Making International Human Rights Treaties Relevant to the Protection of Human Rights in African Countries

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ABSTRACT

Since the 1990s, many African countries have transitioned to democratic political systems characterized by separation of powers with checks and balances. The independent judiciary is one of the most important of these checks and balances. In many of these countries, independent judiciaries are using their power to interpret the constitution to bring national laws into conformity with the provisions of international human rights instruments. In doing so, courts have clarified how international law is given effect in the municipal legal systems of these States. An examination of cases from three African jurisdictions reveals how courts are using international law as an interpretive tool to rule on (i) whether domestic courts can seize the military assets of sovereign states in the execution of foreign judgments, even if the concerned sovereign has waived immunity; (ii) the constitutionality of the mandatory death sentence; and (iii) the constitutionality of corporal punishment. Examining these cases reveals the growing importance of international law and independent judiciaries in recognizing and protecting human rights in Africa. In *S v. Williams*, the Constitutional Court of South Africa used provisions of international human rights

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instruments to interpret the constitution and the Criminal Procedure Act No. 51 of 1977. It held that section 277(2)(a) of the Criminal Procedure Act, which mandates the death sentence for a person convicted of murder, was unconstitutional and invalidated it. In *R. High Court*, the Supreme Court of Ghana made clear that Ghana is a dualist state and that provisions of international treaties can only become part of Ghana's municipal law after the treaties have been domesticated through appropriate enabling legislation. In *Muruatetu & Another v. Republic*, the Supreme Court of Kenya held that the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is unconstitutional and then instructed the legislative branch to enact legislation to repeal those provisions that make the death penalty a mandatory sentence for murder.

I. INTRODUCTION

Before the adoption of the Universal Declaration of Human Rights ("UNDHR") by the UN General Assembly on December 10, 1948, human rights had already found expression in the Covenant of the League of Nations, "which led, *inter alia*, to the creation of the International Labor Organization."[1] In 1945, several countries met in San Francisco to draft the Charter of the United Nations, which in Article 1, paragraph 3, speaks of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[2]

After the San Francisco Conference, the Preparatory Commission of the United Nations recommended that "the Economic and Social Council ("ESC") should, at its first session, establish a commission for the promotion of human rights as envisaged in Article 68 of the United Nations ("UN") Charter."[3] Subsequently, the ESC established the Commission on Human

1. Office of the UN High Commissioner for Human Rights, The International Bill of Human Rights - Fact Sheet No. 2 (Rev. 1) (June 1, 1997), https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-02-rev-1-international-bill-human-rights-archive [hereinafter Fact Sheet No. 2]. *See also* UNGA Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

2. U.N. Charter art. 1, ¶ 3.

3. Fact Sheet No. 2 (Rev. 1), *supra* note 1. U.N. Charter, *supra* note 2, art. 68 ("The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.").

Rights in early 1946, and that year, the UN General Assembly deliberated on a draft Declaration on Fundamental Human Rights and Freedoms and subsequently transmitted it to the ESC "for reference to the Commission on Human Rights for consideration . . . in its preparation of an international bill of rights."[4] At its first meeting in 1947, the Commission on Human Rights "authorized its officers to formulate what it termed a 'preliminary draft International Bill of Human Rights.'"[5]

The Drafting Committee transmitted "to the Commission on Human Rights draft articles of an international declaration and an international convention on human rights," and at its second session in December 1947, the Commission on Human Rights applied the term "International Bill of Human Rights" to "the series of documents in preparation and established three working groups: one on the declaration, one on the convention (which it renamed 'covenant'), and one on implementation."[6] At its third session in May/June 1948, the Commission on Human Rights revised the draft declaration and considered comments received from Governments. Subsequently, the draft declaration was submitted through the ESC to the UN General Assembly, which was meeting in Paris at the time.[7] By Resolution 217 A (III) dated December 10, 1948, the General Assembly adopted the Universal Declaration of Human Rights, which became the first of several international instruments guaranteeing human rights.[8]

In December 1966, the UN General Assembly adopted two international human rights treaties (generally referred to as "the international covenants")—the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[9] Together, the UDHR and the two international covenants are generally known as the International Bill of Human Rights. The Covenants impose obligations on States Parties to (i) refrain from interfering directly or indirectly with the rights of its citizens; (ii) take measures to ensure that no one, including

4. Fact Sheet No. 2 (Rev. 1), *supra* note 1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171. [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3 [hereinafter ICESCR].

state- and non-state actors, can interfere with individuals' rights; and (iii) take all necessary steps and measures to realize the rights guaranteed by these international covenants.[10]

The ICCPR and the ICESCR are binding treaties.[11] The UDHR, however, is considered "hortatory and aspirational, recommendatory rather than, in a formal case, binding."[12] Nevertheless, many international legal scholars have argued that "the years have further blurred the threshold contrast between 'binding' and 'hortatory' instruments."[13] While the UDHR may not enjoy the same legal status as a treaty, its position in international law since it was adopted in 1948 has changed significantly and, through state practice, has received favorable treatment in many domestic legal systems.[14] Most important, however, is the fact that over the years, there has developed in international law arguments that "all or parts of [the UDHR should be viewed] as legally binding, either a matter of customary international law or as an authoritative interpretation of the UN Charter."[15]

According to the UN, the UDHR was adopted and proclaimed by the General Assembly:

> as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both

10. United Nations Human Rights Office of the High Commissioner, International Bill of Human Rights: A Brief History, and the Two International Covenants (Dec. 29, 2022), https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights.

11. However, a treaty is only binding on State Parties to the treaty. Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The international law principle of *pacta sunt servanda* is the foundation for the binding effect of treaties and is codified in Article 26. *Id.* ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

12. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 152 (2008).

13. *Id.*

14. John Mukum Mbaku, *Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, the Responsibility to Protect, and Presidential Immunities*, 16 S.C. J. INT'L L. & BUS. 1, 21 (2019).

15. STEINER ET AL., *supra* note 12, at 152.

> among, the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[16]

After the voting was completed, the President of the General Assembly issued a statement in which he stated that adopting the Declaration was:

> a remarkable achievement, a step forward in the great evolutionary process. It was the first occasion on which the organized community of nations had made a Declaration of human rights and fundamental freedoms. The instrument was backed by the authority of the body of opinion of the United Nations as a whole, and millions of people—men, women and children all over the world—would turn to it for help, guidance and inspiration.[17]

Article 1 of the UDHR defines the Declaration's basic assumptions and states as follows: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[18] The right to liberty and equality, according to Article 1, then, is "man's birthright and cannot be alienated: and that, because man is a rational and moral being, he is different from other creatures on earth and therefore entitled to certain rights and freedoms which other creatures do not enjoy."[19]

Article 2 sets out the basic principle of equality and non-discrimination as it relates to the enjoyment of human rights and fundamental freedoms and forbids "distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[20] Article 2 also outlaws distinction "on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of

16. UDHR, *supra* note 1.

17. Fact Sheet No. 2, *supra* note 1.

18. UDHR, *supra* note 1, art. 1.

19. *Id.* art. 2. The use of the term "man" here does not exclude women, as evident in Article 2, which forbids distinctions based on, *inter alia*, sex. *See Id.*

20. *Id.*

sovereignty."[21]

The first cornerstone of the UDHR is found in Article 3—it proclaims the right to life, liberty, and security of person.[22] This right is essential and critical to the enjoyment of the other rights guaranteed in the UDHR. The second cornerstone of the UDHR is Article 22, which introduces Articles 23–27, in which "economic, social and cultural rights—the rights to which everyone is entitled 'as a member of society'—are set out."[23] These rights are characterized in Article 22 as "indispensable for human dignity and the free development of personality, and indicates that they are to be realized 'through national effort and international cooperation.'"[24] Articles 22–27 guarantee economic, social, and cultural rights, and these include the right to social security, the right to work, the right to equal pay for equal work, the right to rest and leisure; the right to a standard of living adequate for health and well-being; the right to education; and the right to participate in the cultural life of the community.[25]

Articles 28–30 of the Declaration "recognize that everyone is entitled to a social and international order in which the human rights and fundamental freedoms set forth in the [UDHR] may be fully realized, and stress the duties and responsibilities which each individual owes to his community."[26] Article 29(3) of the UDHR emphasizes that "[t]hese rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."[27] Finally, Article 30 states, "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[28]

Until 1976, when the International Covenants on Human Rights entered into force, the UDHR was "the only completed portion of the International Bill of Human Rights."[29] The UDHR and the international covenants have "exercised a profound

21. *Id.*
22. *Id.* art. 3.
23. Fact Sheet No. 2, *supra* note 1.
24. *Id.*
25. UDHR, *supra* note 1, arts. 22–27.
26. Fact Sheet No. 2, *supra* note 1.
27. UDHR, *supra* note 1, art. 29.
28. *Id.* art. 30.
29. Fact Sheet No. 2, *supra* note 1.

influence on the thoughts and actions of individuals and their Governments in all parts of the world."[30] For 25 years, the UDHR "stood alone as an international 'standard of achievement for all peoples and all nations'" and "[i]t became known and was accepted as authoritative both in States which became parties to one or both of the Covenants and in those which did not ratify or accede to either."[31] Today, the UDHR is recognized "as a historic document articulating a common definition of human dignity and values" and is a "yardstick by which to measure the degree of respect for, and compliance with, international human rights standards everywhere on earth."[32]

When the International Covenants on Human Rights entered into force in 1976, they represented an acceptance by State Parties of a legal "as well as a moral obligation to promote and protect human rights and fundamental freedoms" that did not "diminish the widespread influence of the [UDHR]."[33] On the other hand, noted the UN High Commissioner for Human Rights, "the very existence of the Covenants, and the fact that they contain measures of implementation required to ensure the realization of the rights and freedoms set out in the [UDHR], gives greater strength to the [UDHR]."[34] Of particular note is the fact that the UDHR is universal in scope, while the International Human Rights Covenants are only legally binding on those States that have accepted them by ratification or accession.[35]

Since 1948, the UN has adopted several other international human rights instruments besides the UDHR, ICCPR, and the ICESCR. Most of these instruments have elaborated principles set out in the UDHR. For example, the ICESCR states in its preamble that the State Parties to the ICESCR have recognized that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."[36] The ICCPR makes a similar statement in its preamble.[37]

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. ICESCR, *supra* note 9, pmbl.
37. ICCPR, *supra* note 9, pmbl.

Even international human rights instruments adopted outside the UN system also mention the principles embodied in the UDHR. For example, the Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted by the Council of Europe at Rome on November 4, 1950, states in its preamble: "[b]eing resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."[38] When Africans adopted the Charter of the Organization of African Unity in Addis Ababa on May 25, 1963, Article 2 provided that one of the purposes of the new organization was "[t]o promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights."[39]

The UDHR has emerged as a foundation for "many domestic constitutions, laws, regulations, and policies that protect fundamental human rights."[40] As argued by Professor Hannum, "[t]hese domestic manifestations include direct constitutional reference to the Universal Declaration or incorporation of its provisions; reflection of the substantive articles of the Universal Declaration in national legislation; and judicial interpretation of domestic laws (and applicable international law) with reference to the Universal Declaration."[41] In addition, Professor Hannum notes, "[m]any of the Universal Declaration's provisions also have become incorporated into customary international law, which is binding on all states."[42]

Since the adoption of the declarations and the international treaties that constitute the International Bill of Human Rights—that is, the UDHR, the ICCPR, and the ICESCR—other human rights treaties and conventions have been adopted at the international and regional levels. Major international human

38. European Court of Human Rights & Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 (Nov. 4, 1950), at pmbl [hereinafter European Convention on Human Rights].

39. Org. of African Unity (OAU), Charter art. II (d).

40. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1995).

41. *Id.*

42. *Id.*

rights treaties adopted in Africa include (1) the African Charter on Human and Peoples' Rights ("Banjul Charter") (1981); (2) the African Charter on the Rights and Welfare of the Child (1990); (3) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003); (4) the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998); and (5) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018).

The Banjul Charter, the international human rights instrument that ushered in a new era in the recognition and protection of human rights in Africa, was inspired by the provisions of the International Bill of Human Rights—the UDHR, the ICCPR, and the ICESCR. [43] In fact, the Banjul Charter's preamble states that the Member States of the OAU had pledged to "have due regard to the Charter of the United Nations and the Universal Declaration of Human Rights."[44] However, the Banjul Charter "represents a significant departure from international and regional human rights instruments which have preceded it, in that it is singularly African and responsive to uniquely African circumstances."[45] In addition to enumerating "conventional norms, rights, and freedoms ascribed to the individual," the Banjul Charter guarantees a long list of rights, including civil and political rights and economic, social, and cultural rights.[46]

The Banjul Charter entered into force on October 21, 1986, and as of December 1, 2023, the only African country that had not yet ratified this important human rights instrument is Morocco.[47] Besides the regional human rights instruments, such as the Banjul Charter, many Member States of the African

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43. Makau W. Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 339 (1995). The African Charter on Human and Peoples' Rights is also known as the Banjul Charter as its final draft was produced in Banjul, the capital city of The Gambia. *Id.*

44. Org. of African Unity (OAU), African (Banjul) Charter on Human and Peoples' Rights (June 27, 1981) OAU Doc. CAB/LEG/67/4/Rev. 5, reprinted in 21 I.L.M. 58 (1982), at pmbl. [hereinafter Banjul Charter].

45. Julia Swanson, *The Emergence of New Rights in the African Charter*, 12 NYLS J. INT'L & COMP. L. 307, 307 (1991).

46. *Id.*

47. African Union, *African Charter on Human and Peoples' Rights: Status List*, AFRICAN UNION (Last updated June 15, 2017) https://au.int/en/treaties/african-charter-human-and-peoples-rights.

Union have also signed and ratified most of the principal international human rights instruments, including the ICCPR, ICESCR, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), and Convention on the Rights of Persons with Disabilities (CRPD).

However, signing and even ratifying a treaty does not automatically create rights that are justiciable in the domestic courts of the State that has done so. Granted, the act of ratification imposes legal obligations on the State that has ratified the treaty—that State is legally bound to carry out the terms of that treaty. However, in most African countries, once a treaty is ratified, the political branches must then enact enabling legislation to domesticate the treaty and create rights that are justiciable in domestic courts and, hence, can be directly invoked by citizens. Thus, the ratification of international and regional human rights instruments is a necessary but not a sufficient condition to render the rights guaranteed by these instruments justiciable in domestic courts in the African countries. Without domestication, the rights guaranteed by these international instruments will fail to contribute positively to protecting human rights in the continent. In the section that follows, this Article will provide an overview of how international law is given effect in the domestic courts of African States.

II. GIVING EFFECT TO INTERNATIONAL HUMAN RIGHTS LAW IN AFRICAN COUNTRIES

A. INTRODUCTION

International treaties, which include international human rights instruments, are usually entered into by States. According to Article 2 of the Vienna Convention on the Law of Treaties, a treaty "means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[48] After an international agreement has been successfully negotiated and signed by the relevant governmental delegations, "a decision must be made—at the domestic level—about what

48. Vienna Convention, *supra* note 11, art 2(a).

type of agreement it is."[49] The type of agreement determines how much effect is given to the agreement in domestic law. However, such a distinction is important only domestically and does not have relevance in international law, given that international treaty law "recognizes only 'treaties' and does not distinguish them on their status in national legal systems or by their mode of creation/or incorporation."[50]

Under international law, it is not necessary that the word "treaty" need not be in the instrument or agreement's name for it to be a treaty. It is the content of the agreement and not its name which renders it a treaty. An international treaty can be called a convention, a protocol, an accord, a pact, or a covenant. For example, the International Covenant on Civil and Political Rights is an international human rights treaty, even though the word "treaty" is not part of its name.[51]

The following types of international agreements have been identified: (1) informal or executive agreements and (2) formal treaties. When States cooperate at the international level, "they can choose from a wide variety of forms to express their commitments, obligations, and expectations."[52] The most formal international agreements are "bilateral and multilateral treaties, in which states acknowledge their promises as binding commitments with full international legal status."[53] According to international legal experts, at the other extreme, treaties are "tacit agreements, in which obligations and commitments are implied or inferred but not openly declared, and oral agreements, in which bargains are expressly stated but not documented."[54]

Lying between these two identified international agreements are a variety of written instruments that express national obligations with greater precision and openness than

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49. Kal Raustiala, *The Domestication of International Commitments* 3–4 (Int'l Inst. for Applied Sys. Analysis, Working Paper No. 95–115), https://pure.iiasa.ac.at/id/eprint/4481/.

50. *Id.* at 4.

51. *See generally* SCOTT DAVIDSON, THE LAW OF TREATIES (Routledge ed., 2016) (presenting a series of essays that provides an overview of various international agreements, with specific emphasis on treaties).

52. Charles Lipson, *Why Are Some International Agreements Informal?*, *in* INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: AN INTERNATIONAL ORGANIZATION READER 293, 300 (Beth A. Simmons & Richard H. Steinberg eds., 2012).

53. *Id.*

54. *Id.*

tacit or oral agreements but do not require the full ratification and national pledges that accompany formal treaties.[55] These instruments include executive agreements, nonbinding treaties, joint declarations, final communiqués, agreed minutes, memoranda of understanding, and agreements pursuant to legislation.[56] While treaties require ratification before entering into effect, "these informal agreements generally come into effect without ratification and do not require international publication or registration."[57]

Most legal scholars argue that unless clearly stated otherwise, international agreements, regardless of their title, are legally binding upon the signatories, and therefore, "informal agreements, if they contain explicit promises, are conflated with treaties."[58] Distinguishing between lawfully binding agreements and those that are not is "central to the technical definition of treaties codified in the Vienna Convention on the Law of Treaties."[59] According to Article 26 of the Vienna Convention on the Law of Treaties (VCLT), treaties are "binding upon the parties" and "must be performed by them in good faith."[60] In addition, some texts on international law emphasize the binding nature of both treaties as well as other types of international agreements.[61]

Human rights treaties often require modifications or amendments in domestic or national law before the rights guaranteed in the treaties can be justiciable in municipal courts. Legal scholars argue that "[t]he period between signature and ratification allows states time to pass the necessary enabling legislation."[62] Particularly in States with democratic political systems, the process of ratifying treaties "allows for more effective oversight, discussion, and informational exchange between a government, writ broadly, its agent (the negotiating team or delegation), and interested third parties, such as

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 300–01.
59. *Id.* at 301.
60. Vienna Convention, s*upra* note 11, art. 26.
61. *See* Lipson, *supra* note 52, at 301; *see also* Oliver Dörr, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 548 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) ("According to the most fundamental rule of the law of treaties, every treaty must be performed 'in good faith.'").
62. Raustiala, *supra* note 49, at 5.

[affected] societal actors and organizations."[63]

While the government would usually seek to ensure that its delegates "carry out its wishes," civil society groups and organizations likely want to ensure that the government is accountable and enters into international agreements that benefit society.[64] The process of ratification, then, is very important because it, *inter alia*, ensures that "delegations do not commit states to unwanted agreements," and, most importantly, ratification serves as a means of "injecting elements of democratic procedure into the conduct of foreign affairs."[65]

In many countries with legal systems based on common law, such as the United States, the United Kingdom, and its former colonies, the power to negotiate, conclude, and ratify treaties is invested in the executive branch of government without any need for participation by the legislative branch. In some of these countries, the national constitution specifically mentions treaties or international agreements. For example, § 231(1) of the Constitution of the Republic of South Africa, enacted in 1996, states that "[t]he negotiating and signing of all international agreements is the responsibility of the national executive."[66]

However, that same Constitution states that "[a]n international agreement binds the Republic only after it has been approved by resolution of both the National Assembly and the National Council of Provinces."[67] This provision, however, does not apply to "[a]n international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive"—this type of agreement binds the Republic of South Africa "without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time."[68]

France and many of its former colonies in Africa base their legal systems on the French Civil law system. According to Article 52 of the French Constitution of 1958 (i.e., the Constitution of the French Fifth Republic), "[t]he President of the Republic shall negotiate and ratify treaties" and "shall be informed of any negotiations for the conclusion of an

63. *Id.*
64. *Id.*
65. *Id.*
66. S. AFR. CONST., 1996, § 231(1).
67. *Id.* § 231(2).
68. *Id.* § 231(3).

international agreement not subject to ratification."[69] Article 55 defines and establishes the relationship between international agreements or treaties and domestic law.[70] Article 55 further reads that approved treaties and international agreements have authority over municipal law. [71] This means that in practice, "a treaty has effect in French municipal law when it is embodied in a decree signed by the French president and printed in the Official Journal."[72] The Constitution of the Republic of Cameroon vests similar powers in the executive, stating in Article 43 that "[t]he President of the Republic shall negotiate and ratify treaties and international agreements."[73]

Since the United Nations came into existence, States have increasingly relied on treaties "to regulate activity that was previously regulated exclusively by domestic law."[74] As noted by David Sloss, "under the 1993 Hague Convention on Intercountry Adoption, ninety-nine States have agreed to regulate child adoption on a transnational scale."[75] Furthermore, "States have concluded numerous treaties that protect the rights of private parties, including, for example, treaties related to international human rights law, international humanitarian law, and international refugee law."[76] Scholarship on how effect is given to treaties in domestic legal systems has distinguished between monism and dualism.[77] Some international legal scholars have argued, however, that "scholarly preoccupation with the formal distinction between monism and dualism tends to obscure key *functional* differences among States."[78]

B. HOW EFFECT IS GIVEN TO INTERNATIONAL LAW IN DOMESTIC COURTS: MONISM AND DUALISM

How international human rights law affects the legal systems of African countries is explained by two alternative

69. 1958 CONST. art. 52 (Fr.).
70. *Id.* art. 55.
71. *Id.*
72. MARK WESTON JANIS, INTERNATIONAL LAW 103 (7th ed. 2021).
73. LA CONSTITUTION DE LA RÉPUBLIQUE DU CAMEROUN [CONSTITUTION] June 2, 1972, art. 43 (Cameroon).
74. DAVID L. SLOSS, THE OXFORD GUIDE TO TREATIES 355 (Duncan B. Hollis ed., 2020).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 365.

theories, namely, monism and dualism. In a country in which the relationship between domestic law and international law is regulated by monism, "the latter and the former comprise one single legal order within the nation's legal system."[79] As stated in Brownlie's Principles of International Law, "[m]onism postulates that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent."[80] While some scholars of monism "assert the supremacy of international law over domestic law," others argue that "this is not an essential feature of monist theory."[81]

Some international legal scholars use "the terms monism and dualism to describe different types of domestic legal systems"[82] such that dualist States are States in which "the constitution . . . accords no special status to treaties; the rights and obligations created by them have no effect in domestic law *unless legislation is in force to give effect to them*."[83] Professor Anthony Aust notes, however, that the constitutions of many countries "contain both dualist and monist elements."[84]

In dualist states, "*no treaties* have the status of law in the domestic legal system; *all* treaties require implementing legislation to have domestic legal force."[85] Monist states, on the other hand, are those in which "*some* treaties have the status of law in the domestic legal system, even in the absence of implementing legislation"—that is, some treaties "enter into force domestically at the same time they enter into force internationally, without the need for any additional steps."[86] Nevertheless, in most monist states, "there are some treaties that require implementing legislation and others that do not," and "[t]here is substantial variation among monist States as to which treaties require implementing legislation."[87] Finally, although "monist States differ considerably in terms of the

79. John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT'L L. 43, 69 (2018) [hereinafter Mukum Mbaku, *Limits on Sovereignty*].

80. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 45 (9th ed. 2019).

81. SLOSS, *supra* note 74, at 356.

82. *Id.* at 356.

83. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 167 (2013).

84. *Id.* at 162.

85. SLOSS, *supra* note 74, at 357.

86. *Id.* at 357, 362.

87. *Id.* at 357.

hierarchical rank of treaties within the domestic legal order," they have at least one common feature: "at least some treaties have the status of law within the domestic legal order."[88]

It is important to distinguish between the need to enact enabling legislation to domesticate a treaty once it has entered into force internationally from "the question whether legislative approval is necessary prior to treaty ratification."[89] In most dualist states, the executive is granted the authority by the constitution to negotiate and conclude treaties that bind the country under international law without prior approval from the legislative branch.[90] However, after the executive in a dualist State has concluded and signed a treaty, implementing or enabling legislation is still needed to grant the treaty domestic legal force.[91]

In most monist states, however, "the constitution requires legislative approval for at least some treaties before the executive can make an internationally binding commitment on behalf of the nation," and the fact that the legislative branch must approve some treaties "before they become binding on the nation helps explain why, in most monist States, some treaties have the status of domestic law even in the absence of implementing legislation."[92] Thus, "in both monist and dualist States, it is rare for a treaty to have domestic legal force unless the legislature has acted either to approve the treaty before international entry into force, or to implement the treaty after international entry into force."[93]

1. Dualism and How Effect is Given to International Law in Domestic Courts

Most of the former colonies of the United Kingdom in Africa follow the dualist approach to how effect is given to international treaties in domestic legal systems. An important feature of dualism is "that no treaties have the formal status of law in the domestic legal system unless the legislature enacts a statute to incorporate the treaty into domestic law" and, hence, create

88. *Id.*
89. *Id.*
90. *Id.* at 357–58.
91. *Id.* at 357.
92. *Id.*
93. *Id.*

justiciable rights in municipal courts.[94] This enabling legislation must be distinguished from that which is designed to authorize and empower the executive "to make a binding international commitment."[95] The executive in many dualist states usually consults with the legislative branch "before concluding 'important' treaties," however, there is "considerable variation among States concerning which treaties qualify as 'important.'"[96]

In dualist states, domestic courts do not have "the authority to apply treaties directly as law."[97] However, if the legislature has enacted enabling or implementing legislation "to incorporate a particular treaty provision into national law, courts apply the statute as law" and "frequently consult the underlying treaty to help construe the meaning of the statute."[98] The application of treaties in dualist states, then, is indirect. However, "judges who are receptive to the domestic judicial application of treaties can use their judicial power to protect the treaty-based rights of private parties and promote compliance with national treaty obligations."[99]

The methods used to incorporate treaty provisions into national law are not the same in all dualist States. For example, in the UK, "the text of a treaty may be attached to a statute stipulating that the attached treaty provisions 'shall have the force of law in the United Kingdom.'"[100] Also, "Parliament may pass an Act granting government officials 'all the powers necessary to carry out obligations under an existing or future treaties" or "Parliament may pass an Act authorizing the Crown to enact regulations to implement one or more treaties."[101]

Some national courts have attempted to address the ambiguity created by these varying approaches to the domestication of international treaties. For example, the Australian High Court has developed what has been referred to as "quasi-incorporation"—through this process, "government departments, and administrative decision makers are given [a statutory directive] to take into account the provisions of . . .

94. *Id.*
95. *Id.* at 358.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 359.

international instruments to which Australia is a party."[102] Concerning unincorporated treaties, international legal scholars have noted that "courts in dualist States have developed a variety of strategies for judicial application of [these] treaties—even in the absence of any statutory directive for government officials to take account of treaty provisions."[103]

For example, in *Minister of State for Immigration and Ethnic Affairs v. Teoh* ("Teoh Case"), the High Court of Australia was called upon to resolve the question as to whether "the provisions of the Convention [on the Rights of the Child] are relevant to the exercise of the statutory discretion and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention."[104] At the time the *Teoh Case* was being decided, the Convention on the Rights of the Child ("CRC") had not yet been incorporated into Australian law. The High Court held that administrative decision-makers had to exercise their statutory discretion in conformity with the CRC because the act of ratification had created a "legitimate expectation" that the actions of government officials "which concerned children, . . . would be conducted in a manner which adhered to the relevant principles of the [CRC]."[105] Within such a context, noted Judge Lee, "the parents and children who might be affected by a relevant decision had a legitimate expectation that the Commonwealth decision-maker would act on the basis that the 'best interests' of the children would be treated as 'a primary consideration.'"[106]

In *Attorney General v. Unity Dow*, the Court of Appeal of Botswana addressed the situation where the state had signed an international treaty but had not yet incorporated its provisions into domestic law.[107] Justice Amissah, writing for the Court, cited with approval a passage from the judge *a quo* in the same case:

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102. *Id. See also* Donald R. Rothwell, *Australia*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 120, 159 (David Sloss ed., 2009).

103. SLOSS, *supra* note 74, at 359; *see, e.g.*, *Minister of State for Immigr. and Ethnic Affairs v. Teoh*, (1995) 128 ALR 353 (Austl.).

104. *Minister of State for Immigr. and Ethnic Affairs v. Teoh*, (1995) 128 ALR ¶ 29 (Austl.).

105. *Id.* ¶ 13.

106. *Id.*

107. Att'y Gen. v. Unity Dow (1992) BLR 119 (CA) (Bots.).

> I bear in mind that signing the convention does not give it power of law in Botswana but the effect of the adherence by Botswana to the convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the convention must be preferable to a "narrow construction" which results in a finding that section 15 of the Constitution permits unrestricted discrimination on the basis of sex.[108]

In the same case, Justice Amissah also held as follows:

> Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its [c]ourts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.[109]

Ghana, a dualist state, has had to confront the issue of unincorporated treaties. For example, in *New Patriotic Party v. Inspector of Police*,[110] the Ghana Supreme Court was asked to rule on the constitutionality of provisions of the Ghana Public Order Decree, 1972, "which granted the Minister of the Interior, *inter alia*, the power to impose restrictions on the freedom of assembly, and whether individuals holding a meeting to celebrate a traditional custom should obtain prior 'consent' or 'permit' of the Minister of the Interior."[111] When *New Patriotic Party* was decided, Ghana had not yet domesticated the Banjul Charter. In holding that §7 of the Public Order Decree had violated Article 11 of the Banjul Charter, which guarantees the right to assembly, the Supreme Court declared as follows:

> Ghana is a signatory to [the African Charter on Human and Peoples' Rights] and Member States of the Organization of African Unity and parties to the Charter

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108. *Id.* at para. 108.

109. *Id.* at para. 109.

110. New Patriotic Party v. Inspector-Gen. of Police (1993) 2 GLR 459 (SC) (Ghana).

111. John Mukum Mbaku, *The Role of International Human Rights Law in the Adjudication of Economic, Social and Cultural Rights in Africa*, 8 PENN ST. J. L. & INT'L AFF. 579, 593 (2020).

> are expected to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. *I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter, [means that] the Charter cannot be relied upon*. On the contrary, Article 21 of our Constitution has recognized the right to assembly mentioned in Article 11 of the African [Banjul] Charter.[112]

Scholars have noted that "increasing judicial reliance on unincorporated treaties by courts in dualist States blurs the traditional distinction between monist and dualist States."[113] What is emerging in many dualist states, then, is "an uneasy tension between the formalities of strict dualist doctrine and the practical reality that courts in dualist States have developed a variety of strategies to facilitate judicial application of unincorporated and partially incorporated treaties."[114]

2. Monism and How Effect is Given to International Law in Domestic Courts

An important feature of the monist approach to the incorporation of international law into domestic or national legal systems is that "at least some treaties are incorporated into the domestic legal order without the need for any legislative act, other than the act authorizing the executive to conclude the treaty."[115] African countries, such as Egypt and South Africa, fit this definition of monist states.[116] In these states, "some form of legislative approval is required for at least some types of treaties before the executive is authorized to make a binding international commitment on behalf of the nation."[117] These similarities aside, however, "there are substantial differences among these States concerning the application of treaties within

112. Christian N. Okeke, *The Use of International Law in the Domestic Courts of Ghana and Nigeria*, 32 ARIZ. J. INT'L & COMP. L. 371, 411–12 (2015) (quoting New Patriotic Party v. Inspector Gen. of Police (1996-1997) GLR 729 ¶ 6 (SC) Ghana) (emphasis added).

113. SLOSS, *supra* note 74, at 360.

114. *Id.*

115. *Id.*

116. *Id.* at 361.

117. *Id.*

their national legal systems."[118]

An important difference between these states concerns the types of treaties that require the passage of enabling and implementing legislation before a treaty is incorporated into domestic law. The Constitution of the Republic of South Africa (1996) provides a default rule that mandates that an international agreement can bind the country only "after it has been approved by resolution in both the National Assembly and the National Council of Provinces."[119] There are, however, certain exceptions to this rule. As provided for in § 231(3), "[a]n international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time."[120] In addition, § 231(4) states that "[a]y international agreement becomes law in the Republic [of South Africa] when it is enacted into law by national legislation; *but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*."[121]

In Egypt, the constitution incorporates international treaties into domestic law without the need or requirement for enabling or implementing legislation. According to Article 151, "[t]he President of the Republic represents the state in foreign relations and *concludes treaties and ratifies them after the approval of the House of Representatives*. They shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution."[122] Thus, provided that the Egyptian House of Representatives has granted its consent, the President of the Republic has the constitutional authority to conclude and ratify international treaties, including those dealing with human rights.[123] Once ratified, the provisions of a treaty become part of

118. *Id.*

119. S. AFR. CONST., 1996, § 231(2).

120. *Id.* § 231(3).

121. *Id.* § 231(4) (emphasis added).

122. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, as amended, 2019, art. 151 (emphasis added).

123. Ryan Suto, *Human Rights Treaties in Egypt: As Good as the Government that Upholds Them*, THE TAHRIR INSTITUTE FOR MIDDLE EAST POLICY (Jan. 24, 2014), https://timep.org/commentary/analysis/human-rights-treaties-in-egypt-as-good-as-the-government-that-upholds-them/.

Egyptian domestic law without the need for enabling legislation.[124] However, in the case of treaties of "peace and alliance," as well as those affecting "the rights of sovereignty," the President of the Republic must submit them for approval through a nationwide referendum before they are ratified.[125]

In Egypt's constitutional system, "international treaties which have been ratified and approved by competent authorities automatically engender domestic legal effects and become judicially enforceable once they have been officially published."[126] According to Professor Islam Ibrahim Chiha, "[t]his position has long been maintained by Egyptian legal scholars of public international law and by the Court of Cassation precedents, on the basis that neither the 1971 Constitution nor the 2014 Constitution has required parliament to adopt implementing legislation to ratify and approve international conventions."[127]

Professor Chiha notes further that Egypt's approach, which grants "international law and domestic legislation equal authority, . . . seems to engender critical consequences in cases of conflict between national and international law, especially when an international convention has been ratified before the enactment of domestic legislation."[128] Thus, "an international law norm or obligation remains valid on the international level even if it is repealed domestically."[129] However, if such an international obligation is, indeed, repealed, this could "invoke Egypt's international responsibility for failure to fulfil its international commitments."[130] For example, according to Article 27 of the Vienna Convention, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[131]

In addition to the fact that Article 151 of the Egyptian Constitution of 2014 does not make any mention of "unwritten international law rules, including customary international law

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124. *Id.*

125. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, as amended, 2019, art. 151.

126. Islam Ibrahim Chiha, *Constitutionalism of International Human Rights Law in the Jurisprudence of the Egyptian Supreme Constitutional Court*, 32 ARAB L. Q. 242, 245 (2018).

127. *Id.*

128. *Id.* at 247.

129. *Id.*

130. *Id.*

131. Vienna Convention, *supra* note 11, art. 27.

and general principles recognized in civilized nations as a part of the applicable law in the national legal order,"[132] it also does not "provide for the binding force of such norms in the internal legal system."[133] However, the Egyptian Court of Cassation has held in several cases that since "Egypt is a member of the international community, national judges should apply norms of international law, notably international customary law, except in cases where these rules are in clear contrast with a public order rule."[134]

While all monist states recognize "the possibility, at least theoretically, that domestic courts can apply (at least some) treaties directly as law" and dualist states "permit only indirect judicial application of treaties," nevertheless, "there are several reasons why judicial practice exhibits many similarities between monist and dualist States."[135] First, domestic "courts in dualist States apply various strategies to facilitate judicial application of unincorporated and partially incorporated treaties. Second, courts in monist States often apply treaties indirectly as an aid to statutory or constitutional interpretation, rather than applying treaties directly as rules of decision to resolve disputed issues."[136] If "courts in monist States prefer indirect rather than direct application, this further erodes the practical significance of the distinction between monist and dualist States."[137]

Finally, courts in some monist states "have articulated a distinction between 'self-executing' and 'non-self-executing' treaties" and that "[w]hen domestic courts decide that a treaty is 'non-self-executing,' they sometimes behave as if the treaty has not been incorporated into domestic law even though the treaty, as a formal matter, has the status of law within the domestic legal system."[138] Hence, Sloss concluded, "just as judicial practice in some dualist States blurs the monist-dualist divide by applying unincorporated treaties as if they were incorporated, judicial practice in some monist States blurs the monist-dualist divide by handling formally incorporated treaties

132. Chiha, *supra* note 126, at 247.
133. *Id.*
134. *Id.*
135. Sloss, *supra* note 74, at 363.
136. *Id.*
137. *Id.*
138. *Id.* at 363–64.

as if they were unincorporated."[139]

C. INTERNATIONAL LAW AND THE INTERPRETATION OF NATIONAL STATUTES

In both monist and dualist states, domestic courts "frequently apply an interpretive presumption that statutes should be construed in conformity with the nation's international legal obligations, including obligations derived from both treaties and customary international law."[140] Referred to as the "presumption of conformity," it is defined as "a rule of legal interpretation whereby domestic law is read, wherever possible, consistently with international law and comity."[141] The application of this interpretive presumption is to ensure that the government conducts itself in a way that "conforms to the nation's international treaty obligations."[142]

But what are the threshold conditions needed to trigger the application of the interpretive presumption? It is generally agreed that courts may apply this presumption when confronted with cases in which "the statute is facially ambiguous."[143] The highest court in South Africa, the Constitutional Court ("CC)"), has held that it is not necessary to have an ambiguity in the legislative text in order for the "obligation of consistent interpretation to be activated."[144] In *Glenister v. President of the Republic of South Africa*, the CC of South Africa held as follows:

> A further provision of the Constitution that integrates international law into our law reinforces this conclusion. It is section 233, which, as we have already noted, demands any reasonable interpretation that is consistent with international law when legislation is interpreted. *There is, thus, no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law*. We do so willingly and in compliance

139. *Id.* at 364.

140. *Id.* at 368.

141. GIBRAN VAN ERT, USING THE INTERNATIONAL LAW IN CANADIAN COURTS 130 (2nd ed. 2008).

142. SLOSS, *supra* note 74, at 368.

143. *Id.*

144. *Id.*

with our constitutional duty.[145]

While the application of the interpretive "presumption is clearly transnationalist, especially in cases where the statute is not facially ambiguous," it is important to note that "judges with a more nationalist orientation sometimes avoid application of the presumption by declaring that a statute is unambiguous in cases where litigants argue that the statute could reasonably be interpreted in conformity with international treaty obligations."[146] Of course, in cases where litigants fail to raise or invoke a "possible treaty argument, or courts decline to address the argument explicitly," the presumption may not be applied.[147]

D. THE INTERPRETATION OF TREATIES

The national courts of both monist and dualist states are often called upon to interpret treaties. In dualist states, the need to interpret treaties usually arises when the legislative branch enacts an enabling law to domesticate a treaty.[148] In monist states, however, courts may be called upon to interpret a treaty when litigants ask the court to directly apply a treaty to their case and also when the treaty is "applied indirectly."[149] In Africa, as in other regions of the world, courts can choose "to adopt [either] a nationalist or transnationalist approach to treaty interpretation."[150]

A court that has adopted the transnationalist approach will "interpret treaties in accordance with the shared understanding of the parties."[151] In supporting their interpretations of particular treaty provisions, courts utilizing the transnationalist approach to treaty interpretation usually "cite the Vienna Convention on the Law of Treaties, decisions of foreign courts and international tribunals, as well as views adopted by nonjudicial international bodies."[152] However, courts that have adopted the nationalist approach usually argue that the

145. *Glenister v. President of the Republic of S. Afr. and Others* 2011 (3) SA 347 (CC) at 106 para. 202 (S. Afr.) (emphasis added).
146. SLOSS, *supra* note 74, at 369.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 369–70.

interpretation of treaties is "primarily an executive function, not a judicial function."[153]

Thus, courts that apply the nationalist approach often grant deference to the executive branch of government in matters involving the interpretation of treaties.[154] As a consequence, judicial rulings arrived at through this process tend to grant "greater weight to unilateral national policy interests, and less weight to the shared, multilateral understanding that guides transnationalist interpretations."[155] The nationalist approach, international legal scholars argue, is a minority approach used almost exclusively in the United States, where domestic courts "have adopted an explicit interpretive presumption favoring deference to the executive branch in treaty interpretation issues."[156]

An important issue that often arises in treaty interpretation is the protection given to the rights of private parties by treaties. Since transnationalist judges "recognize that many treaties are designed to protect the rights of private parties," they usually "interpret treaties in a manner that accords significant protection to treaty-based private rights."[157] Nationalist judges, on the other hand, "sometimes apply a presumption that treaties ordinarily regulate horizontal relations between States, not vertical relations between States and private parties."[158] An important outcome of the application of this presumption by nationalist courts is that the latter is likely to "construe vertical treaty provisions as if they were horizontal provisions, thereby denying protection for treaty-based private rights."[159] A nationalist judge can employ this strategy as a "convenient rationale for declining to apply treaty-based (vertical) constraints on government conduct."[160]

E. INTERPRETING NATIONAL CONSTITUTIONS

In Africa, courts in both monist and dualist countries routinely use international treaties and other provisions of

153. *Id.* at 370.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 371.
158. *Id.*
159. *Id.*
160. *Id.*

international law, including customary international law, as tools to interpret their national constitutions. In some African countries, domestic courts are constitutionally mandated to consider international law when they are called upon to interpret provisions of the constitution. For example, § 39(1) of the Constitution of South Africa (1996) specifically mandates that when interpreting the Bill of Rights, a South African "court, tribunal or forum . . . *must* consider international law."[161] In addition, courts "*may* consider foreign law."[162]

In conjunction with § 233, the Constitution ensures that the country's laws are interpreted to comply with international law, especially on issues dealing with human rights. According to § 233, "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[163]

Taking these constitutional provisions into consideration, South Africa's highest court—the CC—has considered international law as a tool to interpret the Bill of Rights in accordance with § 35(1) of the Interim Constitution (1993) and § 39(1)(b) of the Constitution of South Africa (1996). In *State v. Makwanyane*, a case that was decided under the Interim Constitution, Chief Justice Chaskalson, writing for the CC, established that, within the context of section 35(1) of the Interim Constitution, public international law includes "non-binding as well as binding law" and that "[t]hey may both be used under the *section* as tools of interpretation."[164]

The Court's judgment in *Makwanyane* also established that

> [i]nternational agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with

161. S. AFR. CONST., 1996, § 39(1)(b) (emphasis added).

162. *Id.* § 39(1)(c) (emphasis added). The Constitutional Court is South Africa's highest court and final arbiter in constitutional matters and is empowered to decide the constitutionality of legislative acts and executive conduct. *See Id.* at § 167 (3)(b). The Constitution also empowered the Court to determine the constitutionality of any amendment to the Constitution. *Id.* § 167(3)(d).

