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The Status of International Law in Kenya

Maurice Oduor*

ABSTRACT

In a major leap, the 2010 Constitution of Kenya recognises international law as part of the domestic legal order. This provides courts with the opportunity to seek inspiration from the non-municipal legal framework when resolving disputes. However, the manner in which the Constitution incorporates international law is ambiguous and confusing. It fails to create a rank that can be used to resolve conflicts between local legislation and a rule of international law. This lack of affirmation of the place of international law in the normative rank has spawned judicial interpretation that has accorded international law the same status as statute law. This not only diminishes the weight that courts should place on international law, but also provides courts with a certain amount of discretion whenever a conflict with an Act of Parliament arises. In addition to treaties ratified by Kenya, the Constitution also refers to 'general rules of international law' as being part of the law of Kenya. This phrase is problematic because, first, it is one not generally used to refer to sources of legal norms in international law. Secondly, it makes it difficult for courts to ascertain where customary international law falls within the scheme of sources of legal norms. There has been a general tendency to equate general rules of international law with customary international law in a manner that is strenuous and confusing. Because courts may not be best placed to devise an interpretation that affirms the content and nature of international law in the legal system, a constitutional amendment has become an imperative if the uncertainty is to be removed.

1 INTRODUCTION

This article considers the textual and contextual status of international law in Kenya. Textual status refers to formal legal provisions in the Constitution and statutes, in this case the Treaty Making and Ratification Act, whereas the contextual status is the manner in which courts have characterised the place of international law within the

* LLD Candidate (Pretoria); LLM (Pittsburgh); Lecturer, Moi University School of Law, and Head, Department of Legal Aid Clinics and Externships. Email: moduor2001@yahoo.com

normative framework.¹ Article 2(5) of the Constitution provides that 'general rules of international law shall form part of the law of Kenya' while article 2(6) states that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya'. The expression of international law as forming 'part of the law of Kenya', while deceptively simple, is not without its ambiguities, especially in relation to the local effect of international legal norms. From the cases so far decided, it is clear that determining the correct place of international law in Kenya has not been an easy task, with courts sometimes reaching different positions. While some courts have contemplated a very robust role for international law domestically, others have ordained a status that is hardly different from that of local statutes. The divergent opinion may largely be attributed to inelegant drafting of the Constitution. By stating that international law is part of Kenyan law and failing to specify where it falls in the hierarchy of norms, the Constitution has sown the seed of interpretative confusion in the courts.

Another issue has to do with the use of the phrase 'general principles of international law' in article 2(5) of the Constitution. This is conceptually problematic because, arguably, the hierarchy of international legal norms does not recognise a source of law known as 'general principles of international law'. The closest reference is what has been set out as 'general principles of law recognised by civilised nations'.² And yet, if by 'general principles of international law', the drafters had somehow sought to call attention to 'general principles of law recognised by civilised nations', they missed the mark, considering these two do not mean the same thing. The issue becomes more pertinent when one considers the complete omission of customary international law from the sources of law under the Constitution. Perhaps then the intention was to use the phrase 'general rules of international law' in a manner that seemingly incorporates customary international law. While this view has found support in the courts, it is a very tortured extrapolation of the law that does little in helping courts appreciate the true import of international law, especially customary legal norms, and may in fact limit the impact that Kenyans had envisaged for international law domestically. This article confronts some of the confusion wrought by the manner in which the Constitution has sought to incorporate international law into Kenya's system of legal norms.

¹ See Constitution of Kenya (promulgated 27 August 2010), available at <<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>> accessed on 30 August 2014. See, also, Treaty Making and Ratification Act 45 of 2012, available at <<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2045%20of%202012>> accessed on 30 August 2014.

² See art 38(1) of the Statute of the International Court of Justice (26 June 1945) Annexed to the United Nations Charter (24 October 1945) 1 UNTS XVI.

2 INTERNATIONAL LAW AS PART OF THE LAW OF KENYA

2.1 *Treaties*

The 2010 Constitution of Kenya is, by all accounts, a revolutionary document. One of its key aspects is the acceptance of international law as part of Kenyan law. From an avowedly dualistic philosophy where international law had local effect only if domesticated through legislation,³ the country now boasts of a 'somewhat'⁴ monistic system of recognition of international law. Thus article 2(5) of the Constitution provides that 'the general rules of international law shall form part of the law of Kenya'. The implication is that a court can recognise the so-called 'general rules' without having to look for justification outside the Constitution. Article 2(6) in turn provides that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya'. The meaning of this is that ratification not only creates legal relations between Kenya and other States Parties to the particular treaty, but it also, and more significantly so, binds the State at the domestic level. Therefore, the process by which a treaty becomes ratified under Kenyan

³ Prior to the current Constitution, the sources of law in Kenya, as set out in s 3 of the Judicature Act, were as follows: the Constitution; Acts of Parliament; some specified United Kingdom statutes; where no written law existed, the substance of the common law, doctrines of equity and statutes of general application in force in England on 12 August 1897; and, finally, customary law. See Judicature Act, Chapter 8 of the Laws of Kenya. While this position remains to date, the introduction of international law as a source of law in the current Constitution has created confusion in terms of the place that it should occupy within the hierarchy of norms. Before the current Constitution, Kenyan courts had held for a long time that no legal principles outside the framework of the Judicature Act would be applied as a source of law. In particular it had been decided in the case of *Okunda v R* [1970] EA 453 that international law did not form part of Kenyan law unless it was domesticated. This is a principle deriving its source from the British constitutional law rule of parliamentary supremacy by which Parliament, being the supreme law-making organ, must be the originator of all law. The principle that international law only applies upon domestication; that is, the dualist principle of international law, is one that had been faithfully affirmed and reaffirmed by Kenyan courts over time.

⁴ The term 'somewhat' is used because there has been a tendency to dispute whether indeed Kenya can now be said to be monistic, in the sense that ratified international treaties become locally enforceable sources of law. Part of the confusion stems from the Constitution, when, in art 2(6), it provides that once a treaty is ratified, it becomes part of the law of Kenya. However, the Constitution then proceeds to provide, in art 94(5), that no person or body other than Parliament has the mandate to make law unless otherwise allowed to do so by the Constitution or an Act of Parliament. The first impression created by art 94(5) is that a treaty, even if ratified, does not become law unless passed by Parliament. A careful reading of the Constitution, however, shows that it does not contemplate anything beyond ratification as necessary for a treaty to have binding effect in Kenya. This in effect would mean that Kenya is a monist State. But as shall be discussed elsewhere in this article, the Constitution is not clear on whether Kenya is a monist state.

law is significant. As an issue for municipal law, States generally create their own internal mechanisms for expressing their acceptance to be bound.⁵ Some States allow the Executive to play that role while others consider a legislative process to be ideal; all for different reasons.⁶

By itself, the Constitution does not shed much light on the issue of treaty making. While article 2(6) provides that all treaties 'ratified' become law, article 94(5) reserves the power of making law to Parliament in the edict that '[n]o person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by ... [the] Constitution or by legislation'. While this point has not been clear among commentators, it would appear that for a treaty to 'have the force of law' and hence become 'part of the law of Kenya', either the ratification process must be brought within the legislative ambit of Parliament or a treaty once ratified must again be approved by Parliament. The latter scenario seems inimical to the spirit and intention of the drafters whose intention, in view of the then prevailing jurisprudence, may have been to allow a clean break from the traditional dualistic approach to international law.⁷ Participation by Parliament in the ratification appears to be what was contemplated by the drafters of the Constitution and, therefore, the more consistent argument would be that ratification is the domain of Parliament; unless that other 'person or body' performs such function

⁵ AO Adede, 'Domestication of International Obligations' Constitution of Kenya Review Commission, 15 September 2001, available at <<http://www.commonlii.org/ke/other/KECKRC/2001/14.html>> accessed on 24 August 2014. Adede observes that:

limiting itself to the choices of means by which a State may accept international obligations arising from treaties, the [1968 Vienna Convention on the Law of Treaties] does not address the question of how States may then bring about the implementation domestically of the treaties, which they have made applicable to them internationally. The Convention rightly leaves this question to be settled by each State, in accordance with its legal system. Thus, 'domestication' of treaties is a matter of national law and is not governed by international law.

