is Collectif des Leagues et Associations de Défense des Droits de l’Homme.

¹⁶⁶ The practitioner may hesitate to have recourse to the rules of treaty’s interpretation as provided by articles 31 to 33 of the VCLT unless they have got any particular training. See also MPV Alstine ‘The role of Domestic Courts in Treaty Enforcement’ in Sloss (ed) (n 59 above) 587.

¹⁶⁷ Schabas & Imbleau (n 15 above) 188.

¹⁶⁸ *Re Akoto* (1961) 2 GLR.

discussed in previous sections IHRIs reached Ghanaian courts. This has been possible thanks to the activism of judges and a broad interpretation of article 33(5) and the extracting the state's obligations and commitment from the treaties themselves.

3.6.2 Conclusion

Rwanda and Ghana come from different legal and historical context. This explains why as far as the domestication of IHRIs is concerned Rwanda follows monism while Ghana follows dualism theory. Consequently, IHRIs ratified or accessed on by Rwanda form part of its laws while only IHRIs passed by the legislative act subsequent to its ratification of accession by Ghana form part of its legislation. Nonetheless the way the IHRIs take effects in both countries has been pertaining to the way each of the branches of the government plays its role.

Even though the case where IHRIs were used in courts are still scarce in both countries, Ghana still have better records compared to Rwanda due the active role played by the judiciary to supplement to reluctance of the legislature. Ghana can learn from Rwanda the mode of reception which is conducive to a more effectiveness of human rights. As for Rwanda the activism of the judiciary constitute a good lesson to learn from Ghana in order to make IHRIs effective on domestic level.

CHAPTER IV: Conclusions and Recommendations

4.1 Conclusions

This paper has raised the issue of the application of IHRIs, as one of the branches of public international law, by domestic courts in Ghana and Rwanda in a comparative perspective. IHRI is one of the international treaties or conventions that a state becomes a party to on a voluntary basis. Unlike ordinary international instruments, customary international law counters the principle of free choice of states to become a party.

This thesis has identified challenges and opportunities of IHRIs applications by municipal courts. It has concluded that the constitutional mode of IHRI reception in Rwanda is very conducive to the application of IHRIs by domestic courts. The process of international instrument integration takes end at the level of ratification by the Executive power and publication. From the date of publication in the Official Gazette, the IHRI duly ratified becomes part of domestic legislation (with a privileged place compared to other ordinary statutory laws).¹⁶⁹

Even though researchers¹⁷⁰ still lament that the cases where judges have recourse to IHRIs are still scarce in Ghana, the record is still higher in comparison to Rwanda.

However, Rwanda approach to integration constitutes a challenge for Ghana where the ratification by the Executive does not give effect to IHRIs as far as human rights litigation is concerned. The Executive action must be complemented by an implementing Act of the Legislature. Thus, in Ghana, despite the existence of ratified IHRI, strictly speaking, they are unhelpful for litigants.

The Ghanaian constitutional provision which unambiguously authorise litigants to be heard by the High Court when human rights have been violated emphasizes one of the challenges for Rwandan human rights potential litigants as the constitution of the Republic of Rwanda does not have a similar provision.

¹⁶⁹ See article 190 of the Constitution of 2003.

¹⁷⁰ E Quansah 'An examination of the use of international law as in interpretative tool in human rights litigation in Ghana and Botswana' in Killander (ed) (n 99 above) 54. See also K Appiagyei-Atua 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu *et al.* (ed) (n 15 above) 179.

At this point, it is important to point out that the Ghana dualism dynamic system which allows judges to seek remedies using jurisprudence from other courts is not very beneficial for the Rwanda's legal system where the remedies have to be found firstly and mainly from codes of laws. Some of the codes date back to the nearly post-colonial time.

Interestingly, in both states practice does not flow from theory and the method of integration of IHRIs into domestic legal framework. Both states have ratified most of the key IHRIs. One may expect Rwanda to be more familiar with the application of IHRIs duly ratified than Ghana since the mode of domestication is very easy, but it is not the case.