163. *Id.* § 233.

164. *State v. Makwanyane* 1995 (3) SA 391 (CC) at 24 para. 35 (S. Afr.). At the time, Chaskalson was Chief Justice of South Africa and President of the Constitutional Court.

> comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights . . . and the European Court of Human Rights . . . and in appropriate cases, reports of specialised agencies such as the International Labor Organization may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].[165]

Demichelle Petherbridge argued that "the [*Makwanyane*] judgment is also significant in its recognition of a generous breadth of sources, which includes soft law, in the interpretation of the Bill of Rights."[166] However, while "the Constitutional Court has engaged with international law in the interpretation of the Bill of Rights, it does not appear as though it has developed a clear methodological approach in respect of the consideration of international law subsequent to *Makwanyane*."[167]

Before this Article examines cases on the application of international law by domestic courts in African countries, it is necessary to provide an overview of the concept of international law.

III. WHAT IS INTERNATIONAL LAW?

A. INTRODUCTION

International law, which is also referred to as "the law of nations," "is the name of a body of rules which . . . regulate the conduct of states in their intercourse with one another."[168] International law, at its most basic level, functions to "secure the coexistence of sovereign States."[169] International law "creates the *ordering of societies and of relationships between societies*, and the body of rules and principles, through which the paradox

165. *Id.* at 24–25 para. 35.

166. Demichelle Petherbridge, The Role of International Law in the Interpretation of Socio-Economic Rights in South Africa (March 2015) (Doctor of Law dissertation, Stellenbosch University) (on file with the Stellenbosch University) at 5.

167. *Id.*

168. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 3 (2003).

169. VAUGHAN LOWE, INTERNATIONAL LAW: A VERY SHORT INTRODUCTION 2 (2015) [hereinafter LOWE, A SHORT INTRODUCTION].

of the chained man's defiant affirmation of his freedom is worked out on the international scale."[170] That ordering of societies and of relationships between societies is thought of by international legal scholars and lawyers "in terms of relations between States."[171] Whether democratic or authoritarian, "it is the State which stands as the most prominent social unit within which the rules and values that are the main external constraints on individual action are articulated."[172]

Here, the State is considered independent and sovereign, is not subject to the authority of any other "body," and freely engages in relations with other States.[173] States' political leaders regularly acknowledge, affirm "and observe the principles of sovereign equality and independence of States in their dealings with those in other countries."[174] In international law, the principle of sovereign equality is reflected in Article 2 of the Charter of the United Nations, which states that all Member States "shall act in accordance with [the Principle that the UN] is based on the principle of sovereign equality of all its Members."[175] The principles of "sovereign equality and independence of States . . . determine who can routinely tell whom to do what, with the expectation of obedience driven by a sense of obligation."[176] For example, domestic institutions, such as the police, the army, and other security forces, "routinely obey the laws and orders laid down by the central government of their own State, and not the laws and orders of any other State or body."[177] The principle of sovereignty implies "that all States are equal," regardless of the size of the land mass that they occupy or their economic or military strength.[178]

Under the principle of sovereign equality, Haïti, with an area of 27,750 square kilometers and a population of 11,334,637 (2022 est.) and the poorest and least developed country in the Western Hemisphere, cannot be dictated to by the United States, which has an area of 9,833,517 square kilometers and a population of 337,341,954 (2022 est.) and is the richest and most

170. *Id.* (emphasis added).
171. *Id.*
172. *Id.*
173. *See id.* at 4.
174. *Id.*
175. U.N. Charter, *supra* note 2, art. 2 ¶ 1.
176. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 4.
177. *Id.*
178. *Id.*

developed country in the Western Hemisphere.[179] Both Haïti and the United States are equal sovereign States, and each one of them has only one vote as a Member State in the UN General Assembly. The United States cannot, for example, compel Haïti to sign and ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment any more than Haïti can force the United States to act similarly.

Sovereign equality is very important to the international legal system and provides the "fundamental features of the architecture of the [international legal] system."[180] In most of the international organizations where decision-making is based on a majority voting rule, each State has one vote and that vote is equal to that of any other State.[181] In fact, "[e]very State is entitled to the same degree of immunity for its actions and for its diplomats from the jurisdiction of every other State."[182]

However, some States can play a much more active and influential role in certain international matters than others. The ability to do so, however, is not limited to economically and militarily powerful States, such as the United States, France, the UK, the Russian Federation, and the People's Republic of China (PRC). As argued by international legal scholar Vaughan Lowe, "[a] visionary and skilled ambassador or Foreign Minister can wield an influence wholly disproportionate to the size of the State that he or she represents."[183] This is evident in the significant contributions made by relatively small States, such as Malta, Peru, Chile, and Ecuador, in the development of international law, particularly in the law of the sea.[184] However, throughout the world, many States "commonly defer to the wishes of a local, regional, or global superpower—much as

179. CIA, *United States*, THE WORLD FACTBOOK (2022), https://www.cia.gov/the-world-factbook/about/archives/2022/countries/united-states/; *see* CIA, *Haiti*, THE WORLD FACTBOOK (2022), https://www.cia.gov/the-world-factbook/about/archives/2022/countries/haiti/summaries.

180. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 7.

181. Of course, there are exceptions. In the International Monetary Fund (IMF), voting power and decision-making reflect the IMF Member States' relative economic positions. *See generally* LEO VAN HOUTVEN, GOVERNANCE OF THE IMF: DECISION MAKING, INSTITUTIONAL OVERSIGHT, TRANSPARENCY, AND ACCOUNTABILITY 5 (2002) (examining the IMF's voting system).

182. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 7.

183. *Id.*

184. *Id.* (noting the role played by Malta in developing the law of the sea). *See generally* TIRZA MEYER, ELISABETH MANN BORGESE AND THE LAW OF THE SEA 63–85 (2022) (analyzing the effect of the Maltese initiative on ocean governance).

individuals who have in principle the dignity of independence and equality before the law tend to show a particular regard for the wishes of employers, police officers, hostage-takers, and others in a position to do them significant good or significant harm."[185]

Of course, as was seen in the case of the Union of Soviet Socialist Republics ("USSR"), Yugoslavia, Sudan, and Ethiopia, a State that has existed for many years as a single, sovereign economic and political unit can, for a variety of reasons, fragment into smaller independent units. For example, in 2011, Sudan, which had existed as a single independent unit since it gained independence from the Anglo-Egyptian Condominium on January 1, 1956, split into two independent countries—South Sudan and the Republic of Sudan.[186] Similarly, the USSR, which came into being on December 30, 1922, was officially dissolved on December 26, 1991, and its fifteen constituent republics turned into independent and sovereign States.[187]

Scholars of international politics note that "[i]t is the arbitrariness of these groupings that lies behind many international conflicts."[188] For example, several separatist movements in Africa (e.g., in Cameroon, Central African Republic, Democratic Republic of Congo, Ghana, and Mali) claim that their members were involuntarily incorporated by colonialism into the nations of which they are presently members and that they have the right to unilateral secession so that they can form their own independent States.[189]

The relations between various groups within a country are governed by national constitutional law, which also determines the structure of the State, including the relationship between the people and the government, as well as between various branches of government—the executive, legislative, and judicial

185. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 4–5.

186. *See generally* ØYSTEIN H. ROLANDSEN & M. W. DALY, A HISTORY OF SOUTH SUDAN 73, 151–59 (2016) (providing an overview of the struggle for and independence of South Sudan from the Republic of Sudan). *See also* M. W. DALY, IMPERIAL SUDAN: THE ANGLO-EGYPTIAN CONDOMINIUM, 1934–1956, at 243–80 (1991) (providing an overview of the independence of Sudan).

187. VLADISLAV M. ZUBOK, COLLAPSE: THE FALL OF THE SOVIET UNION 4, 51 (2021) (examining the implosion of the USSR).

188. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 5.

189. *See, e.g.*, John Mukum Mbaku, *International Law and the Anglophone Problem in Cameroon: Federalism, Secession or the Status Quo?*, 42 SUFFOLK TRANSNAT'L L. REV. 1, 91–121 (2019) (examining efforts by Cameroon's Anglophone Regions to secede and form their own independent State).

branches. African Union (AU) law governs the continental organization's structure and the AU's relationship with its Member States and the latter's domestic institutions, including national courts, legislatures, and governments. International law, on the other hand, governs the relationship between independent sovereign States.[190]

The principle of sovereign equality and its implications have been incorporated into some specific rules of international law. The Vienna Convention on the Law of Treaties, for example, "stipulates that treaties procured by coercion are void, thus reflecting the principle that each State must freely give its consent to be bound by a treaty and that no State has the right to impose its will on another."[191] Principles that govern the jurisdiction of States protect the equality of States and significantly enhance "the ability of each State to decide for itself what kind of society it will seek to maintain within its borders through the operation of its own domestic law (or 'municipal law', as the law applicable within a State or part of a State– e.g., English law or Scots law)."[192]

To be a State, an entity must first have a permanent population. Second, it must have a physical territory, regardless of its size. Third, there must be an effective government. Finally, a State must have the capacity to enter into relations with other States, a principle that is explained to mean that the entity is free to decide its own foreign policy, as well as how to conduct it. That is, an entity that enjoys Statehood under international law is, by definition, not subject to control by another State, which is another "manifestation of the sovereign equality principle."[193]

Some international lawyers and legal scholars have added a fifth requirement for an entity to be recognized as a State—it is called "legitimacy" and implies that "the entity has achieved the requisite independence in a manner consistent with international law."[194] The principle of equal rights and self-determination of peoples, which is enshrined in Article 1 of the Charter of the United Nations, "gives a positive right to Statehood."[195] Self-determination, as a principle in international

190. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 6.

191. See *id.* at 8 for quoted commentary on the Vienna Convention. *See also* Vienna Convention, *supra* note 11, arts. 51–52.

192. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 8.

193. *Id.* at 12.

194. *Id.*

195. *Id.* at 12–13.

law, attaches to "a people." Although there is no authoritative or generally accepted definition for "a people," some of the characteristics of a people include a "shared and distinct ethnicity, language, culture," and a common historical experience.[196]

International law acknowledges two types of self-determination—*internal* and *external*. Internal self-determination is defined as "the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime—which is much more than choosing among what is on offer perhaps from one political or economic position only."[197] The right to internal self-determination belongs to a people that is part of a sovereign State and hence, implicates "the right to have a representative and democratic government; the rights of *racial* or *religious* groups living in States which grossly discriminate against them; the rights of *ethnic groups*, *linguistic minorities*, *indigenous populations*, and *national peoples living in federated states*."[198]

In the non-colonial context, external self-determination, which may involve remedial secession, "can only take place with the approval of the parent state" and "[s]uch approval may be given by the constitution of the parent state, or in some form, either prior to the declaration of independence or following an initial unilateral declaration."[199] Some international legal scholars have argued that since the parent-state must grant approval, there really is no right to secession in international law.[200] Nevertheless, the right of States to territorial integrity may not be "absolute and unqualified."[201] Since the establishment of the United Nations and the subsequent adoption of the UDHR, there have been significant developments in international law, particularly international human rights law. These developments have produced the concept of *remedial secession*, under which "gross and systematic human rights violations can lead a state to lose part of its

196. *Id.* at 13.

197. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 101 (1995).

198. *Id.* at 102.

199. Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST. ANTONY'S INT'L REV. 37, 38 (2010).

200. *Id.*

201. *Id.*

territory if oppression is directed against a specific people."[202]

Entities may meet the criteria for Statehood, and a people may be entitled to the right to self-determination. However, they may not be recognized by the international community as a State. Most importantly, even if an entity meets the legal criteria for Statehood, existing States cannot be compelled to recognize this entity as a State. The act of recognition "remains a high political act; and one State may refuse to recognize another purely as a matter of political discretion."[203] For example, "[a] State may decide that at a given time political stability and justice are better served by non-recognition, as some States do not recognize Palestine and several States refuse to recognize Israel, although both of them meet the legal criteria of Statehood."[204]

State recognition may be manifested by a formal activity, such as the exchange of diplomatic representatives. An unrecognized State is not likely to be accepted by those States that do not recognize it as a party to an international treaty. In addition, States are not likely to accept diplomatic representatives from an unrecognized State. While States may not invade the territory of an unrecognized State, they can "support or oppose an application from an entity to become a Member State in the United Nations and other international bodies that are open only to States."[205]

The key point here is that the world, in its present configuration, is divided up primarily into States, and "[t]hese States are the repositories of the sovereign independence which gives those who govern the States the right to choose and determine the nature of the social order which prevails within them."[206]

B. WHAT IS THE SCOPE OF INTERNATIONAL LAW

According to Professor Vaughan Lowe, "[t]he central core of international law may be described as the body of rules and principles that determine the rights and duties of States, primarily in respect of their dealings with other States and the

202. *Id.*
203. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 16.
204. *Id.*
205. *Id.*
206. LOWE, A SHORT INTRODUCTION, *supra* note 169, at 17.

citizens of other States, and that determine what *is* a State—which political entities, such as Australia and Palestine and Quebec, count as States, and when and within what geographical territory they exist."[207] Although conventional international law is "concerned with the rights and duties of States towards one another . . . the principles, materials and techniques of international law are applied much more widely."[208]

Although international law differs from domestic laws, there is "no absolute line that sets the boundaries between" the two as "some bodies of law and legal procedures have characteristics of each."[209] While international lawyers are concerned primarily with "treaties and customary international law," municipal lawyers concern themselves largely with "statutes and reports of court decisions."[210] However, national laws, which include statutes and the constitution, are based on "some notion of sovereignty."[211] Municipal courts are bound by the national Constitution and defer to the legislative branch of government, even in States such as the United States, where courts can strike down statutes that are determined to be unconstitutional. Professor Lowe noted that the "principle of sovereignty underpins national legal systems: it answers the question, who's in charge here? It affirms the right of each State to be different, so that conduct that is lawful in one, such as smoking cannabis or stoning someone to death, may be punishable as a crime in another."[212]

International law is based on the principle that "all States, whether they like it or not, are subject to international law and must comply with it."[213] However, international law does not suppress national sovereignty. Instead, it "seeks to secure the conditions that allow sovereign States to co-exist, and to enable each State to choose what kind of society will exist within its borders."[214] International law accomplishes this by "regulating relations between States."[215] With respect to relations between

207. VAUGHAN LOWE, INTERNATIONAL LAW 5 (2007) (emphasis) [hereinafter LOWE, INTERNATIONAL LAW].
208. *Id.*
209. *Id.* at 6.
210. *Id.*
211. *Id.*
212. *Id.* at 7.
213. *Id.*
214. *Id.*
215. *Id.*

provinces or towns within a State, international law leaves that to national law and concerns itself only with relations between States.

The roots of international law can be found in the "conscious efforts of States to co-operate in dealing with certain problems," which include "the making of war and peace and alliances, diplomatic exchanges, trade, and the return of fugitive offenders."[216] Eventually, "these practices and principles were reduced to writing and systematized, and the principles of the Law of Nations (as international law used to be known) were set out in textbooks, often intermingled with discussions of the principles of domestic government and right behavior in general."[217]

The coming into being of the United Nations in 1945 and the subsequent adoption of the UDHR in 1948, as well as the adoption of various regional human rights instruments, such as the American Declaration of the Rights of Man in 1948 and the European Convention on Human Rights in 1950, effectively marked "the inception of modern international human rights law."[218] In 1981, the OAU adopted the African Charter on Human and Peoples' Rights (Banjul Charter), which is now the continent's premier human rights instrument.[219]

The development of international law has been incremental, with States cooperating to adopt treaties and conventions dealing with or addressing specific issues, sometimes with the help of international institutions, such as the United Nations. For example, the immediate post-WW II period saw the creation of the United Nations, the Bretton Woods system of international monetary management, the General Agreement on Tariffs and Trade (GATT), as well as other agreements to govern international trade, primarily in primary commodities. In addition, international agreements were adopted to deal with economic and environmental issues.[220]

The growth of international organizations contributed significantly to the expansion of the scope of international law. One such important international organization was the tribunal of arbitration that was established by Article I of the Treaty of Washington of May 8, 1871, to settle the United States' claims

216. *Id.* at 8–9.
217. *Id.* at 9.
218. LOWE, INTERNATIONAL LAW, *supra* note 207, at 11–12.
219. Banjul Charter, *supra* note 44.
220. LOWE, INTERNATIONAL LAW, *supra* note 207, at 1213.

against Great Britain for the damage inflicted upon the Union by the confederate warship *Alabama* during the American Civil War.[221] The path to international adjudication was pioneered by the establishment of the Permanent Court of International Justice ("PCIJ") under the auspices of the League of Nations and was succeeded by the International Court of Justice ("ICJ") under the United Nations. Other international courts and tribunals include "the dispute panels established by the World Trade Organization (WTO), the International Tribunal for the Law of the Sea (ITLOS), and many others.[222]

Today, international organizations, individuals, companies, and groups (e.g., the Anglophones of Cameroon, the Ogiek of Kenya, the UK's Scots, and Australia's First Nations) are all entities that are the subject matter of international law. International law has also developed to provide protection for peoples whose rights are under threat (e.g., refugee and humanitarian law). International law then "governs all activities of States that involve a foreign element: that is to say, all dealings by public authorities with foreign States or foreign citizens or with matters outside the borders of the State."[223]

Unlike municipal law, in which there is a recognized governmental authority, international law does not have such an authority—there is no police force, there is no legislature, and there is no "compulsory system of courts before which States can be compelled to appear."[224] However, most States voluntarily "comply with most of the rules of international law most of the time," and they do so for a variety of reasons.[225] International law is usually not imposed, say, by some external legislature, on any State against its will. Instead, rules of international law arise primarily either from treaties or customary international law. Treaties are usually entered into voluntarily by States that believe that doing so will confer on them more benefits than costs. Thus, a treaty is a commitment that a State has already decided it is in its best interest to comply with the terms of the agreement because doing so will generate more benefits for the

221. *See* Alabama Claims of the United States of America Against Great Britain, 31 R.I.A.A. 125, 125 (1871). The Alabama had been built in Birkenhead (UK) and delivered to the Confederacy in what was argued by the United States as a breach of Britain's obligations as a neutral party in the American Civil War. *See* LOWE, INTERNATIONAL LAW, *supra* note 207, at 13.

222. LOWE, INTERNATIONAL LAW, *supra* note 207, at 14.

223. *Id.* at 18.

224. *Id.*

225. *Id.*

country than costs.[226]

Customary international law, on the other hand, evolved from what States habitually do—for example, the evolution through the practice of the "right" or "proper" way to treat diplomatic envoys. Because international customary law is rooted in the practices of States, "it is no surprise that States should habitually comply with customary international law."[227] Thus, one reason why States voluntarily obey international law is that "[States] make the rules to suit them" and provide them with more benefits than costs.[228] That is, "[i]nternational law is made by States to serve their interests, so it is likely that it will be in their [best] interest to comply with it."[229] In addition, noted Professor Lowe, "[i]nternational law constrains errant States, which seek to break away from established patterns of behavior or to abandon treaty commitment they have made."[230]

C. SOURCES OF INTERNATIONAL LAW

According to Article 38 of the Statute of the ICJ:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: *(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; *(b)* international custom, as evidence of a general practice accepted as law; *(c)* the general principles of law recognized by civilized nations; *(d)* subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree

226. *Id.* at 19. Of course, most treaties have provisions that provide modalities for Contracting Parties to withdraw from the treaty if they so wish. *See, e.g.*, ANTONIO MORELLI, WITHDRAWAL FROM MULTILATERAL TREATIES (2022) (examining the legal framework for withdrawal from multilateral treaties).

227. LOWE, INTERNATIONAL LAW, *supra* note 207, at 19.

228. *Id.*

229. *Id.* at 20.

230. *Id.* at 19–20.

thereto. [231]

While in form, these provisions are:

> merely a directive to a particular international body as to what rules it is to apply, the opening phrase stating that the Court's function is 'to decide in accordance with international law' (which was in fact added to the Statute of the PCIJ when it was readopted as the ICJ Statute) confirms that the application of sub-paragraphs *(a)* and *(d)* will result in international law being applied; that is, no international law is to be found elsewhere, and that everything pointed to as being such by those sub-paragraphs is indeed international law.[232]

Some international legal scholars and jurists have argued that "subparagraphs *(a)* to *(d)* of Article 38, paragraph 1, are not exhaustive of 'international law' as more generally referred to in Article 36, paragraph 2 *(b)*" and that "[s]ince the Court's function is 'to decide in accordance with international law,' if a principle can be shown to form part of international law the Court must decide in accordance with that principle where relevant, whether or not it falls under subparagraphs *(a)* to *(d)* of Article 38, paragraph 1."[233]

Treaties and conventions are another source of international law. They impose "agreed duties on the parties to them."[234] The binding effect of treaties is expressed by the principle referred to as *pacta sunt servanda*. According to Article 26 of the Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[235]

Article 38 of the Statute of the ICJ describes international custom as "evidence of a general practice accepted as law."[236] Many international lawyers note that several widely accepted and respected practices exist in the conduct of international

231. Charter of the United Nation and Statute of the International Court of Justice art. 38, ¶¶ 1–2, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

232. HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 5–6 (1st ed. 2014).

233. *Id.* at 6 (quoting MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 81 (2007)).

