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A Jigsaw Puzzle or a Map? The Role of Treaties under Kenya's Constitution

Archibold Ombongi Nyarango*
Gumbo and Company Advocates
archieombongi@yahoo.com

Abstract

Kenya's 2010 Constitution marks the first time that treaty law has been constitutionally declared part of Kenya's domestic law. However, the laconic drafting of the relevant provision leaves unanswered questions about the role of treaties. This article seeks to answer some of those questions, addresses conflicts between treaties and other laws, and concludes that treaties can be directly enforceable in domestic law unless they are expressly non-self-executing. Furthermore, domestic courts must apply treaties in accordance with the constitution, although the article also addresses the problems that this causes with article 103 of the UN Charter and the East African Community Treaty. Treaties that are applied directly domestically should be considered at a par with statutes enacted by the national Parliament and prevail over county laws. Human rights treaties should carry greater weight than conflicting statutes. Where a treaty is implemented into domestic legislation, the "parent" treaty should prevail where there is a conflict.

Keywords

Kenya, international law, treaty, monism, dualism, domestication, transformation, constitution

INTRODUCTION

The law of treaties in Kenya received constitutional underpinning through article 2(6) of the Constitution of the Republic of Kenya, 2010 (2010 Constitution). This provision states that treaties and conventions form part of the law of Kenya "under this Constitution". A number of questions arise from this and may determine how treaty law and municipal law interact in international jurisprudence before Kenyan courts.

The first issue is whether the dualist position under the previous constitution remains: do treaties still need legislation to transform[1] them to be

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* LLB (hons), LLM (international law), advocate of the High Court of Kenya. Consultant, Gumbo and Company Advocates, Nairobi, Kenya.

1 Some writers use the term "translation" to describe the process of legislating non-self-executing treaties into domestic law. Others label it "transformation". The terms appear interchangeable. See DJ Devine "The relationship between international law and municipal law in the light of the interim South African Constitution 1993"

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domestically enforceable? This article argues that the direct applicability of treaties has not been treated consistently, with some courts still putting forth dualist positions. Even where treaties are directly enforced, there is a lack of consistency in addressing the jurisprudence of treaty bodies.

Secondly, where do treaties fit into the hierarchy of norms within Kenya? This article argues that some treaties, such as the Treaty establishing the East African Community (EAC), pose a challenge to Kenyan courts, which must mediate between the supremacy clause in the constitution and the treaty's own claim to supremacy over inconsistent national laws. However, these should be seen as exceptional, unique agreements; the constitution will usually supersede treaty law. In addition, treaties should be treated as equal to ordinary domestic statutes if they fulfil two conditions: they are ratified in accordance with the Treaty Making and Ratification Act 2012 (TRA 2012) and are not expressly meant to be non-self-executing. This article discusses a possible exception to this rule with respect to treaties and legislation on human rights and freedoms. Finally, it argues that county legislation should not override treaty obligations where a conflict arises.

Assuming that the constitution prevails over contrary treaty provisions, a third question is whether a treaty can be reviewed by a domestic court for constitutionality and what the effect of unconstitutionality would be on its validity. This article argues for the acceptability of judicial review of treaty constitutionality but urges that courts should provide an opportunity for the executive to remedy unconstitutional treaty provisions before declaring them void. How do the courts negotiate conflicts with treaties that specifically claim to be supra-constitutional, such as the EAC Treaty, and treaties containing *jus cogens* [peremptory norms]?

This article analyses the language of the 2010 Constitution and TRA 2012. It also uses prior constitutional drafts and reports as well as a broad comparison of the different constitutional traditions that span the globe. Especially key are constitutions that have explicitly sought to recognize treaties as a source of law. These traditions range between monism and dualism doctrines in addressing the relationship between national and international law.

BACKGROUND: MONISM AND DUALISM

In determining where the 2010 Constitution fits in the spectrum of monist and dualist approaches, the two terms need some definition.

Monism refers to the doctrine that international and national law are two parts of the same system and thus a treaty becomes law once it has been concluded in accordance with a state's constitution and comes into force for

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contd
(1995) 44 *International & Comparative Law Quarterly* 1 at 5 and M Shaw *International Law* (5th ed, 2003, Cambridge University Press) at 121.

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that state.[2] Some monist theorists go further than this basic proposition, asserting the superiority of international norms over conflicting domestic norms.

Under the dualism doctrine, the international and national law systems are separate. The usual consequence is that a treaty is not enforceable domestically until a state passes legislation transforming or translating the treaty into its national law.[3] Another consequence of dualism is that a treaty is not superior to national laws, as the transforming legislation can simply be repealed or amended, changing the treaty's status within domestic law.[4] In practice, few states adhere strictly to either monist or dualist approaches, although dualism appears more prevalent amongst common law states modelled on the British legal system.

THE PRE-2010 CONSTITUTIONAL BACKGROUND

Kenya's previous constitutions (of 1963 and 1969) had been greatly influenced by international instruments such as the Universal Declaration of Human Rights, European Convention on Human Rights and International Covenant on Civil and Political Rights (ICCPR).[5] Despite this international contribution, especially to the Bill of Rights, neither specifically incorporated international law.

This led the courts to adjudicate on the domestic role of treaties in a series of cases. They took the position that Kenya was a dualist state in which international law, including treaties, did not become part of domestic law until incorporated by statute.[6] However, judges could use international law to remove ambiguity or uncertainty in the constitution, legislation or common law.[7] If an act incorporating or translating a treaty into domestic law was itself ambiguous, then the courts would defer to international law in interpreting that act.[8] The High Court also recognized "the presumption that legislation is to be construed so as to avoid a conflict with international law".[9] In

2 LF Damrosch and SD Murphy *International Law: Cases and Materials* (6th ed, 2013, West Academic Publishing) at 621.

3 Ibid; A Aust *Handbook of International Law* (2005, Cambridge University Press) at 80–81.

4 PH Verdier and M Versteeg "Modes of domestic incorporation of international law" in W Sandholtz and CA Whytock (eds) *Research Handbook on the Politics of International Law* (2017, Edward Elgar) 149 at 172.

5 ML Dudziak "Working toward democracy: Thurgood Marshall and the Constitution of Kenya" (2006) 56 *Duke Law Journal* 721 at 758; *Minister of Home Affairs (Bermuda) and Another v Fisher and Another* (1980) AC 319 at 328–29, 2 All ER 21 (PC) at 25h–26e; ICCPR Human Rights Committee *Third Periodic Reports of State Parties: Kenya* (2010) CCPR/C/KEN/3, para 30.

6 *RM and Another v Attorney General* [2006] eKLR; *Rono v Rono* (2008) 1 KLR (G & F) 803.

7 *Rono*, ibid.

8 Ibid.

9 Ibid.

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addition, ratified instruments, even if not incorporated into national legislation, could be used to address gaps in the law.[10]

Generally, however, the courts made clear that, where there was no ambiguity, the constitution and national law prevailed over international conventions.[11] The supremacy of the constitution over treaties had been upheld in early cases such as *Okunda*[12] and *Evan Maina*.[13] In these cases, the Kenyan courts clearly indicated that the constitution superseded the Treaty for East African Cooperation (EAC Treaty) of 1967 and its subsidiary laws and regulations.[14] As argued below, the position is less clear under the 1999 EAC Treaty, which expressly states that it prevails over national laws in matters of EAC implementation.[15] Nonetheless, the general supremacy of the constitution above other laws was again upheld in the later case of *Njoya*,[16] although the application of international law was not directly at issue in this case.

The drafting of the new constitution had a clear effect on the trajectory of the use of treaty law, with the courts displaying increasing confidence in relying on international norms. During this period, the courts paid attention to the constitutional drafting process in their reliance on international law. The judges in *Rono*[17] expressly noted, in justifying their use of treaty law that was not incorporated by legislation, that the Proposed National Constitution of 2005[18] (the PNC Draft) would have made customary and treaty law part of Kenyan law.

