

The status of international law in Namibian national law: A critical appraisal of the constitutional strategy

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Introductory remarks

The Republic of Namibia, formerly South West Africa, attained independence in 1990.¹ Thereupon Namibia adopted a national Constitution that not only embraces general international law – or, rather, is international-law-positive² – but also regulates the relationship between international law, both customary and conventional, within the national legal sphere.³ In a broader sense, the Constitution lays down conditions and circumstances under which international legal rules may operate within Namibian municipal law. The aim of this article is to examine the position of international law in Namibian municipal law in light of the country's Constitution and the general role of international law in the national legal system.

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¹ The Republic of Namibia attained its independence on 21 March 1990. For a discussion of the historical developments leading up to this historical change, see generally Cliffe, Lionel, Ray Bush, Jenny Lindsay & Brian Mopokagkosi. 1994. *The transition to independence in Namibia*. Boulder: Lynne Rienner Publishers; Cottrell, Jill. 1991. "The Constitution of Namibia: An overview". *Journal of African Law*, 35:56; Katjavivi, H Peter. 1988. *A history of resistance in Namibia*. Paris: United Nations Educational, Scientific and Cultural Organisation; Van Wyk, Dawid. 1991. "The making of the Namibian Constitution: Lessons for Africa". *Comparative and International Law of Southern Africa*, 24:341.

² Erasmus, Gerhard. 1989/1990. "The Namibian Constitution and the application of international law". *South African Year Book of International Law*, 15:81. See also Maluwa, Tiyanjana. 1993/1994. "International human rights norms and the South African Interim Constitution". *South African Year Book of International Law*, 19:14. For a general discussion of the interrelationship between international law and Namibian national law, see Mtopa, Arnold M. 1990/1991. "The Namibian Constitution and the application of international law – A comment". *South African Year Book of International Law*, 16:105.

³ Constitution of the Republic of Namibia, Article 144. This provision is discussed in detail below.

In order to place the discussion in its proper historical context, the enterprise examines both the pre-independence and post-independence positions in order to find out whether the legal position has undergone any fundamental changes at independence and, therefore, has thereby been made clearer. The paper also examines the role of international law in Namibian national legal sphere. Furthermore, the article investigates the extent to which the Namibian judiciary has given effect to the constitutional clause domestically incorporating international law. It is argued that assigning international law in the Constitution is just one step in the domestic translation process. Thus, the judiciary plays a major role not only in the application of international normative standards in national law, but also in their domestication. The judiciary also determines the length and breadth if not even the contours of the application of international legal rules and principles in national law.

International law in Namibian national law

Conceptual context: Monism and dualism

At a theoretical level, the interrelationship between international law and municipal law is regulated by two rival theories: monism and dualism.⁴ According to monism, international law and national constitute aspects of a single universal system. The theory posits that all rules of law ultimately regulate the behaviour of the individual, whether those rules emanate from international or national law. Thus, the two systems are interrelated parts of a single legal structure. The monists, most of whom belong to the natural law school, include Hugo Grotius, a Dutch scholar and diplomat who is generally regarded as the father of the

⁴ Early treatises on these theories include Brierly, JL. 1935. "International law in England". *Law Quarterly Review*, 51:24; Kelsen, Hans. 1945. *General theory of law and state*. Cambridge: Harvard University Press; Kelsen, Hans. 1966. *Principles of International law* (Second Edition). New York: Holt, Rinehart & Winston; Kunz, L Joseph. 1953. "The nature of customary international law". *American Journal of International Law*, 47:662; O'Connell, Derek. 1970. *International law* (Second Edition). London: Steven & Sons; and Starke, JG. 1936. "Monism and dualism in the theory of international law". *British Year Book of International Law*, 16:66. For the more recent discussion of the theories, see Brownlie, Ian. 1990. *Principles of public international law* (Fourth Edition). Oxford: Clarendon Press; Butler, WE. 1985. "Comparative approaches to international law". *Recueil Des Cours*, 190:9; Cassese, A. 1985. "Modern Constitutions and international law". *Recueil Des Cours*, 192:331; and Dugard, John. 2006. *International law: A South African perspective* (Third Edition). Kenwyn: Juta.

rationalist school of natural law;⁵ Hans Kelsen; and Hersch Lauterpacht – all of whom have argued that the international legal order is significant only as part of a universal legal order which comprises the national legal order as well.⁶ The monist school argues that not only do international legal rules and various national legal orders constitute a single universal system, but, in cases of conflict, national legal orders take a subordinate position.⁷