234. *Id.*

235. Vienna Convention, *supra* note 11, art. 26.

236. ICJ Statute, *supra* note 231, art. 38, ¶ 1(b).

affairs. For example, "Heads of State are consistently treated as immune from arrest and prosecution when they visit foreign States, no matter how bestial the offenses they have directed in their home States."[237] This process of "according immunity from arrest and prosecution to visiting Heads of State is long established and has generated a rule of customary international law so that States are legally obliged to accord such immunity."[238]

However, it is important to note that there are many other well-established "patterns of behavior and expectations that, despite their consistency and clarity, are not regarded as manifestations of rules of law."[239] An important function of the doctrine of sources of international law "is to distinguish those social conventions that are legally binding from those that are not."[240] That distinction lies in the fact that Article 38 of the Statute of the ICJ requires that the general practice be "accepted as law."[241] Thus, the States engaged in the practice in question must generally regard their practice "as an expression of a rule of international law and that the action is in conformity with it."[242] The belief in "the conformity of the practice with international law is known as the opinion juris."[243] *Opinio juris* (the psychological element) and a general practice of States (the material element) are "the two essential components that together generate rules of international customary law."[244]

But what about States that persistently object to rules of customary international law? International lawyers have argued that persistent objection is "an anachronistic survival of the nineteenth century consensualist view of international law" and that most of these objectors eventually come to recognize the high costs of "holding out" and eventually "seek an acceptable compromise and come into line."[245] Then, there are the peremptory rules of international law, which are also known as rules of *jus cogens*. These rules admit no derogation, which

237. LOWE, INTERNATIONAL LAW, *supra* note 207, at 38.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 58. For example, in the 1980s, the United States abandoned its opposition to maritime claims in excess of three miles "in the wake of a new consensus that preserved passage rights through the wider maritime zone." *Id.*

means that "States may not escape their binding force either by persistent objection or by making agreements to disregard the rule."[246] Accepted examples include "the prohibitions of the waging of aggressive war, and of genocide, and of slavery, and of piracy."[247]

According to Article 53 of the Vienna Convention on the Law of Treaties, a rule of *jus cogens* 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."[248] Although the international community of States as a whole has the responsibility to determine what constitutes "peremptory rules of international law, it is important to note that "disputes over questions of the effect of jus cogens on treaties may ultimately be referred to the ICJ for decision."[249]

Treaties are another source of international law. Treaties may come by other names, including a Treaty, a Convention, a Covenant, an Exchange of Notes, a Memorandum of Understanding, a Charter, and other names.[250] The law of treaties has been codified in the Vienna Convention on the Law of Treaties, 1969, and applies to all these agreements. In Article 38 of the Statute of the ICJ, treaties are listed first as a source of international law.[251] Treaties are usually negotiated on behalf of States by civil servants and other political appointees who have legal competence in the treaty's subject matter. Usually, a delegation, which is made up of "officials from the various Ministries concerned with the subject matter of the treaty, now often accompanied by representatives of industry and of NGOs, will attend the drafting conference."[252]

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246. *Id.* at 59.

247. *Id.*

248. Vienna Convention, *supra* note 11, art. 53.

249. LOWE, INTERNATIONAL LAW, *supra* note 207, at 59.

250. *Id.* at 64.

251. *See* Vienna Convention, *supra* note 11, art. 38(1)(a). While most of today's treaties are concluded between States, the latter are not the only ones that may conclude treaties. For example, during the colonial period, European countries, such as Britain and Germany, concluded treaties with African Kingdoms. *See, e.g.*, HARRY RUDOLPH RUDIN, GERMANS IN THE CAMEROONS, 1884–1914: A CASE STUDY IN MODERN IMPERIALISM (1938) (noting the signing of treaties between various kings on the Cameroon River District to found the Germany colony of Kamerun in 1884).

252. LOWE, INTERNATIONAL LAW, *supra* note 207, at 66.

After the delegates have agreed on a text that "commands the highest level of acceptance," they would then proceed to sign the text.[253] The signing of the text by delegates, however, only signifies authentication of the text and not ratification or acceptance of the agreement by States Parties to it. Ratification of treaties differs from State to State and is usually dependent on constitutional requirements. In South Africa, for example, an international agreement binds the country only after it has been "approved by resolution in both the National Assembly and the National Council of Provinces."[254]

Once the negotiation has been concluded, each State Party has the option to accept the treaty and hence proceed to ratify it or reject it. However, some States Parties may seek a third option, which involves accepting the treaty but modifying some provisions "in so far as [these provisions apply] to themselves."[255] Modification of treaties is usually affected through a process referred to as ratification subject to reservation. In doing so, the ratifying State Party would include "a statement that excludes or modifies the legal effect of certain provisions of the treaty in their application to that State."[256]

For example, in ratifying the African Charter on the Rights and Welfare of the Child ("African Child Charter"), the Government of Sudan made declarations and reservations that could be considered major obstacles to the full realization of the rights guaranteed by the African Child Charter.[257] In ratifying the African Child Charter, Sudan declared that it did not consider itself bound by the following articles: Article 10 (protection of privacy), Article 11(6) (education of children who become pregnant before completing their education), and Article 21(2) (child marriage and betrothal of girls and boys).[258]

With respect to the interpretation of a treaty, States Parties are encouraged to "adopt a robust approach by the Vienna Convention on the Law of Treaties, whose provisions on interpretation are frequently cited" and whose Article 31 states: "A treaty shall be interpreted in good faith in accordance with

253. *Id.*

254. S. AFR. CONST., 1996, § 231(2).

255. LOWE, INTERNATIONAL LAW, *supra* note 207, at 68.

256. *Id.*

257. Org. of African Unity [OAU], African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter African Child Charter].

258. *Id.* at 30.

the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[259] The Vienna Convention also "describes the categories of evidence that may be referred to in order to establish the 'context' (and presumably also the 'object and purpose') of the treaty, and to specify 'supplementary means of interpretation' including the *travaux préparatoires* that may be used to 'confirm' the ordinary meaning or resolve ambiguities left by a reading based on the ordinary meaning."[260] Professor Lowe states that "[i]f one were to try to distill a rule of interpretation from what tribunals actually do, . . . it would probably be something like 'interpret the treaty as reasonable parties would have interpreted it if they had faced the questions now before the court.'"[261]

Although treaties are binding on all States or Contracting Parties, there are circumstances in which a treaty can cease to bind a State Party. For example, "[i]f a treaty, valid when made, conflicts with a peremptory norm that emerges after the treaty was made, it automatically becomes void and terminates."[262] As a consequence, rules of *jus cogens* (i.e., peremptory norms) have "a potentially destabilizing effect upon treaty and other relations between States, which is one reason why they remain controversial."[263] Article 61 also provides another ground for terminating or withdrawing from a treaty. According to Article 61:

> A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.[264]

Impossibility of performance, however, "may not be invoked by a party as a ground for terminating, withdrawing from or

259. LOWE, INTERNATIONAL LAW, *supra* note 207, at 73–74 (citing Vienna Convention, *supra* note 11, art. 31.

260. *Id.* at 74.

261. *Id.*

262. *Id.* at 77; *see e.g.*, Aloeboetoe et al. Case, Judgment, Inter-Am Ct. H.R. (ser. C) No. 11, ¶¶ 56–57 (Dec. 4, 1991).

263. LOWE, INTERNATIONAL LAW, *supra* note 207, at 77.

264. Vienna Convention, *supra* note 11, art. 61(1).

suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."[265] A valid ground for terminating or withdrawing from a treaty is a fundamental change of circumstances, as provided for in Article 62 of the Vienna Convention.[266] However, for the fundamental change doctrine to operate, "the change must have been unforeseen."[267]

The Vienna Convention, through Article 60, also permits the termination of the operation of a treaty because of a material breach by one of its parties. Article 60 states that "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."[268] In the case of a multilateral treaty, a material breach "by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State; or (ii) as between all parties."[269]

A material breach of a treaty is defined as "(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."[270] As made clear in the *Case Concerning the Air Service Agreement* dispute between France and the United States, "[t]he right to terminate or suspend bilateral treaties for material breach is well established."[271] However, the most common way in which a State Party is released from its treaty obligations is "termination in accordance with the express or implied terms of the treaty."[272] The Vienna Convention provides as follows:

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or

265. *Id.* art. 61(2).
266. *Id.* art. 62.
267. LOWE, INTERNATIONAL LAW, *supra* note 207, at 77.
268. Vienna Convention, *supra* note 11, art. 60(1).
269. *Id.* art. 60(2)(a).
270. *Id.* art. 60(3).
271. LOWE, INTERNATIONAL LAW, *supra* note 207, at 78 (citing Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France, Arb. Trib. (Dec. 9, 1978)).
272. *Id.* at 79.

> withdrawal unless: (a) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) A right of denunciation or withdrawal may be implied by the nature of the treaty.
>
> 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.[273]

Professor Lowe notes that "treaties establishing borders are examples of treaties that will never be held to have an implied right of denunciation."[274] However, "[a] bilateral treaty of friendship and co-operation, on the other hand, may well be thought to be of a character that implies a right to terminate it on notice."[275] Although not classified as part of the Law of Treaties, the defense of necessity operates to "'preclude the wrongfulness' of acts taken by a State that are the only means for the State to safeguard an essential interest against a grave and imminent peril."[276] This defense, however, is "available only as long as the act does not seriously impair an essential interest of a State towards which the obligation exists, or of the international community as a whole."[277] The necessity defense is enshrined in the United Nations General Assembly Resolution on the Responsibility of States for Internationally Wrongful Acts.[278]

In general, treaties only bind States Parties to them. In principle, then, they cannot bind or impose obligations on third States without their consent. The latter effectively creates "an extension of the treaty relationship."[279] According to Article 36 of the Vienna Convention: "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise

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273. Vienna Convention, *supra* note 11, art. 56(1)–(2).
274. LOWE, INTERNATIONAL LAW, *supra* note 207, at 79.
275. *Id.*
276. *Id.* at 80.
277. *Id.*
278. G.A. Res 56/83 (Dec. 12, 2001).
279. LOWE, INTERNATIONAL LAW, *supra* note 207, at 81.

provides."[280] It must be established, however, that the Parties to the Treaty intended for the third State "to have a right, and not merely a benefit, under the treaty."[281]

Article 38 of the Statute of the ICJ lists "the general principles of law recognized by civilized nations" as the third source of international law.[282] While it is easier and more compelling to adjudicate cases by "holding States to explicit rules to which they have signed up in a treaty and to rules of customary international law which bind all States," general principles of law recognized by civilized nations are still an important source of international law.[283] International lawyers have argued that "[n]ational and international law are not separate systems, |" which are "isolated one from the other" but that they are "deeply interconnected," and that "the techniques and principles and practices of national laws permeate international law."[284]

Article 38(1)(d) of the Statute of the ICJ states that judicial decisions are a subsidiary way of determining the rules of law.[285] In international law, unlike the situation in common law States, there is no doctrine of *stare decisis*. In fact, according to Article 59 of the Statute of the ICJ, its decisions have "no binding force except between the parties and in respect of that particular case."[286] However, the ICJ frequently makes references to its own past decisions, and, in addition, most international tribunals cite ICJ decisions as a guide to determining the content of international law. Thus, judicial decisions do not lack importance in the determination of international law.[287]

Although decisions of international courts, such as the ICJ, are generally considered more authoritative sources or evidence of international law, those of municipal courts can also be as important. The decisions of the courts of a State represent an important part of its practice and hence, can contribute directly to the development of customary international law.[288]

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280. Vienna Convention, *supra* note 11, art. 36(1).

281. LOWE, INTERNATIONAL LAW, *supra* note 207, at 81.

282. ICJ Statute, *supra* note 231, art. 38(1)(c).

283. LOWE, INTERNATIONAL LAW, *supra* note 207, at 87.

284. *Id.* at 87–88.

285. ICJ Statute, *supra* note 231, art. 38(1)(d).

286. *Id.* art. 59.

287. INT'L CT. JUST., THE INTERNATIONAL COURT OF JUSTICE HANDBOOK 97 (2018) (noting that the ICJ frequently makes references to its own jurisprudence in the reasoning of its own decisions).

288. *See generally* SOURCES OF STATE PRACTICE IN INTERNATIONAL LAW

The interest of this Article is the application of international law in municipal courts in Africa. Hence, the next section will be devoted to examining cases that deal with the application of international law, including especially international human rights law, from courts in different African countries.

IV. AFRICAN CASES ON THE APPLICATION OF INTERNATIONAL LAW BY MUNICIPAL COURTS

A. INTRODUCTION

In the early-1990s, pro-democracy movements emerged to promote institutional reforms in many African countries. These movements were interested in creating constitutions, which they believed would "provide the effective foundation for constitutionalism, democracy, the rule of law, the protection of fundamental human rights, and good governance."[289] Since then, many African countries, including South Africa, which emerged from the racially-based apartheid system in 1994, have developed and adopted constitutions that include a bill of rights. Many of these bills of rights are based on international human rights instruments, such as the Universal Declaration of Human Rights, the ICCPR, and the ICESCR. For example, South Africa's bill of rights "focuses on individual rights and endorses the basic civil and political rights found in most international instruments and bills of rights."[290]

In the early-1990s, South Africans engaged in the "unprecedented negotiation of a new dispensation in South Africa, resulting in profound changes to the country's social, political, and economic structures."[291] As explained by Professor Jeremy Sarkin, "[i]n drafting the Constitution, South Africa followed the recent trend discernible elsewhere of borrowing from international instruments, national constitutions and international and foreign decisions in order to benefit from

(Ralph F. Gaebler & Alison A. Shea eds., 2014) (presenting a series of essays that examines how practice in several States contributes to the formation of customary international law).

289. Mukum Mbaku, *Limits on Sovereignty*, *supra* note 79, at 94.

290. John Dugard, *A Bill of Rights for South Africa*, 23 CORNELL INT'L L.J. 441, 449 (1990).

291. Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. Const. L. 176, 176 (1998).

lessons learned by others."[292]

The process of drafting the Constitution, including the development of the bill of rights, was affected substantially by "international and foreign experience."[293] Additionally, international and comparative laws and decisions have already "had a major effect on the constitutional and human rights adjudication that has taken place [in South Africa] since 1994."[294] For example, in *State v. Makwanyane and Mchunu*, a case that was decided under the Interim Constitution, the CC used international and foreign comparative law as interpretive tools to decide on the constitutionality of the death penalty.[295]

Although South Africa's permanent constitution "enjoins the courts to consider international law and makes it permissible to apply foreign law," the country's courts "may depart from these laws."[296] Thus, while post-apartheid courts have relied on international and comparative law, they have "also often departed from these positions or quoted from them selectively in support of the decision being handed down."[297]

Until the coming into effect of the Interim Constitution in 1993, international and comparative law had not always been welcomed in South Africa. During the apartheid period in South Africa, the legal system consisted of Roman-Dutch law elements of the common law of England and Wales.[298] Before the official abolition of the apartheid system in South Africa, the country did not have much regard for international and comparative law.[299] In addition to the fact that the international community considered apartheid South Africa a "pariah" State, Pretoria had virtually no regard for international organizations, including the United Nations.[300] The apartheid regime's disdain for international law and institutions was reflected in the South African Law Commission's 1989 statement on group and human rights:

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292. *Id.* at 177.
293. *Id.*
294. *Id.*
295. *State v. Makwanyane* 1995 (3) SA 391 (CC) at 23 para. 34 (S. Afr.); S. AFR. (INTERIM) CONST., 1993.
296. S. AFR. CONST., 1996; Sarkin, *supra* note 291, at 178.
297. Sarkin, *supra* note 291, at 178.
298. *Id.* at 179.
299. *Id.*
300. *Id.*

> It cannot be envisaged that human rights norms as enshrined in international law can to any extent play a part—let alone a significant part—in the decision of the protection of group and individual rights in South Africa. *Safety does not lie in the hope that our courts will apply the norms of international law*.[301]

Professor Sarkin has noted that this view that international law was irrelevant to law in South Africa was "grounded in the fact that for almost half a century the apartheid state had defied the United Nations and dismissed its Universal Declaration of Human Rights as communist propaganda."[302] In addition, noted Professor Sarkin, the apartheid regime "also vilified the declarations and resolutions of various United Nations agencies," a process that effectively isolated the country's lawyers and judges and placed them in a position in which they generally lacked "knowledge and experience about the meaning of [international law and norms], about how they came to be adopted, and about how they could shape and influence the content of South African law once a constitutional system became the order of the day."[303] This knowledge gap among apartheid South African lawyers and judges, noted Professor Sarkin, "created an opportunity for lawyers from other countries to participate in different ways in the drafting of both the interim and final Constitutions."[304]

After a democratic South Africa rejoined "the community of nations, previously scorned international covenants and other documents [were] signed and ratified."[305] As a consequence, international and comparative law have "taken on greater

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301. *Id.* (quoting S. Afr. L. Comm'n, *Group and Human Rights* at 182 (Working Paper No. 25, Project 58, 1989)) (emphasis added).

302. *Id.*; *see also* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 436 (3d ed. 2010) (explaining that Apartheid South Africa's approach to international law was like that adopted by conservatives in the United States in the 1950s). At that time, the legal system in the United States, like that in apartheid South Africa, was characterized by "segregation" and "racially discriminatory practices." DUNOFF ET AL., *supra*, at 436. American conservatives "in the 1950s feared that rapidly developing international human rights norms would threaten segregation and other racially discriminatory practices then prevalent in the United States." DUNOFF ET AL., *supra*, at 436.

303. Sarkin, *supra* note 291, at 179–80.

304. *Id.* at 180.

305. *Id.*at 181.

significance than before."[306] This is reflected in § 232 of the Constitution of South Africa, 1996, which states that "[c]ustomary international law is law in the Republic [of South Africa] unless it is inconsistent with the Constitution or an Act of Parliament."[307] In line with South Africa's post-apartheid constitution, "a particular human rights standard, which has become accepted as a rule of customary international law, must be implemented by a South African court in a decision, unless this rule is incompatible with the Constitution or an Act of Parliament."[308]

According to the post-apartheid constitution, international treaties also play a role in South African law. The constitution empowers the President of the Republic to negotiate, conclude, and sign international agreements.[309] Nevertheless, the constitution also provides for a check on the president's power. According to § 231(2), "[a]n international agreement binds the Republic [of South Africa] only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."[310] Finally, § 233 states that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[311]

Before Kenya adopted its 2010 Constitution, international law, including international human rights law, had to be "transformed" before it could be applied in the country's municipal courts. In other words, Kenya's legislative branch was required to pass legislation to domesticate the international agreement to create rights that are justiciable in municipal courts.[312] Thus, before Kenya adopted the 2010 Constitution, how international law is given effect in the county's legal system was established by the Court of Appeal, which at the time was the country's highest court, in *Rono v. Rono & Another*.[313] *Rono*

306. *Id.*
307. S. AFR. CONST., 1996, § 232.
308. Sarkin, *supra* note 291, at 181.
309. S. AFR. CONST., 1996, § 231(1).
310. *Id.* § 231(2).
311. *Id.* § 233.
312. Nicholas Wasonga Orago, *The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective*, 13 AFR. HUM. RTS. L.J. 415, 440 (2013).
313. Rono v. Rono, (2005) 1 K.L.R. 803 (C.A.K.) (Kenya).

was a case that concerned succession in relation to the estate of Stephen Rono Rongoei Cherono, who had died intestate on July 15, 1988.[314] At his death, Rono left "a sizeable number of properties, both moveable and immoveable."[315] He was survived by two wives and nine children—six daughters and three sons.[316]

Although there was no objection from any members of Rono's family to the High Court's grant of letters of administration of Rono's estate to his two widows and his eldest son, there was serious disagreement over the distribution of the estate's assets and liabilities.[317] On June 12, 1997, Justice Nambuye, writing for the superior court, delivered her judgment, which was dated May 5, 1997. Rono's second widow, Mary Toroitich Rono ("Mary"), and her children expressed their dissatisfaction with the distribution of assets and liabilities presented in Justice Nambuye's judgment and indicated their intention to appeal the decision.[318]

Most of the conflict between Rono's first wife, Jane Toroitich Rono ("Jane") and her children and his second wife, Mary, and her children, was over "the distribution of 192 acres of land, and the liabilities of the estate."[319] Jane, representing the first house, had put forth a proposal that called for Jane, her three sons, and two daughters to receive 108 acres; Mary and her children (four daughters) would receive and share equally 70 acres.[320] That would leave 14 acres, which would be allocated as follows: "11 acres for a market where each member of the family would be entitled to 1 acre; 2 acres for a communal cattle dip, and 1 acre for the farmhouse where all members of the family were entitled to reside."[321]

The second house, headed by Mary, objected to this allocation, calling it discriminatory. Instead, she called for a "50/50" distribution in which members of each house would receive 96 acres of the 192 acres and then determine for themselves how to allocate the land.[322] Mary's household also

314. *Id.* at para. 1.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.* at para. 4.
320. *Id.* at para. 4–5.
321. *Id.* at para. 5.
322. *Id.* at para. 7.

suggested a 50/50 sharing of the estate's liabilities.[323] Justice Waki, writing for the Court of Appeal, noted that the superior court had considered both customary and statutory laws on succession in order to arrive at its own independent distribution.[324] Mary, the second wife of the late Rono, challenged the superior court's allocation.[325] The main ground of appeal was that the superior court had "erred in taking into consideration the Marakwet Customary law or any customary law, since the estate that fell for consideration was governed by the Law of Succession Act, Cap 160 Laws of Kenya."[326] Rono had been adjudged by the superior court to be a member of the Marakwet sub-tribe, although "the evidence was that he was Keiyo."[327]