Despite these promising steps, the orthodox position before the 2010 Constitution was that, without an incorporating statute, treaty law was only an interpretive aid to ambiguous domestic law provisions and not a source of directly enforceable rights and obligations.

ARTICLE 2(6) OF THE CONSTITUTION: TREATIES AND MUNICIPAL LAW

According to the Constitution of Kenya Review Commission, making international treaties automatically part of domestic law was meant to ensure that domestic law would conform much more closely to international law binding upon Kenya and cut the time between the ratification of treaties

10 *RM*, above at note 6, *Rono*, ibid, both citing the Zambian case of *Sara Longwe* (1993) 4 LRC 221. *Ahmed and Others v Republic* criminal appeal 198, 199, 200, 201, 202, 203, 204, 205, 206 and 207 of 2008 [2010] eKLR at 8 and 9.

11 *RM*, ibid.

12 *Okunda v Republic* 9 ILM 556 (1970) (Kenya); [1970] EALR 453.

13 *In the Matter of an Application by Evan Maina* misc case no 7/1969.

14 See further discussion of the cases in RF Oppong "Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems of Africa" (2006) 30 *Fordham International Law Journal* 296 at 300–05.

15 EAC Treaty, art 8(4).

16 *Njoya and Others v Attorney General and Others* (2004) AHRLR 157 (KeHC 2004), para 29.

17 Above at note 6.

18 One of the drafts preceding the current constitution, rejected in a referendum in 2005.

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and their transformation, something that has been a pressing problem, especially with regard to human rights agreements.[19]

This direct applicability having been attempted through article 2(6), there is, however, conflicting case law as to the status of ratified treaties under the 2010 Constitution. Cases such as *Walter Barasa*[20] seem to imply that the dualist doctrine described above continues unabated in Kenya. In that case (concerning the surrender of a wanted person to the International Criminal Court (ICC)) the judge held that "to acquire the force of law, treaties and conventions have to undergo domestication".[21] The worry was that any other result would undermine the legislative authority that the Kenyan people delegated to Parliament. Given that the ICC Treaty had been domesticated through the International Crimes Act 2008, this issue could not prevent the surrender of an accused and the court upheld the arrest warrant issued by the ICC.

Yet in cases such as *Zipporah Mathara*,[22] the courts were prepared to enforce treaty obligations lacking domestic implementing legislation, pointing to a monist position. In a more recent case relating to the enforcement of Security Council resolutions, the High Court explicitly stated that Kenya was now a monist state.[23] As argued below, Parliament now has a clear and key role in treaty ratification under TRA 2012. This means that the fear of infringing sovereignty recedes and, for practical purposes, treaty law becomes Kenyan law through a similar sort of legislative "dialogue" between the Houses of Parliament and the executive as occurs in passing ordinary statutes. This is so even if the treaty is self-executing and no domestic implementing legislation is passed. This ratification process serves as a check on executive treaty power and ensures that the people participate indirectly in creating treaty law.

A final preliminary aspect of article 2(6) is that it has no subject matter restriction. The importance of this is revealed by comparing US practice on treaties. As early as the case of *Geofroy v Riggs*, the US Supreme Court ruled that the treaty power, though broad, had to be limited to "[a matter] which is properly the subject of negotiation with a foreign country".[24] By contrast, although the fourth schedule of the 2010 Constitution mandates that only the national government may exercise treaty powers, the issues within the scope of treaties are not listed. However, it should be noted that, under international law, some issues may not validly be the subject of treaties. Treaties inconsistent with *jus cogens* (for example treaties to launch wars of conquest

19 Constitution of Kenya Review Commission *Final Report of the Constitution of Kenya Review Commission* (2005) at 46, 151 and 153.

20 *Walter Osapiri Barasa v Cabinet Secretary, Ministry of Interior and National Coordination and Six Others* [2014] eKLR.

21 Id, para 50.

22 *In Re Zipporah Mathara* [2010] eKLR.

23 *Mukazitoni Josephine v Attorney General Republic Of Kenya* [2015] eKLR.

24 *Geofroy v Riggs* (1890) 133 US 255 at 267.

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or trade slaves) are void to the extent of the inconsistency. Furthermore, treaties are part of Kenyan law "under" the constitution and so must be consistent with that constitution.[25] Thus *jus cogens* and constitutionality are two implied limitations to the subject matter of treaties.

The absence of a subject matter clause may have another effect: it leaves unclear the constitutionality of treaties that address subject matter that is within the powers of county governments. This is discussed below under "Devolution and treaties".

Thus, while article 2(6) has, on the face of it, created a new role for treaty law as a direct source of domestically enforceable rights and obligations, there is a reluctance, based on constitutional concerns over sovereignty and devolution, to move too far from the previous dualist approach. The topic of the next section is how far this new role has affected the interaction between treaty law and other types of domestic and international law recognized by the constitution.

THE STATUS OF TREATIES IN THE HIERARCHY OF DOMESTIC LAWS

Treaties and the constitution

It is relatively clear that, as part of the law of Kenya "under this Constitution", treaties must conform to that constitution, at least domestically.[26] TRA 2012 supports this in requiring the national executive to apply constitutional values and principles in negotiating treaties.[27] The act also requires the government to consider the constitutional implications of ratification in the cabinet memorandum submitted before ratification.[28]

However, this is not the end of the inquiry; some writers suggest that human rights agreements, in particular, should be seen as a body of law that is above the constitution not only because their subject matter is fundamental rights but because, in the event of their violation, an individual often has recourse to a supra-national treaty body to adjudicate the alleged breach.[29] This accords with the monist views of Lauterpacht and other writers who justified the primacy of international law over national law because of its role in limiting state infringements of individual rights.[30]

25 2010 Constitution, art 2(6).

26 *Walter Osapiri Barasa*, above at note 20, paras 49 and 59, citing *Beatrice Wanjiku and Another v the Attorney General and Others* and *Beatrice Wanjiku and Another v Attorney General and Another* (2012) eKLR with approval.

27 TRA 2012, sec 6(1).

28 Id, sec 7(b).

29 T Bulto "The Monist-dualist divide and the supremacy clause: Revisiting the status of human rights treaties in Ethiopia" (2009) 23/1 *Journal of Ethiopian Law* 132 at 135–36 and 148–49; see also P Spiro "Treaties, international law and constitutional rights" (2003) 55 *Stanford Law Review* 1999 at 2001.

30 H Lauterpacht *International Law and Human Rights* (1950, FA Praeger) at 70.

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Others, citing judicial decisions, argue from the point of view of "constitutional block" theory. Under this doctrine, the constitution is not just one document, but a "constitutional fabric" of different sources.[31] For example, a Colombian court argued that the Colombian Constitution and ratified human rights treaties form such a "block", under which international human rights and domestic constitutional law intermingle and fuse.[32]

Block theory has its problems, not least its perceived erosion of state sovereignty. Sovereignty is a word of "many meanings".[33] For example, some international lawyers refer to independent statehood as "*external sovereignty*, by which is meant the state has no other authority than that of international law".[34]

Some argue against using "sovereignty" at all in explaining concepts like statehood and state power.[35] However, if one takes Kelsen's approach that "sovereignty" means there is no higher authority to bind the sovereign,[36] and that there is no difference between external sovereignty (between states) and internal sovereignty (between a state and the people),[37] then in the 2010 Constitution sovereignty means that the Kenyan people are the highest law-making power in Kenya.[38] Such sovereignty is compromised by having multilateral treaties negotiated largely by state consensus as superior to, co-equal to or part of the constitution. Indeed TRA 2012 expressly requires that treaties affecting Kenya's sovereignty must be subjected to a constitutional referendum.[39] This reflects the fact that the holders of Kenya's "sovereign power" have the sole authority to decide to delegate or donate such power.