⁶ Ibid.

⁷ The *travaux préparatoires* seem to indicate this intention going by the many versions of the draft Constitution that were presented to Kenyans. For example, the Proposed New Constitution that was rejected during the 2005 referendum provided for the recognition of international law. That document was an apparently watered-down version of a draft ('Bomas Draft') that had been presented by the Constitutional of Kenya Review Commission (CKRC); a body that was seen as more in touch with the interests of Kenyans. In fact, what happened is that the Government took the Constitution that had been proposed by the CKRC, removed those parts that it did not agree with, presented the document as the Proposed New Constitution ('Wako Draft') then asked Kenyans to vote for it. It was defeated. But even this Draft that was deemed to safeguard the political interests of the then leaders was very robust and radical in its treatment of international law. For instance, clause 3(g) stated that '[t]he laws of Kenya comprise ... [the] Constitution and each of the following laws to the

'under authority conferred by...[the] Constitution or by legislation'.⁸ The key point is that ratification is a one-off process that has a dual effect; it not only binds Kenya in her relations with other States (on the basis of the concept of *pacta sunt servanda*)⁹ but also, and more importantly, has an effect within the domestic framework of law.

Indeed, Parliament enacted the Treaty Making and Ratification Act with the intention of '[giving] effect to article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes'.¹⁰ The Act provides for the procedure of initiating and ratifying multilateral treaties and certain bilateral treaties.¹¹ Generally, the Executive has treaty making, negotiation and ratification powers except that that mandate may be delegated to a relevant State Department.¹² A treaty may be initiated by either the National Executive or the relevant State Department and the proposal must be submitted for approval by the Cabinet.¹³ In the case of ratification initiated by a Cabinet Secretary of a relevant State Department, he should, in consultation with the Attorney General, submit the text of the treaty, together with a memorandum, to the Cabinet for approval. If approved, the Cabinet Secretary then submits the treaty, together with the memorandum, to the Speaker of the National Assembly, who then tables it as a Bill, which is then subjected to the usual rigours of legislation.

Contrary to what it may appear to suggest, the Act merely provides for the process of ratification and does not purport to give Parliament the power to 'domesticate' treaties once ratified. With the Constitution, and the statute, it would prima facie appear that Kenya has fully embraced monism insofar as domestic effect of international law is concerned. However, having regard to the apparently varied conceptions of the term 'monism', coupled with the jurisprudence on article 2(6) of the

extent that it is consistent with ... [the] Constitution – customary international law, and international agreements applicable to Kenya'. See Proposed New Constitution, *Kenya Gazette Supplement* 63 of 2005. See also, Constitution Net, 'Kenya: Country Constitutional Profile', available at <<http://www.constitutionnet.org/country/kenya-country-constitutional-profile>> accessed on 5 May 2014; Media Development Association, 'History of Constitution making in Kenya (2012)', available at <http://www.kas.de/wf/doc/kas_32994-1522-2-30.pdf?121206114608> accessed on 3 May 2014.

⁸ Constitution of Kenya (n 1) art 94(5).

⁹ Article 26 of the Vienna Convention on the Law of Treaties. The art states that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Vienna Convention on the Law of Treaties (adopted 22 May 1969, entry into force 27 January 1980) 1155 UNTS 331.

¹⁰ Preamble, Treaty Making and Ratification Act (n 1).

¹¹ *Ibid* s 3.

¹² *Ibid* s 4.

¹³ *Ibid* s 4(3) and (4).

Constitution, it becomes apparent that the issue is not one that can be so easily disposed of.¹⁴

This said; there remain other areas in need of further clarity. For example, while the Treaty Making and Ratification Act is expressed to apply to treaties made after its commencement,¹⁵ the position is not clear with respect to those that were ratified before. It may be argued though that those treaties have already been ratified and need not be subjected to any further process. Indeed, courts have taken it for granted that those treaties having already been ratified are enforceable locally without the necessity of further procedures.¹⁶ This is a position that is also consistent with the bar against retroactive application of the law. While this is so, what does one make of the article 21(4) of the Constitution provision that ‘the State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms’? This article can only mean that, if the State is required, under the relevant regime, to enact law or do something in order to implement international law that is already binding on it, then it should do so; otherwise it would be violating the Constitution. Any other interpretation would contradict both the text and intendment of article 2(6) of the Constitution. For example, to suggest that article 21(4) means that the State must pass implementing legislation for every respective treaty would be to contradict article 2(6).

2.2 *The Concept of ‘General Rules of International Law’*

Whether or not a treaty is applicable is an easy question. If the treaty is ratified it has the force of law; otherwise, it is not part of the normative system and does not apply. The ‘general rules of international law’, on the other hand, are something else altogether. Two points need to be made with regard to the general rules of international law. First, it is not readily apparent what that phrase means. Second, even if it means what it has commonly been thought to refer to; that is, customary

¹⁴ See section 3.4 of this article.

¹⁵ Treaty Making and Ratification Act (n 1) s 3(1). It provides that the Act ‘applies to treaties which are concluded by Kenya after’ its commencement.

¹⁶ For instance, in *Re The Matter of Zipporah Wambui Mathara* [2010] eKLR para 9, the judge stated as follows:

The provisions of the Constitution of Kenya 2010 [were] also invoked, and this ruling would not be complete without a commentary on those submissions. Principally *I agree with counsel for the Debtor that by virtue of the provisions of section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus the provision of article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan law* [emphasis added].

See also the *Diamond Trust Ltd* case, where Justice Njagi took it for granted that ‘the ICCPR, having been “ratified by Kenya on 1st May, 1972” was ‘part of the laws of Kenya by virtue of article 2(6) of the Constitution’. *Diamond Trust Ltd v Daniel Mwema Mulwa* [2010] eKLR.

international law, no rules exist to guide our courts on how to apply such legal norms. Perhaps the latter is not much of a concern because it may be that the courts will simply follow the procedure used by international courts in determining whether certain practice has attained the status of international customary law. The more profound concern is the first one. One may be hard-pressed to find 'general rules of international law' as a regime of law recognised as part of the established sources of international law. Article 38 of the Statute of the International Court of Justice (ICJ), which may be taken to provide a generalised appreciation of sources of international law,¹⁷ lists the following as forming the sources of international law:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹⁸

From this list of sources, the closest that the article 2(5) reference to 'the general principles of international law' comes to is, 'the general principles of law recognised by civilised nations'. There is, however, the question of whether that is what the drafters of the Constitution had intended. Such conclusion would be hard to support for various reasons. First, under article 38 of the Statute of the ICJ, the general principles recognised by civilised nations appear to be of lesser stature in the hierarchy of norms than international customary law.¹⁹

¹⁷ T Treves, 'Customary International Law', *Max Planck Encyclopedia of Public International Law*, available at <http://www.mpepil.com/sample_article?id=/epil/entries/law-978019231690-e1393&> para 15, accessed on 13 June 2013, where the author refers to art 38 as a 'catalogue of the sources of international law'.

¹⁸ Statute of the International Court of Justice (n 2) art 38.

¹⁹ For one, they appear lower in the list. But even then, they are barely used in the determination of disputes considering they may be very subjective. Bechar-Torres has characterised them as follows:

The source of law recognized in article 38(1)(c) of the Statute of the International Court of Justice, the so-called 'general principles of law recognized by civilized nations', occupies a place at the margins of international law. Some have argued that these general principles do not constitute an independent source of binding legal norms. Others recognize the source's formal independence, but simply claim that it is of little practical significance; Professor Mark Janis has bluntly claimed of these general principles – perhaps with some regret – that 'you can be an effective, card-carrying international lawyer and not believe in them!'

