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The Application of Human Rights Treaties in the Development of Domestic and International Law: A Personal Perspective

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Abstract

This article considers the application of international human rights treaties or conventions to domestic law in common law countries and the historical differences in approach between some jurisdictions. It promotes the view that the judiciary of a country which has signed an international human rights treaty or convention may refer to such a treaty when interpreting domestic law, notwithstanding the fact that the treaty or convention has not been incorporated into domestic legislation. The article also suggests that international human rights treaties and conventions have a role in developing international criminal law and international humanitarian law. It cites the example of the decision that forced marriage is an inhumane act, a crime against humanity, by the Special Court of Sierra Leone, and gives the factual and jurisprudential background to that decision.

Key words

application of human rights treaties; crimes against humanity; forced marriage; Special Court of Sierra Leone

1. Human rights treaties and domestic law

The implementation of human rights treaties in domestic law varies between common law and civil law countries. In common law jurisdictions the signing of a treaty by the state does not mean that it is automatically part of the domestic law. Procedures for ratification and implementation by domestic legislative bodies must be followed. It is not uncommon for a country to sign an international human rights treaty and be slow to take further action to give it the force of law.[1] This raises the

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1 This view is based on the writer's personal experiences in Sierra Leone, Northern Ireland, and Papua New Guinea.

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question of what the role is of international human rights treaties which have yet to be implemented by a signatory country.

The attitudes of the judges towards the use of international human rights treaties when interpreting or enforcing domestic legislation and customary law also vary. In most common law countries, in common with some other jurisdictions, an unincorporated treaty may not be relied upon to found a cause of action.

In some jurisdictions, human rights treaties are not referred to in interpreting or implementing the law in domestic courts; in others, treaties have been used in the interpretation and application of law. The latter view stems from the premise that a country that has signed a treaty, regardless of whether it has ratified or implemented it, does not intend to act in contravention of that treaty, and statutes and other laws, including customary law, should be interpreted in a manner which is consistent with the treaty. In Australia, New Zealand, Papua New Guinea, southern Africa, and the countries of the southern Pacific, the courts have used international treaties and jurisprudence in the interpretation of national and constitutional rights.[2]

It has been stated,

> Even in those cases where international standards are yet to be incorporated in domestic law, a court can be informed by these standards in interpreting existing laws. As long as a country has ratified a convention it is under a legal obligation to comply with its tenets. Courts and other relevant national bodies are under a corresponding obligation not to do anything which might lead the country to contravene its obligations.[3]

In contrast the English courts held in *R* v. *Secretary of State for the Home Department, ex p. Brind and Others*[4] that the European Convention for the Protection of Human Rights and Fundamental Freedoms was not incorporated by statute into English domestic law, so that its provisions were not applicable as a rule of statutory construction except in limited circumstances.[5]

The Harare Declaration on Human Rights, which sets forth principles to be followed in domestic jurisdictions, states, *inter alia*,

> Fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts.[6]

The attitude to the use of international treaties depends on the attitude of the judiciary; if the courts are amenable to the consideration of using international

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2 A. Byrnes, 'Using Gender-Specific Human Rights Instruments in Domestic Litigation: The Convention on the Elimination of Discrimination against Women', in K. Adams and A. Byrnes (eds.), *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level* (1999). See, e.g., *Attorney-General of Botswana v. Unity Dow*, [1991] LRC (Const.) 574 (High Court of Botswana); [1992] RC (Cons) 623 (Court of Appeal of Botswana); *State v. Ncube*, 1990 (4) SA 151 (Supreme Court of Zimbabwe); *In re Corporal Punishment*, 1991 (3) SA 76 (Namibian Supreme Court); *Rattigan v. Chief Immigration Officer of Zimbabwe*, (1994) 1031 LR 224, [1994] 1 LRC 343, 1995 (2) SA 182 (Supreme Court of Zimbabwe). See also *State v. Kule*, [1991] PNGLR 404.

3 F. Butegwa, 'Protecting and Promoting the Rights of the Girl-Child in Commonwealth Jurisdictions with emphasis on Commercial Sexual Exploitation', in Adams and Byrnes, *supra* note 2, 223 at 233.

4 *R v. Secretary of State for the Home Department, ex p. Brind and Others*, (1990) 2 WLR 787 (CA).

5 The Convention has since been incorporated into domestic law and is now cited in litigation.

6 See Harare Declaration of Human Rights, (1989) 15 *Commonwealth Law Bulletin* 999.

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treaties to interpret domestic law, then those treaties will be cited. As expressed by Brennan J of the High Court of Australia,

> The opening up of the international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imposes.[7]

When considering the application of human rights treaties to domestic law it is important to bear in mind that customary law may also be part of the law of a country. In many countries, particularly developing countries, it is customary law that affects rights in family, marriage, land, and inheritance – those matters that are most important in everyday life to the individual, the clan, and the community.

The Papua New Guinea courts did consider international human rights treaties when interpreting domestic law, and this was the approach I adopted when confronted by an application to enforce a custom that the family of a man who had killed another person must give a child belonging to his clan as compensation to the deceased's family. I applied the 1956 Supplementary Convention on the Abolition of Slavery in interpreting the provision in Papua New Guinea's constitution that slavery is illegal, and held that the use of a human being as compensation was unconstitutional.