Dualism – or, rather, the doctrine of transformation – for its part perceives international law and national law as two distinct and independent legal orders, each having an intrinsically and structurally distinct character.⁸ The two legal orders are separate and self-contained spheres of legal action, and theoretically there should be no point of conflict between them. Since they are separate legal systems, international law would as such not form part of the municipal law of the State. This view has been propounded by positivist theorists such as Hegel, Anzilotti and Triepel, who have invoked a consensual approach to international law to argue that the two legal systems are distinct in nature. Firstly, the two legal systems are different in the particular relations that they govern: State law deals with the social relations between individuals, and international law regulates the social relations between States, who alone are subject to it.⁹ In the second sense, Triepel argues – and is widely supported by other dualists – that the two systems have different juridical origins. The source of municipal law is the will of the State itself, while the source of international law is the common will of States (*Gemeinwille*).¹⁰

⁵ Dugard (2006:53–58).

⁶ Kunz (1953:662–669); see also Kelsen (1945, 1966) and Tshosa, Onkemtse. 2001. *National law and international human rights law: Cases of Botswana, Namibia and Zimbabwe*. Aldershot: Ashgate.

⁷ Brownlie (1990:33); Shaw, Malcolm. 2003. “Sources”. *International law* (Fifth Edition). Cambridge: Cambridge University Press, pp 100–101.

⁸ Generally, see Maluwa, Tiyanjana. 1996. “The role of international law in the protection of human rights under the Malawian Constitution”. *African Year Book of International Law*, 53; Morgenstern, Felice. 1950. “Judicial practice and the supremacy of international law”. *British Year Book of International Law*, 27:42; O’Connell (1970); Shaw (2003:102).

⁹ Lindholt has noted that the classical dualist theory is “based on the perception that the two types of law regulate different subjects, where national law operates with individual subjects while international has the states as its subjects”; see Lindholt, Lone. 1997. *Questioning the universality of human rights: The African Charter on Human and Peoples’ Rights in Botswana, Malawi and Mozambique*. Dartmouth: Ashgate, pp 84–85.

¹⁰ Starke, JG & Shearer, IA. 1994. *Starke’s International Law*. London: Butterworths, p 64.

Thirdly, according to Anzilloti, the two legal systems are differentiated by the fundamental principles by which each is conditioned.¹¹ Municipal law is conditioned by the norm that legislation is to be obeyed, whereas international law is conditioned by the *pacta sunt servanda* principle.¹² The latter principle commands that agreements between States are to be respected. This principle is at the heart of modern international law, especially treaty law, and underlies the basis for performance of treaty obligations. Because of this conditioning factor, Anzilloti concludes that the two systems are so distinct that no possible conflict is possible. In case of any conflict, national law prevails; this is predicated on State sovereignty, which gives the right to the State to determine which rules of international law are to have effect in a municipal sphere.¹³

However, these theories need to be approached with caution. This is because, in practical terms, they may not purely determine the relationship between national and international law. This is posited on a number of reasons. Firstly, the internal application of international law in general and treaties in particular is always conditioned by a rule of municipal law. The basic principle in most legal systems is that the internal application of treaties is governed by domestic constitutional law.¹⁴

Second is the practical approach of national courts. Even in monist countries, courts sometimes fail to effectuate treaties which are binding under international law; an example of this is the non-self-executing treaties in United States law. Conversely, in dualist systems, the courts may sometimes give limited effect even to unincorporated treaties, for example, British courts' use of the European Convention on Human Rights (ECHR) before its incorporation into United Kingdom (UK) law. In countries like the UK, courts rely on the principle that legislation should, wherever possible, be so interpreted as not to conflict with the international obligations of the State.¹⁵

¹¹ (ibid.).

¹² (ibid.).

¹³ (ibid.).

¹⁴ Maluwa (1996); see also Dugard, John. 1983. "International human rights norms in domestic courts: Can South Africa learn from Britain and the United States?". In Kahn, E (Ed.). *Fiat iustitia: Essays in memory of Oliver Deneys Schriener*, Cape Town: Juta, pp 983:221, 223–224).

