CHAPTER
1

Utilising International, Regional and Comparative Law

As the main focus of this manual is on international standards on the right to freedom of expression and the approach various fora have taken in interpreting the right and its limitations, Chapter One looks at the international treaties that address the right, and the use of international and foreign law in domestic courts.

International and Regional Law

Globally, the key treaty protecting freedom of expression is the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR requires:

> "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[1]

The body that monitors states' compliance with the ICCPR is the United Nations (UN) Human Rights Committee, a body of independent experts that gives interpretative guidance on how the Covenant is to be implemented. It also periodically reviews each State Party's progress in implementing its ICCPR obligations. And, if a state has also ratified the first Optional Protocol to the ICCPR, the Human Rights Committee may consider individual complaints from individuals who allege that their rights have been violated provided that they have first exhausted all domestic remedies.

The ICCPR and regional treaties create binding obligations on the state to comply with the obligations these treaties create. Regional human rights standards may be particularly influential, with almost universal ratification of the relevant treaties in Africa, Europe, and Latin America. The African Commission has noted that "international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties".[2] The African Commission on Human and People's Rights (African Commission) noted, in *Zimbabwe Human Rights*

[1] Article 2(2), ICCPR.

[2] African Commission: *Legal Resources Foundation v Zambia* Communication No 211/98 (2001) at para 60.

NGO Forum v Zimbabwe,[3] that:

> "Human rights standards do not contain merely limitations on [the] State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation."[4]

However, the exact way in which international law obligations are implemented domestically is a matter of great variation.

Theoretically, states are said to fall into one of two categories: *monist* and *dualist*.

Monist states are those where international law is automatically part of the domestic legal framework. This means that it is possible to invoke a state's treaty obligations in domestic litigation (such as a defamation trial). States with civil law systems are more likely to be monist, but some are not (for example the Scandinavian states).

Dualist states are those where international treaty obligations only become domestic law once they have been enacted by the legislature. Until this has happened, courts could not be expected to comply with these obligations in a domestic case. States with common law systems are invariably dualist.

That is the theory. The practice is more complicated

In monist states, although ratified treaties are automatically a part of domestic law, their exact status varies. Do they stand above the constitution? On a par with it? Above national statutes? On a par with them? The answer varies from country to country.

In dualist states, some parts of international law may be automatically applicable. In states such as the United Kingdom and the United States, customary international law may be directly invoked, provided that it is not in conflict with national statute law.

The United States Constitution also says that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land." In Kenya, the Court of Appeal noted that "the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation".[5]

It is always important to have regard to the legislative framework of the country in which you are litigating – and so lawyers seeking to make arguments relating to international

[3] African Commission: *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No. 245/2002 (2006).

[4] *Id* at para 143.

[5] Kenya Court of Appeal: *Rono v Rono* (2005) AHRLR 107 at para 21.

law in court must examine the constitution and interpretation legislation of that country.

However, even where treaties have not been incorporated in dualist states, courts are likely to consider them as interpretive guidance in deciding cases, and many courts in dualist states have acknowledged that they should take note of international treaties which have been ratified by their country. After all, most national constitutions protect freedom of expression, and the limitations on freedom of expression permitted in national law often echo closely the terms of the limitations allowed in international and regional standards. Various courts in different countries have pronounced on how to use international law in domestic adjudication.

Zambia

In *Sara Longwe v International Hotels*[6] the Zambian High Court held that the Convention on the Elimination of All Forms of Discrimination against Women was relevant to the applicant's gender discrimination:

> "Ratification of such instruments by a national state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that treaty convention in my resolution of the dispute."[7]

The Zambian courts have also commented on the fact that international law is of persuasive value only in *Attorney General v Clarke*:[8]

> "We agree that in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in our laws." [9]

Kenya

The Kenya Court of Appeal in the case of *Rono v Rono*[10] held that, despite being a dualist country, international law was relevant in consideration of a case dealing with discrimination:

> "Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states: it is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common

[6] Zambian High Court: *Sara Longwe v International Hotels* 1992/HP/765.

[7] *Id*, J19.

[8] Supreme Court of Zambia: *Attorney General v Clarke* 2008 (1) ZR 38 (SC).

[9] *Id* at para 69.

[10] Kenya Court of Appeal: *Rono v Rono supra* note 5.