See E Bechar-Torres, 'We Hardly Knew Ye? "General Principles" as a Source of International Law' *Legal Frontiers: McGill's Blog on International Law*, available at <<http://www.legalfrontiers.ca/2012/03/we-hardly-knew-ye-general-principles-as-a-source-of-international-law/>> accessed on 13 June 2013; see, also, MD Nolan and FG Sourgens, 'Issues of Proof of General Principles of International Law in International Arbitration' (2009) 3 *World Arbitration and Mediation Review* 505–533.

The general thrust of opinion on this matter is that the general principles are meant to apply only when the other enumerated sources are non-existent. On that basis, Torres opines that they were 'born from a desire to simultaneously preclude an envisioned Permanent Court of International Justice from ruling *non-liquet*, while at the same time constraining judges from acting as a free-handed, creative legislator when deciding cases in which there was no readily applicable law'.²⁰

Also, it is quite difficult to conclude that the drafters of the Constitution contemplated that Kenyan courts would seek the domestic jurisprudence of other countries as a source of law. For instance, why then would the drafters eschew a specific reference to international customary law and point the courts to a source which may best be made use of as 'gap-fillers for notoriously under-elaborated, treaty-generated legal regimes'?²¹ Why avoid a specific reference to a system of law that is not only a lot more sophisticated and more established than 'general principles', but also whose bindingness does not depend on State consent?²² Was this omission inadvertent? Other commentators have suggested that article 2(5) of the Constitution refers to international customary law.²³ If so, why couldn't that term be used? It is submitted that in the context of legal norms in international law, the phrase 'general rules of international law' is ambiguous if not entirely non-existent.²⁴

The less generous view is that article 2(5) of the Constitution is superfluous due to ambiguity regarding the exact meaning of the phrase 'general rules of international law'. Not even the normative framework under the African Union seems to contemplate 'general rules of international law'. For instance, the African Charter on Human and Peoples' Rights directs the African Commission on Human and Peoples' Rights to be guided by the following principles, which are enumerated in articles 60 and 61:

²⁰ Bechar-Torres (n 19) 1.

²¹ Ibid.

²² Ibid 2.

²³ Mbondenyi and Ambani state, without explaining, that:

For the first time since independence, there is express constitutional recognition of general rules of international law as well as international instruments (mainly treaties) ratified by the State. General rules which may have acquired the force of law include principles of sovereign equality of states; territorial integrity; customary international law; *pacta sunt servanda*; among others.

See MK Mbondenyi and JO Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (CLARION 2012) 24.

²⁴ Although Mbondenyi and Ambani seem to suggest that there is a concept discernible in international law as such, *ibid*. See also CFA Voigt, 'The Role of General Principles in International Law and their Relationship to Treaty Law' (2008) 31 *Retfærd Årgang* 3. Voigt observes that 'legal scholars have contributed with their criticism to mark general principles a rather "ambiguous source of law".'

Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.²⁵

Article 60 of the African Charter is a clear reference to treaties and similar instruments. Article 61, far from validating any 'general rules of international law', suggests that the listed sources are of a secondary character, hence complementary to the sources in article 60. The allusion to 'general principles of law recognised by African states' is no cure for the inelegance of article 2(5) of the Kenyan Constitution not only because it is akin to the Statute of the ICJ's 'general principles of law recognised by civilised nations', but also, and perhaps significantly, due to the fact that it is of lesser force than international customary law (since it is to be used as a 'subsidiary' source).²⁶ And neither does the framework of law relating to the contemplated African Court of Justice and Human Rights provide much solace; as the only close reference, found in article 31(d), is to 'the general principles of law recognized universally or by African States', which are analogous to the Statute of the ICJ and the African Charter's 'general principles'.²⁷

The ambiguity of article 2(5) of the Constitution has made the judicial appreciation of its import rather difficult. For example, in

²⁵ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3/Rev.5.

²⁶ Ibid art 61.

²⁷ See Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Eleventh Ordinary Session of the Assembly, held in Sharm El-Sheikh, Egypt, 1 July 2008. Article 31 of the statute sets the sources of law in the court as follows:

1. In carrying out its functions, the Court shall have regard to:
 - a) The Constitutive Act;
 - b) International treaties, whether general or particular, ratified by the contesting States;
 - c) International custom, as evidence of a general practice accepted as law;
 - d) The general principles of law recognized universally or by African States;

Kituo cha Sheria and Others v Attorney General, the court seemed to conflate different legal concepts into one.²⁸ The issue before the court was whether a Government directive requiring the relocation of all refugees from urban centres to refugee camps in North Eastern Kenya, was unconstitutional. The court held that indeed it was, because it violated not only statutory and treaty law, but also because it was an abrogation of the principle of *non-refoulement*, which forms 'part of international customary law'.²⁹ But the analysis that the court employed to reach this conclusion is problematic. This is apparent from the following paragraph:

As a preemptory norm of international law [*non-refoulement*] is part of, the general rules of international law which are part of the law of Kenya under article 2(5) of the *Constitution*. Although the phrase 'the general rules of international law' used in article 2(5) is similar to the phrase 'general principles' found in article 38(1) of the Statute of the International Court of Justice which defines the sources of international law, its reference to customary international law is obscured by the phraseology used in the *Constitution*.³⁰

The court seemed to suggest that 'general rules of international law' was a tangential reference to not only the 'general principles' in article 38(1) of the Statute of the ICJ, but also to customary international law. This is a conclusion that is very difficult to justify. In the former case, any similarity beyond the phraseology will likely be much too stretched. Indeed, the Statute of the ICJ makes use of the phrase 'general principles' under article 38(1)(c) where it speaks of 'the general principles of law recognized by civilized nations'. The question then is whether the Constitution's 'general rules' can be said to be similar to, or at best analogous to, the Statute of the ICJ's 'general principles'. In the Statute of the ICJ, the use of the phrase 'general principles' is an unambiguous reference to principles of *domestic* law that have received widespread application globally and are accepted as sound principles of law.³¹ An example would be the application of principles of equity by the Permanent Court of International Justice (PCIJ) in the *Diversion of*

e) Subject to the provisions of paragraph 1, of article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law;

f) Any other law relevant to the determination of the case.

2. This Article shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

²⁸ *Kituo cha Sheria and Others v Attorney General* Constitutional Petition 19 of 2013 (Consolidated with Petition 115 of 2013).

²⁹ *Ibid* para 71.

³⁰ *Ibid* para 71 (emphasis added).

³¹ M White, 'Equity – A General Principle of Law Recognised by Civilised Nations?' (2004) 4 *Queensland University of Technology Law and Justice Journal* 103; see, also, M Akehurst, 'Equity and General Principles of Law' (1976) 25 *International and Comparative Law Quarterly* 801.

Water from the River Meuse case.³² As Lowe notes with respect to equity, what was contemplated by article 38(1) of the Statute of ICJ was that courts would glean legal values espoused by domestic legal systems:

The first question which should be asked is whether it is permissible to use 'equity' within the international legal system. The answer is so clear on one level that extended discussion is unnecessary. Recourse to general principles of justice in order to assist the 'just' application of law is a feature common to the major legal systems of the world. As such, there is no difficulty in accepting that it is a part of public international law subsumed, in the terms of article 38.1 of the Statute of the International Court of Justice, within the category of 'general principles of law recognized by civilized nations'. Consequently, international tribunals would be entitled to apply it, to the extent that its application is within the boundaries of that common practice in municipal legal systems, even in the absence of an express authorization.³³

In the same vein, the court in the *Kituo cha Sheria* case also suggested that 'general rules of international law', as used in the Constitution, is an 'obscured' reference to customary international law. If, for the sake of argument, it is accepted that 'general rules of international law' mean the same thing as 'general principles of law', then the idea that the same phrase also refers to customary international law becomes untenable. This is so considering that the Statute of the ICJ unambiguously identifies international customary law as a source of law that is not only distinct from, but also normatively superior to, 'general principles of law recognised by civilised nations'. The court's conflation of 'general principles of law recognised by civilised nations', with customary international law, as well as the suggestion that both are covered by article 2(5)'s allusion to 'general rules of international law' is very hazy. As already seen, this reasoning repudiates the structure and even legal content of article 38 of the Statute of the ICJ not to mention that all three of the concepts stand for different things. While it is true that the phraseology of the Constitution creates significant uncertainty in relation to the application of international customary law, such cannot be resolved by a matter-of-factly equation of 'general rules of international law' to customary international law. As seen below, there may be a less tortured basis for the application of international customary law under the Constitution.