¹⁵ Collier, JG. 1989. "Is international law really part of the Law of England?". *International Law and Comparative Law Quarterly*, 38:924–925; Jackson, H John. 1992. "Status of treaties in domestic legal systems: A policy analysis". *American Journal of International Law*, 86:310; Erasmus (1989/1990:91–

In the final analysis, the theories are relevant only in the specific context of customary, but not conventional, international law. The real concern, it is submitted, is how international law standards can be infused or, rather, incorporated into State law to reinforce the effectiveness of the national legal system. Oftentimes, national legal rules are not well-defined and are sometimes inadequate in respect of addressing practical legal questions. But this is not to say the theories are insignificant: indeed, on the contrary, they are important. They continue to illuminate the interaction between international law and municipal law. Most importantly, they will increasingly have some impact on efforts to find practical solutions on the role of international law in the municipal legal sphere.

The Namibian Constitution and international law

The pre-1990 Constitution situation

Prior to the adoption of the Namibian Constitution, the country went through German colonial rule from 1884 to 1915, after which it was occupied by the Union of South Africa at the beginning of the First World War (WWI).¹⁶ Consequently, Germany's contribution to the development of the Namibian legal system was very insignificant, if at all.

In 1919 the Allied Powers placed Namibia under an international mandate through the mandate system.¹⁷ The mandate system meant that the country had to be administered under the laws of the mandatory as an integral part of its territory.¹⁸ The mandate for South West Africa was conferred on His Britannic Majesty – but to be exercised on his behalf by the government of the Union of South Africa, as a mandatory. A mandate agreement concluded between the Union of South Africa and the Council of the League of Nations empowered the mandatory to, inter alia, apply its laws to South West Africa,

97). See also the jurisprudence from southern Africa, such as *Unity Dow v Attorney General of Botswana* (1992) LRC (Const), at 623; *Mharapara v The State* (1986) LRC (Const), at 234.

¹⁶ For a general discussion of the German occupation of South West Africa, see Cliffe (1994); Cockram, G Gail-Maryse. 1976. *South West African mandate*. Cape Town: Juta; Imishue, RW. 1965. *South West Africa: An international problem*. London: Pall Mall.

¹⁷ Imishue (ibid.:2–3).

¹⁸ The League of Nations provided for three types of mandates – A, B or C – based on the stage of development of the inhabitants, economic conditions and geographical location. The C mandates were to be administered under the laws of the mandatory as integral parts of its territory. South West Africa fell into this category. See Imishue (ibid.:3–5).

subject to the mandate and such local codifications as the circumstances required.¹⁹ Consequently, the Union of South Africa issued the 1919 Proclamation, which introduced a formal legal order into South West Africa.²⁰ This marked an important watershed in the legal system of South West Africa by explicitly and clearly transposing the Roman–Dutch law of the Cape of Good Hope into South West Africa.²¹ In *R v Goseb*,²² Claassen, JP, as he then was, observed and acknowledged that the Roman–Dutch law reception instrument also introduced, albeit implicitly, the English common law in South West Africa.

According to the Roman–Dutch law, treaties required legislation to be part of the national law of South West Africa. The position was confirmed in *Binga v Administrator-General, South West Africa & Others*, in which Justice Strydom said the following:²³

Obligations incurred by international treaty and resolutions by international organisations such as the United Nations stand on a different footing from customary law and generally speaking a court in South Africa, and for that matter a court in this country will only give effect thereto if such a treaty or resolution was incorporated by legislative act into the laws of the land.

As regards customary international law, the legal position was that rules of customary international law were regarded as part of the national law of South West Africa. The position was endorsed by the courts. In the fore-cited *Binga* case, the Court observed the following:²⁴

Although it was accepted by Rumpff CJ in *Nduli and Another v Minister of Justice and Another* (supra at 906) that the *rules of customary international law are to be regarded as part of our law “as are either universally recognised or have received the assent of this country,”* it follows that the decisions of the United Nations, of the nature here under discussion, are not part of customary international law. [Emphasis added]

¹⁹ Article 2.

²⁰ Administration of Justice Proclamation No. 21 of 1919 (South West Africa). For a discussion of the Proclamation, see Imishue (ibid.).

²¹ Proclamation No. 21 of 1919, section 1(1). According to this clause, “The Roman–Dutch law as existing and applied in the province of the Cape of Good Hope at the date of the coming into effect of this proclamation shall, from and after the said date, be the common law of the Protectorate, and all laws within the Protectorate in conflict therewith shall, to the extent of such conflict and subject to the provisions of this section, be repealed”. For an analysis of this clause, see *Tittel v R* 1921 (2) SA (SWA) at 58.