The empirical evidences show that notwithstanding the scarcity of cases, Ghanaian court decisions are more revolutionary. The activism of the Ghanaian judiciary has proven that the solution does not only lie in the ratification and enactment of implementing legislative Act. The recourse to a broader interpretation of the Constitution and the "doctrine of implied incorporation"¹⁷¹ led Ghanaian bar and bench to overcome the theoretical and constitutional provision challenges. The activist attitude exhibited in Ghana can be a good lesson to the Rwanda bench and bar. If Ghanaian courts have applied IHRIs not yet domesticated through an Act of the Legislature, IHRIs duly domesticated by Rwanda should have been easier to apply but it has not been the case.

Nevertheless, it is relevant to point out one potential side effect of the practice of applying IHRIs which are not yet domesticated: the risk of lack of uniformity and sustainability of jurisprudence. It is important to recall that nothing compels judges to apply IHRIs in human rights litigations¹⁷². In fact, legalist judges can counter the jurisprudence because it does not respect the constitutional requirements. Hence, it is better for judges to have recourse to 'safe IHRIs', that is the IHRIs which have been domesticated in respect of the legislative Act requirement.¹⁷³

Concerning Rwanda, the recent initiative of the Supreme Court to compile the cases decided by Rwandan courts is to be welcomed. The emerging jurisprudence of

¹⁷¹ MPV Alstine 'The role of Domestic Courts in Treaty Enforcement' in Sloss (ed) (n 59 above) 585.

¹⁷² E Quansah 'An examination of the use of international law as in interpretative tool in human rights litigation in Ghana and Botswana' in Killander (ed) (n 99 above) 57.

¹⁷³ They can be qualified as 'safe IHRI' because they cannot create controversy among law practitioners.

using IHRI in the emerging few cases is optimistic. The Rwanda expectations are also based on its initiative to join organisations mainly from common law dualist countries where human rights litigations and the recourse to international law are more frequent. The experience sharing with Commonwealth countries like Ghana and India and East African countries like Kenya¹⁷⁴, may influence the current practice in Rwanda which was inherited from Belgian colonialism as previously stated..

From the findings of the research, recommendations have been addressed to institutions aiming at improving the application of IHRIs in Rwanda and Ghana.

4.2 Recommendations

To the Government of Ghana

The Government sheds light on its commitment to respect human rights especially in article 33(5) of the Constitution. Yet, the reluctance to domesticate IHRIs undercuts the effectiveness of its commitment. The legislative power should not prevent the process of Ghana to become a full party to IHRIs it ratified or acceded to by applying them. The voice of the author joins Ocran's strong appeal to the legislature to finalize the process of domesticating the many International instruments Ghana has signed.¹⁷⁵ Indeed, as mentioned above an Act of the Legislature is a safeguard of the IHRIs and secures their application before the bench. Before its application before the courts, like other national laws an IHRI needs to be scrutinized by the legislature as it is done for other laws.

Given the fact that the Judiciary has showed its capacity to bypass the ordinary process in the circumstances where the absence of legislative act would precludes the application of IHRI, it is recommended that the courts, not only the

¹⁷⁴ About Kenya Jurisprudence, one can mention the *Rono v Rono case* where Justice Waki JA basing his argument on the fact that Kenya is party to various IHRIs and subscribes to CIL concluded that since there was that willingness if a case has to be decided by the court and could be covered by such international instrument, he would take notice of that IHRIs in his resolution of the dispute. (see *Rono v Rono* (2005) AHRLR 107 (KeCA 2005).