> law... That principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women."[11]

Nigeria

The Nigerian Supreme Court held in *Abacha v Fawehinmi*[12] that the African Charter, which had been ratified and incorporated into domestic law, is superior to all domestic laws except the Constitution. The Nigerian High Court, went further in *Odafe v Attorney General*,[13] and held that the refusal to provide pre-trial prisoners who were HIV-positive with access to antiretroviral treatment violated their right to enjoy the best attainable state of physical and mental health as guaranteed under the African Charter. Though there is no right to health care in the Nigerian Constitution, the High Court held that Nigeria was obligated to provide for adequate medical treatment under the African Charter.

Swaziland

In Swaziland, in *Masinga v Director of Public Prosecutions and Others*,[14] the High Court held that international law can be used as a guide only:

> "It cannot be controverted that a convention that is ratified by the Kingdom of Swaziland, but not yet enacted locally as an Act of Parliament, is not part of the laws of the Kingdom. An example of such a convention is the Convention of the Rights of the Child, which was acceded to by the Kingdom on the 6th October 1995, but is yet to be incorporated into the domestic law. It is however an accepted rule of judicial interpretation, one of universal and hallowed application, that regard must be had to international conventions and norms in construing domestic law, when there is no inconsistency between them and there is a lacuna in the domestic law."[15]

In *Sithole NO and Others v Prime Minister of the Kingdom of Swaziland and Others*[16] the High Court confirmed the role of international treaties in interpretation:

> "It is to be observed that it was held in the Gwebu case (Ray Gwebu and Lucky Nhlanhla Bhembe, Case No. 19/20 of 2002, Supreme Court of Appeal) that unincorporated international agreements and treaties may be used as aids to interpretation but may not be treated as part of municipal law for purposes of adjudication in a municipal court."[17]

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[11] Kenya Court of Appeal: *Rono v Rono supra* note 5 at para 21.

[12] Nigeria Supreme Court: *Abacha v Fawehinmi* [2000] 6 NWLR 228.

[13] Nigeria High Court: *Odafe v Attorney General* (2004) AHRLR 205.

[14] Swaziland High Court: *Masinga v Director of Public Prosecutions* [2001] SZHC 58.

[15] *Id*.

[16] Swaziland High Court: *Sithole NO v Prime Minister of the Kingdom of Swaziland* [2007] SZHC 123.

[17] *Id* at para 37.

Botswana

The Court of Appeal, in *Attorney General v Dow,*[18] held that domestic legislation should be interpreted so as not to conflict with international obligations:

> "Botswana is a signatory to this [African] Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. The learned judge a quo made reference to Botswana's obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution … [W]e should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations … Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken."[19]

Zimbabwe

The Supreme Court, in *Mildred Mapingure v Minister of Home Affairs and Two Others*,[20] held that courts should have regard to international obligations – irrespective of whether or not they have been incorporated into domestic law:

> "A further aspect that arises for consideration in the present context is the normative role of international instruments that specifically address the rights of women. In strict constitutional terms, the prescriptions of such instruments cannot operate to override or modify domestic law unless and until they are internalised and transformed into rules of domestic law. (This principle of the common law was expressly codified in s111B(1) of the former Constitution and is now reaffirmed in s327(2)(b) of the new Constitution). Nevertheless, it is proper and necessary for national courts, as a part of the judicial process, to have regard to the country's international obligations, whether or not they have been incorporated into domestic law. By the same token, it is perfectly proper in the construction of municipal statutes to take into account the prevailing international human rights jurisprudence."[21]

[18] Botswana Court of Appeal: *Attorney General v Dow* 1992 BLR 119 (CA).

[19] *Id*, 153-154.

[20] Zimbabwe Supreme Court: *Mildred Mapingure v Minister of Home Affairs* SC22/14.

[21] *Id*, 14.

Comparative Case Law from other Jurisdictions

Domestic courts are not bound by case law from outside their own jurisdictions, but courts do increasingly refer to jurisprudence from comparative jurisdictions as a guide to interpreting constitutional rights. The Ugandan Supreme Court acknowledged this when it stated:

> "It is a universally acceptable practice that decided cases decided by the highest courts in jurisdictions with similar legal systems, which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so."[22]

The Zambian High Court also recognised the benefit of considering decisions from other courts:

> "This court is at large to consider and take into account provisions of international instruments and decided cases in other courts. Zambian courts are not operating in isolation and any decision made by other courts on any aspect of the law is worth considering."[23]

[22] Uganda Supreme Court: *Obbo v Attorney General* [2004] 1 EA 265 (SCU), 270.

[23] Zambia High Court: *Kingaipe and Another v Attorney General* 2009/HL/86 (HC).