One could argue against this, by pointing out that Parliament, representing the people and exercising their sovereignty,[40] has a role under TRA 2012 in treaty ratification. But this elides the representative role of Parliament in legislating ordinarily, with Parliament's role in constitutional amendment a separate process that is set out expressly under the amendment provisions of chapter 16 of the constitution. Thus, block theory is difficult to apply in Kenya since a block potentially permits de facto constitutional amendment via a treaty rather than via the appropriate constitutional procedure. This

31 V Undurraga and RJ Cook "Constitutional incorporation of international and comparative human rights law: The Colombian Constitutional Court decision C-355/2006" in S Williams (ed) *Constituting Equality: Gender Equality and Constitutional Law* (2009, Cambridge University Press) 215 at 226–27.

32 *Colombian Constitutional Court Decision* C355/2006, cited in Undurraga and Cook "Constitutional incorporation", id at 229.

33 H Kelsen *Principles of International Law* (1952, Rinehart and Co, Inc) at 108.

34 *Advisory Opinion on Customs Regime Between Germany and Austria* (1931) PCIJ series A/B, no 41, individual opinion by D Anzilotti at 24 (emphasis added).

35 Kelsen *Principles of International Law*, above at note 33 at 113–14.

36 Id at 108.

37 Id at 112.

38 2010 Constitution, art 1(1).

39 TRA 2012, sec 3(3).

40 2010 Constitution, art 94(2).

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also feeds the fear, whether justified or not, of unelected judges using international agreements to amend the constitution at their own discretion, using a "constitutional block" treaty to justify their actions.

Another objection to the theory is that TRA 2012 requires the government, in initiating and negotiating treaties, to consider the values and principles of the 2010 Constitution.[41] Furthermore, in presenting the memorandum for ratification, the constitutional implications of the proposed treaty must be set out.[42] This suggests that treaties are viewed as sub-constitutional, rather than part of a constitutional "block".

Finally, although block theory may justify treating some treaties as being constitutional in nature, it does not really address how conflicts between different documents within the "block" or different human rights instruments are to be adjudicated.[43]

As a result, treaties have a role, as they did before the 2010 Constitution, in interpreting constitutional provisions such as the Bill of Rights. However, that role, in view of the supremacy clause and the insistence on the sovereignty of Kenyans, does not extend to treaties being *part* of the constitution.

Judicial review of the constitutionality of treaties

Can a treaty that violates the constitution be reviewed and invalidated by a court? The High Court in *Khanna* posed this query with respect to the bill of rights: "the question [that] arises is whether an individual can be subjected to bilateral agreement in contravention of his basic fundamental rights".[44]

If these "basic fundamental rights" are enshrined in the constitutional bill of rights, and treaties are part of the law *under* the constitution, then one must read the treaty in the light of the supreme law of Kenya. Although this judicial comment was probably obiter dictum, it does suggest that treaties that violate fundamental rights and freedoms could suffer legal challenge. This, however, poses a fundamental problem of how a state mediates between the constitution and the principle of *pacta sunt servanda* [agreements must be kept].[45] Indeed it is a customary rule of international law that a state cannot rely on its internal law to justify a failure to abide by treaty obligations.

The EAC Treaty is one such treaty that may infringe the supremacy clause of the constitution and lead to constitutional litigation. Although the East African Court of Justice (the EACJ) suggested that the treaty did not provide an explicit solution for the case of a treaty provision conflicting with a national rule,[46] article 8(4) of the treaty contains a transfer of sovereignty

41 TRA 2012, sec 6(1).

42 Id, sec 7(b).

43 Undurraga and Cook "Constitutional incorporation", above at note 31 at 230–31.

44 *Khanna v Attorney General and Others* [2010] eKLR, per Warsame J at 1.

45 Devine "The relationship between", above at note 1 at 10.

46 *Nyong'o and Ten Others v Attorney General and Others* (2008) 2 KLR (EP) 397 at 430.

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from member states to the EAC. Under this provision, community organs, institutions and laws take precedence over national ones that cover the same issue. The treaty was domesticated in Kenya before the 2010 Constitution through the Establishment of the East African Community Act, which states that acts of the community "have the force of law" in Kenya.[47] The domesticating act did not specify whether and to what extent community law would take priority over national laws as per article 8(4) of the EAC Treaty. Therefore, if the language in article 8(4) is followed, then members' laws, including constitutional laws, must be subordinate to EAC law where there is a conflict. As Oppong points out, this can have unintended effects because the wording of article 8(4) could permit even minor, technical community legislation to supersede cherished constitutional norms.[48]

The 1967 EAC Treaty (predecessor to the current EAC Treaty) did not directly address conflict resolution between members' national constitutions and the treaty. However, in the early case of *Okunda*,[49] the Kenyan High Court stated that the treaty was part of Kenyan law and therefore subordinate to Kenya's Constitution. In that case, a conflict arose from EAC legislation that required the consent of counsel for the EAC before certain offences could be prosecuted. Yet that (now repealed) Kenyan Constitution stated that the Attorney General, whose office prosecuted criminal offences at that time, could not be subject to the control or direction of any person. The court held that any community law in conflict with the constitution was void to the extent of the conflict. Even if Kenyan courts today come to the same conclusion as in *Okunda* in relation to the current EAC Treaty and the 2010 Constitution, the result still leaves Kenya in breach of an international obligation to which it voluntarily bound itself.

A further problem between the EAC Treaty and the 2010 Constitution is that Kenyan courts must apply the constitution as the supreme law and not entertain any challenge to its validity.[50] On the other hand, the EACJ established under the EAC Treaty is not constrained by the national constitutions of member states. It may hold a national constitutional provision to be invalid where it clearly conflicts with the treaty.[51] The EACJ's reach is likely to grow as eastern African integration proceeds. The potential exists not only for EAC institutions to pass laws that violate the Kenyan Constitution, but for individuals aggrieved by the Kenyan courts' interpretation of the supremacy of the constitution to appeal to "higher" community law by applying to the EACJ for relief, thus subverting the domestic supremacy of the constitution.

Countries such as South Africa, Germany, Ireland and Senegal have grappled with similar questions. Indeed over 30 per cent of countries have some form

47 Establishment of the East African Community Act 2000, sec 8(1).
48 Oppong "Re-imagining international law", above at note 14 at 305.
49 Above at note 12.
50 2010 Constitution, art 2(1) and (3).
51 Oppong "Re-imagining international law", above at note 14 at 304.

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of constitutional review of treaties.[52] The current South African Constitution came out of a climate where the preceding apartheid state was hostile to international law and was in turn viewed as an international "delinquent" in the context of "the new international law of human rights".[53] By contrast, the post-apartheid state saw international law as a "pillar of the new democracy".[54] As the South African Supreme Court of Appeal put it: "[f]rom being an international pariah South Africa has sought in our democratic state to play a full role as an accepted member of the international community".[55]

This history resonates to some extent in Kenya, where the 2010 Constitution was seen as an antidote to injustice caused by the skewed distribution of national resources, coupled with two successive presidents who seemed to enjoy near-imperial powers. International law was thus meant to help secure the architecture of the rule of law, respect for human rights and freedoms as well as reducing impunity, for example by stripping the president of any immunity for crimes contained in treaties that Kenya has ratified.[56] In both states, international law is therefore a tool for cementing the break from the past and guiding the constitutionalism of the future. Especially key were the principles of "transparency and accountability" in making treaties.[57]

As Devine points out, South African practice has been that, even if an unconstitutional treaty provision would still be binding in international law, it could be challenged in the domestic courts.[58]

Even in Germany, another state concerned not to repeat violations of international law from its history but to bind the state to international law, the Constitutional Court has continually affirmed its right to review treaty obligations as against the Basic Law for the Federal Republic of Germany (the German Constitution, also known as the Basic Law).[59] While the German Constitutional Court has endorsed the Basic Law principle of "friendliness" towards international law,[60] it has also emphasized that this does not mean "tyranny" of international law over domestic statutes, rather that its powers

52 Verdier and Versteeg "Modes of domestic incorporation", above at note 4 at 7.

53 J Dugard "International law and the South African Constitution" (1997) 1 *European Journal of International Law* 77 at 77. See also A Nollkaemper "The effect of treaties in domestic law" in CJ Tams, A Tzanakopoulos, A Zimmerman and A Richford (eds) *Research Handbook on the Law of Treaties* (2014, Edward Elgar) 123 at 139.