The learned counsel for Mary, Mr. Gicheru, noted that § 3(2) of Kenya's Law of Succession Act defines "child" without "any discrimination on account of sex" and that the Constitution of Kenya outlaws discrimination "on grounds, *inter alia*, of sex."[328] Mr. Gicheru also submitted that "section 40 of the Succession Act should have been applied in which case all children and the widows would have been considered as units, entitling them to equal distribution of the land."[329] Mr. PKK Birech, counsel for the respondent, Jane Rono, submitted that "[t]he superior court was justified therefore in considering customary law and giving only nominal acreage of the land to the girls."[330]

Justice Waki started the analysis of the case by submitting that "[t]he manner in which courts apply the law [in Kenya] is spelt out in section 3 of the Judicature Act, Chapter 8, Laws of Kenya."[331] In addition, noted Justice Waki, the application of African customary laws "takes pride of place in section 3(2) but it is circumscribed thus: ' . . . so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.'"[332] The learned Justice then cited § 82(3) of Kenya's Constitution, which protects citizens from discrimination on

323. *Id.*
324. *Id.* at para. 9.
325. *Id.* at para. 12.
326. *Id.* at para. 13.
327. *Id.* at para. 9.
328. *Id.* at para. 13.
329. *Id.*
330. *Id.* at para. 14.
331. *Id.* at para. 17.
332. *Id.*

various grounds, including sex.[333]

Justice Waki then discussed the relevance of international law to the matter before the High Court. As a member of the international community, submitted Justice Waki, "Kenya subscribes to international customary laws and has ratified various international covenants and treaties."[334] In particular, noted Justice Waki, Kenya, "subscribes to the [I]nternational Bill of Rights, which is the [UDHR] (1948) and two international human rights covenants: [the ICCPR] and [the ICESCR]."[335] In 1984, Kenya ratified "without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women," which outlaws discrimination against women.[336]

Justice Waki noted that Kenya ratified the African Charter on Human and Peoples' Rights ("Banjul Charter") in 1992, and it did so without reservations.[337] Justice Waki noted further that Article 18(3) of the Banjul Charter imposes an obligation on States Parties to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions."[338] It is in the context of the provisions of these international human rights instruments, noted Justice Waki, that one can understand and appreciate the 1997 amendment to Article 82 of Kenya's Constitution 1963.[339]

In amending its independence constitution in 1997, noted Justice Waki, Kenya was "moving in tandem with emerging global culture, particularly on gender issues" and that of the two theories dealing with when international law should apply, "Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated."[340] In civil law jurisdictions, noted Justice Waki, "the adoption theory is that international law is automatically part of domestic except where it is in conflict with domestic law."[341] However, the learned justice continued, "the current

333. *Id.* (citing CONSTITUTION art. 82(3) (1963) (as amended through 1999) (Kenya)).
334. *Id.* at para. 19.
335. *Id.*
336. *Id.*
337. *Id.* at para. 20.
338. *Id.* (quoting Banjul Charter, *supra* note 44, art. 18(3)).
339. *Id.* at para. 21; *see generally* CONSTITUTION (1997) (Kenya).
340. Rono v. Rono, (2005) 1 K.L.R. 803 at para. 21 (C.A.K.) (Kenya).
341. *Id.*

thinking on the common law theory is that both international customary law and treaty law can be applied in state courts where there is no conflict with existing state law, even in the absence of implementing legislation."[342]

Justice Waki next cited Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms, which states as follows:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.[343]

Principle 7 of the Bangalore Principles, noted Justice Waki, has been "reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women."[344] Justice Waki then cited *Longwe v. Intercontinental Hotels*, a case of the High Court of Zambia that dealt with gender-specific discrimination and the violation of freedom of movement under articles 11 and 23 of the Constitution of Zambia.[345] In *Longwe*, Justice Musumali stated as follows:

> . . . ratification of such (institutions) by [a] nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute.[346]

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342. *Id.*

343. *Id.*; *see also* Michael Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUSTL. L.J. 514, 531–532 (1988) (citing the Bangalore Principles on the Domestic Application of International Human Rights Norms).

344. Rono v. Rono, (2005) 1 K.L.R. 803 at para. 22 (C.A.K.) (Kenya).

345. *Id.* (citing *Longwe v. Intercontinental Hotels*, (1992) 4 LRC 221 (HC) (Zam.)).

346. *Id.* (citing *Longwe v. Intercontinental Hotels*, (1992) 4 LRC 221 (HC)

Justice Waki then adduced that "[a] clear pointer to the currency of that thinking in this country is in the draft Constitution where it is proposed that the Laws of Kenya comprise, amongst others: 'Customary international law and international agreements applicable to Kenya.'"[347] Justice Waki then concluded as follows: "I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relating to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws which Kenya has ratified, will also inform my decision."[348]

Lillian Mushota, a legal practitioner who served as counsel for the claimants in *Longwe v. Intercontinental Hotels*, has argued that "[b]ecause the Kenya Court of Appeal was so unequivocal in its support of international law, the Kenya High Court was subsequently, in *Estate of Musyoka*, able to affirm that—based on *Rono*—international law is applicable in Kenya as part of its law, as long as it is not in conflict with existing law, even without it being adopted by specific legislation."[349] Mushota also notes that the Court of Appeal held that "the limitations to the prohibition against discrimination which exempted customary law must be read in terms of the provisions of CEDAW and the ACHPR, which require the elimination of discrimination against women."[350]

Although Kenya, like other former British colonies, followed the dualist approach to how international law is given effect in its domestic courts, that changed when it adopted a new constitution in 2010.[351] The new constitution granted international law "a more prominent role in the domestic legal system through the inclusion in the Constitution of a provision directly incorporating ratified treaty law into the Kenyan legal system as a legitimate source of law."[352] According to § 2(5) of the Constitution of Kenya, 2010, "[t]he general rules of

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(Zam.)).

347. *Id.* at para. 23.

348. *Id.* at para. 24.

349. Lillian Mushota, *International Law, Women's Rights and the Courts: A Zambian Perspective*, *in* USING THE COURTS TO PROTECT VULNERABLE PEOPLE: PERSPECTIVES FROM THE JUDICIARY AND LEGAL PROFESSION IN BOTSWANA, MALAWI, AND ZAMBIA 94, 100 (Anneke Meerkotter et al. eds., 2015).

350. *Id.*

351. *See* CONSTITUTION (2010) (Kenya).

352. Orago, *supra* note 312, at 415.

international law shall form part of the law of Kenya."[353] With respect to treaties and conventions, the Constitution states as follows: "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[354]

However, Kenyan courts still have to deal with two important issues. First is how to interpret the constitutional provision that directly incorporates international law norms in treaties ratified by Kenya into the Kenyan domestic legal system.[355] Second is the hierarchical status that should be granted to international human rights norms contained in treaties ratified by Kenya.[356] This change in how international law is given effect in Kenya's municipal courts from "transformation to incorporation was confirmed by Justice Martha Koome in the High Court case of *Re The Matter of Zipporah Wambui Mathara*."[357] Writing for the High Court, Justice Koome held that "by virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law."[358]

In re Mathara involves a debtor who was serving a jail term at Murang's G. K. Prison for failing "to satisfy the decretal sum."[359] In presentations to the High Court, counsel for the debtor invoked Article 11 of the ICCPR, which states that "[n]o one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."[360] In her ruling, Justice Koome declared that § 2(6) of the Constitution of Kenya, 2010, imported the provisions of the ICCPR— which Kenya ratified on May 1, 1972—into Kenyan law as part of the sources of law in Kenya.[361] This was affirmed by Judge Majanja in *Beatrice Wanjike v. Att'y Gen.*, where the petitioners based their case on the fact that Kenya had ratified the ICCPR, whose Article 11 "disallows civil jail for matters whose cause of action arises from contractual obligations" and that by "dint of Article 2(5) and (6) [of the

353. CONSTITUTION art. 2, 5 (2010) (Kenya).

354. *Id.* art 2, 6.

355. Orago, *supra* note 312, at 418.

356. *Id.*

357. *Id.* at 420 (citing *In Re The Matter of* Zipporah Wambui Mathara (2010) eKLR (C.C.K.) http://kenyalaw.org/caselaw/cases/view/71032/).

358. *In Re The Matter of* Zipporah Wambui Mathara (2010) eKLR para. 9 (C.C.K.) http://kenyalaw.org/caselaw/cases/view/71032/.

359. *Id.* at para. 2.

360. *Id.* at para. 3 (quoting ICCPR, *supra* note 9, art. 11 ¶ 1.

361. *Id.* at para. 9.

Constitution of Kenya], the ICCPR forms part of the laws of Kenya."[362] The petitioners also argued that "Article 2 creates a hierarchy of laws with the international conventions being superior to national legislation" and that, as such, "the provisions of the *Civil Procedure Act* contravene the ICCPR."[363] In her ruling, Judge Majanja held that:

> Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular Articles 2(5) and 2(6) gave new color to the relationship between international law and international instruments and national law.[364]

In the Supreme Court of Kenya's Advisory Opinion No. 2 of 2012 on *In re Principle of Gender Representation in the Nat'l Assembly and the Senate*, Chief Justice Mutunga affirmed, in his dissenting opinion, the applicability of international law in Kenya through the operation of Article 2(6) of the 2010 Constitution of Kenya:

> From article 27, and from CEDAW, it is clear that disenfranchisement of the Kenyan women in the political arena is a form of discrimination. *CEDAW applies through the operation of Article 2 (6) of the Constitution of Kenya, having been acceded to by Kenya on 9th March 1984*. These provisions collectively call for the immediate removal of this discrimination through the empowerment of women representation in political office, with CEDAW calling for stop-gap measures to be put in place to reverse the negative effects on our society through the operation of this systemic discrimination.[365]

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362. Beatrice Wanjiku v. Attorney General (2012) eKLR para. 3 http://kenyalaw.org/caselaw/cases/view/81477/.

363. *Id.*

364. *Id.* at para. 17.

365. *In the Matter of the* Principle of Gender Representation in the National Assembly and the Senate (2012) eKLR para. 11.1 http://kenyalaw.org/caselaw/cases/view/85286 (emphasis added).

The approach to how international law is given effect in municipal courts adopted by Kenya through its 2010 Constitution "is in line with the prevailing jurisprudence of international treaty bodies such as the Committee on Economic, Social and Cultural Rights."[366] In its Draft General Comment No. 9, the Committee of Economic, Social and Cultural Rights ("ESCR Committee") addressed the status of the CESCR in the domestic legal order of States Parties. The ESCR Committee recommended as follows:

> In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.[367]

In addition, the ESCR Committee added, "[i]t is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations."[368] In the case where a "domestic decision maker" must decide between "an interpretation of domestic law that would place the [S]tate in breach of the [ICESCR] and one that would enable the State to comply with the [ICESCR], international law requires the choice of the latter."[369]

Despite the progressive nature of Kenya's 2010 Constitution, particularly concerning how international law is given effect in municipal courts, some critics have argued that "[t]he lack of clear constitutional safeguards in relation to the interpretation and operationalization of Article 2(6), coupled with the lack of a clear constitutionally-entrenched role for

366. Orago, *supra* note 312, at 421 (emphasis added).

367. Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Draft General Comment No. 9: The Domestic Application of the Covenant* ¶ 4, UN Doc. E/C.12/1998/24 (Dec. 3, 1998).

368. *Id.* ¶ 15.

369. *Id.*

parliament in the treaty-adoption process, raises concerns about the limitation of Kenya's sovereignty *vis-à-vis* international law."[370] In addition, there remains the question of "the hierarchy or place of international human rights law in ratified international treaties in relation to other sources of law in the Kenyan domestic legal system."[371]

If—as is the case in many countries (e.g., the United States)—international treaties, including international human rights instruments, are placed at the same hierarchal level as domestic legislation, this can result in the adoption of a last-in-time approach to the treatment of both treaties and national statutes. Under such a rule, when there is a conflict between a treaty and national statutes, effect is given to whichever was enacted later. U.S. supporters of this doctrine have argued that it grants treaties direct domestic effect, which enhances the United States' ability to participate in the international system, but, at the same time, "guarantees that a politically accountable Congress retains the flexibility to control a treaty's domestic effects."[372]

Some international legal scholars have argued, however, that this U.S. approach to the treatment of international human rights law "has generally detracted from the comprehensive human rights protection and accountability standards that have been set at the international level, with the result that the rights of individuals are more easily violated."[373] In the case of African countries, it is argued that the adoption of such an approach to the treatment of international human rights law in domestic courts could seriously endanger the protection of human and fundamental rights. Hence, it is suggested that the doctrine of last-in-time doctrine should not be adopted in the legal systems of African countries, as it is likely to be used by domestic legislators to undermine the ability of their citizens to realize the rights guaranteed to them by international human rights instruments.

Concerning Kenya, constitutional expert and legal scholar Nicholas Orago has suggested at least three ways in which Article 2(6) of the 2010 Constitution can be interpreted to provide international human rights with "a prominent status" in

370. Orago, *supra* note 312, at 421–22.

371. *Id.* at 422.

372. Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 319 (2005).

373. Orago, *supra* note 312, at 429.

Kenya's domestic legal system.[374] First, Orago argues that Kenya could adopt an interpretation that places international human rights law at the same level as provisions of the national constitution.[375] However, this approach might not be a viable option in Kenya's domestic legal system due to the national Constitution's supremacy clause.[376]

The second alternative is for Kenya to place provisions of international human rights instruments that have been ratified by Kenya below both the provisions of the national constitution and legislative enactments (i.e., statutes). This was the approach that was adopted by the High Court of Kenya in *Beatrice Wanjike v. Att'y Gen.*[377] In this case, Judge Majanja held as follows:

> I take the position that the use of the phrase "under this Constitution" as used in the Article 2(6) means that the *international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution*. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, *I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94.* Article 1 places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional set up.[378]

It has been noted, however, that the view expressed by Judge Majanja in *Wanjiku*, is *per incuriam* since "it is not supported by the judge's engagement with any comparative

374. *Id.* at 430.

375. *Id.* at 430–32.

376. CONSTITUTION art. 2 (2010) (Kenya).

377. *Beatrice Wanjiku v. Attorney General* (2012) eKLR http://kenyalaw.org/caselaw/cases/view/81477/.

378. *Id.* para. 20 (emphasis added).

national or international judicial jurisprudence or based on the writings of any national or international commentator on the hierarchy of international human rights law in national jurisdictions."[379] In addition, the adoption of this approach would provide for "retrogressive application of international human rights law in the Kenyan domestic legal system as, prior to the adoption of the 2010 Constitution, ratified and domesticated international human rights treaties shared a similar hierarchical status to national legislation, and not a lower status as is envisaged by the Court's infra-legislative interpretation in the *Wanjiku* case."[380] Human rights scholar, Nicholas Orago, then concluded that Kenya should not adopt this approach "as it has the potential to lower the standard of protection of human rights and fundamental freedoms envisaged in the 2010 Constitution."[381]

A third suggestion is for the adoption of an approach to interpretation that grants "international law a hierarchical status slightly lower than the constitutional provisions, but superior to domestic legislation (infra-constitutional but supra-legal hierarchy) in the new constitutional dispensation."[382] This approach should be in line with legal systems in Kenya and many other African countries with supremacy clauses in their constitutions. Article 2(1) of Kenya's 2010 Constitution states that "[t]his Constitution is the supreme Law of the Republic [of Kenya] and binds all persons and all State organs at both levels of government."[383] In addition, Article 2(3) states that "[t]he validity or illegality of this Constitution is not subject to challenge by or before any court or other State organ," and Article 2(4) continues, stating that "[a]ny law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."[384] Finally, Article 2(6) states that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[385]

A holistic reading of Article 2 and noting the incorporation of international law into the laws of Kenya through Article 2 (6),

379. Orago, *supra* note 312, at 433.
380. *Id.* at 434.
381. *Id.* at 434.
382. *Id.* at 434–35.
383. CONSTITUTION art. 2(1) (2010) (Kenya).
384. *Id.* art. 2(3) & 2(4).
385. *Id.* art. 2(6).

and taking into consideration the supremacy clause (i.e., Article 2(1)), one can conclude that "the drafters intended that international law, as long as it is consistent with the purport, spirit and the provisions of the Constitution, should have a prominent place in the Kenyan domestic legal system."[386] Then, there is the phrase "under this Constitution" as used in Article 2(6).[387] Some scholars have argued that "a proper constitutional analysis be undertaken before the ratification of a treaty to ensure that it is in compliance with the Constitution and that the processes leading to ratification of a treaty must be accomplished in accordance with the Constitution."[388] The argument is that in order "for treaties to have direct application, they must be constitutional, and that an a priori process of analysis of the constitutionality of the treaty is undertaken by [a country's] Constitutional Court before the ratification of the treaty in question."[389]

The problem with this approach is that it can undermine the protection of human rights in those African countries whose constitutions were not drafted to conform with the provisions of international human rights instruments. Take, for example, an African country whose constitution does not prohibit child marriage and the betrothal of girls and boys. That means that any effort by this country to ratify the African Charter on the Rights and Welfare of the Child ("African Child Charter") will invariably either have to the country (i) amending its constitution or (ii) making a declaration to the effect that the State is not bound by Article 21(2). [390] That is exactly what the Republic of Sudan did when it ratified the African Child Charter on July 30, 2005.[391] By doing so, Sudan effectively made it impossible for children to realize the rights guaranteed to them by the African Child Charter.

The most effective and human-rights-friendly approach to how international law is given effect in municipal courts is one that begins with the internationalization of the national

386. Orago, *supra* note 312, at 435.

387. CONSTITUTION art. 2(6) (2010) (Kenya).

388. Orago, *supra* note 312, at 435.

389. *Id.* at 436.

390. African Child Charter, *supra* note 257, art. 21(2) states as follows: "Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be eighteen years and make registration of all marriages in an official registry compulsory."

391. *Id.* at 30.

constitution to ensure that its provisions conform to those of international human rights instruments. For example, had Sudanese constitutional drafters ensured that the provisions of the country's constitution conformed to those of the various international human rights instruments, there might not have been any need for the country to make declarations exempting itself from articles dealing with child marriage and the betrothal of girls and boys when it ratified the African Child Charter. If international standards of human rights (as elaborated, for example, in the International Bill of Human Rights) are fully and sufficiently entrenched in the constitutions of African countries and the amendment process is sufficiently robust, then the constitution cannot be changed by a simple majority of parliament.[392]

With respect to Kenya, the constitution that it adopted in 2010 provides for the direct application of the provisions of treaties that have been ratified by Kenya.[393] In order for international law, including international human rights law, to be given a prominent place in the country's legal system, § 2(6) "must be interpreted in a progressive manner to give international human rights law a higher status hierarchically as compared to domestic legislative Acts."[394] International legal expert Nicholas Orago argues that in order for Kenya to achieve this, the country should adopt "an interpretation that accords international human rights law norms an infra-constitutional but supra-legal hierarchical status in the Kenyan domestic system."[395] Through this process, Orago noted, "for international human rights law to be applicable directly in the Kenyan domestic jurisdiction, it must be compatible with the Constitution, which is the supreme law of the land."[396]

However, where the provisions of an existing national constitution do not conform with the provisions of the various international human rights instruments, adopting the approach suggested by Orago for giving international law effect in

392. For example, the Constitution of the Republic of South Africa, 1996, presents a very robust amendment process for various sections and chapters of the Constitution. For example, Chapter 2 (Bill of Rights) can only be amended by "a Bill passed by—the National Assembly, with a supporting vote of at least twothirds of its members; and the National Council of Provinces, with a supporting vote of at least six [of nine] provinces." S. AFR. CONST., 1996, § 74(2).

393. CONSTITUTION art. 2(2) (2010) (Kenya).

394. Orago, *supra* note 312, at 440.

395. *Id.*

396. *Id.*

municipal legal systems could seriously endanger the protection of the human rights guaranteed citizens by international human rights law. The solution to this dilemma lies in the internationalization of African constitutions to make certain that their provisions conform with those of the various international human rights instruments, which include the International Bill of Human Rights and the various African human rights instruments (e.g., the Banjul Charter; the Maputo Protocol; and the African Child Charter).

In the following sub-section, this Article will examine a few cases from various African jurisdictions on the application of international law. This examination will begin with a case from the CC of South Africa—*S v. Williams & Others.*[397]

B. *S V. WILLIAMS & OTHERS (SOUTH AFRICA)*

This case was referred to the CC by the Full Bench of the Cape of Good Hope Provincial Division of the Supreme Court and represented "a consolidation of five different cases in which six juveniles were convicted by different magistrates and sentenced to receive a 'moderate correction' of a number of strokes with a light cane."[398] The issue before the CC was "whether the sentence of juvenile whipping, pursuant to the provisions of section 294 of the Criminal Procedure Act, is consistent with the provisions of the Constitution."[399] *S v. Williams & Others* was decided under South Africa's Interim Constitution.[400]

Writing for the CC, Justice Langa stated that "[c]ourts do have a role to play in the promotion and development of a new culture 'founded on the recognition of human rights,' in particular, with regard to those rights which are enshrined in

397. *S v. Williams & Others* 1995 (3) SA 632 (CC) (S. Afr.).

398. *Id.* at 1 para. 1.

399. *Id.* at 1 para. 1 (citation omitted).