¹⁷⁵M Ocran 'Access to global jurisprudence and problems in the domestic application of international legal norms', keynote address at the 2nd West African Judicial Colloquium, 8 October 2007, Accra, Ghana, www.brandeis.edu/ethics/pdfs/internationaljustice/WAfricaColloq.pdf (accessed 22 September 2011)

Supreme Court but also the High Court be proactive and enrich existing jurisprudence by extensive resort to IHRIs even when the parties do not raise it. The organisation of continuing training for the Judiciary focusing on IHRI and their application by domestic courts will contribute to this development. The intensive recourse to IHRIs may compel the legislature to take up their task of domesticating IHRIs ratified by the executive.

The Ghana Bar Association

Given the main role played by the lawyers in the adjudication process it is recommended that they integrate IHRIs in their reasoning and argumentation before courts using the existing jurisprudence.

Faculties of Law and Ghana School of Law (GSL)

Currently, all legal practitioners are trained by the GSL and the Faculties of Law in various universities. Given the current situation it is recommended that a importance be granted to a module focusing on international Law in general and international human rights law in particular.

Rwanda

Government of Rwanda

Rwanda is party to many IHRIs and the aim of the government is to make them effective. Given the fact that they cannot take effect if the judiciary does not play its adjudicating role, it is recommended they start using IHRIs in their judgments. Continuous training aimed at the awareness of the applicability of IHRIs by domestic courts is important.

Rwanda Bar Association

In Rwanda, complaints for human rights violations can be filed by victims or their lawyers. Considering the fact that lawyers are more knowledgeable than their clients, they should integrate IHRIs extensively in their litigations.

Universities and the Institutes for Legal Practice and Development (ILPD)

The ILPD has been established to provide practical training in legal practice to law graduates prior to their effective participation in the profession.¹⁷⁶ The institute trains judges, prosecutors and lawyers. Among the nine modules offered at the ILPD none of them is devoted to human rights apart from two days continuing training which covers the topic 'human rights and juvenile justice'.¹⁷⁷ It is recommended that there is a need to review the content of the training provided by the Institute because of its influence in training legal practitioners in Rwanda. The Faculty of Law of the National University of Rwanda teaches public international law as well as human rights law but the time assigned to them is not sufficient: 75 hours for Public International law and 30 hours for Human Rights. It is recommended that the time assigned to it be increased.

Word count: 17,822

¹⁷⁶National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council Rwanda. Human Rights Council Working Group on the Universal Periodic Review Tenth session Geneva,

¹⁷⁷ The modules taught at ILPD can be found at its website: <http://www.ilpd.ac.rw> visited on 02 October 2011.

Bibliography

Books

Bosl, A & Diescho, J (ed) (2009) *Human Rights in Africa, Legal perspectives on their protection and promotion* Windhoek: Konrad Adenauer Foundation.

Conforti, B (1993) *International Law and the role of domestic legal system* The Hague: Martinus Nijhoff.

Dugard, J (2005) *International law: A South African perspective* Lansdowne: JUTA.

Jayawickrama, N (2002) *The judicial application of human rights law: National, Regional and International Jurisprudence* Cambridge: Cambridge University Press.

Law, J & Martin, EA (2009) *Dictionary of Law* Oxford: Oxford University Press.

Nollkaemper, A (2011) *National court and international rule of law* Oxford: Oxford University Press.

Schabas, W A & Imbleau, M (1997) *Introduction to Rwandan Law* Québec: Yvon Blais Inc.

Seiderman, D (2001) *Hierarchy in International Law, the human rights dimension* Antwerpen: Intersentia.

Viljoen, F (2007) *International Human Rights Law in Africa* Oxford: Oxford University Press.

Villiger, ME (1997) *Customary International Law and Treaties* The Hague: Kluwer Law International.

Chapters in books

Adjami, ME 'African Courts, International law and comparative case law: Chimera or emerging Human Rights Jurisprudence?' in Heyns, CH and Steffszyn, K (eds) (2006) *Human rights, peace and justice in Africa: A reader* Pretoria: Pretoria University Law Press.

Alstine, MPV 'The role of Domestic Courts in Treaty Enforcement' in Sloss, D (ed) (2009) *The role of Domestic Courts in Treaty Enforcement* Cambridge: Cambridge University Press.