54 Dugard, ibid.

55 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016), para 63.

56 2010 Constitution, art 143(4).

57 Dugard "International law", above at note 53 at 81.

58 Devine "The relationship between", above at note 1 at 10.

59 A de Mestral and E Fox-Decent "Rethinking the relationship between international and domestic law" (2008) 53 *McGill Law Journal* 573 at 580, citing Constitutional Court decisions including BVerfG [Federal Constitutional Court] 29 May 1974, 2 BvL 52/71. For a recent case see BVerfG 18 March 2014, docket number 2 BvR 1390/12 (Ger).

60 For example, Basic Law, art 24(1) on the transfer of sovereign powers to international bodies and art 25 on the primacy of international law.

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to review constitutionality extend both to international treaties binding Germany as well as German legislation.[61] This is in keeping with the court's understanding of its role as the ultimate interpreter of the German Constitution; it cannot abdicate this role by holding all international law to be automatically constitutional while determining contrary domestic law to be automatically unconstitutional.

This view could plausibly be taken in Kenya, despite the absence of a constitutional court. One could argue, along the German line, that the Kenyan High Court has been vested with jurisdiction to hear and determine questions of whether laws contravene the constitution.[62] It would not be logical to give such jurisdiction, declare treaties and conventions to be part of Kenyan law and then deny the High Court the power to review the constitutionality of this particular type of law.

The Irish case of *McGimpsey*[63] provides a glimpse of how this review might operate in practice. In that case, a constitutional challenge to the 1985 Anglo-Irish Treaty by Irish citizens was allowed to proceed. However, the Irish Supreme Court then interpreted the treaty and the Irish Constitution so as to avoid any conflict between the two.

Where does the burden of proof lie in cases where the constitutionality of a treaty is at issue? The lower court in *McGimpsey* held that there was a heavy onus on the party alleging the unconstitutionality of the treaty. This burden is higher than for a party alleging that a piece of ordinary legislation is unconstitutional because, according to this argument, foreign policy does not lend itself easily to judicial review. Therefore, courts must be careful in nullifying treaty provisions negotiated by the executive. Importantly, the court was not saying that the issue was non-justiciable (as falling within the foreign relations powers of the executive) but rather that, for a court, the practical exercise of delving into treaty negotiations was much more difficult than when dealing with domestic laws. However, when the case reached the Irish Supreme Court, the final judgment did not mention this holding by the lower court (it was neither approved nor disapproved), thus somewhat undermining its value as a precedent.

In any case, the lower court's view can be criticized. First, it defers excessively to the executive. While it may be important that foreign policy such as treaty negotiation is not unduly restricted by the courts, arguably the question of interpretation of norms and resolving conflicts between norms is a core judicial function. The courts should not abdicate this responsibility simply on the basis that the case raises practical difficulties.[64] Secondly, the proceedings of the International Court of Justice (ICJ) and various international

61 Decision of 15 December 2015, 2 BvL 1/12.

62 2010 Constitution, art 165(3)(d)(i).

63 *McGimpsey and Another v Ireland and Others* [1990] ILRM 441.

64 F Francioni "International law as a common language for national courts" (2001) 36 *Texas International Law Journal* 587 at 590.

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tribunals show that it is not necessarily impractical to interpret treaties and their negotiating history: domestic courts can utilize the same treaty interpretation tools that guide international tribunals when addressing conflicts with the constitution. Some of these tools are discussed below.

Senegal's Constitution suggests an alternative approach that permits the constitutionality of the treaty to be challenged in the Constitutional Court *before* ratification.[65] While it is arguably more difficult to forecast potential unconstitutionality or adjudicate theoretical conflicts before a treaty takes effect, at least this approach has the virtue of allowing the state to signal any potential constitutional issues to other treaty member states before it deposits its instrument of ratification.

Thus the conclusion must be that, in view of the role of treaties as laws *under* the constitution, the Kenyan courts must retain the power to review that law as they would any other national statute or county law. The immediate concern is what happens if a treaty or one of its provisions is found to be unconstitutional? This is the topic of the next section.

Dealing with unconstitutional treaty provisions

The Kenyan Constitution specifies that a law that is inconsistent with the constitution is void *to the extent* of the inconsistency.[66] This implies that courts do not have to invalidate an entire treaty for violating the constitution. However, severing provisions of a treaty (particularly a multilateral instrument that was negotiated as a consensus package) is not something that a domestic court should entertain lightly. Furthermore, the rule against using internal law to justify avoiding international obligations leaves the state vulnerable to counter-measures or international responsibility, regardless of whether it is simply applying a domestic court order that prevents it from fulfilling those obligations. Finally, some treaty provisions are so fundamental to the structure of the entire agreement that the treaty may even prohibit reservations and derogations. A domestic court claiming to sever such a provision would not be performing a surgical excision but a reckless gutting of the entire agreement.

Thus the position is arguably that, if the treaty provision violates the constitution and there is no possibility of interpreting away the conflict, then the court needs to scrutinize the provision to determine if it is so essential that its removal would vitiate the application of the entire treaty. Voiding the treaty's application in Kenya would require the executive to take steps to remedy the situation, through amending the constitution, denouncing the treaty, introducing a valid reservation to the treaty or convincing other parties to the treaty to approve amendments to make the treaty conform to Kenya's Constitution. The executive should be granted the opportunity to remedy this situation before the provision is irrevocably voided by the court.

65 Senegal Constitution, art 97.
66 2010 Constitution, art 2(4).

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The status of treaties in relation to customary international law

Under the 2010 Constitution, does customary international law rank equally with treaty law? Does it supersede treaty law or vice versa? Article 2(5) makes the general rules of international law part of Kenyan law. However, unlike the treaty clause in article 2(6), this "general rules" clause omits the phrase "under this constitution". There is no evidence within the constitution that the difference in the drafting of the two articles created a strict hierarchy between general rules and ratified treaties. The early Ghai,[67] Bomas[68] and PNC[69] drafts of the constitution seemed to suggest that customary international law and international agreements were equal with each other and with other types of law. Subsequent constitutional drafts (the Harmonised, Revised Harmonised and Parliamentary Select Committee drafts) omitted any provision listing applicable Kenyan law and so are not particularly useful in answering this question. References to international law as part of the law only returned with the final 2010 Proposed Constitution. This was, however, drafted differently from the Ghai, Bomas and PNC drafts. Specifically, the 2010 Proposed Constitution did not list all the different sources of Kenyan law exhaustively and omitted the words "under this constitution" when referring to general rules of international law.

Thus, while the drafting history is not definite on this issue, the differences could be attributed to differences in drafting style rather than a specific intention create a hierarchy between general rules and treaties. Therefore, the question of whether custom or treaty prevails should be answered through the application of the rules governing conflicts of international norms. In international law, excluding peremptory norms, there is no straight-forward hierarchy between treaty law and customary international law; the Statute of the ICJ presents no hierarchy between custom and treaty.[70] Rather, international courts and tribunals resolve conflicts between the two major sources of international law through a number of rules, some of which were listed in a 2006 International Law Commission (ILC) report.[71]

Examples of such rules that may be useful to Kenyan courts include the harmonization rule, the *lex specialis* rule and the *lex priori* rule.[72] The rule of

67 See the Ghai Draft, art 5(1)(g) under which "customary international law … applicable in Kenya" formed a source of Kenyan law.