400. *Id.* at 1 para. 1 n.2. These provisions are part of Chapter 3, generally referred to as the Chapter on Fundamental Rights. S. AFR. (INTERIM) CONST., 1993. This Interim Constitution was repealed by the Constitution of the Republic of South Africa Act No. 108 of 1996. *See* S. AFR. CONST., 1996. § 8(1) of the Interim Constitution guaranteed to each person "the right to equality before the law and to equal protection of the law;" §8(2) prohibited unfair discrimination on grounds which include race, gender, sex, color, and age; § 10 guaranteed every person "the right to respect for and protection of his or her dignity"; and § 30 provides various protections for children. S. AFR. (INTERIM) CONST., 1993, §§ 8, 10, 11, & 30.

the Constitution."[401] Justice Langa noted, "over the last thirty years . . . , South African jurisprudence has been experiencing a growing unanimity in judicial condemnation of corporal punishment for adults."[402] Justice Langa also noted that "[t]he provisions being challenged, however, relate[s] to juvenile whipping."[403] In seeking to impugn § 294 of the CPA, the applicants contended that this provision violated §§ 8, 10, 11, and 30 of the Constitution.[404]

Justice Langa noted that "much of the applicants' argument before the CC was . . . devoted to the alleged violation of § 11(2) of the [Interim] Constitution," which deals with the freedom and security of the person.[405] A careful examination of § 11(2) of the Interim Constitution, observed Justice Langa, reveals seven modes of conduct, which are (i) torture, (ii) cruel treatment, (iii) inhuman treatment, (iv) degrading treatment, (v) cruel punishment; (vi) inhuman punishment; and (vii) degrading punishment.[406] Justice Langa then noted that the wording of Section 11(2) "conforms to a large extent with most international human rights instruments," for example, Article 5 of the Universal Declaration of Human Rights, Article 7 of the ICCPR, and Article 5 of the Banjul Charter.[407]

With respect to the interpretation of the concepts provided in Section 11(2) of the Interim Constitution, Justice Langa noted the importance of international law and foreign case law as interpretive tools.[408] In addition, argued Justice Langa, interpretation of these concepts implicates

> the making of a value judgment which "requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the . . . people as expressed in its national institutions and its Constitution, and further *having regard to the emerging*

401. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 3 para. 8 (S. Afr.).
402. *Id.* at 4 para. 11.
403. *Id.* at 5 para. 13.
404. *Id.* at 6 para. 15.
405. *Id.* at 7 para. 19. *See also* S. AFR. (INTERIM) CONST., 1993, § 11(2) ("No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.").
406. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 7–8 para. 20 (S. Afr.).
407. *Id.* at 8 para. 21 & n.24.
408. *Id.* at 8 para. 23.

> *consensus of values in the civilized international community*."[409]

While the CC's ultimate definition and interpretation of the concepts presented in Section 11(2) of the Interim Constitution must necessarily reflect the experiences of South Africans and the contemporary circumstances that South Africans face as a community of peoples, noted Justice Langa, "there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with *in public international law as well as foreign case law*."[410]

Justice Langa's stipulations regarding international law and foreign case law were in line with § 35(1) of the Interim Constitution, which was the law of the land at the time *Williams* was decided by the CC. Section 35, which deals with the interpretation of Chapter 3 (Fundamental Rights), states as follows:

> In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to *public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law*.[411]

With respect to the interpretation of the words in Section 11(2), Justice Langa stated that "international forums offer very little guidance with regard to the meaning to be given to each word, individually."[412] However, the general practice has been to deal with these words as "phrases or a combination of words."[413] For example, noted Justice Langa, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment,"[414] "has been interpreted by distinguishing the concepts primarily by the

409. *Id.* at 8 para. 22 (emphasis added).
410. *Id.* at 8 para. 23 (emphasis added).
411. S. AFR. (INTERIM) CONST., 1993, § 35(1).
412. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 9 para. 26 (S. Afr.).
413. *Id.*
414. European Convention on Human Rights, *supra* note 38, art. 3.

degree of suffering inflicted."[415] Justice Langa also noted that both the European Commission on Human Rights ("ECHR") and the European Court of Human Rights ("ECtHR") have defined "inhuman treatment," "torture," "degrading conduct," as well as "inhuman and degrading punishment."[416]

The Court in *Williams* noted that "[t]he Eighth Amendment to the Constitution of the United States of America (Eighth Amendment) as well as Article 12 of the Canadian Charter of Rights and Freedoms (Canadian Charter) prohibit 'cruel and unusual punishment.'"[417] Justice Langa then cited a U.S. Supreme Court case—*Furman v. Georgia*[418]—in which Justice Brennan "postulated criteria in the assessment of what amounts to cruel and unusual punishment."[419] In *Furman v. Georgia*, Justice Brennan held that "[t]he true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded" and that these punishments are thus, "inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."[420]

Justice Langa noted that the views expressed in *Furman v. Georgia* were later qualified in *Gregg v. Georgia*,[421] a case that was decided by the U.S. Supreme Court four years after *Furman*.[422] However, in *Gregg*, Justice Stewart held that "[a] penalty also must accord with 'the dignity of man,' which is the basic concept underlying the Eighth Amendment."[423] Justice Langa then cited the Canadian Charter of Rights and Freedoms and noted that Canada's framework of rights legislation is "not much different [South Africa'] and that § 1 of "the Canadian Charter plays a role not very dissimilar to that of section 33(1) of the Constitution [of South Africa]."[424]

Justice Langa noted that the Supreme Court of Canada

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415. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 10 para. 27 (S. Afr.).

416. *Id.*

417. *Id.* at 10–11 para. 28.

418. *Furman v. Georgia*, 408 U.S. 238 (1972) (adjudicating whether imposing and carrying out the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment, as applied to the states by the Due Process Clause of the Fourteenth Amendment).

419. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 10–11 para. 28 (S. Afr.).

420. *Furman*, 408 U.S. at 273.

421. *Gregg v. Georgia*, 428 U.S. 153 (1976).

422. *Furman* was decided in 1972, and *Gregg* was decided in 1976.

423. *Gregg*, 408 U.S. at 173 (quoting Trop v. Dulles, 356 U.S. 86 (1958)).

424. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 11 para. 30 (S. Afr.).

"interpreted the concept 'cruel and unusual punishment' as a 'compendious expression of a norm' to which the relevant test was 'whether the punishment prescribed is so excessive as to outrage the standards of decency."[425] Justice Langa then cited Chief Justice Dickson and Justice Lamer in the Supreme Court of Canada case, *Smith v. The Queen* in which the two justices held that "some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed."[426]

Justice Langa then turned next to some decisions of the Supreme Courts of Namibia and Zimbabwe that dealt with corporal punishment for adults and noted that these were of special significance for two reasons: first, both countries are geographic neighbors to South Africa and second, South Africa "shares with them the same English colonial experience which has had a deep influence on [South Africa's] law."[427] In the Namibian case, *Ex Parte Attorney-General of Namibia*, Justice Langa noted that "Mohamed AJA had no difficulty in arriving at the conclusion that the infliction of corporal punishment, whether on adults or juveniles, was inconsistent with article 8 of the Namibian Constitution and constituted 'inhuman and degrading' punishment."[428]

In three cases, *S v. Ncube*, *S v. Tshuma*, and *S v. Ndhlovu*, the Zimbabwe Supreme Court was called upon to adjudicate the issue of corporal punishment for adults. Justice Langa noted that the Zimbabwe Supreme Court had held that corporal punishment is "inhuman and degrading in violation of section 15(1) of the Declaration of Rights of the Zimbabwe Constitution which prohibits 'torture or inhuman or degrading punishment.'"[429] In addition, noted Justice Langa, "[t]he same conclusion was reached with respect to juvenile whipping by the Zimbabwe High Court in *S v. F*."[430] Finally, the Supreme Court of Zimbabwe held, in *S v. Juvenile*, that juvenile whipping constituted "inhuman and degrading punishment."[431]

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425. *Id.*

426. R. v. Smith, [1987] S.C.R. 1045, 1073–74 (Can.).

427. *S v. Williams & Others* 1995 (3) SA 632 (CC) 11–12 para. 31 (S. Afr.).

428. *Id.*; *see also Ex Parte* Attorney-General of Namibia (1991) (3) SA 76, 76 (SC) (Namibia).

429. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 12 para. 32 (S. Afr.).

430. *Id.*

431. *Id.*; *see also* S. v. Juvenile (1990) 4 SA 151 (SC) (Zim.).

Justice Langa cited Justice Gubbay's decision in *S v. Juvenile* regarding juvenile whipping. In that case, Justice Gubbay held that juvenile whipping is:

> . . . inherently brutal and cruel; for its infliction is attended by acute physical pain. After all, that is precisely what is designed to achieve . . . In short, whipping, which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime.[432]

Justice Langa then noted that

> [w]hether one speaks of 'cruel and unusual punishment' as in the Eighth Amendment of the United States Constitution and in article 12 of the Canadian Charter, or 'inhuman or degrading punishment' as in the European Convention and the Constitution of Zimbabwe, or 'cruel, inhuman or degrading punishment' as in the [UDHR], the ICCPR and the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity.[433]

Justice Langa then noted that "[i]n the United States, the Eighth Amendment to the Constitution has been interpreted in the light of 'contemporary standards of decency,'" which have been held not to be static but to be continually evolving. [434] In *Trop v. Dulles*, the Supreme Court held that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[435] However, public opinion, as pointed out by Chief Justice Chaskalson in *S v. Makwanyane & Another*, "is not determinative of constitutional issues."[436] Specifically, Chief Justice Chaskalson, writing for the CC of South Africa, held that:

> Public opinion may have some relevance to the enquiry,

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432. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 12 para. 32 (S. Afr.).
433. *Id.* at 13 para. 35.
434. *Id.* at 13 para. 36.
435. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
436. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 14 para. 36 (S. Afr.).

> but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favor. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.[437]

Noting that South Africa's constitution is different from that of the United States' constitution, Justice Langa stated that it was not clear to him that South Africa should adopt the U.S. concept of "contemporary decency" or that it was necessary for the CC to "give definitive meaning to that phrase."[438] Section 35(1) of the Interim Constitution states expressly that the rights entrenched in the Constitution, including §§ 10 and 11(2), shall be interpreted "in accordance with the values which underlie an open and democratic society based on freedom and equality."[439] Thus, noted Justice Langa, "[i]n determining whether punishment is cruel, inhuman or degrading within the mining of our Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution."[440] In other words, in imposing punishment, the State must do so in accordance with standards that underpin the Constitution which, in the context of the post-apartheid constitutional order, means "punishment must respect human dignity and be consistent with the provisions of the Constitution."[441]

Within the international community, noted Justice Langa, there is a growing consensus that "judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human

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437. *State v. Makwanyane* 1995 (3) SA 391 (CC) at 59 para. 88 (S. Afr.).

438. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 14 para. 37 (S. Afr.).

439. *Id.* Specifically, § 35(1) states as follows: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law." S. AFR. (INTERIM) CONST., 1993, § 35(1).

440. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 14 para. 37 (S. Afr.).

441. *Id.* at 14 para. 38.

dignity."[442] In addition to the fact that this consensus has "found expression through the courts and legislatures of various countries," it is also found in various "international instruments."[443]

With respect to whether the court should differentiate between adult and juvenile whipping, Justice Langa cited the *dicta* in *Campbell and Cosans v. United Kingdom* in which Mr. Klecker, in a dissenting opinion, stated as follows:

> Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being . . . The sum total of adverse effects, whether actual or potential, produced by corporal punishment on the mental and moral development of a child is enough, as I see it, to describe it as degrading within the meaning of Article 3 of the Convention.[444]

Justice Langa noted that while South Africa's Constitution requires the courts to "have regard" to the international consensus on corporal punishment, the CC was "not bound to follow it;" however, the Court could not ignore it.[445] In the case of South Africa, Justice Langa stated that "[t]he determinative test will be the values we find inherent in or worthy of pursuing in this society which *has only recently embarked on the road to democracy*."[446] The highlighted phrase is a reference to South Africa's transition from a constitutional order pervaded by exploitation and oppression of the country's African majority by its white minority, a gross violation of human rights, and a general failure to adhere to basic principles of human decency. The Interim Constitution, under which *Williams* was decided, offered South Africans the opportunity to "join the mainstream of a world community that is progressively moving away from punishments that place undue emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights."[447]

While in interpreting § 11(2) of the Constitution, the Court

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442. *Id.* at 14–15 para. 39.

443. *Id.*

444. *Id.* at 17 para. 45 (citing Campbell v. United Kingdom 3 Eur. H.R. Rep 531, at 556 (1980)).

445. *Id.* at 19–20 para. 50.

446. *Id.* (emphasis added).

447. *Id.*

should have regard to "the position in other jurisdictions," Justice Langa also noted that it is important to recognize the CC's holding in *S v. Zuma & Others*, as well as in *S v. Makwanyane*, where has "held that in interpreting the rights enshrined in Chapter 3 of the Constitution, a purposive approach should be adopted."[448] The new Constitution and the process through which it was adopted, noted Justice Langa, was a rejection of the country's violent past, particularly violence perpetuated by the State on juvenile offenders as authorized by § 294 of the Criminal Procedure Act.[449] After holding that "[a] culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands," Justice Langa concluded that "section 294 of the [Criminal Procedure] Act infringes the rights contained in sections 10 and 11(2) of the Constitution" and that this conclusion is "consistent with the view that has been expressed by man South African judges before."[450]

South African courts, noted Justice Langa, have already "acknowledged the international consensus against corporal punishment and, in a sense, associated themselves with it in many judgments which have criticized, sometimes in the strongest terms, the infliction of corporal punishment."[451] With respect to Chapter 3 (Fundamental Rights) analysis, Justice Langa stated that this involves a "two-stage enquiry:" first is establishing whether "there is a violation of a right sought to be protected by the Constitution" and second, is resolving the question whether "the violation constitutes a permissible limitation of the right in question."[452]

After completing the two-stage inquiry and citing case law from various international jurisdictions, as well as the CC's own jurisprudence, Justice Langa concluded as follows:

> No compelling interest has been proved which can justify the practice [of juvenile whipping]. It has not been shown that there are no other punishments which are adequate to achieve the purposes for which it is imposed. Nor has it been shown to be a significantly effective deterrent. On the other hand, as observed by Page J in *S v*

448. *Id.* at 20 para. 51, n.72.
449. *Id.* at 20 para. 52.
450. *Id.* at 20–21 para. 53.
451. *Id.*
452. *Id.* at 21 para. 54.

> *Motsoesoana*, its effect is likely to be coarsening and degrading rather than rehabilitative. It is moreover also unnecessary. Many countries in the civilized world abolished it long ago; there are enough sentencing options in our justice system to conclude that whipping does not have to be resorted to. Thus, whether one looks at the adjectives disjunctively or regards the phrase as a "compendious expression of a norm," it is my view that at this time, so close to the dawn of the 21st century, juvenile whipping is cruel, it is inhuman and it is degrading. It cannot, moreover, be justified in terms of section 33(1) of the Constitution.[453]

Justice Langa then held that "the provisions of section 294 of the [Criminal Procedure] Act violate the provisions of sections 10 and 11(2) of the Constitution and that they cannot be saved by the operation of section 33(1) of the Constitution. Although the provision concerned is a law of general application, the limitation it imposes on the rights in question is, in the light of all the circumstances, not reasonable, not justifiable, and, furthermore, not necessary. The provisions are therefore unconstitutional."[454] Justice Langa then ordered as follows:

> 1. The following provisions of the Criminal Procedure Act No. 51 of 1977 (as amended) are inconsistent with the Republic of South Africa Constitution Act No. 200 of 1993 (as amended) and are, with effect from the date of this order, declared to be invalid and of no force and effect: (a) section 294 in its entirety; and (b) the words "or a whipping" in section 290(2).
>
> 2. In terms of section 98(7) of the Constitution, it is ordered that with effect from the date of this order, no sentences imposed in terms of section 294 of the Criminal Procedure Act No. 51 of 1977, shall be carried out.[455]

In *Williams*, the CC of South Africa made use of international and comparative sources of law as a tool of interpretation to interpret provisions of the Constitution and the Criminal Procedure Act No. 51 of 1977. In doing so, the Court

453. *Id.* at 33 para. 91.
454. *Id.* at 34 para. 92.
455. *Id.* at 34–35 para. 96.

was interested in making sure that its decision reflected "generally-accepted international human rights standards and norms."[456] The Court took cognizance of what it referred to as "the emerging consensus of values in the civilized international community."[457] Justice Langa noted, however, that the Court's interpretation of the constitutional provisions and those of the Criminal Procedure Act must reflect the experiences of South Africans and the contemporary circumstances that they face as a community of peoples.[458]

C. *THE REPUBLIC V. HIGH COURT (COMMERCIAL DIVISION) ACCRA, EX PARTE: ATTORNEY-GENERAL (NML CAPITAL LTD AND REPUBLIC OF ARGENTINA, INTERESTED PARTIES) (SUPREME COURT OF GHANA)*

This case deals with how international law is given effect in Ghana's municipal law.[459] The Republic of Ghana had granted permission to the Republic of Argentina for the latter's warship, *ARA Fragata Libertad*, which had been on "a diplomatic mission of promoting friendship between Argentina and other States," to "dock at Tema Harbour."[460] As the *ARA Fragata Libertad* docked at the Ghanaian port of Tema, it was "arrested and detained by the security services of the Republic of Ghana in enforcement of the orders of the High Court."[461] The High Court had issued the orders in relation to a suit filed by the first interested party, NML Capital Ltd.[462]

In response, the second interested party, the Republic of Argentina, applied to the High Court to quash its order "detaining the warship."[463] That request, however, was denied on October 11, 2012.[464] Writing for the High Court, Justice Adjei-Frimpong provided an overview of the events leading to the first

456. John Mukum Mbaku, *International Law, African Customary Law, and the Protection of the Rights of Children*, 28 MICH. ST. INT'L L. REV. 535, 612 (2020).

457. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 8 para. 22 (S. Afr.).

458. *Id.*

459. Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 2 (SC) (Ghana).

460. *Id.* at 9–10.

461. *Id.* at 10.

462. *Id.*

463. *Id.*

464. *Id.*

interested party's suit before the Court.[465] In October 1994, the Republic of Argentina concluded a Fiscal Agency Agreement ("FAA") with New York-based Bankers Trust Company.[466] The FAA allowed the Republic of Argentina to issue securities and sell them to the public.[467]

The first interested party, NML Capital Ltd, had purchased some of the securities issued by the Republic of Argentina.[468] The latter, however, defaulted on the bonds, and NML Capital Ltd then sought relief for its losses by bringing legal action in the U.S. District Court for the Southern District of New York.[469] After the Southern District of New York ruled in favor of NML Capital Ltd, the Republic of Argentina failed to honor the judgment and settle the debt.[470] On May 15, 2005, NML Capital Ltd began legal action against the Republic of Argentina at the English High Court to recover the "debt obligation adjudged by the New York court."[471]

The Republic of Argentina objected to the "jurisdiction of the English High Court on the ground of state immunity."[472] After the English Supreme Court ruled that the Republic of Argentina did not have "state immunity in relation to the suit and that the English court had jurisdiction to entertain the suit," the English High Court issued a consent order against the Republic of Argentina and in favor of NML Capital Ltd.[473] The Republic of Argentina, however, did not honor the English High Court's ruling and refused to pay the judgment debt issued by the Southern District of New York.[474]

The *ARA Fragata Libertad*, a vessel belonging to the Republic of Argentina, entered the port of Tema "on or about October 1, 2012."[475] Subsequently, NML Capital Ltd sought help from the High Court of Ghana to enforce the judgment that it had won against Argentina in the U.S. District Court for the Southern District of New York.[476] NML Capital Ltd filed for a

465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.* at 11.

temporary injunction preventing the Argentine vessel from leaving the port of Tema.[477] In passing its judgment, the High Court of Accra (Commercial Division) relied on "a broad waiver provision in both the Argentine bonds and the agreement under which they were issued, the Fiscal Agency Agreement."[478] The High Court "granted the interlocutory injunctions on the basis that Argentina had waived any sovereign immunity from jurisdiction and enforcement that would otherwise protect the *Libertad*."[479]

In rendering judgment, the High Court did not doubt that as a sovereign state, Argentina and its property were "entitled to immunity from the court's jurisdiction."[480] The High Court "also acknowledged the universally recognized right of sovereign States to waive immunity."[481] It then interpreted the "waiver clause" to mean that the "other courts" mentioned in the FAA and to which "Argentina had agreed to submit for enforcement of a final New York judgment included the Ghanaian courts."[482] The Ghana High Court at Accra then held that "[t]he rules . . . allow for the application of the principle of res judicata for the purpose of proceedings properly brought in a Ghanaian court in which issues determined in a foreign court arise."[483]

After failing to "persuade the High Court to set aside its orders," Argentina "brought action against Ghana before the International Tribunal on the Law of the Sea" (ITLOS) and alleged that "Ghana had breached international law by detaining [Argentina's] warship and requesting the release of the ship, among other reliefs."[484] On December 15, 2012, the ITLOS ordered Ghana to immediately release the *ARA Fragata Libertad* "unconditionally" and "ensure that it was resupplied to enable [it] to sail out of Ghana's maritime areas."[485] After the

477. *Id.*

478. Sadie Blanchard, *Republic v. High Court of Accra, ex parte Attorney General*, 108 AM. J. INT'L L. 73, 73 (2014); *see also* Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 11–12 (SC) (Ghana).

479. Blanchard, *supra* note 478, at 73.

480. Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 13 (SC) (Ghana).

481. *Id.*

482. Blanchard, *supra* note 478, at 74; *see also* Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 12 (SC) (Ghana).

483. Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 15 (SC) (Ghana).

484. *Id.* at 15–16.

485. *Id.* at 16.