2.3 *Salvaging Article 2(5) of the Constitution*

Article 2(5) of the Constitution is not without useful purpose, and may even be better contextualised in relation to the applicability of customary international law in Kenyan courts. First, in the area of

³² *Diversion of Water from Meuse (Netherlands v Belgium)* 1937 PCIJ (ser. A/B) 70 (June 28).

³³ V Lowe, 'The Role of Equity in International Law' (1988–89) 25 *Australian Year Book of International Law* 54.

human rights, at least, there appears to be room for recognising and applying international customary law by courts in spite (rather than because) of article 2(5). In other words, the Constitution provides a sufficiently broad basis for reliance on international legal customs such that one need not rely on the impugned article. For example, article 19 of the Constitution settles two points of immense significance: one is that the rights in the Bill of Rights are inherent in every human being and are not created by the State, and second (which is the significant one for our purposes) that the list of rights is not an exhaustive one and that it is possible to enforce other rights recognised in other laws, a provision that is wide enough to encompass matters tenable in international customary law.³⁴ In addition, the article 20(3) of the Constitution call to the courts to 'develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom'³⁵ would appear to require a court to cast as wide a net as possible when determining matters under the Bill of Rights. Principles of international customary law may then be considered under this rubric by way of incorporation without offending the wider constitutional principles.

That said; is it also possible that the drafters, while framing article 2(5), may have intended to refer to international customary law. It may also, at the very least, be suggested that it was never the intention of Kenyans to jettison customary international law from the framework of the contemplated basic norm.³⁶ To address that assumption, one would need to look at the history behind the quest to recognise international law as a direct source of norms and how previous drafts of the Constitution had treated the matter.

The struggle for the direct application of international norms in Kenyan courts has been a long one. In a string of decisions, Kenyan courts, beholden to an orthodox appreciation of the domestic effect of international law, routinely rebuffed lawyers and litigants seeking remedies for violations of human rights. The infamous *Okunda v R* case³⁷ stipulated (i) that a treaty had no domestic effect unless it was made part of municipal law through legislation, and (ii) that even if it was, its provisions could not supersede those of the Constitution in the

³⁴ Constitution of Kenya (n 1) art 19(3).

³⁵ Ibid art 20(3).

³⁶ It must never be forgotten that customary international law includes peremptory norms, which are obligatory by their very nature and from which no derogation can be allowed. So, in the case of Kenya, it would really be an overemphasis to state that there was never an inclination to disregard international customary law as playing a part in its domestic legal framework because deviating from some of its norms could never be allowed. See, for instance, BB Roozbeh (Rudy), 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 *European Journal of International Law* 173, 176–177.

³⁷ *Okunda* (n 3).

event of conflict; a classic dualistic position.³⁸ Deriving support from this case, Kenyan courts for a long time refused to apply principles of international law locally. Examples of such cases abound. In *Pattni and Another v R*,³⁹ the court reiterated the *Okunda* position that international treaties were not applicable unless made part of the law, and in *Echaria v Echaria* the Court of Appeal overturned its own settled precedent in which it had incorporated a principle of English law in the distribution of matrimonial property.⁴⁰

More importantly, the court in the *Echaria* case observed that even though principles of international law (just as comparable foreign jurisprudence) may represent progressive jurisprudence, they were not part of law unless they received the necessary legislative fiat.⁴¹ Ironically though, the court surmised that it might be possible to rely on principles of international law in appropriate circumstances.⁴² This latter point is important because, despite the long-standing negative treatment of international law in Kenyan courts, there were times

³⁸ The court held that:

The provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the constitution, then, to the extent of such conflict such provisions are void.

Ibid 457.

³⁹ *Pattni and Another v R* [2001] eKLR.

⁴⁰ *Echaria v Echaria* Civil Appeal 75 of 2001; [2007] eKLR.

⁴¹ *Ibid*. In this regard the court stated thus:

In the light of those authorities, it is our respectful view that [the High Court] though, undoubtedly guided by a noble notion of justice to the wife were far ahead of Parliament when they said that the wife's non-monetary contributions have to be taken into account and a value put on them. It is now about seven years since this court expressed itself in *Kamore v Kamore*, but there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our law reform agenda to keep the country shackled to a 125-year-old legislation which the mother country found wanting more than 30 years ago! In enacting the 1967, 1970 and 1973 Acts, Britain brought justice to the shattered matrimonial home. Surely our Kenyan spouses are not the products of a lesser god and so should have their fate decided on precedents set by the House of Lords which are at best of persuasive value! Those precedents, as shown above are of little value in Britain itself and we think the British Parliament was simply moving in tandem with the times.

⁴² *Ibid*. The court observed as follows:

Human rights issues, and in particular women's rights issues, took centre stage on the global theatre from the 1960's. There were for example [the International Covenant on Civil and Political Rights and the International Covenant on Economic Social & Cultural Rights] which were adopted in 1966 and came into force in 1976; the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) which came into force in 1981; and the African Charter on Human & People's Rights which was adopted in 1981. Kenya has ratified all those international instruments and they therefore provide a source of law which in appropriate cases, the courts in this country may tap from.

when the courts reached out and sought inspiration from human rights treaties, particularly when there was a gap in local law.⁴³ The Court of Appeal in the case of *Rono v Rono* appreciated that 'the current thinking on the common law theory [that is, dualism] 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'.⁴⁴ Taking up this gauntlet, Justice Rawal in the *Lerionka ole Ntutu* case observed that courts in Kenya could 'have regard to international obligations' that Kenya had undertaken for purposes of removing ambiguities.⁴⁵

On the eve of adoption of the Constitution, rules derived from international treaties and customs were less hostilely received, notwithstanding the absence of an express authority allowing courts to apply them. If this generally favourable attitude towards the use of international customary law is taken to mean that the spirit and intention of the Constitution also favours such use, then, *a fortiori*, the courts will be on firmer ground when seeking to rely on international customary law. Customary international law embodies principles that have crystallised over a period of time and which are considered to have a binding effect on States.⁴⁶ The entire thrust of the Constitution, insofar as international law is concerned, is to bring Kenya out of that state where international law was of minimal to zero effect to one where it is respected and applied directly. It would be hard to imagine a Kenyan court now declining to rely on a rule of customary international law in a relevant case where such rule was applicable. The *travaux préparatoires* (preparatory documents) would seem to suggest that there was always the intention to refer to international customary law instead of the not so elegant 'general principles of international law'. For instance, Clause 3 of the Proposed New Constitution of Kenya of 22 August 2005 treated the issue of international law as follows:

The laws of Kenya comprise this Constitution and each of the following laws to the extent that it is consistent with this Constitution:

- (a) laws enacted under this Constitution;
- (b) the Acts of Parliament in force immediately before the effective date;
- (c) any other law that was recognized by the courts as part of the laws of Kenya immediately before the effective date;
- (d) personal laws of the peoples of Kenya;

⁴³ See, for example, *Rono v Rono* (2008) 1 KLR (G&F) 803; and the *Estate of Lerionka ole Ntutu* Succession Cause 1263 of 2000; [2008] eKLR.

⁴⁴ *Rono* (n 43) para 30.