However, in common with many other west African countries, the Sierra Leonean courts did not adopt this judicial approach to the application of international human rights treaties to domestic law in the cases coming before them. They adopted the strict approach that until the treaty was incorporated into domestic law it had no impact or effect on domestic law. Despite my references to such treaties as the International Convention on the Rights of the Child there was a strong resistance to using international human rights treaties in the interpretation of domestic legislation.

It was in this atmosphere that the Special Court for Sierra Leone, a court set up by agreement of the United Nations and the government of Sierra Leone to 'prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law since 30 November 1996',[8] considered gender violence in the civil war that decimated Sierra Leone from 1991 to 2002.

The Special Court for Sierra Leone is noted for several landmark decisions in international law, including decisions on the immunity of a head of state from indictment,[9] on the application of amnesties in peace treaties to crimes against

7 *Mabo v. Queensland (No. 2)*, 1995 175 CLR 1, at 42.
8 Statute of the Special Court, Art. 1.
9 *Prosecutor v. Taylor*, SCSL-03-01-I, Decision on Immunity from Jurisdiction, 31 May 2004.

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humanity and war crimes,[10] and on the recruitment and use of children in war.[11] My emphasis in this article will be on the decision relating to forced marriage.

2. Forced marriage

In the course of the civil war two rebel groups, the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC), regularly abducted civilians and used them for forced labour such as mining, domestic work, and carrying loads, and women and girls specifically for sexual purposes. The phenomenon which became known as 'forced marriage' was first considered and ruled on in the case of *Prosecutor* v. *Brima, Kamara and Kanu* (commonly referred to as the 'AFRC trial').[12]

Girls and women were abducted from their homes by invading fighters, and were then distributed among commanders and men.

The prosecution charged the conduct of forcing women into a 'marriage' and forcing those 'wives' to perform a number of conjugal duties under coercion by their 'husbands' as an inhumane act and a crime against humanity under Article 2(i) of the Statute of the Special Court. Two experts and several witnesses of fact gave evidence.

The evidence showed that a fighter had to sign for a woman or girl and a record was maintained of these allocations. These women and girls were then forced to provide sexual services and perform domestic housework, carry loads, and protect the property of these men; they often became pregnant and bore children from these relationships. One benefit that resulted from these forced relations was the protection from sexual assault or other demands by other rebel fighters. There was evidence that 'wives' of commanders had some status and power, for example to distribute looted goods and control abducted children. However, a rebel could dispense with his wife without formality whenever the relationship no longer suited him. Indeed, a witness testified that once her 'husband' was tired of her, she was trained as a fighter and sent to the front lines.

An expert report showed that the long-term association of abducted women with the rebels meant that women could not return to their communities, and if they did, not only the women themselves but often their children faced enduring stigma for their association with the rebels, even though they had not chosen voluntarily to follow the fighters. They were said to be 'tainted' with 'rebel blood'.[13]

Expert evidence adduced by both the prosecution and the defence also showed that customary arranged marriages were, and still are, a common phenomenon in rural areas throughout west Africa; they were less so in the urban areas. Girls were and are frequently married or had marriages arranged when quite young and have

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10 *Prosecutor v. Kallon and Kamara*, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004; *Prosecutor v. Kondewa*, SCSL-04-14-AR 72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by Lomé Accord, 25 May 2004.

11 *Prosecutor v. Norman*, SCSL-04-14-AR 72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Soldiers), 31 May 2004.

12 *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Judgement, 20 June 2007 (AFRC Trial Judgement).

13 *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Trial Exhibit P-32, Expert Report on the Phenomenon of Forced Marriage in the Context of the Conflict in Sierra Leone.

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little say as to whom they marry. While the Muslim religion (the majority religious group in Sierra Leone) did not allow women to be married without their consent, it was apparent from the expert evidence that many girls were and are obliged for the good of the clan or the community to conform with the choice made by their elders. There was consent, albeit a reluctant consent or one that was given for the good of the community rather than for the good of the individual. The vital element here is the consent of the families of the prospective spouses.

The majority of the trial chamber in the AFRC trial, having heard the evidence, decided that the facts did not establish a basis for a separate crime of so-called 'forced marriage', but that such an offence was subsumed into the crime of sexual slavery, which is a separate crime provided for as a crime against humanity in Article 2(g) of the Statute of the Special Court.[14] It found that the evidence adduced by the prosecution did not establish the elements of a non-sexual offence independent of the crime of sexual slavery.[15] Specifically, the trial chamber majority found that use of the word 'wife' by the perpetrator was the sign of intent to exercise ownership over the victim rather than to assume a marital or quasi-marital status with the victim.[16]