68 Bomas Draft, art 3A(g): "The laws of Kenya comprise this Constitution and each of the following to the extent that it is consistent with this Constitution … customary international law, and international agreements, applicable to Kenya."

69 PNC Draft, art 3(g): "The laws of Kenya comprise this Constitution and each of the following laws to the extent that it is consistent with this Constitution … customary international law, and international agreements applicable to Kenya."

70 M Akehurst "The hierarchy of sources of international law" (1975) 47/1 *British Yearbook of International Law* 273 at 274.

71 ILC *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006, UN).

72 See Akehurst "The hierarchy of sources", above at note 70, for a comprehensive study of rules of conflict resolution and hierarchy in international law.

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harmonization states that, where there are several norms addressing the same matter, they should be interpreted in such a way as to give rise to a single set of compatible obligations.[73] According to the maxim *lex specialis derogat legi generali*, where several norms address the same matter, priority should be given to the more specific norm.[74] This rule is particularly important when interpreting conflicting sources of international obligations.[75] Under the maxim *lex posterior derogat legi priori*, where several norms address the same matter, priority is given to the norm that is later in time.[76] Finally, compounding the *lex priori* and *lex specialis* rules, a prior general rule should not prevail over a later specific rule.

These rules should, however, be applied cautiously, bearing in mind Lord Hoffman's famous words in *Jones v Saudi Arabia* against domestic courts enunciating their own version of international law.[77]

Nonetheless the role of treaties vis-à-vis customary international law is to be determined more by international law rules of interpretation and conflict avoidance than by the constitutional architecture of the 2010 Constitution.

Treaties and parliamentary statutes

Do treaties override ordinary statutes? The court in *Beatrice Wanjiku*[78] argued that treaties should never override local legislation passed by Parliament under its constitutional powers in article 94 of the 2010 Constitution. However, given that TRA 2012 now has a specific treaty-making role for Parliament, the argument that Parliament's law-making authority would be undermined is itself substantially weakened. Furthermore, some African constitutions that permit the direct application of treaties in domestic law, such as South Africa's[79] and Namibia's,[80] have been careful to state that domestic statutes prevail over inconsistent treaty law. One must question why, if treaties were intended to be subordinate to domestic law, Kenya's constitutional drafters could not simply have said so.

The matter is further complicated by the fact that, although article 2(6) of the 2010 Constitution provides for the automatic incorporation of treaties into domestic law, the constitution retains the transformation method of domesticating treaties. For example, article 21(4) demands that the state

73 ILC *Conclusions of the Work*, above at note 71, para 4.

74 Id, para 5.

75 Akehurst "The hierarchy of sources", above at note 70.

76 ILC *Conclusions of the Work*, above at note 71, paras 24–25.

77 *Jones v Saudi Arabia* [2006] UKHL 26, para 66 per Lord Hoffman: "But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."

78 *Beatrice Wanjiku and Another v Attorney General and Another* (2012) eKLR.

79 Constitution of the Republic of South Africa, art 231(4).

80 Constitution of Namibia, art 144.

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enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. In article 51(3)(b), Parliament is clearly required to take into account "international human rights instruments" in legislating for the humane treatment of prisoners. Thus the 2010 Constitution anticipates that, from a practical standpoint, not all treaties can simply be applied instantly to domestic matters; some will require further transformation.

Another issue arising from these differing methods of applying international obligations (incorporation or transformation) is whether a treaty that is directly part of Kenyan law under article 2(6) but has not been transformed through domestic legislation should have equal status with a treaty that has been transformed through legislation. Furthermore, what is the status of the domesticating legislation vis-à-vis its "parent treaty"?

Some case law hints that, where there is a conflict between a treaty and a domestic statute, the Kenyan courts may resolve this in favour of the international agreement. Before the 2010 Constitution, courts already appeared to accept, albeit warily, that EAC acts pursuant to the EAC Treaty would prevail over conflicting national acts.[81] After the promulgation of the new supreme law, the High Court in *Zipporah Mathara*[82] upheld the petitioner's argument that article 11 of the ICCPR, now part of Kenyan law under article 2(6) of the constitution, prevailed over aspects of the Civil Procedure Act that provided for civil jail for failure to repay debts. The Court of Appeal quoted the decision with approval in *David Macharia*,[83] a case that dealt with the right to state-funded legal representation. While subsequent decisions have interpreted article 11 of the ICCPR narrowly, so as to avoid a conflict with the Civil Procedure Act,[84] few have questioned the *Zipporah Mathara* principle of the supremacy of treaty over ordinary statutes. Therefore, although there was no express statement in *Zipporah Mathara* or *David Macharia* that treaty law would always supersede domestic statutes, the courts are clearly open to such a concept with regard to fundamental rights and freedoms and the EAC Treaty.

In relation to other non-human rights and non-EAC treaties, much depends on the role of Parliament. Under section 8 of TRA 2012, Parliament (comprising the Senate and the National Assembly) must approve a treaty whose subject matter falls under section 3 of that act. However, for executive agreements, neither Senate nor National Assembly authorization is required for treaty ratification. Executive agreements are those relating to "government business" or technical, administrative or executive matters.[85] Arguably, such

81 See J Gathii "Kenya's piracy prosecutions" (2010) 104 *American Journal of International Law* 416 at 419, citing *In re Sugar Act 2001 (no 10 of 2001), ex parte Mat International Ltd* misc civil appeal no 192 of 2004 [2004] eKLR at 12 (High Ct). Similarly, *Juma Ganzori v Commissioner General Kenya Revenue Authority* appeal no 60 of 2006.

82 Above at note 22.

83 *David Macharia v Republic* criminal appeal 497 of 2007.

84 *RPM v PKM* (2011) eKLR; *Beatrice Wanjiku*, above at note 78.

85 TRA 2012, sec 3(4).

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agreements should not supersede national statutes. This would prevent the executive from by-passing Parliament if the legislature refuses to pass a law implementing international treaty obligations, or demands additional provisions in the implementing law that are not included in the treaty. This may happen where the treaty allows member states to enact laws that go further than the treaty provisions. For example, article 65(2) of the UN Convention against Corruption 2003 states: "[e]ach State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption".[86] Nevertheless few conventions allow states to pass enacting legislation with provisions that would undermine or weaken the application of the treaty (unless the state has placed a valid reservation to that treaty).

How should conflict be resolved if the treaty has no negative impact on fundamental rights and freedoms? In addition to Parliament's role in ratification, both the executive and Parliament must take into account the views of the public before ratification.[87] If this is the case, then the question of such treaties' priority over other domestic legislation should be determined by the standard canons of statutory interpretation, including the rules of *lex priori* and *lex specialis*, since both types of law have similar levels of parliamentary input and public participation.

The danger of ranking treaties and domestic statues equally is that if a court, using the various canons of interpretation, decides that a domestic law should prevail in a conflict with a treaty, that will result in the state unintentionally violating its international obligations.[88] However this remains subject to the presumption that Parliament does not intend to violate international law when it legislates, a presumption cited with approval in the case of *Walter Osapiri Barasa*.[89] That case involved the interpretation of the Rome Statute of the ICC (Rome Statute) and the domesticating legislation, the International Crimes Act 2009. The petitioner challenged the constitutionality of both the treaty and its domesticating legislation, the court threw out the challenge, supporting its decision in part by quoting the presumption. Furthermore, the court should be alive to the danger of unilaterally re-interpreting rules of international law agreed by state consent.[90]

In the case of a conflict between an implementing statute and its "parent" treaty, the statute should be interpreted as closely as possible to the parent treaty. This fits with the presumption that, unless it clearly states otherwise, Parliament does not intend to violate international obligations when it legislates. It also ensures that Kenya implements its treaty obligations consistently with fellow member states. Finally, it is consistent with pre-2010

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86 See para 21.