⁴⁵ *Estate of Lerionka ole Ntutu* (n 43).

⁴⁶ In the formation of customary international law, two elements must exist, namely state practice and *opinio juris* (the feeling, by States, that the required conduct amounts to a legal obligation). See *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3 para 77.

- (e) the rules of law generally known as the common law or the doctrines of equity, as they relate to the practice and procedures of the courts;
- (f) the laws of the East African Community; and
- (g) *customary international law, and international agreements, applicable to Kenya.*⁴⁷

This Clause had survived an earlier draft referred to as the Draft Constitution of 2004 (and also known as the 'Bomas Draft') that had been prepared by the National Constitutional Conference.⁴⁸ This Draft was the one that was taken over by the Attorney General, amended and then published as the Proposed New Constitution.⁴⁹ While this rather clear-cut list was not utilised in the subsequent drafts that were prepared in the course of making the current Constitution, international law in the form of ratified treaties was recognised. However, the drafts, and even the final document that was subjected to a vote, made no reference to customary international law. Going by the constitution-making history in Kenya, it seems plausible that this omission was inadvertent, perhaps in the mistaken belief that the term 'general rules of international law' would aptly capture customary international law.⁵⁰ This position is not only consistent with the nature and general framework undergirding the Constitution, but it is also one that seems sound and proper. Indeed it is an argument that might find some judicial support. In *Kituo cha Sheria and Others v Attorney General*,⁵¹ the court, having appreciated that *non-refoulement* was a

⁴⁷ Proposed New Constitution of Kenya (n 7) (emphasis added).

⁴⁸ See National Constitutional Conference, 'Draft Constitution of 2004' clause 3A.

⁴⁹ Proposed New Constitution of Kenya (n 7).

⁵⁰ Other commentators, however, are not as kind in their view of this confusion. For example, Luis Franceschi states that:

The Harmonised Draft published on 17 November 2009 by the Committee of Experts on Constitutional Review pursuant to section 32(1)(a)(i) of the *Constitution of Kenya Review Act, 2008* stated in article 81(4) that 'With the approval of Parliament, the State President may sign instruments of consent of the Republic to be bound by treaties and international agreements.' Further in article 87(d) it stipulated that the State shall 'domesticate international and bilateral agreements and treaties.' This Harmonised Draft gave Parliament the role of 'considering and approving treaties and international agreements.' The Harmonised Draft presented a clear step towards the clarification and establishment of a well-defined system for international law domestication. The subsequent version of this draft, known as the Revised Harmonised Draft Constitution vested the power to consider and approve treaties and international agreements on the National Assembly by virtue of its article 119. However ... there was a dramatic shift in wording and conception of the relation between international and constitutional law in Kenya. We can actually conclude that the Harmonised Draft and the Constitution Kenyans voted [for] in the 4 August 2010 referendum were two different documents.

See LG Franceschi, 'Constitutional Regulation of International Law in Kenya' in P Lumumba et al (eds), *The Constitution of Kenya: Contemporary Readings* (Law Africa 2011) 279–280.

⁵¹ *Kituo cha Sheria* (n 28).

cornerstone of refugee law that had gained the status of customary international law, stated as follows:

[T]he drafting history from the previous drafts constitutions prepared by the Constitution of Kenya Review Commission (CKRC) and the National Constitution Conference (Bomas) from which the Constitution is derived shows the intent of article 2(5) is to incorporate customary international law as part of the law of Kenya and therefore 'general rules of international law' means customary international law.⁵²

3 THE PROBLEM OF HIERARCHY OF LEGAL NORMS

The other important question is the effect of a failure to expressly delineate a hierarchy of norms as between international legal principles and local statutes. As it is, this omission has spawned different positions on the place of international law in Kenya. On the one hand, there is the view that international law supersedes conflicting local law (for ease of reference this may be referred to as the 'Kooome view' as it was espoused by Justice Kooome in a case that first considered the effect of article 2(5) and (6) of the Constitution).⁵³ On the other hand, it has been suggested that being 'part of the law of Kenya' under the Constitution must mean that international law is not above any local statute (which was first espoused by Justice Majanja, and hence may be referred to as the 'Majanja view').⁵⁴ This latter view has been nuanced by the argument that, since neither trumps the other, as they are both law under the Constitution, international law and other local laws are really to be viewed as equal in stature in which case any conflicts must be resolved through ordinary rules of interpretation.

3.1 *The Zipporah Wambui Mathara Case*

The *Zipporah Wambui Mathara* case was an application made in a bankruptcy cause seeking to stay the execution of orders of detention on account of an unsatisfied judgment debt.⁵⁵ The applicant argued, inter alia, that her detention was contrary to article 11 of the International Covenant on Civil and Political Rights (ICCPR), which states that '[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'.⁵⁶ It seems to have been the applicant's suggestion that to the extent that the Civil Procedure Rules provided for committal to civil jail as a method of execution, then they condoned imprisonment 'merely on the ground of inability to fulfil

⁵² Ibid para 71.

⁵³ *Zipporah Wambui Mathara* (n 16).

⁵⁴ *Beatrice Wanjiku and Another v Attorney General and Others* Petition 190 of 2011.

⁵⁵ *Zipporah Wambui Mathara* (n 16).

⁵⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

a contractual obligation', contrary to the provisions of the ICCPR.⁵⁷ Impliedly therefore, the provisions of the Civil Procedure Rules were inferior to the international law prohibition set in the ICCPR. Taking the supremacy analogy, the argument was that international law applicable in Kenya had a higher normative value than local law and that a conflict between the two would result in the former prevailing. With regard to the status of article 11 of the ICCPR, the court took the view that committal to civil jail on account of a judgment debt was akin to imprisoning a person merely for failing to perform a contractual obligation, which was contrary to the International Covenant and hence unconstitutional. Thus the court effectively suggested that applicable international law must trump contrary local legislation. The court, however, was not clear whether it was making a definitive pronouncement on the issue, merely characterising it as a 'commentary'. The court seemed to have made short shrift of the matter when it stated as follows:

The provisions of the Constitution of Kenya 2010 [were] also invoked, and this ruling would not be complete without a commentary on those submissions. Principally I agree with counsel for the Debtor that by virtue of the provisions of section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus the provision of article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan law. This covenant makes provisions for the promotion and protection of human rights and recognizes that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. *It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed.*⁵⁸

The court merely 'agrees' that treaties and conventions were part of Kenyan laws but did not engage in a thorough analysis of the relationship between international law and local law. Considering that this was one of the first cases in which this issue arose, the court should have taken this opportunity to clarify the many ambiguities surrounding the matter. The court appears to have taken it for granted that local law would be subordinate to relevant international law if the two conflicted. In so far as the development of jurisprudence on the local application of international law is concerned, the court should have pronounced itself more robustly notwithstanding that

⁵⁷ The court characterised this submission as follows:

Mr. Kang'ata learned Counsel for the debtor argued that due to the hierarchy of the laws, the Constitution is supreme therefore the Civil Procedure Act that provides for committal to civil jail as a means of forcing a debtor to satisfy a contractual obligation is against the spirit of the Constitution and, International Human Rights Law that protects and promotes basic freedoms. *Zipporah Wambui Mathara* (n 16) para 4.

⁵⁸ *Ibid* (emphasis added).

it characterised its view merely as a 'commentary', hence more of an *obiter*.