I dissented from the majority view. In my opinion, the evidence showed that women and girls who were made into wives had a conjugal status forced on them. They were immediately stigmatized as 'bush wives' or 'rebel wives', were considered 'tainted' by 'rebel blood', and were refused re-entry into their village communities or their family homes. Their children were stigmatized and, as one expert described it, were 'running naked' without an education or future. The women suffered physically and the label 'wife' to a rebel caused mental trauma, stigmatized the victims, and negatively impacted on their ability to reintegrate into their communities.[17]

In approaching the evidence and the submissions of the parties I looked to the international customary law and internationally recognized norms and standards, because, as stated by Professor Werle,

> As part of the international order, international criminal law originated from the same legal sources as international law. These include international treaties, customary international law, and general principles of law recognized by the world's major legal systems. Decisions of international courts and international legal doctrine can be used not as sources of law, but subsidiary means for determining the law. Decisions of national courts which apply international law can also be referred to here.[18]

This led to the taking into account of the penal laws of other countries in Islamic, Christian, Hindu, and common law and civil law systems. However, more importantly, I applied international treaties and conventions; in particular the International Covenant of Civil and Political Rights (ICCPR) and the Convention on

14 AFRC Trial Judgement, *supra* note 12, para. 713.
15 Ibid., para. 714.
16 Ibid., para. 711.
17 Ibid., Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriage), para 51.
18 G. Werle, *Principles of International Criminal Law* (2005), 123.

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Elimination of all Forms of Discrimination Against Women (CEDAW), which Sierra Leone signed on 21 September 1988 and ratified in November 1988.

However, it was also relevant in the circumstances and on the facts of the case to look particularly at specific African conventions, such as the African (Banjul) Charter on Human and People's Rights and the protocols to the African Charter on the Rights of Women in Africa, both of which had been signed (but not implemented) by Sierra Leone. On the basis of those conventions and on the evidence, I held that

> [I]international treaties and domestic law provide that a marriage is a relationship founded on the mutual consent of both spouses. In forced marriage the consent of the victim is absent. In the absence of such consent, the victim is forced into a relationship of a conjugal nature with the perpetrator thereby subsuming the victim's will and undermining the victim's exercise of their rights to self determination.

Furthermore, in my opinion the fact that 'forced marriage' did not necessarily involve elements of physical violence such as abduction, enslavement, or rape, and the fact that many women accepted their lot and remained with their 'husbands' because they had no other choice, did not transform a forced marriage into a consensual situation and therefore did not retroactively negate the original criminality of the act.[19]

The prosecution appealed against the majority decision, and the Appeals Chamber reviewed the evidence and the majority and minority opinions.

The Appeals Chamber overturned the trial chamber majority.[20] It found that while there was an overlap between the phenomenon of forced marriage and sexual slavery, there were also distinguishing factors. It found that the perpetrators of forced marriages intended to impose a forced conjugal association on victims rather then exercise an ownership interest, and therefore that forced marriage is not predominantly a sexual crime. The Appeals Chamber also referred to the trial chamber findings that these forced conjugal associations were often organized and supervised by the various groups of armed forces for the comfort of their fighters. It further found that 'forced marriage' implies a relationship of exclusivity between the 'husband' and 'wife' which could lead to disciplinary procedures for breach of this exclusive arrangement by the 'wife'. No 'husband' would be disciplined for breaching the arrangement. Finally, it noted the trial chamber findings that the victims of these crimes suffered great stigma once they returned to their communities.

In finding that the offence of forced marriage was distinct from the crime of sexual slavery, the Appeals Chamber held that the offence was widespread and systematic and that the gravity of the offence was sufficient to constitute 'other inhumane acts', a residual category of crimes against humanity.[21]

After reviewing the history of 'other inhumane acts' in international criminal law first introduced in the Nuremburg Charter, the Appeals Chamber held that the category 'other inhumane acts' was intended to be a residual provision so as to

19 Partly Dissenting Opinion of Justice Doherty, *supra* note 17, para. 51.
20 *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-A, Judgement, 22 February 2008.
21 Ibid., paras 199–202.

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punish criminal acts not specifically recognized as crimes against humanity but which, in context, are of comparable gravity to the listed crimes against humanity.[22]

After considering the evidence and the law, the Appeals Chamber held that the perpetrator intended to impose a forced conjugal association rather than exercise mere ownership over civilian women and girls. They adopted the view in the dissenting opinion that

> [F]orced marriage involves 'the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victims'.

And

> Victims were subjected to mental trauma by being labelled as rebel 'wives'; further they were stigmatized and found it difficult to integrate into their communities causing mental and moral suffering, which, in the context of the Sierra Leone conflict, is of comparable seriousness to other crimes against humanity listed in the Statute.

The Appeals Chamber then considered whether forced marriage satisfies the elements of 'other inhumane acts', and held that other inhumane acts contained in Article 2(i) of the Statute form part of customary international law. The Appeals Chamber stated:

> The Appeals Chamber is firmly of the view that acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.

I suggest, paraphrasing the words of Hon. Justice Kirby of Australia, that when faced with ambiguities of legislation or uncertainty of the law, it is appropriate and legitimate in filling the gap to have regard to international human rights and norms.[23]

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22 Ibid., para. 183.

23 M. Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', (1988) 62 *Australian Law Journal* 514.

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