An-Na'im, AA 'Expanding Legal Protection of Human Rights in Africa Contexts' in An-Na'im, AA (ed) (2003) *Human Rights Under African Constitutions: Realizing the Promise for ourselves* Philadelphia: University of Pennsylvania Press.

Appiagyei-Atua, K 'Ghana at 50: The place of International Human rights norms in the courts' in Bonsu, H *et al.* (eds) (2007) *Ghana law since independence: History, development and prospects* Accra: Black Mask Ltd.

Gahamanyi, BM 'Building Constitutional Order in the aftermath of Genocide' in An-Na'im, AA (ed) (2003) *Human Rights Under African Constitutions: Realizing the Promise for ourselves* Philadelphia: University of Pennsylvania Press.

Gaja, G 'Dualism-a Review' in Nijman, J & Nolkaemper, A (eds) (2007) *New perspective on the divide between National and International law* Oxford: Oxford University Press.

Hayes, K 'Judicial implementation of international human Rights Norms' in International Commission of Jurists (ed) (2007) *Human Rights Litigation and the domestication of Human rights standards in sub-Saharan Africa* Nairobi: The Kenya Section of International Commission of Jurists.

Higgins, R 'United Kingdom' in Jacobs, FG & Roberts, S (ed)(1987)*The effect of treaties in domestic law* London: Sweet & Maxwell.

Killander, M & Adjohoun, A 'International law and domestic human rights litigation in Africa: An Introduction' in Killander, M (ed) (2010) *International law and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press.

Sloss, D 'Treaty Enforcement in Domestic Courts' in Sloss, D (ed) (2009) *The role of Domestic Courts in Treaty Enforcement* Cambridge: Cambridge University Press.

Murphy, D 'Does International Law Obligate States to Open Their National Court?' in Sloss, D (ed) (2009) *The role of Domestic Courts in Treaty Enforcement* Cambridge: Cambridge University Press.

Nijman, J & Nollkaemper, A 'Introduction' in Nijman, J & Nollkaemper, A (eds) (2007) *New perspective on the divide between National and International law* Oxford: Oxford University Press.

Quansah E 'An examination of the use of international law as in interpretative tool in human rights litigation in Ghana and Botswana' in Killander, M (ed) (2010) *International law and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press.

Shestack, JJ 'The philosophic foundations of Human Rights' in Heyns, CH and Stefiszyn, K (eds) (2006) *Human rights, peace and justice in Africa: A reader* Pretoria: Pretoria University Law Press.

Articles

Fairweather, CLR 'Obstacles to the enforcing international human rights law in domestic courts' (1998) 4 *U.C Davis Journal of International law & Policy* 119.

Gibney, M & Franswosky, S (ed) (2000). 'Judicial protection of human rights: Myth or Reality?' 13 *Harvard Human rights Journals* 315.

Hassan, F (1981) 'Panacea or miracle? Domestic enforcement of international human rights law: recent cases' 4 *Houston Journal of International law* 13.

Viljoen, F (1999) 'Application of the African Charter on Human and Peoples' rights by domestic courts in Africa' 43 *Journal of African Law* 1.

Dissertations

Bimpong-Buta, SY 'The role of the Supreme Court in the Development of Constitutional Law in Ghana' Unpublished LLD thesis, University of Pretoria, 2005.

Legal Instruments

International and regional legal instruments

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

International Covenant on Civil and Political Rights (1966).

International Covenant on Economic, Social and Cultural Rights (1966).

International Law Commission Statutes.

Status of the International Court of Justice.

United Nations Charter (1945).

Universal Declaration of Human Rights (1945).

Vienna Convention on the Law of Treaties (1969).

National legal instruments

Rwanda

The Constitution of the Republic of Rwanda of 24 November 1962.

The Constitution of the Republic of Rwanda of 20 December 1978.