87 TRA 2012, secs 7(m) and 8(3).

88 Verdier and Versteeg "Modes of domestic incorporation", above at note 4 at 9.

89 Above at note 20, para 65.

90 Per Lord Hoffman in *Jones v Saudi Arabia*, above at note 77, para 63.

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jurisprudence in *Rono v Rono*[91] that, if the domesticating law is ambiguous, the courts will defer to international law in interpreting the statute. If such an interpretation is not plausible, the treaty should prevail, but with an express notification from the court to Parliament to amend the law urgently to bring it into line with Kenya's international obligations.

Finally, where two treaties conflict and one is untransformed by domestic statute (but self-executing) while the other has been domesticated by statute, there is no reason why one should automatically override the other. After all, article 2(6) simply states that both types of treaties are part of Kenyan law. For example, the fact that Kenya has transformed the various multilateral terrorism treaties into domestic law through the Prevention of Terrorism Act should not automatically mean that a conflict between a terrorism treaty and the ICCPR should be resolved in favour of the terrorism treaty. The court would still need to interpret each treaty in line with the Vienna Convention on the Law of Treaties and other rules of treaty interpretation, as well as applying the relevant rules to resolve conflicting provisions.

Thus, although there is no clear-cut answer, there are hints that the status of a treaty as against a domestic statute will depend on the subject matter of the treaty and the domestic statute. This is especially so where the subject is human rights and fundamental freedoms. In view of the constitution's preference for rights-enhancing interpretations,[92] a similar approach should be taken where a treaty and statute are in conflict and one would limit or enhance fundamental rights or freedoms more than the other.

Treaty tribunals, precedent and Kenyan law

A number of treaties ratified by Kenya also create courts and tribunals that are authorized to make binding decisions upon member states. Some of these include the Statue of the ICJ (to which Kenya is a party by virtue of its being a UN member state),[93] the African Convention on Human and Peoples' Rights (ACHPR) and the Rome Statute.

Would the decision of a treaty tribunal, as a corollary to the superiority of a human rights treaty-based law over ordinary statutes, thus become a precedent that is able to bind a Kenyan court? Regrettably, although courts in African states have shown themselves generally willing to use the decisions of treaty tribunals in interpreting their international obligations, many neglect the rulings of African tribunals.[94] The same could be said of Kenya; Kenyan courts have quoted the African Commission on Human and

91 Above at note 6.

92 For example, art 20(3)(b): "In applying a provision of the Bill of Rights, a court shall … adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

93 UN Charter, art 93.

94 Oppong "Re-imagining international law", above at note 14 at 318.

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Peoples' Rights (African Commission)[95] and the Special Tribunal for Sierra Leone[96] much more rarely, compared with the ICCPR's Human Rights Committee or the UN Economic and Social Council.[97] Regardless of these gaps in utilizing tribunal case law, none of the existing cases quoting tribunal decisions suggests that such decisions would themselves be a binding precedent in Kenyan courts. Rather, they tend to be seen as persuasive guidance or interpretation.

Much might also depend on the text of the treaty and whether Parliament has transformed it into domestic law. For example, the ICC already binds Kenyan courts in some of its decisions. The Rome Statute has been transformed through the International Crimes Act 2009 and the High Court has already held that Kenyan courts are bound by the ICC's determinations on jurisdiction and justiciability.[98]

Another treaty body whose ruling will potentially bind all Kenyan courts is the EACJ, by virtue of articles 8, 33 and 34 of the EAC Treaty. The EACJ will be capable of ruling against the validity of any constitutional or statutory provision that violates the treaty or the community laws made under it. Indeed the EACJ has already ruled that articles 33 and 34 of the treaty make clear that the EACJ's interpretation of the EAC Treaty takes precedence over that of national courts.[99] If, however, Kenyan courts rule that a particular EAC law contravenes the constitution and the EACJ subsequently rules that the same EAC law supersedes the constitution, the government may be obliged to ignore the EACJ ruling and thus incur international responsibility in failing to abide by a treaty obligation. As long as EAC integration is relatively slow,[100] the problem is not pressing, but if integration quickens and more community legislative acts and EACJ rulings begin to appear, the potential for constitutional conflict increases in proportion to the increase in EAC intrusion into domestic matters. Therefore, in the near future, there may be a need to revisit either the EAC Treaty or the supremacy clause of the constitution in order to ensure that the state keeps faith with both its constitution and its international obligations.

A further treaty body, the African Commission on Human and Peoples' Rights (African Commission), has the potential to bind domestic courts in

95 *RM*, above at note 6.

96 *David Njoroge Macharia v Republic* criminal appeal 497 of 2007 at 11, citing *Advocats Sans Frontières (on behalf of Bwampamye) v Burundi, African commission on Human and Peoples' Rights* comm no 231/00 (2000) and also citing *Prosecution v Sam Hinga Norman, Moinina Fofanah and Alieu Kondowa* case no SCSL-04-14-T (*CDF*).

97 *Andrew Omtata Okoiti and Others v Attorney General and Others* constitutional petition 3 of 2010 IICDRC [2010] eKLR; *Zipporah Mathara*, above at note 22; *David Macharia v Rep* criminal appeal 497 of 2007.

98 *Gathungu v Attorney General and Others* (2010) eKLR.

99 *Nyong'o*, above at note 46 at 415.

100 TN Kibua and A Tostensen *Fast Tracking East African Integration: Assessing the Feasibility of a Political Federation by 2010* (2005, CMI Reports) at 3–4.

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the field of human rights. The ACHPR has not been domesticated via legislation. Yet the treaty is now part of the law of Kenya; how then are pronouncements of the African Commission, a body created by that charter, to be received, given that such bodies have a bearing on the future interpretation of international treaties such as the ACHPR?

One example of the problem is the *Endorois People* communication heard before the African Commission.[101] This case was decided against Kenya, yet calls are still being made for its implementation. Indeed in the wake of a lack of response from the Kenyan government,[102] the African Commission subsequently brought proceedings against the Republic of Kenya before the African Court of Human Rights (African Court), over alleged breaches of the African Charter of Human and Peoples' Rights (African Charter) with respect to the Endorois People. The African Court decided this case against Kenya in May 2017 and ordered the state to take action to remedy violations of articles 1, 2, 8, 14, 17, 21 and 22 of the African Charter.[103] However it remains unclear to what extent the successful applicants can now use the local courts to enforce the commission's recommendations as a legal obligation on the state. In addition, what weight should be given to the ruling in other cases of indigenous peoples' land rights that come before the Kenyan courts, especially the African Commission and African Court's interpretations of ACHPR articles 1, 8, 14, 17, 21 and 22 that are now part of Kenyan law? A clear statement is required from the Supreme Court as to how to regard international tribunal case law.

Even if treaty tribunals may not always bind domestic courts, their rulings provide keys to interpreting treaty provisions. However recourse to international bodies has proved controversial where the treaty tribunal is seen as being insensitive to local law and legal traditions, or where the body subjects democratic decision-making to scrutiny by foreign judges.[104] There is also growing suspicion in some sections of Kenyan political society of international tribunals and their impact on sovereignty, culminating in court cases unsuccessfully challenging the very basis of the jurisdiction of some such tribunals.[105]

Such a challenge occurred in the constitutional case of *Gathungu*,[106] where the petitioners sought to argue that the Rome Statute and the International Crimes Act were unconstitutional because, among other things, allowing the ICC to operate in Kenya "amounts to surrender of the sovereignty of Kenya to

101 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* comm no 276/2003.