ITLOS's order, the Attorney-General filed the "present motion on notice of orders of *certiorari* and prohibition against the High Court."[486] Specifically, the Attorney General asked the Supreme Court to quash the relevant prior orders of the High Court, which would thereby allow for the enforcement of the ITLOS order.[487]

The Supreme Court began its analysis of the case by explaining Ghana's approach to the incorporation of international law into the country's municipal law.[488] Ghana's approach, noted the Supreme Court, is like that of other common law jurisdictions. Customary international law is "part of Ghanaian law," having been incorporated into municipal law through judicial decisions so long as such international law does not conflict with domestic statutes or case law.[489] Ratified treaties, noted by the Supreme Court, are not part of Ghanaian law until they are incorporated through enabling legislation enacted by the legislature.[490] The Supreme Court then held that without enabling or implementing legislation, the orders of a treaty-based international tribunal, such as the ITLOS, "has no basis in [Ghanaian] law."[491]

The government had argued that provisions of the Constitution of Ghana had incorporated the UN Convention on the Law of the Sea (UNCLOS) into Ghanaian law.[492] Specifically, the government had argued that the UNCLOS is incorporated into the laws of Ghana through Article 75 of the Constitution of Ghana, 1992.[493] According to Article 75, treaties must be ratified by Ghana's Parliament and provide how that has to be undertaken.[494] Article 75(2) states, "[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."[495]

The Supreme Court then held that the government's

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486. *Id.*
487. *Id.* at 9.
488. *Id.* at 2.
489. *Id.*
490. *Id.*
491. *Id.* at 3.
492. *Id.*
493. *Id.*
494. CONSTITUTION OF THE REPUBLIC OF GHANA (NO. 282 OF 1992), Apr. 28, 1992, art. 75.
495. *Id.* art. 75(2).

argument that the UNCLOS "is incorporated into Ghanaian law by virtue of Article 75 . . . is a spectacularly erroneous proposition of law" and that "Article 75 does no such thing."[496] The simple ratification of a treaty, noted the Court, does not incorporate it into Ghanaian law. Although Parliament may, through legislation ratifying a treaty, incorporate it "by appropriate language, into the municipal law of Ghana," this was not the case with the UNCLOS.[497] The Court ruled that Parliament had not incorporated provisions of the UNCLOS into Ghana's municipal law.[498]

Next, the Court discussed how provisions of international treaties are incorporated into municipal law in dualist States, such as Ghana.[499] The Court noted that in dualist States, legislation must be enacted to incorporate treaty provisions into municipal law and that this is backed up by "a long string of authorities."[500] The Court then considered provisions of Articles 40 and 73 of the Constitution of Ghana, 1992, which require the government to "promote respect for international law, treaty obligations, and the settlement of international disputes by peaceful means."[501] The government is also required by the Constitution to "conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana."[502]

The Court then concluded that "neither of these two constitutional principles" eliminates the need for treaties to be domesticated through legislation before the rights guaranteed by these treaties can become justiciable in municipal courts.[503] An interpretation that authorizes "the courts to enforce treaty provisions that change rights and obligations in the municipal

496. Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 3 (SC) (Ghana).

497. *Id.* at 4.

498. *Id.* at 4–5.

499. *Id.* at 5

500. *See id.* at 5 (citing several cases from the English Court of Appeal, English House of Lords, Judicial Committee of the Privy Council, High Court of Australia, and New Zealand Court of Appeal).

501. *Id.* at 6 (citing CONSTITUTION OF THE REPUBLIC OF GHANA (NO. 282 OF 1992), Apr. 28, 1992, art. 40(c)).

502. Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 7 (SC) (Ghana); *see also* CONSTITUTION OF THE REPUBLIC OF GHANA (NO. 282 OF 1992), Apr. 28, 1992, art. 73.

503. Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 7 (SC) (Ghana).

law of Ghana without legislative backing," noted the Court, "would give the Executive an opportunity to bypass Parliament in changing the rights and obligations of citizens and residents of Ghana."[504]

To support the dualist approach to how international law is given effect in Ghana's municipal courts, the Court referred to the decision of the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*.[505] In its judgment, the ICJ held that Italy had violated Germany's "sovereign immunity" through decisions of Italian courts and ordered Italy to remedy the violation "by enacting appropriate legislation, or by resorting to other methods of its choosing."[506] After the ICJ's ruling, the Supreme Court noted, the Italian government had "shown its willingness to act to implement the decision of the [ICJ]."[507] The Court then ordered the government of Ghana to act accordingly and enact the necessary legislation.[508]

The Court then noted that some provisions of UNCLOS had evolved into customary international law "through the practice of States" and that these would "be given effect in Ghanaian law as part of the common law of Ghana."[509] The Court then next turned to the High Court's incorrect interpretation of Argentina's waiver of immunity.[510] The Court accepted "as *res judicata* the interpretation put by the English Supreme Court on the contested waiver cause" and noted that "[t]he issue attracting the estoppel is that relating to whether the language of the waiver clause was to be interpreted to mean that the Republic of Argentina had waived its sovereign immunity and subjected itself to the jurisdiction of 'other courts.'"[511]

After accepting "the view of the English Supreme Court . . . which was adopted by Adjei-Frimpong J in the court below," the Supreme Court of Ghana noted that it still had to determine another issue, which is whether courts in Ghana should grant effect to the waiver of immunity to a military asset.[512] The Court

504. *Id.*

505. *Id.* (citing Jurisdictional Immunities of State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. 99 (Feb. 3) [hereinafter Germany v. Italy]).

506. *Id.* at 8 (quoting Germany v. Italy, *supra* note 505, ¶ 139(4)).

507. *Id.* at 8.

508. *Id.*

509. *Id.* at 9.

510. *Id.*

511. *Id.* at 20.

512. *Id.* at 22.

then cited a "common law rule on conflict of laws which states that the courts will not enforce or recognize a right . . . arising under the law of a foreign country, if the enforcement of that right, . . . would be inconsistent with the fundamental public policy of the law of the forum."[513]

The Court then concluded that the right claimed by the first interested party,

> which is based on a combination of customary public international law, the law of New York and common law, to attach a foreign military asset in Ghana in execution of a judgment debt obtained abroad, is against the fundamental public policy of Ghana, since it imperils, to a degree, the peace and security of Ghana."[514]

In coming to that conclusion, the Court cited statutes of Canada and the United States which prohibit "the attachment or execution of foreign military property."[515] Although Ghana did not yet have a statute such as those found in the United States and Canada, noted the Court, when it does, "such a law ought to allow the exclusion of foreign law, on public policy grounds, where the enforcement of a right under that foreign law contributes to such risk of military conflict or insecurity."[516]

While it was not certain about what should be included "in the category of public policy in relation to conflict of laws and the enforcement of foreign law," the Court held that it was "reasonable and legitimate to insist that the enforcement in the Ghanaian courts of a right under the law of a foreign country should not imperil the security of the Ghanaian state, broadly defined."[517] Ghana's public policy stated that the Court "should surely include the need to preserve its security."[518]

The High Court, the Supreme Court concluded, "should, on public policy grounds, have refused jurisdiction on the ground that a contractual waiver of sovereignty over a warship would not be effective in conferring jurisdiction over the warship" and that "[t]he error of the learned trial judge in failing to refuse jurisdiction to seize the military asset of a sovereign State is to

513. *Id.* at 22–23.
514. *Id.* at 23.
515. *Id.* at 23–24.
516. *Id.* at 24.
517. *Id.*
518. *Id.*

our mind fundamental enough to merit the grant of the remedy of *certiorari*."[519] In its conclusion, the Court held that Ghanaian courts should, henceforth, not seize any "military assets of sovereign states . . . in execution of foreign judgments, even if the sovereign concerned has waived its immunity."[520]

In this case, the Supreme Court of Ghana settled the matter of which "source of law governs the construction of advance waivers of sovereign immunity."[521] The Court's decision "highlights the unusual posture of sovereign immunity waivers, straddling public and private international law, and the resulting uncertainty surrounding the scope of broad waivers."[522] Writing about the sources of the law of state immunity, Professor Xiaodong Yang has argued that "[t]he law of State immunity has developed chiefly from case law, together with other sources such as national legislation, treaties, both bilateral and multilateral, statements made by governments and scholarly opinions including particularly the codification efforts of learned bodies."[523]

More specifically, noted Professor Yang, the rules of state immunity "have evolved chiefly *from within* the States, not *between* them," and these rules are "primarily the result of hundreds of cases decided by various domestic courts in their handling of claims brought against (and, in rare cases, by) foreign States."[524] Finally, Professor Yang notes, "such rules very much resemble those conflict of law rules in the field of private international law."[525] The existing diversity in "practice concerning waivers leaves open the possibility of finding a jurisdiction willing to enforce a judgment against a sovereign."[526]

For Ghana, the Supreme Court made clear that international law, including international human rights law, is not part of the law of Ghana until the international instrument has been incorporated into the State's municipal law through appropriate legislation.[527] Customary international law,

519. *Id.* at 28.

520. *Id.* at 32.

521. Blanchard, *supra* note 478, at 76; *see also* Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 32 (SC) (Ghana).

522. Blanchard, *supra* note 478, at 79.

523. XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 26 (2012).

524. *Id.*

525. *Id.*

526. Blanchard, *supra* note 478, at 79.

527. Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 4 (SC) (Ghana).

however, is part of the law of Ghana, "incorporated by the weight of common law case law."[528] The Supreme Court held that, for public policy considerations, Ghanaian courts cannot seize the military assets of sovereign States in the execution of foreign judgments, even when the sovereign State has waived its immunity.[529]

D. *FRANCIS KARIOKO MURUATETU & ANOTHER V. REPUBLIC (SUPREME COURT OF KENYA)*

The case *Muruatetu & Another v. Republic* is an appeal from the judgment of the Court of Appeal (at Nairobi), which was delivered on July 11, 2014, and deals with "whether or not the mandatory death penalty is unconstitutional."[530] The petitioners, Francis Karioko Muruatetu, Wilson Thirimbu Mwangi, and others, had been brought before the High Court of Kenya and charged with the crime of murder.[531] They were subsequently convicted of murder and sentenced to death as mandated by section 204 of the country's Penal Code.[532]

After their conviction and sentencing, the petitioners appealed both their conviction and sentence to the Court of Appeal.[533] The appeal, however, was dismissed.[534] Dissatisfied with the Court of Appeal's decision, the petitioners filed two separate petitions to the Supreme Court.[535] These appeals were subsequently consolidated into one.[536] The Court noted that the "[t]he gravamen of petitioners' appeal is that the mandatory death sentence imposed upon them and the commutation of that sentence by an administrative fiat to life imprisonment are both

528. *Id.* at 2.

529. *Id.* at 32.

530. Francis Karioko Muruatetu v. Republic (2017) eKLR at para. 1 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

531. *Id.* at para. 2.

532. *Id.* Section 204 of the Penal Code states, "[a]ny person convicted of murder shall be sentenced to death." Penal Code (2012) Cap. 63 § 204 (Kenya). Murder is defined as, "[a]ny person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder." Penal Code (2012) Cap. 63 § 203 (Kenya).

533. Francis Karioko Muruatetu v. Republic (2017) eKLR at para. 2 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

534. *Id.* at para. 2.

535. *Id.*

536. *Id.*

unconstitutional and therefore null and void."[537]

Before the Supreme Court, the counsel for the petitioners[538] argued that "the mandatory nature of the death penalty under Section 204 of the Penal Code jettisons the discretion of the trial, forcing it to hand down a sentence pre-determined by the Legislature, thus fouling the doctrine of separation of powers."[539] In addition, the petitioners considered the determination and imposition of a sentence as part of "the right to a fair trial enshrined in Article 50(2) of the Constitution."[540] They then argued that Section 204 of the Penal Code's mandatory death penalty violated their right to a fair trial since it eliminated the trial judge's discretion in sentencing.[541]

The petitioners argued further that Article 50(2)(q) of the Constitution of Kenya grants anyone who is convicted by a court of law the right "to appeal to, or apply for review by, a higher court as prescribed by law."[542] In support of their appeal to the Supreme Court, the petitioners relied on various articles of the Constitution of Kenya and a number of authorities from several jurisdictions, including the Privy Council, the U.S. Supreme Court, the Supreme Court of India, the Supreme Court of Uganda, and the Constitutional Court of Malawi. [543]

The petitioners urged the Supreme Court to overturn the decision of the Appeal Court and hold that the court *a quo* had committed a gross error in law by "failing to find that the mandatory nature of the death sentence set out in Section 204 of the Penal Code is unconstitutional."[544] Counsel for the petitioners contended that "only a valid sentence in law can be commuted by the President of the Republic" and "dismissed the commutation of the petitioners' death sentence to life imprisonment as untenable given that the mandatory death

537. *Id.* at para. 4.

538. The first petitioner, Mr. Francis Karioko Muruatetu, was represented by Mr. Ngatia, while the second petitioner, Mr. Wilson Thirimbu Mwangi, was represented by Mr. Kilukumi. *See* Francis Karioko Muruatetu v. Republic (2017) eKLR at para. 6 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

539. *Id.* at para. 6.

540. *Id.*

541. *Id.*

542. CONSTITUTION art. 50(2)(q) (2010) (Kenya).

543. Francis Karioko Muruatetu v. Republic (2017) eKLR at paras. 8–11 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

544. *Id.* at para. 12.

sentence imposed upon them was unconstitutional."[545] The petitioners then urged the Supreme Court to set aside their mandatory death sentence, which had since been commuted to life imprisonment, and that "a definite term of imprisonment, subject to the applicable remission rules, be meted out to them or alternatively, an order be made remitting the matter to the High Court to undertake a sentence hearing for the purpose of determining an appropriate definite sentence."[546]

The petitioners described what they said was an "agonizing" 17-year incarceration in a "segregated death row" and urged the Court to "find that they are entitled to compensation for that unconstitutional detention and proceed to assess the quantum thereof."[547] In addition, the petitioners urged the Court to declare the mandatory death sentence prescribed by Section 204 of the Penal Code unconstitutional and apply the "award of damages for that illegality" to "all convicts suffering the same fate."[548]

The Respondent, the Director of Public Prosecutions ("DPP"), was represented by Mr. Nderitu as counsel. He "conceded that the mandatory aspect of [the death penalty] is unconstitutional" and "concurred with counsel for the petitioners that sentencing is a judicial function."[549] He concluded that the case should be sent back to the High Court for resentencing so that the Petitioners could have the opportunity to argue their case.[550] In addition, Respondent suggested the appellants' time spent in custody be taken into consideration to determine the appropriate sentence.[551]

Recalling that the Petitioners did not challenge their conviction for murder by the High Court, the Respondent dismissed the Petitioners' claim for damages as baseless.[552] The Court summarized the Respondent's position that "the award of damages is a civil claim that demands a separate and distinct hearing."[553] Finally, the Respondent argued that the Petitioners' recommendation that the Court apply its judgment to others

545. *Id.*
546. *Id.*
547. *Id.* at para. 13.
548. *Id.* at para. 14.
549. *Id.* at para. 15.
550. *Id.* at para. 17.
551. *See id.*
552. *Id.* at para. 18.
553. *Id.*

convicted of the death penalty but not currently before the Court was not justifiable.[554]

After examining all "the pleadings, written and oral submissions of the parties," the Court provided a summary of the issues that it was to decide:

> (a) Whether the mandatory nature of the death penalty provided for in the Penal Code under section 204 is unconditional; (b) Whether the indeterminate life sentence should be declared unconstitutional; (c) Whether this Court can or should define the parameters of a life sentence; and (d) What remedies, if any, accrue to the petitioners.[555]

The Court began its analysis of the case by noting that courts around the world, including those in Kenya, have adjudicated cases involving "the constitutionality of the mandatory nature of the death penalty."[556] Both the High Court and the Court of Appeal in Kenya adjudicated cases on the mandatory nature of the death penalty but, according to the Supreme Court, produced "divergent opinions."[557] The Court proceeded to review some of the cases decided in Kenya under the Constitution of Kenya and the constitution that it repealed.[558] One of the cases that the Court analyzed was *Godfrey Ngotho Mutiso v. Republic*,[559] which was decided by the Court of Appeal under the 2008 Constitution of Kenya.[560] In *Mutiso*, the Court noted that "[t]he entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice" and held that "[b]y fixing a mandatory death penalty, Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution."[561]

The *Mutiso* Court also held that "section 204 of the Penal

554. *Id.*
555. *Id.* at para. 25.
556. *Id.* at para. 27.
557. *Id.*
558. *Id.* at paras. 27–30.
559. *Id.* at para. 27; Godfrey Ngotho Mutiso v. Republic (2010) eKLR at para. 23 (C.A.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/69838/.
560. *See* Godfrey Ngotho Mutiso v. Republic (2010) eKLR at para. 23 (C.A.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/69838/.
561. *Id.* at para. 35.

Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial" and that "[w]hile the Constitution itself recognises the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed."[562] The Court then declared that "section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision."[563]

The Court of Appeal's holding in *Mutiso*, however, was modified by *Joseph Njuguna Mwaura & 2 Others v. Republic*.[564] In *Mwaura*, the Court delivered the following decision: "We hold that the decision in *Godfrey Mutiso v. R* to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences."[565] Following the *Mwaura* decision, some of the country's High Court judges questioned its "propriety," however, because of the "doctrine of stare decisis," they continued to abide by it.[566]

The Supreme Court then noted that the presence of the word "shall" in section 204 of the Penal Code deprives courts of the discretion to consider "mitigating factors" at the time they impose sentences.[567] The Court continued its interrogation of section 204 of the Penal Code by examining cases from other jurisdictions, including two cases from the Indian Supreme Court.[568] In *Bachan Singh v. The State of Punjab*, the Court held as follows: "[i]f the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."[569]

The Court noted that the UN Human Rights Committee

562. *Id.* at para. 36.

563. *Id.*

564. Joseph Njuguna Mwaura v. Republic (2013) 1 K.L.R. 12 (C.A.K.) (Kenya).

565. *Id.* at para. 29.

566. Francis Karioko Muruatetu v. Republic (2017) eKLR at para. 29 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

567. *Id.* at para. 30.

568. *Id.* at para. 32.

569. Bachan Singh v. State of Punjab, (1982) 3 SCC at para. 170 (India), https://indiankanoon.org/doc/1235094/.

("HR Committee") also considered the mandatory death sentence in *Eversley Thomson v. St. Vincent & the Grenadines*.[570] Communication No. 806/1998 was submitted to the HR Committee by Mr. Eversley Thompson, a citizen of St. Vincent, under the Optional Protocol to the International Covenant on Civil and Political Rights.[571] Mr. Thompson was arrested and charged with murdering a four-year-old girl.[572] The High Court (Criminal Division) subsequently convicted Mr. Thompson and sentenced him to death on June 21, 1995.[573]

The HR Committee held that the mandatory death sentence constitutes "a violation of article 26 of the [ICCPR], since the mandatory nature of the death sentence does not allow the judge to impose a lesser sentence taking into account any mitigating circumstances."[574] The HR Committee also held that "a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case."[575]

Taking into consideration the various positions on the mandatory death sentence, the Supreme Court held that it was the duty of the Court "to bring clarity and make a determination as to whether the mandatory nature of the death penalty under Section 204 of the Penal Code meets the constitutional standard."[576] The Court then considered several provisions of the Constitution of Kenya that deal with the rights of individuals, including the right to a fair trial and the right of a convicted person "to appeal to, or apply for review by, a higher court as prescribed by law."[577]

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570. Francis Karioko Muruatetu v. Republic (2017) eKLR at para. 33 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

571. *See Eversley Thompson v. St. Vinvent and the Grenadines*, Hum. Rights Comm., Commc'n No. 806/1998 T 1, U.N. Doc. CCPR/C/70/D/806/1998 (2000).

572. *See id.* at para. 2.1.

573. *Id.*

574. *Id.* at para. 3.2.

575. *Id.* at para. 8.2.

576. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 34 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/. This case was decided under Kenya's new constitution, which was adopted in 2010. *See generally* CONSTITUTION (2010) (Kenya).

577. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 34 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/ (citing CONSTITUTION arts. 19, 50 (2010) (Kenya); *see* CONSTITUTION art. 19 (2010) (Kenya)("The rights and fundamental freedoms in the Bill of Rights . . . belong to each and every individual and are not granted by the State."); *see also*

Next, the Supreme Court noted that Kenya is a signatory to the ICCPR and that the Covenant's Article 14 guarantees everyone's right "to a fair and public hearing by a competent, independent and impartial tribunal established by law."[578] In its *Resolution 2005/59*, the UN Commission on Human Rights addressed the question of the death penalty.[579] In that resolution, the Commission on Human Rights expressed "its concern at the continuing use of the death penalty around the world" and its alarm at the death penalty's "application after trials that do not conform to international standards of fairness and that several countries impose the death penalty in disregard of the limitations set."[580]

The Commission on Human Rights then urged all States Parties of the ICCPR that have not done so to sign and ratify the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.[581] With respect to States Parties that still have laws that impose the death penalty, the Commission on Human Rights urged them "[n]ot to impose the death penalty for any but the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence."[582] The Commission also urged States Parties to the ICCPR:

> To ensure also that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults *nor as a mandatory sentence*.[583]

CONSTITUTION art. 50 (2010) (Kenya) ("Every accused person has the right to a fair trial, which includes the right . . . if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.").

578. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 38 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/. *See also* ICCPR, *supra* 9, art. 14.

579. Off. of the High Comm'r for Hum. Rights, *The Question of the Death Penalty*, Hum. Rights Res. 200/59, E/CN.4/RES/2005/59 (April 20, 2005).

580. *Id.* ¶ 1.