3.2 *The Interregnum: An Article and a Judgment*

There were two significant happenings after Koome's judgment; first was an article that appeared in the *Nairobi Law Monthly*, a legal magazine that focuses on legal and political issues of the day.⁵⁹ The article, a critique of the Koome view, was coincidentally penned by David Majanja before he was appointed a judge. The second was a decision handed down by Justice Njagi in the case of *Diamond Trust Ltd v Daniel Mwema Mulwa*,⁶⁰ which also incidentally dealt with the very issue that had confronted Justice Koome in *Re Zipporah Wambui Mathara*. Both of these events attempted to unravel the Koome view with varying results. In his commentary, Majanja analysed the impact of the *Mathara* decision on resolution of civil disputes as well as the understanding of the place of international law within the legal system.⁶¹ While noting that the *Mathara* decision did not declare arrest and civil jail unconstitutional, since it only considered the matter in its *obiter dictum*, Majanja seemed to decry the perfunctory manner with which the court treated the issue. In his view, the court 'ought to have provided a textual connection between the constitution itself and the conclusion reached in application of the ICCPR'.⁶² More importantly he stated that

[T]he judge failed to clarify whether article 11 of the *ICCPR* [is] superior to our *Civil Procedure Act* and whether the Act is to be judged in accordance with the standard established by that treaty. By accepting this reasoning, it would seem to imply that treaties and conventions are superior to Acts of Parliament.⁶³

In his view, the court did not discharge the duty bestowed upon it 'to give effect to the provisions of the *Civil Procedure Act* and the *ICCPR* in a manner that is consistent with the values and principles set out in the [C]onstitution'.⁶⁴ The court was required to look into the context of the impugned statute and the rule of international law before concluding that one trumped the other. It was never simply a question of which of the two norms was superior to the other; rather, it was one that required the court to conduct a wholesale analysis of the relationship between the international legal rule and the local statute within the framework

⁵⁹ D Majanja, 'Debtors and the Law: A Delicate Balance of Different Legislations' (2010) 1(3) *Nairobi Law Monthly* 94.

⁶⁰ *Diamond Trust Ltd* (n 16).

⁶¹ *Ibid.*

⁶² Majanja (n 59) 94.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

of the Constitution.⁶⁵ According to Majanja, such a trajectory would lead to the conclusion that:

[C]onsistent with our international obligations, the *Civil Procedure Act* permits arrest and committal but only as a last resort. Article 11 of the ICCPR, by use of the word ‘merely’ recognises that indeed there may be cases where arrest and committal may be used to enforce a civil debt.⁶⁶

A reading of the relevant articles would suggest that the Constitution did not purport to elevate any one type of law over the other – it only decreed that all other laws were under it. Therefore, this implies that textually all other laws – whether Acts of Parliament, customs, case law or subsidiary legislation – enjoy the same status under the Constitution. It would then be up to a court to weigh the relative strength of each source of law depending on the context; in other words, to resolve any conflicts using the usual rules of interpretation.⁶⁷

The second significant happening was the decision of the High Court, in the case of *Diamond Trust Ltd v Daniel Mwema Mulwa*.⁶⁸ The facts and issues were somewhat similar to the *Mathara* case. The applicant, Daniel Mwema Mulwa, sought to stay a warrant of arrest that had been issued on account of a judgment debt he owed to Diamond Trust Ltd. He argued that, since the warrant was issued in furtherance

⁶⁵ Thus, according to Majanja, ‘[i]n order to declare the arrest and committal of the judgment debtor unconstitutional, the court would have to review the Civil Procedure Act provisions in light of the values set forth in the Constitution and thereafter decide whether execution of a decree for a debt by way of arrest and committal is unconstitutional’. *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ This is not to suggest that a discernible hierarchy does not exist. The Judicature Act, for example, lists sources of law in a manner that is hierarchical. Section 3 of the Act provides as follows:

3. (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—
 - (a) the Constitution;
 - (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
 - (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date;

but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

- (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

⁶⁸ *Diamond Trust Ltd* (n 16).

of a debt collection in a civil matter, it violated his fundamental rights and freedoms as it went contrary to article 11 of the ICCPR. The court considered the main issue as being 'whether the warrant arrest issued ... [was] unconstitutional and violates the fundamental rights and freedom of the judgment debtor'.⁶⁹ The judge was aware of the *Mathara* decision as well the view expressed by Majanja in the article.⁷⁰ So, in effect, there was already in place two views commending themselves to the court.

The court first set out what it considered to be the relationship between the norms of law applicable in Kenya:

We have in this country a three-tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws [are] subservient. Next in rank are Acts of Parliament, followed by subsidiary legislation at the bottom of the pile.⁷¹

The court found that the ICCPR enjoyed the rank of an Act of Parliament (agreeing with Majanja). This was not a status that was akin to that of the Constitution. And yet it was not above that of an Act of Parliament. In effect, an applicable treaty had to be treated the same way as an Act of Parliament. In the event of a conflict, a court would not have to consider which of the two was superior to the other. It is for this reason that, while the court found that there was a conflict between section 40 of the Civil Procedure Act and article 11 of the ICCPR, it held that the latter did not render the former unconstitutional because 'for as long as section 40 remains in the statute book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts'.⁷² While Justice Njagi was evidently leaning towards the Majanja view, he did not wish to go so far as to suggest that a court should resolve apparent conflicts between a treaty and an Act of Parliament. In fact, the judge seemed to defer to Parliament as the appropriate forum for resolving such disputes; which was quite contrary to what Majanja had envisaged the court's role to be in such circumstances. The following paragraph is instructive:

Since, however, section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other. That conflict calls for a re-consideration of the probative value of section 40 in the light of the new Constitutional dispensation. Only after a revaluation can it be determined whether to retain section 40 in the Civil Procedure Act, or to do away with it altogether in favour of article 11 of the Convention on

⁶⁹ Ibid.

⁷⁰ Ibid. The judge stated that up to then, the only literature he had read on the issue was 'the ruling of Honourable Martha Koome, J., in *Re Zipporah Wambui Mathara*, Bankruptcy Cause No. 19 of 2010, and a stimulating review of that case by Mr D. Majanja, Advocate, in the *Nairobi Law Monthly*'.

⁷¹ *Diamond Trust Ltd* (n 16).

⁷² Ibid.

Civil and Political Rights. If it doesn't find favour in the current climate of Constitutional civil liberties, then section 40 should be repealed as being unconstitutional. In the spirit of the new Constitutional order, it is more likely than not that Kenyans would prefer a system in which there is no threat of civil jails. *Until a decision is taken at a proper forum, section 40 of the Civil Procedure Act will continue to haunt the liberal freedoms enshrined in the Constitution until it is repealed or found to be unconstitutional at a proper forum.* In my view, where a section of the law takes away a right which is conferred by another section, the former section should itself be taken away. As we have two conflicting provisions of the law in force, it is correct to say that both of them are applicable. In that event, if the applicant is jailed under section 40, and that section is later found to be out-dated in the current Constitutional order, the Applicant's rights will have been trampled on.⁷³

3.3 *The Formal Expression of the Majanja View: The Beatrice Wanjiku Case*

Manja, this time as a judge, got the opportunity to formally express and elaborate on his view in the case of *Beatrice Wanjiku and Another v Attorney General and Others*.⁷⁴ The case raised direct constitutional questions that the court had necessarily to pronounce itself on. The petitioners were judgment debtors in other civil suits in which warrants of arrest had been issued in pursuance of execution. They argued that a process that allowed committal of an individual to civil jail on account of a civil debt was unconstitutional because it violated article 11 of the ICCPR, which, on the basis of article 2 of the Constitution, was not only part of the law, but was also superior to the impugned domestic statute. The issue thus was whether the entire process of committal to civil jail, as a means of enforcing a civil debt, was contrary to article 11 of the ICCPR and hence unconstitutional.

As far as coincidences go, it would be Manja the judge who now had to sit in a case that involved exactly the same issue he had addressed as a commentator and which would call on him to tackle a decision that he had criticised in a different setting. Not surprisingly, he did not diverge from the view he had already expressed. According to the judge, the common issue as to whether there was a breach of article 11 of the ICCPR required the court to consider the place of international law in the hierarchy of norms in the legal system. The judge was acutely aware of the ambiguities presented by the Constitution in relation to the application of international law. Thus, whereas the Constitution was clear that international law was applicable in Kenya, 'it is the relationship between international instruments that Kenya has ratified and legislation that lack clarity'.⁷⁵ Contrary to the petitioners' submission that international law trumped conflicting

⁷³ Ibid (emphasis added).