102 *African Commission v Republic of Kenya* appln no 006/2012, judgment of May 2017, para 5.

103 Id, para 227.

104 AL Young "Whose convention rights are they anyway?" (12 February 2012), available at: <http://ukconstitutionallaw.org/2012/02/12/alison-l-young-whose-convention-rights-are-they-anyway/> (last accessed 10 September 2017).

105 See for example *Gathungu*, above at note 98, challenging the constitutionality of ICC investigations within Kenya.

106 Ibid.

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foreigners which is totally untenable". In dismissing the petition, the court held that, far from being alien to the constitution, the ICC and its organs readily "integrated" with the aims of the 2010 Constitution. It upheld the ICC's right to interpret the limits of its own jurisdiction under the provisions of the Rome Statute.

As *Barasa* and *Gathungu* show, at the heart of the hostility to the ICC in particular is a question of a loss of political control over the processes of justice. This is consistent with Nollkaemper's remarks regarding the close relationship between treaties' applicability and political leaders' need to have the final say on the law applicable in society.[107] Thus, one ICC judge in the Kenyan cases before that court remarked that, "[t]he incidence of interference was bolstered and accentuated by an atmosphere of intimidation, fostered by the withering hostility directed against these proceedings by important voices that generate pressure within Kenya at the community or national levels or both. Prominent among those voices were voices from the *executive and legislative branches* of Government".[108]

Noteworthy is that the reception of the binding authority of international bodies is less troublesome for the Kenyan judiciary who, in both *Barasa* and *Gathungu*, firmly dismissed arguments that the Rome Statute and attendant obligations infringed Kenya's sovereignty.

From this, one can conclude that, even if treaties are part of Kenyan law, treaty bodies have not always received the same level of political acceptance domestically in their interpretation and enforcement of treaty norms. Thus, the question of the role of treaties is less about monism and dualism but more about fear of encroachment of political control from external bodies, which the greater reception of treaty law may be seen to encourage. Kenya may accept a binding treaty obligation, but its leaders still seek a "safety valve" to ensure that they retain some measure of control over the domestic application of treaties.[109]

Devolution and treaties

Treaties and their interpretation can affect power relationships between local and national governments.[110] It is therefore unsurprising that TRA 2012 requires the state, before ratification, to consider a treaty's implications on matters relating to Kenya's counties.[111] In practice, treaties may rarely infringe upon the somewhat restricted powers of counties in schedule 4 of the 2010 Constitution; however the national government may still experience "frustrations and pitfalls"[112] if it commits Kenya to a treaty but cannot guarantee that the treaty will be properly implemented by the county governments.

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107 Nollkaemper "The effect of treaties", above at note 53 at 123.

108 Per the separate opinion of Judge Chile Eboe-Osuji in *Decision on Defence Applications for Judgment of Acquittal* no ICC-01/09-01/11 (5 April 2016), para 142 (emphasis added).

109 Nollkaemper "The effect of treaties", above at note 53 at 127.

110 Id at 127 and 129.

111 TRA 2012, sec 7(i).

112 de Mestral and Fox-Decent "Rethinking the relationship", above at note 59 at 644.

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Devolution is part of Kenya's supreme law and binds all branches of government; neither Parliament nor the courts can simply override the laws passed by devolved government because of conflicts with ratified treaties. Even if the state were to ratify a treaty, thus making it part of Kenyan law, if the subject matter fell within county jurisdiction, it could not be properly implemented without county consent, leaving Kenya at risk of violating its international obligations by incomplete or inconsistent implementation.

The main argument for treaties to override county legislation is the need for uniformity and consistency in meeting treaty obligations across the country.[113] This argument is supported by the Government Taskforce on Devolved Government,[114] which noted in its final report that security, economic management and the need for a common market were particular areas where national regulation is required.[115]

The same need for standardization, unity and proper national regulation applies to treaties to which Kenya becomes a party. Although the Supreme Court can give binding advisory opinions on whether a matter is in the sphere of county or national government,[116] there is still a strong argument that, on the face of things, treaties ratified by national government should always be treated the same as national legislation that overrides inconsistent county laws in the situations set out in the taskforce report noted above. This would be consistent with the argument expressed earlier that, in a non-rights context, treaties and domestic statute law should be considered equal to each other.

However, the opposite argument could be made that the Kenyan devolved system is unique and provides for a partnership with both horizontal and vertical features in which power is shared and disagreements are negotiated, rather than solutions being imposed by the central state. As article 6(2) of the 2010 Constitution says: "[t]he governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation".

The Taskforce on Devolved Government also noted that the different levels are "coordinate" rather than "subordinate" in their relations and that both are constitutionally protected.[117]

Furthermore, powers and functions can only be transferred between the different levels of government by agreement.[118] Even then, responsibility for

113 Nollkaemper "The effect of treaties", above at note 53 at 129.

114 Established 22 October 2010.

115 Taskforce on Devolved Government *Final Report of the Taskforce on Devolved Government* (2012) vol 1 at 82.

116 2010 Constitution, art 163(6). See also the Kenyan Supreme Court case *In Re The Matter of The Interim Independent Electoral Commission* constitutional appln 2 of 2011, para 40, stating that the phrase "any matter concerning county government" incorporates any national-level process bearing a significant impact on the conduct of county government.

117 Taskforce on Devolved Government *Final Report*, above at note 115 at 25.

118 2010 Constitution, art 187(1).

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ensuring that the function is performed or power is exercised remains with the government to which it is assigned by the constitution.[119] Where, for example, a treaty touches on a county power like agriculture, tourism or drug control[120] but leaves it open to each member state to choose its method of implementation, it seems reasonable that the national and county governments should negotiate so that each county may pass its own implementing legislation to address local conditions. To facilitate this, the national government might draft model implementing legislation that may then serve as a blueprint for the counties in their own implementing laws. This meets the challenges of legislative consistency and the *pacta sunt servanda* principle, without jeopardizing counties' independent lawmaking powers.

Although an analogy with other devolved systems is tempting, several differences make this difficult. In the UK, for example, devolution is governed by acts of the Westminster Parliament, such as the Scotland Act 1998, rather than by a single written constitution. The same sovereign UK Parliament may legally repeal or amend any part of this devolved system. Furthermore, the fact that treaties generally still require domesticating legislation in the UK means that Parliament and the UK executive are able to leave the implementation of certain treaties to the devolved bodies, where the legislative subject matter falls within the remit of the devolved powers. By contrast, ratified treaties are immediately part of Kenyan law; there is no grant of discretion under the constitution where the treaty touches on county powers. As mentioned above, such discretion may only be possible if the treaty itself gives member states discretion as to how to implement its provisions.

Uganda is another state with a devolved system. However, it enshrined devolution differently from Kenya. Devolution in Uganda is based upon objective II(iii) of the National Objectives and Directive Principles of State Policy contained in Uganda's 1995 Constitution.[121] The Local Governments Act 1997 subsequently implemented this objective. The second schedule of the act sets out the powers of the central government vis-à-vis those of the devolved structures; much of this division of powers resembles the fourth schedule of the Kenyan Constitution. However, unlike in Kenya, Ugandan devolved powers are not listed and protected by the Ugandan Constitution, rather they are the subject of the statutory scheme in an ordinary act and can thus be amended by statutory instruments made by the minister in charge of local government to add or subtract powers from the various devolved sub-structures.[122] Thus, these weaker devolved units are not truly analogous to Kenya's "coordinate" levels of government with constitutionally protected powers.

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119 Id, art 187(2)(b).

120 See id, 4th sched.

121 This objective reads: "The State shall be guided by the principle of decentralisation and devolution of governmental functions and powers to the people at appropriate levels where they can best manage and direct their own affairs."