581. *Id.* ¶ 6.

582. *Id.* ¶ 7(d).

583. *Id.* ¶ 7(f) (emphasis added). *Accord* Francis Karioko Muruatetu &

After analyzing various provisions from the Constitution of Kenya and the ICCPR, the Court acknowledged that the provisions had revealed "a number of principles," which include that "the rights and fundamental freedoms belong to each individual," that "the bill of rights applies to all law and binds all persons," that "all persons have inherent dignity which must be respected and protected," that "the State must ensure access to justice for all," that "every person is entitled to a fair hearing," and finally, that "the right to a fair trial is non-derogable."[584]

The Court then made clear that the process of trying the accused does not end when the accused is convicted. Sentencing, a critical part of the trial process, provides the Court with an opportunity to entertain submissions from both parties that can impact sentencing.[585] Kenya's Criminal Procedure Code, the Court noted, requires "mitigation as part of the trial process."[586] After reading and examining these sections, the Court concluded that courts in Kenya "ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence."[587]

The Court then observed that even though sections 216 and 329 of the Criminal Procedure Code "were couched in permissive terms," the Court of Appeal in *Sango Mohamed Sango & Another v. Republic* has held that "it is imperative for the trial court to afford an accused person an opportunity to mitigate" and that "the trial court should record the mitigating factors."[588] Such mitigation "applied even when accused persons had been convicted of offences where the prescribed sentence was death."[589] Section 24 of the Penal Code, observed the Supreme Court, "is essentially saying to a convict . . . that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the

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Another v. Republic (2017) eKLR at para. 39 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

584. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 40 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

585. *Id.* at para. 41.

586. *Id.* at para. 42. *See* Criminal Procedure Code (2012) Cap. 75 §§ 216, 329 (Kenya).

587. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 43 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

588. *Id.* at para. 44.

589. *Id.*

death sentence nonetheless."[590] Noting that they were unable to determine the "rationale for this provision," the Court held that "a person facing the death penalty is most deserving of to be heard in mitigation because of the finality of the sentence."[591]

The right to a fair trial, which includes mitigation, noted the Court, "is not just a fundamental right" but is also "one of the inalienable rights enshrined in Article 10 of the [UDHR]."[592] Article 25(c) of the Constitution of Kenya stated the Court "elevates [the right to a fair trial] to a non-derogable right which cannot be limited or taken away from a litigant."[593] This right, the Court continued, is "one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse."[594]

Section 204 of Kenya's Penal Code, which takes away the courts' "legitimate jurisdiction to exercise discretion" in matters involving life and death, noted the Court, must be regarded as "harsh, unjust and unfair."[595] Without the ability to exercise such legitimate discretion, the courts cannot impose sentences other than death where they deem it appropriate.[596] In other words, under the sentencing mandate provided by section 204, a court cannot impose an alternative sentence where mitigating circumstances require that a sentence other than death be imposed.[597] If, after taking into consideration all the mitigating circumstances presented by the parties to the case, a court is forced to impose the death penalty because of the dictates of Section 204 of the Penal Code, the Supreme Court remarked that the court will fail to "conform to the tenets of [a] fair trial that accrue to accused persons under Article 25 of the Constitution."[598]

After examining various Kenyan cases that hold that mitigation is an important part of the trial process, the Court then cited *Edwards v. The Bahamas*, a case of the Inter-American Commission on Human Rights (Inter-American

590. *Id.* at para. 45.
591. *Id.*
592. *Id.* at para. 47.
593. *Id.*
594. *Id.*
595. *Id.* at para. 48.
596. *Id.*
597. *Id.*
598. *Id.*

Commission).[599] In this case, Michael Edwards, Omar Hall, Brian Schroeter, and Jerinimo Bowlege were "tried, convicted, and sentenced to death by hanging by The Bahamas, pursuant to Sections 11 and 312 of its Penal Code."[600] Mr. Edwards petitioned the Inter-American Commission challenging the mandatory death penalty on the basis that it violated several of the human rights guaranteed to him by the American Declaration of the Rights and Duties of Man.[601] The Commission held as follows:

> Mandatory sentencing by its very nature precludes consideration by a court of whether the death penalty is an appropriate, or indeed permissible, form of punishment in the circumstances of a particular offender or offense. Moreover, by reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of a crime for which the sentence was mandated.[602]

The Supreme Court then declared that it was "in agreement with the petitioners and amici *curiae* that Section 204 violates Article 50(2)(q) of the Constitution as convicts under it are denied the right to have their sentence reviewed by a higher Court" and that, "in essence," their appeal is "limited to conviction only."[603] Reintegrating that mitigation is a critical part of a fair trial, the Court then concluded that "[a]ccess to justice includes the right to a fair trial."[604] Thus if an individual is convicted of murder and automatically sentenced to death and as a consequence, his sentence cannot be reviewed by a higher court, such an individual is "denied access to justice which cannot be justified in light of Article 48 of the Constitution [of Kenya]."[605]

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599. *Edwards v. Bahamas*, Case 12.067, Inter-Am. Comm'n H.R., Report No. 48/01, OEA/Ser. L/V/II.111, doc. 20, rev. (2000).

600. *Id.* ¶¶ 2–3; *See id.* ¶ 27.

601. *Id.* ¶¶ 1–3.

602. *Id.* ¶ 137.

603. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 56 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

604. *Id.* at para. 57.

605. *Id.* at para. 57. Article 48 of the Constitution states that "[t]he State shall ensure access to justice for all persons and, if any fee is required, it shall

The Court then held that "any court dealing with the offence of murder is allowed to exercise its judicial discretion by considering mitigating factors, in sentencing an accused person charged with and found guilty of that offence."[606] If a court fails to do so, concluded the Supreme Court, the sentence, as mandated by Section 204 of the Penal Code, would be unfair and conflict with "Articles 25(c), 28, 48 and 50(1) and 2(q) of the Constitution [of Kenya]."[607] The Court then next examined what it characterized as the discriminatory nature of the mandatory death sentence. It began its analysis by citing to Article 27 of the Constitution, which states that "[e]very person is equal before the law and has the right to equal protection and equal benefit of the law" and that "[e]quality includes the full and equal enjoyment of all rights and fundamental freedoms."[608]

Citing to Article 26 of the ICCPR, the Court notes that this provision guarantees "all persons" equality before the law.[609] In addition to requiring State Parties to outlaw discrimination, the ICCPR also mandates that State Parties guarantee "equal and effective protection against discrimination" to all persons.[610] The Court then cited a case from the Supreme Court of Uganda, *Attorney General v. Kigula & 417 Others*.[611] In that case, Susan Kigula and her maid were charged and convicted of murdering Ms. Kigula's husband and were subsequently sentenced to death as mandated by the laws of Uganda.[612] Ms. Kigula and other defendants challenged the constitutionality of the mandatory death sentence.[613] The Supreme Court of Uganda confirmed the declarations made by the Constitutional Court that the mandatory death sentence was inconsistent with Articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution of Uganda.[614]

Noting that Uganda's Supreme Court had held that

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be reasonable and shall not impede access to justice." CONSTITUTION art. 48 (2010) (Kenya).

606. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 59 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

607. *Id.*

608. CONSTITUTION art. 27(1)–(2) (2010) (Kenya).

609. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 61 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/. *See* ICCPR, *supra* note 9, art. 26.

610. ICCPR, *supra* note 9, art. 26.

611. Attorney General v. Susan Kigula (2009) U.G.S.C. 1 (Uganda), https://www.refworld.org/cases,UGA_SC,499aa02c2.html.

612. *Id.* at 1.

613. *Id.*

614. *Id.* at 3.

"allowing offenders in all other cases other than those accused of murder to mitigate, breached the right of equality before and under the law," the Kenyan Supreme Court stated that it agreed with and was persuaded by the Uganda decision.[615] The Kenya Supreme Court then noted that since Article 27 of the country's constitution guarantees every person equality and freedom from discrimination, "[c]onvicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence."[616] In addition, according to the Kenyan Supreme Court, if a convict who is facing the death penalty is denied the right to be "heard in mitigation," that constitutes "unjustifiable discrimination."[617] This, the Supreme Court concluded, is "repugnant to the principle of equality before the law" and, accordingly, "Section 204 of the Penal Code violates Article 27 of the Constitution as well."[618]

After concluding that Section 204 of the Penal Code is "out of sync with [Kenya's] progressive Bill of Rights," the Supreme Court held that Section 204 of the Penal Code "cannot stand."[619] Constitutional provisions that guarantee and protect human rights, noted the Court, require a "generous and purposive interpretation," a process that can "give life and meaning to the Bill of Rights."[620] Although Article 26(3) of the Constitution provides for the intentional deprivation of life within the "confines of the law," the wording of that provision, according to the Court, does not permit a mandatory death sentence.[621] The Court then held that imposing a death sentence upon conviction "is therefore permissible only if there has been a fair trial, which is a non-derogable right."[622]

The right to a fair hearing, according to the Court, must take

615. Francis Karioko Muruatetu v. Republic (2017) K.L.R. at para. 62 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/. *See* Attorney General v. Susan Kigula (2009) U.G.S.C. 1, 38–43 (Uganda), https://www.refworld.org/cases,UGA_SC,499aa02c2.html. (describing the Supreme Court of Uganda's disagreement with the Constitutional Court of Uganda over the issue of mitigation).

616. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 63 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

617. *Id.* at para. 63.

618. *Id.*

619. *Id.* at para. 64.

620. *Id.* at para. 65.

621. *Id.* at para. 66. *See* CONSTITUTION art. 26(3) (2010) (Kenya).

622. Francis Karioko Muruatetu & Another v. Republic (2017) eKLR at para. 66 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

into consideration the necessary mitigation circumstances as presented before the Court by both sides.[623] If such mitigation circumstances are not taken into consideration because of the mandatory nature of the death sentence, concluded the Supreme Court, then the convicted individual cannot be said to have received a fair trial.[624] The Court then held that "Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder."[625] In reaching this decision, the Court cautioned, however, that its ruling does not abolish the death penalty, "which is still applicable as a discretionary maximum punishment."[626]

The Court then issued the following order:

> The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.[627]

The Court then directed the High Court to re-hear, on a priority basis, the sentencing portion of the trial.[628] Finally, the Court ordered that the judgment be placed before the relevant governmental agencies (e.g., the National Assembly and the Senate) "for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment."[629] Although the Kenyan Supreme Court declared the mandatory death penalty for a person convicted of murder, as mandated by Section 204 of the Penal Code, unconstitutional, it did not abolish the death penalty or modify the conditions under which it is imposed. Instead, the Court directed the political branches to deal with the issue of the death penalty through appropriate legislation, making certain that any such legislation conforms to provisions

623. *Id.*
624. *Id.*
625. *Id.* at para. 69.
626. *Id.*
627. *Id.* at para. 112(a).
628. *Id.* at para. 112(b).
629. *Id.* at para. 112(c).

of the Constitution, particularly the Bill of Rights.

V. SUMMARY AND CONCLUSION

Although the UDHR is considered the foundation for the international recognition and protection of human rights, human rights have already found expression in the Covenant of the League of Nations ("Covenant").[630] Article 23 of the Covenant deals specifically and expressly with human rights.[631] In 1945, in the aftermath of World War II, delegates from several countries met in San Francisco to draft the UN Charter. The UN was expected to promote and encourage respect for human rights.[632]

One of the most important resolutions that the newly-established UN General Assembly (UNGA) adopted was Resolution 217 A (III), which established the Universal Declaration of Human Rights (UDHR)—the UDHR became the first of several international instruments guaranteeing human rights and their protection.[633] In December 1966, the UNGA adopted two more international human rights instruments—the ICCPR and the ICESCR.[634] The overarching goal of these instruments is a world in which "conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."[635]

Since the adoption of the UDHR by the UNGA and the various treaties that, together with the UDHR, comprise the International Bill of Human Rights, additional human rights instruments have been adopted, especially at the regional level. These include the African (Banjul) Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa. However, signing and ratifying these treaties does not automatically create rights that are justiciable in municipal courts in Africa. Although the act of ratification imposes certain

630. League of Nations Covenant.
631. *Id.* art. 23.
632. U.N. Charter, *supra* note 2, art. 1 ¶ 3.
633. UDHR, *supra* note 1.
634. ICCPR, *supra* note 9; ICESCR, *supra* note 9.
635. ICESCR, *supra* note 9, pmbl.

obligations on the States' Parties to carry out the terms of the treaty, however, in order for the rights guaranteed by the treaty to be justiciable in the municipal courts of the States' Parties, appropriate legislation must be enacted to domesticate the treaty in question.[636]

The effect given to international human rights treaties in Africa's municipal courts can be explained by monist and dualist theories.[637] In dualist States, treaties must be domesticated through enabling legislation before their provisions can have "domestic legal force."[638] Some dualist countries, such as Kenya, have constitutional provisions that directly incorporate provisions that these countries have ratified into municipal law. For example, according to Article 2(6) of the Constitution of Kenya, "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[639]

In monist States, such as Egypt, once a treaty has been ratified, its provisions become part of domestic law without the need for enabling legislation.[640] Other monist countries, such as Benin, have provisions in their constitutions that directly incorporate specific treaties into their national law. For example, Article 7 of the Constitution of Benin, 1990, states as follows:

> The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986, shall be an integral part of the present Constitution and of Béninese law.[641]

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636. John Mukum Mbaku, *International Law, Corruption and the Rights of Children in Africa*, 23 SAN DIEGO INT'L L. J. 195, 212 (2022) (examining the process of domesticating treaties to create rights that are justiciable in municipal courts).

637. Mukum Mbaku, *Limits on Sovereignty*, *supra* note 79, at 69 (examining the monist and dualist theories).

638. SLOSS, *supra* note 74, at 357.

639. CONSTITUTION art. 2(6) (2010) (Kenya).

640. Suto, *supra* note 123 ("This constitutional article incorporates international treaties as part of Egyptian domestic law without the requirement of enabling legislation, exhibiting the characteristics of *legal monism*."); *see also* SLOSS, *supra* note 74, at 357 (explaining legislature's treatment of treaties in monist states).

641. CONSTITUTION DE LA RÉPUBLIQUE DU BÉNIN [CONSTITUTION] Dec. 2, 1990, art. 7 (Benin).

The courts of African courts are often called upon to interpret treaties, including those dealing with human rights. This often happens when litigants request that the court directly apply the provisions of a treaty to their case, as well as when the treaty is applied indirectly to a case at bar.[642] If the constitution is clear on the relationship between international law and municipal law, it is easier for the court to decide when a litigant requests that international law or a provision of an international human rights instrument be applied to their case. For example, according to Article 2(6) of the Constitution of Kenya, "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[643] Kenya ratified the African (Banjul) Charter on Human and Peoples' Rights on January 1, 1992.[644] Hence, a litigant in Kenya, pursuant to Article 2(6) of the Constitution, can request that a local court directly apply a provision of the Banjul Charter to her case.[645]

Even in countries whose constitutions are not clear on the relationship between international human rights law and municipal law, courts have been willing to use international treaties as interpretive tools, even if they have not yet been domesticated through enabling legislation. Ghana, for example, is a dualist country and requires that international treaties which the country has ratified must be domesticated before their provisions can be applied in its municipal courts. In reference to unincorporated treaties, the Chief Justice of the Ghana Supreme Court, in *New Patriotic Party v. Inspector General of Police*, held that "I do not think the fact that Ghana has not passed specific legislation to give effect to the [Banjul] Charter, [means that] the Charter cannot be relied upon."[646] In *Unity Dow*, Justice Amissah made a similar declaration.[647]

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642. SLOSS, *supra* note 74, at 369.

643. CONSTITUTION art. 2(6) (2010) (Kenya).

644. *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and People's Rights,* AFRICAN UNION, https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (last visited Mar. 3, 2023).

645. *See* CONSTITUTION art. 2(6) (2010) (Kenya).

646. New Patriotic Party v. Inspector-Gen. of Police (1993) 2 GLR 459, ¶ 6 (SC) (Ghana); *see* Okeke, *supra* note 112, at 411–12.

647. Attorney-General v. Unity Dow, (1992) BLR 119 (CA) (Bots.). Justice Amissah declared as follows: "I bear in mind that signing the convention does

Since the 1990s, when many African countries began a transition to democracy, many of them have introduced governance systems characterized by separation of powers with independent judiciaries. In addition to checking on the exercise of government power, these independent judiciaries have used their power to interpret the constitution to declare unconstitutional, and hence, null and void, statutory and customary laws that violate the constitution in general and the bill of rights in particular.[648] In doing so, many of these courts have used international law, particularly international human rights law, as interpretive tools.[649] Thus, international law, particularly international human rights instruments, has become increasingly relevant to the recognition and protection of human rights in African countries.

In this article, cases from South Africa (*Williams & Others*), Ghana (*R. High Court*), and Kenya (*Muruatetu & Another*) were examined to see how international human rights law is impacting the interpretation of national law, including the constitution, and the protection of human rights. In *S v. Williams*, the CC of South Africa used international and comparative sources of law as tools of interpretation to interpret provisions of the Constitution and the Criminal Procedure Act No. 51 of 1977. The Court declared certain provisions of the Criminal Procedure Act to be inconsistent with the country's Constitution—Constitution of the Republic of South Africa,

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not give it power of law in Botswana but the effect of the adherence by Botswana to the convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the convention must be preferable to a "narrow construction" which results in a finding that section 15 of the Constitution permits unrestricted discrimination on the basis of sex." *Id.*

648. *See, e.g.*, Ephrahim v. Pastory, (2001) AHRLR 236 (TzHC 1990) (Tanz.) (using international law as an interpretive tool and finding a provision of Haya Customary Law to be unconstitutional and violative of the Bill of Rights and declared it null and void).

649. *See, e.g.*, *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.). In *Makwanyane*, the Constitutional Court of South Africa used international law as an interpretive tool to declare the death penalty was not consistent with South Africa's commitment to human rights as expressed in and guaranteed by the Interim Constitution (Constitution of South Africa 1993). The Court found section 277(2)(a) of the Criminal Procedure Act 51 of 1977, which mandates the death sentence for a person convicted of murder, unconstitutional and invalidated it. *See* Criminal Procedure Act 51 of 1977, GN 748 of GG 5532 (21 Apr. 1977); *see also State v. Makwanyane* 1995 (3) SA 391 (CC) at 94 para. 149 (S. Afr.). (declaring that provisions of section 277(1)(a) of the Criminal Procedure Act "is inconsistent with the Constitution.").

1996. In rendering its decision, the Court recognized what it referred to as "the emerging consensus of values in the civilized international community."[650]

In *R v. High Court*, the Supreme Court clarified how effect is given Ghana's municipal courts to international treaties, including international human rights instruments. The Court made clear that Ghana is a dualist State and that until and unless an international treaty or convention has been incorporated into the State's municipal law through appropriate legislation, the provisions of such a treaty are not part of the law of Ghana.[651] The Court also made clear that customary international law is part of the law of Ghana by incorporation through common law case law.[652] Finally, the Supreme Court of Ghana held that Ghanaian courts cannot seize the military assets of sovereign States in the execution of foreign judgments, even when the sovereign State has waived its immunity.[653]

In *Muruatetu & Another v. Republic*, the Supreme Court of Kenya held that the mandatory nature of the death sentence, as provided for under Section 204 of the Penal Code, is unconstitutional.[654] In reaching its decision, the Court cited various international instruments (e.g., the ICCPR) and comparative case law (e.g., from the Indian Supreme Court, U.S. Supreme Court, Ugandan Supreme Court), as well as from the UN Human Rights Committee. The Court then directed the High Court to re-hear the sentencing portion of the case. In addition, the Court ordered that the judgment should be placed before the relevant governmental agencies so that they could effect the necessary amendments to give effect to the judgment just delivered by the Court.[655]

These three cases have revealed the increasing importance and relevance of international law to Africa's municipal legal systems. Courts in African countries have increasingly been using international law, including international human rights law, as a tool to interpret constitutional and statutory law. In doing so, courts have clarified how international law is given

650. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 8 para. 22 (S. Afr.).

651. Republic v. High Ct. (Com. Div.) Accra (2013) No. J5/10/2013 at 3 (SC) (Ghana)

652. *Id.* at 2.

653. *Id.* at 32.

654. Francis Karioko Muruatetu v. Republic (2017) eKLR at para. 112 (S.C.K.) (Kenya), http://kenyalaw.org/caselaw/cases/view/145193/.

655. *Id.*

effect in the domestic courts of African States. In addition, courts have used international law as an interpretive tool to declare provisions of domestic statutes inconsistent with the bill of rights and, hence, declare them unconstitutional. For example, in Kenya, the Supreme Court declared Section 204 of the Penal Code, which prescribes a mandatory death sentence for any individual convicted of murder, to be inconsistent with the Constitution and then instructed the political branches to take necessary legislative action to bring the statute into conformity with the Constitution.[656]

In South Africa, the CC held that provisions of the Criminal Procedure Act No. 51 of 1977 were inconsistent with the country's Constitution. The Court then declared "invalid and of no force and effect (a) section 294 in its entirety."[657] The Court also held that the words "whipping" in section 290(2) were "invalid and of no force and effect."[658] Throughout the continent, national judiciaries are gradually exercising the independence granted to them by their new constitutions to improve the environment for the recognition and protection of human rights. As a consequence, international law, particularly international human rights law, is gradually gaining significant relevance in Africa's efforts to protect human rights.

656. *Id.*

657. *S v. Williams & Others* 1995 (3) SA 632 (CC) at 34 para. 96(1)(a) (S. Afr.).

658. *Id.* at para. 96(1)(b).