⁷⁴ *Beatrice Wanjiku* (n 54).

⁷⁵ Ibid para 18.

domestic legislation, the court held that international legal provisions are first of all 'subordinate to and ought to be in compliance with the Constitution'.⁷⁶ Secondly, and again, contrary to the petitioners' submission, the court held that international law did not trump conflicting domestic law. The Judge reasoned that to hold otherwise would be to suggest that Kenyans surrendered their sovereignty to the international legal order in so far as legislation was concerned; a view that would not comport with the intention of the framers of the Constitution.⁷⁷

In tandem with his views before he became a judge, Justice Majanja held that a determination of the import of article 2(5) and (6) of the Constitution required a 'purposive interpretation' and not merely a decision on which of the two systems of law was superior in the hierarchy of norms.⁷⁸ The judge stated that those two provisions 'should not be taken as creating a hierarchy of laws' but, instead, 'must be seen in the light of the historical application of international law in Kenya where there was a reluctance by the courts to rely on international instruments even those [that] Kenya had ratified in order to enrich and enhance the enjoyment of human rights'.⁷⁹ Thus, it was the need to localise internationally available rights that informed the inclusion of international law as part of the legal system. There were no pretensions as to the superiority of international law to local legal norms. Viewed together with other provisions of the Constitution, especially those relating to sovereignty, it was very clear that international law had to be read together with local law, and any differences had to be resolved as though both norms were in tandem. Such an approach involved a determination of the extent of applicability of either of those regimes and an interpretation that best suited the enforcement of a fundamental right. That exercise did not

⁷⁶ Ibid para 20.

⁷⁷ Ibid. Justice Majanja specifically opined that:

Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of article 94. Article 1 places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional set up.

⁷⁸ Ibid para 21.

⁷⁹ Ibid.

require one to answer the question of superiority between domestic law and international law.⁸⁰

Applying the above reasoning the court held that the provisions of the Civil Procedure Act were not inconsistent with those of the ICCPR for allowing a process through which an individual could be placed in civil jail on account of a civil debt. The ICCPR used the term 'merely', indicating that the prohibition of imprisonment for civil debts was not total. The court reasoned that the permissive language recognised that there were circumstances when committal to civil jail was a legitimate method of enforcing judgment debts. Such a conclusion could only be reached when the ICCPR was used as 'an interpretative aid'.⁸¹ Thus, provisions of a treaty would not trump those of a conflicting legislation because international law did not enjoy any special status under the Constitution. Such a conclusion was contrary to the tenor and import of Justice Koome's *obiter dictum* in the *Mathara* case.

3.4 *Whether Kenya has Transitioned to a Monist Legal System*

It seems far-fetched to categorise Kenya, in the post-2010 Constitution period, as a monist State. The basis of monism is the conflation of international and domestic legal norms into one.⁸² In its truest

⁸⁰ The court stated that:

The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand bearing in mind that legislative authority, which is derived from the people of Kenya, is conferred by Parliament under article 94 and when dealing with matters of fundamental rights and freedoms, the duty to the court, when applying a provision of the Bill of Rights, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom as provided in article 20(3)(b). The issue then, is not necessarily one of hierarchy but of application of treaties and conventions.

Ibid para 23.

⁸¹ The court observed that:

The *Civil Procedure Act* and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 of the Convention states that, 'No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfill a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognises that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted. As there is no inconsistency between article 11 of the Convention and the general tenor of the committal regime under Civil Procedure Act and the Rules, the provisions of article 11 of the Convention are at best an interpretative aid. (Emphasis added)

Ibid para 24.

⁸² H Kelsen, *Introduction to the Problems of Legal Theory* (BL Paulson and SL Paulson tr, Clarendon Press 1992) 111, where the author observes that 'one can conceive of international law together with the state legal systems as a unified system of norms in exactly the same way as one is accustomed to regarding the state legal system as a unity'.

form, monism considers international law, whether treaty based or customary, to not only have direct domestic application, but also rank above contrary local law.⁸³ In many civil law systems, treaties, especially human rights ones, have been accorded a special status, one which elevates them to a higher pedestal than statutes and sometimes even the Constitution itself.⁸⁴ Netherlands, for example, has, through legal amendments, reached a stage where certain treaties are considered superior to the Constitution.⁸⁵ Article 55 of the French Constitution provides that '[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'.⁸⁶ Article 7 of the Costa Rican Constitution is also very explicit that '[p]ublic treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate'.⁸⁷ So too does the Spanish Constitution of 1978, where, in article 10(2), it declares that '[p]rovisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain'.⁸⁸ Similar examples abound in Africa. Rwanda's Constitution contemplates treaty provisions that are superior to local law. Article 190 of the Constitution states that:

Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the

⁸³ See, for example, JJ Paust, 'Basic Forms of International Law and Monist, Dualist, and Realist Perspectives' in M Novakovic (ed), *Basic Concepts of Public International Law – Monism & Dualism* (University of Belgrade 2013) 244–265, 245, where the author points out that '[m]ost monist theories assume that there is merely one system of human law, that international law is universal in its reach both horizontally and vertically, and that international law is at the apex in terms of laws validity and primacy'. See also, MS McDougal, 'The Impact of International Law Upon National Law: A Policy-Oriented Perspective' (1959) 4 *South Dakota Law Review* 26, 29–30.

⁸⁴ See, for example, T Buergethal, 'Modern Constitutions and Human Rights Treaties' (1997) 36 *Columbia Journal of Transnational Law* 211, 215.

⁸⁵ Ibid.

⁸⁶ Constitution of 4 October 1958, available at <<http://www.assemblee-nationale.fr/english/>> accessed on 20 March 2014.

⁸⁷ Political Constitution of the Republic of Costa Rica, available at <http://www.wipo.int/wipolex/en/text.jsp?file_id=219959> accessed on 20 March 2014. Another translation renders the provision thus: 'The public treaties, the international agreements and the concordats, duly approved by the Legislative Assembly, will have from their promulgation or from the day designated by them, authority superior to that of the laws.' See Costa Rica's Constitution of 1949 with Amendments through 2011, available at <http://www.constituteproject.org/constitution/Costa_Rica_2011.pdf> accessed on 20 March 2014.

⁸⁸ Spanish Constitution of 1978, available at <http://www.wipo.int/wipolex/en/text.jsp?file_id=185360> accessed on 20 March 2014.

provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of the parties.⁸⁹

Similarly, article 45 of the Cameroon Constitution provides that '[d]uly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement'.⁹⁰ And so is the case in many civil law countries in Africa.⁹¹ It seems, therefore, that a monistic system does not merely incorporate treaties, but also renders them superior either over the basic law or statutes, or both. On the basis of that relationship, courts in a true monistic fashion have rendered invalid laws that contradict treaties, leaving no doubt about the supremacy of the latter.⁹²

In many ways, the quest to draw directly from the wellspring of international human rights law has been an attempt to transform Kenya's legal system into a monist one. As discussed earlier, the dualist tradition that Kenya inherited through the common law stood in the way of direct application of treaties that had not been domesticated.⁹³ However, continued assaults by litigants over the years led to a somewhat relaxed attitude on the part of the courts. In the lead up to the adoption of the current Constitution, courts were more readily receptive of international law, especially treaties on human rights. It was therefore no surprise that a renewed social contract would seek to harness the positive constitutional developments that had been gathering momentum before its adoption. This explains the centrality

⁸⁹ Constitution of the Republic of Rwanda (as last amended on 17 June 2010), available at <http://www.wipo.int/wipolex/en/text.jsp?file_id=317549> accessed on 20 March 2014.