122 Uganda Local Governments Act 1997, sec 175(2).

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One solution might be to take practical steps to prevent counties from protesting against the constitutionality of treaties. One way would be to consult with the counties and their governments before ratifying a treaty. However, with 47 county governments, this would be likely to cause considerable delay. Based on the experience of federal countries like Canada, careful consultation with even a few provinces significantly holds up ratification.[123] However, in Kenya the Senate, which represents the counties and protects their interests,[124] has a ratification role under TRA 2012. This could hasten the process of consultation, since it renders it unnecessary to seek separate views from each county government. Such views would instead be channelled through the county senators. In the event of any doubt as to whether a matter affects county powers, either the county or national governments could seek an advisory opinion.[125]

Practical politics may, however, hamper the Senate's ability to advocate effectively for counties' interests. Under the Kenyan system of elections, it is quite possible for the senator to be a member of one political party, the governor a member of a second party, with the County Assembly dominated by yet a third party. Thus it would be presumptuous to assume that all three would put aside their differences when it came to treaty-making to ensure that the county's interests are fully protected. Indeed each may have a completely different idea of what action is in the "best interests" of the county.

CONCLUSION: THE ROLE OF TREATIES UNDER THE CONSTITUTION

Kenyan courts have already shown their determination to continue using ratified treaties to interpret domestic statutes and the constitution, particularly with regard to human rights.[126] Arguably, this should continue, especially with a bill of rights that consciously draws from international treaties. However, although treaties were always available as interpretive guides even before the 2010 Constitution, how they will fare as a direct part of Kenyan law is a more complicated question.

While the legal question of the incorporation of treaties is clear under article 2(6) of the 2010 Constitution, the *practical* question has become tied up in confusions of the term sovereignty and the need to retain domestic political control over matters perceived as too sensitive to surrender via treaty. As was seen in *Barasa* and *Gathungu*, where treaty obligations affect political processes and competition for power between branches of government, "friendliness" towards international law can be sorely tested. In each of these cases the courts were confronted with an absolutist conception of Kenyan sovereignty

123 A de Mestral and E Fox-Decent "Rethinking the relationship", above at note 59 at 594.

124 2010 Constitution, art 96(1).

125 Id, art 163(6).

126 *Okenyo Omwansa George and Another v Attorney General and Two others* [2012] eKLR.

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that, in the view of its proponents, prevents treaty obligations from intruding into "sovereign domestic matters". In both cases the Kenyan courts firmly held the treaty in question to be applicable and enforceable domestically, but there is no clarity as to where the tipping point is, where a treaty will eventually be determined to be unconstitutional for breaching sovereignty provisions.

These concerns will be tested further by treaties like the EAC Treaty,[127] which bind the state to uphold the supremacy of the treaty over domestic law. Under the EAC Treaty, the EACJ's interpretation of EAC obligations also prevails over that of national courts. Indeed, by promulgating a constitution that does not seem to recognize the supremacy of the EAC Treaty over similar national laws, Kenya could already be in breach of its undertaking under article 5 of the treaty.[128] However, failure to bring national laws into line with international law does not itself give rise to international responsibility, unless the international obligation in question was a *jus cogens* norm or expressly required implementing legislation.[129] The fact remains that the hands of the Kenyan courts are tied by the supremacy clause of the constitution and they must resolve any clear conflict between a treaty and a provision of the constitution in favour of the supreme law of the republic. This is in keeping with how most states decide conflicts between treaty and constitution.[130]

At a jurisprudential level, the constitutional incorporation of international law has not yet generated a sea-change in the case law. While there have been a number of noteworthy cases relying on articles 2(5) and 2(6) of the 2010 Constitution to utilize international law, in-depth judicial analysis of its role in Kenyan law is still sparse and sometimes of inconsistent quality. At least one court has confused the nature and application of treaty and customary international law under the 2010 Constitution.[131] Where treaties and other forms of international law (particularly customary international law) conflict, Kenyan courts should try to apply the conflict resolution techniques detailed in the ILC study group report noted above.[132]

The role of treaties vis-à-vis parliamentary statute is another area of potential conflict. Because Parliament (as the representative of the people) is part of the treaty-making process and public participation in treaty-making is enshrined

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127 See also the UN Charter.

128 "In pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones."

129 A Cassese *International Law* (2001, Oxford University Press) at 167.

130 Nollkaemper "The effect of treaties", above at note 53 at 144.

131 *Kenya Section of the International Commission of Jurists and Others v Attorney General and Others* misc criminal appln 685 of 2010 [2011] eKLR at 17, per Ombija J: "I subscribe to the view that the Rome Statute obligations are in any case customary international law which a State cannot contravene." While many of the provisions of the Rome Statute reflect customary international law, it is *not* the case that the treaty itself is now part of customary international law.

132 ILC *Conclusions of the Work*, above at note 71.

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in the 2010 Constitution and TRA 2012, it is acceptable that treaties encapsulating human rights norms should probably prevail over inconsistent statute law, as *Zipporah Mathara* and *Macharia* suggest. This flows from their unique position in elaborating and expanding the constitutional Bill of Rights, itself part of the supreme law.[133] An issue might arise, however, regarding treaties concluded before TRA 2012, when Parliament had no say in ratification. The political storm caused by the Rome Statute (ratified under the old constitution) when Kenyans were charged with crimes against humanity shows what can happen when even rights-enhancing treaties are perceived as a threat to domestic leaders' power and authority. Therefore, although the preferred approach is to give greater deference to rights-enhancing treaties, this should be done cautiously unless the constitution is amended to state explicitly the superiority of such treaties over ordinary statutes.

The corollary to this rights-expanding role is that treaties should not automatically prevail over other laws, if the former would restrict constitutional rights and freedoms. This will protect the Bill of Rights as a reflection both of Kenyan and universal human values and standards. At the same time, it will ensure that Parliament and the duly elected leaders of the executive can alter (rights-restricting) treaty obligations through appropriate ratifications, reservations, derogations or denunciations of treaties. Because ratified treaties, whether or not translated, are capable of giving direct rights and obligations under the constitution, this also means that they should be open to challenge in the courts, particularly if they violate the supreme law. Courts should be careful when reviewing the constitutionality of treaty provisions, but they should not duck that responsibility. If the only plausible interpretation of a treaty means a conflict with the constitution, then the conflict should be resolved in favour of the constitution.

Other treaties with no material effect on fundamental rights and freedoms should, however, be on par with domestic statutes. Again, this is due to the fact that Parliament and the executive share powers to consider and approve treaty law under TRA 2012. As Akehurst put it, ratification "becomes a legislative act".[134] This is analogous to the roles of Parliament and the executive in creating statute law. However, where a statute translates a treaty into domestic law, the "parent" treaty should prevail over the domesticating statute in cases of ambiguity, to ensure that Kenya's implementation of the treaty conforms to that of other member states.

For the purposes of devolution, treaties should be treated as national law applying equally and consistently throughout Kenya. This is acceptable because the national government is required by TRA 2012 to consider implications for counties before ratification, and the Senate (as part of Parliament

133 A Peters "Supremacy lost: International law meets domestic constitutional law" (2009) 3 *Vienna Journal of International Constitutional Law* 170 at 197.

134 P Malanczuk (ed) *Akehurst's Modern Introduction to International Law* (7th ed, 1997, Routledge) at 66.

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representing counties' interests) has a role in the ratification of treaties. However, where there is an irreconcilable conflict between a ratified treaty and county statutes, the treaty should prevail.

In sum, although under the 2010 Constitution Kenya tends towards monism, this article has argued that there is no presumption of Kelsenian monism,[135] whereby international law is generally superior to municipal law. The supremacy clause and concerns about sovereignty prevent this. As pointed out, Kenyan courts may utilize treaty law, but their use of jurisprudence from treaty bodies has not been consistent.

135 Id at 63.

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