The Constitution of the Republic of Rwanda of 10 June 1991.

The Constitution of the Republic of Rwanda of 4 June 2003.

Decree law n° 8/75 of 12 February 1975 relating to ratification of International Covenant on Civil and Political Rights (O.G.R.R., 1975, p. 230).

Decree law n° 8/75 of 12 February 1975 relating to ratification of International Covenant on Economic, Social and Cultural Rights (O.G.R.R., 1975, p. 230).

Decree law n° 8/75 of 12 February 1975 relating to ratification of International Convention on the Elimination of All Forms of Racial Discrimination (O.G.R.R, n° 5 of 12 February 1975 p.231).

Organic law n° 02/2005 of 18/02/2005 establishing rules of procedure of the Senate

Organic law n°06/2006 of 15/02/2006 establishing internal rules of procedure of the Chamber of Deputies in the Parliament.

Law n° 001/2008 of 14/01/2008 authorizing the accession to the convention on protection of children and cooperation in respect of intercountry adoption, adopted at the Hague in Nedherland on 29 may 1993.

Law n° 002/2008 of 14/01/2008 authorizing the ratification of the convention against torture and other cruel, inhuman or degrading treatments or punishments, adopted in New York on 10 December 1984.

Ghana

The Constitution of the Republic of Ghana of 1957.

The Constitution of the Republic of Ghana of 1960.

The Constitution of the Republic of Ghana of 1969.

The Constitution of the Republic of Ghana of 1979.

The Constitution of the Republic of Ghana of 1992.

South Africa

The Supreme Court Act 59 of 1959.

Namibia

Supreme Court Act, °15 of 1990.

France

Constitution of the Republic of France

Case laws

Fiji case

Naba & Ors v the State 2001 No. HAC0012 of 2000L in Fiji, from 4 CHLRD 345 451 (unreported).

Ghanaian cases

Adjei-Ampofo v A-G (2003-2004) SCGLR 411 at 418-419.

New Patriotic Party v Inspector General of Police (1993-1994) 2 GLR 459.

Re Akoto (1961) 2 GLR.

Kenya case

RM v Attorney-General (2006) AHRLR 256 (KeHC 2006).

Rwandan cases

Nzaramba Martin v Attorney General Supreme Court's Case law Booklet from

<http://www.supremecourt.gov.rw/sc/Jurisprudence.aspx> (accessed on 02 September 2011).

Uwimana Jeannette v Attorney General Supreme.

Court's Case law Booklet from

<http://www.supremecourt.gov.rw/sc/Jurisprudence.aspx> (accessed on 02 September 2011)

Other references

UN Doc E/C.12/1998/24

National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council Rwanda. Human Rights Council Working Group on the Universal Periodic Review Tenth session Geneva, 24 January–4 February 2011, A/HRC/WG.6/10/RWA/1 8 November 2010.

National report submitted in accordance with paragraph 15 (a) to Human Rights Council resolution 5/1 Un Doc 5/1, A/HRC/WG.6/2/GHA/1,(2008).

Bangalore Principles, *Concluding statement of the judicial Colloquium held in Bangalore, India from 24-26 February 1988.*

General Assembly resolution 317 (IV) of 2 December 1949.

Access to global jurisprudence and problems in the domestic application of international legal norms', keynote address at the 2nd West African Judicial Colloquium, 8 October 2007, Accra, Ghana:
<<http://www.brandeis.edu/ethics/pdfs/internationaljustice/WAfricaColloq.pdf>>
(accessed 22 October 2011).

Web sites

Supreme Court of Rwanda
<<http://www.supremecourt.gov.rw/sc/Jurisprudence.aspx>> (accessed on 02 September 2011)

Institute of Legal Practice and Development (ILPD) <<http://www.ilpd.ac.rw>> (Accessed on 02 October 2011).

National University of Rwanda <<http://www.law.nur.ac.rw/spip.php>> (Accessed on 02 October 2011)