⁹⁰ Law 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972, available at <[http://www.icrc.org/ihl-nat/0/7e3ee07f489d674dc1256ae9002e3915/\\$FILE/Constitution%20Cameroon%20-%20EN.pdf](http://www.icrc.org/ihl-nat/0/7e3ee07f489d674dc1256ae9002e3915/$FILE/Constitution%20Cameroon%20-%20EN.pdf)> accessed on 20 March 2014.

⁹¹ See, for example, AT and H Adjolohoun, 'International Law and Human Rights Litigation in Cote d'Ivoire and Benin' in M Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (PULP 2010) 109.

⁹² Buergenthal (n 84) 218. He points out that:

In 1989, Costa Rica amended its Constitution and established a Constitutional Chamber within its Supreme Court for the purpose of providing its inhabitants with greater constitutional protection. The legislation implementing the constitutional amendment granted the new Chamber the power to ensure the country's domestic compliance with its international obligations. In addition, it authorized the Chamber to issue writs of *habeas corpus* and *amparo* to protect individuals claiming the denial of rights guaranteed them not only under the Constitution itself but also under any human rights treaty to which Costa Rica is a party. Since the entry into force of the amendment and implementing legislation, the Constitutional Chamber of the Supreme Court has set aside a number of the country's laws it found to be incompatible with the American Convention on Human Rights and other human rights treaties. Moreover, in interpreting the Convention, the Chamber has relied in large part on the case law of the Inter-American Court of Human Rights.

⁹³ See section 2.3 of this article.

of article 2(5) and (6) of the Constitution, which makes it impossible for courts to avoid considering the import of international law in disputes before them, especially those that relate to human rights.

The question of whether Kenya's is a monist legal system has been made significant because of the manner in which courts have so far rendered their understanding of the effect of the two provisions. It seems proper to argue that the accurate legal position on the relationship between domestic and international law provisions is the one held by Justice Majanja, as explained variously in the cases discussed above; that international treaties do not enjoy a status above the Constitution or even statutes.⁹⁴ When the rule is that international treaties are of the same status as statutes, then we are presented with a scenario that negates the classic monistic tradition. In fact, it would seem that the value of treaties under the domestic framework is now largely diminished, perhaps more so than it was on the eve of the adoption of the Constitution. This is because, on the basis of existing jurisprudence, a court, especially a lower one, when confronted by two divergent provisions of law, would have to exclude one or the other, not on the basis of the soundness of either of them, but on the basis of the result that it reaches after applying ordinary rules of statutory interpretation.⁹⁵

While it is true that the court may well find that a treaty applies to the exclusion of a statute, a rule that allows this form of discretion makes it possible for courts to retreat to the days when international law was anathema. And yet those very days are what Kenyans wanted to get away from by formally recognising international law as one of the applicable laws. The allure of international law is that often it provides a bulwark against subjective formation and application of domestic law. It enables litigants to point to a higher authority in cases where a government creates, applies or interprets legislation in a self-serving manner. It is this potential of international law that courts had begun to appreciate in the period immediately before adoption of the Constitution of 2010. The *Rono*⁹⁶ and the *ole Ntutu*⁹⁷ cases evidenced a shift by courts to embrace 'creeping monism', a technique by which they applied international law in spite of the absence of a constitutional

⁹⁴ *Echaria* (n 40) and *Kituo cha Sheria* (n 28).

⁹⁵ *Beatrice Wanjiku* (n 54).

⁹⁶ *Rono* (n 43) 803.

⁹⁷ *Estate of Lerionka ole Ntutu* (n 43).

or legislative authority to do so.⁹⁸ On the basis of this, one would go as far as saying that, implicit in their application of international law, courts appreciated that they were seeking affirmation from a special, if not higher, norm.

For instance, in the *Rono* case, a lower court, in a succession dispute, had given less of the property to the appellants, on the basis that, being women, they were likely to be married off.⁹⁹ The court observed that the issue could not be resolved by reference to domestic law alone, and that reference had to be made to provisions of international instruments, which, though not domesticated, had been ratified by Kenya.¹⁰⁰ In other words, the court implied that international law presented a far more sophisticated, contemporary approach to the question of discrimination, and which, through ratification; Kenya had expressed an intention to subscribe to. This intention could be deduced from the fact that, '[a]s a member of the international community, Kenya subscribe[d] to international customary laws and ha[d] ratified various international covenants and treaties'.¹⁰¹

⁹⁸ See MA Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628, 635, where she describes creeping monism as follows:

One principal value of a narrow lens approach is that it enables scholars to discern important trends in judicial use of foreign and international sources that tend to be obscured when these sources are conflated and treated as interchangeable. Close analysis of common law courts' use of human rights treaties, for example, reveals that many judges are developing a more flexible conception of the role of such treaties in interpreting domestic legal texts. In common law systems, the capacity of domestic courts to utilize international treaties (particularly human rights treaties) has long been limited by the fairly strict dualist approach that traditionally characterized common law systems. In a dualist-oriented legal regime, a treaty has non-self-executing status – that is, it becomes judicially enforceable only after the legislature has enacted specific legislation implementing the treaty's provisions into domestic law. Many common law judges, however, are eroding the traditional dualist approach as part of a phenomenon that I call creeping monism – that is, a gradual shift in judicial orientation toward a more flexible interpretive approach to unincorporated human rights treaties.

Creeping monism was very aptly articulated by the Kenyan Court of Appeal in *Rono* as follows:

There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. *However, 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.*

Rono (n 43) 813 (emphasis added).

⁹⁹ *Rono* (n 43) 809–810.

¹⁰⁰ *Ibid* 812.

¹⁰¹ *Ibid*.

These regimes of law encapsulated higher values and aspirations, which any progressive legal system should embrace. In fact, as the court also noted, Kenya had sought to incorporate these higher values, by amending her Constitution in 1997, to outlaw discrimination on the basis of sex because '[t]he country was moving in tandem with *emerging* global culture, particularly on gender issues'.¹⁰² When a country sets out to conform to international law principles, it does so in appreciation of the fact that they represent very high ideals, perhaps not similar to the puritanical natural law standards beloved of strict monists,¹⁰³ but certainly sound and fair principles that should be embraced by any democratic society.

4 CONCLUSION

While the 2010 Constitution entrenches international law firmly into the domestic legal order, it has done so in a manner that breeds uncertainty as is apparent from decided cases. It states that international law is part of Kenyan law but fails to ascertain the part that international law plays relative to other legal norms such as statutes. This omission has spawned an interpretation that tends to diminish, rather than enhance, reliance on international law. The jurisprudence that obtains now is that treaties occupy the same rank as statutes, to be applied and interpreted in the same manner. This cannot have been the wish of Kenyans going by the history of constitution-making in the country.

In addition, the Constitution has referred to 'general rules of international law' as a genre of international legal norms to be used in the resolution of disputes. However, this phrase is far from conceptually clear. It fits neither within the more common 'general principles of law recognized by civilised nations', nor within international customs. In fact the Constitution has eschewed direct reference to customary international law. This has left courts with the very hard task of finding a contextual basis for applying customary international law. The approach favoured by courts has been to assume that 'general rules of international law' refer to customary international law as well. That approach has not only been tortuous and unconvincing, but has also been at variance with existing international law doctrine. However, it is possible for courts to find a less strenuous basis of applying customary international law by looking at the entire Constitution and deriving inspiration from its spirit and purpose. In the long term, though, there will be need to consider amending article 2(5) and (6)

¹⁰² Ibid 813 (emphasis added).

¹⁰³ Paust (n 83) 245, where the author observes that 'some monists are naturalists, who assume that higher or highest law is natural in all legal processes and eternal. Monists are usually interested in authority and in laws that are higher than that associated with the state and mere processes of power.'

of the Constitution in order to inject more clarity in the law. Such an amendment should unequivocally establish a hierarchy of norms so that courts are not given a free hand to decide how they will use a rule of international law to resolve a dispute. As it stands, this is a freedom that courts currently have.