²² *R v Goseb* 1956 (1) SA (SWA) at 666.

²³ 1984 (3) SA 949 (SWA) at 968–969.

²⁴ (ibid.).

Thus, customary international law was treated as part and parcel of the national law of South West Africa. This position was influenced by the South African position, where customary international law was directly and automatically applicable in the municipal law of South Africa. The position was authoritatively confirmed in *Nduli & Another v Minister of Justice & Another* in which Rumpff, CJ, noted the following:²⁵

It is too obvious that international law is to be regarded as part of our law, though the fons et origo of this proposition must be found in Roman–Dutch law ... [O]nly such rules of international law are regarded as part of SA law as are either universally recognised or have received the assent of this country.

However, as in the Union of South Africa,²⁶ the automatic reception of international customary law in South West African national law could be excluded by clear and unambiguous legislation, the act of State doctrine, and the stare decisis rule.²⁷

The legal position in the 1990 Constitution

A GENERAL REMARK

It is worth noting that the Namibian Constitution has adopted a positive approach towards international law.²⁸ A number of clauses in the Constitution deal with or, rather, relate positively to international law. The Preamble to the Constitution declares that the people of Namibia desire to promote among themselves the dignity of the individual and the unity and integrity of the Namibian nation “among and in association with the nations of the world”. The Constitution also declares that the national territory of Namibia consists of the whole of the territory “recognised by the international community through the organs of the United Nations”.²⁹ Furthermore, in terms of Article 95 of the Constitution, one of the principles of the State is to –

²⁵ 1978 (1) SA 893 at 897. For a discussion of this case, see Erasmus (1989/1990).

²⁶ Erasmus (ibid.).

²⁷ *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* 1977 (1) ALL ER at 881.

²⁸ Some legal scholars have described the Namibian Constitution as international-law-friendly. See, for instance, Devine, J Dermont. 1995. “The relationship between international law and municipal law in light of the Interim South African Constitution 1993”. *International Law and Comparative Law Quarterly*, 44:1; Maluwa (1996).

²⁹ Constitution of the Republic of Namibia, Article 1(4).

... actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

...

(d) membership of the International Labour Organisation (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO; ...

Also, Article 96, which deals with Namibia's foreign relations, declares, *inter alia*, that –

[t]he State shall endeavour to ensure that in its international relations it:

- (a) adopts and maintains a policy of non-alignment;
- (b) promotes international co-operation, peace and security;
- (c) creates and maintains just and mutually beneficial relations among nations;
- (d) fosters respect for international law and treaty obligations;
- (e) encourages the settlement of international disputes by peaceful means.

Furthermore, in terms of Article 99 dealing with foreign investments, –

[f]oreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament.

The positive outlook of the Constitution to international law is predicated on a variety of factors. In the first instance, the experience of a long period of apartheid colonial rule in total disregard of international law and defiance of the international community reminded the architects of the Constitution that they had to ensure that the legal system of Namibia was anchored on firm principles of international law. Furthermore, the founding fathers of the Constitution felt that the intent to introduce the minimum democratic values in the territory long denied by the South African apartheid regime to the great majority of Namibian people did not stop at the country's national boundaries, but were to be extended to Namibia's international conduct – hence the proclaimed adherence of the newly constituted Namibian State to the general standards of behaviour agreed upon by the vast majority of members of the international community.³⁰ Therefore, it was reasonable that, upon attaining independence, the framers of the Constitution had to anchor it firmly on international law.

³⁰ For instance, the Preamble to the Namibian Constitution states that "... these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid". For an analysis of this clause, see Erasmus (1989/1990:81–82).

INTERNATIONAL LAW CLAUSE – ARTICLE 144

The extant status and role of both customary and conventional international law in the municipal law of Namibia are now regulated by the Constitution. The latter explicitly recognises international law and its role and function in Namibian municipal law. The relevant Article 144 of the Constitution explicitly and unequivocally declares the following:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

The effect of this provision is to accord both the general rules of public international law and international agreements direct and automatic application in Namibian municipal law, subject to two main qualifications. Firstly, the general rules of international law and international agreements may be excluded from applying directly in municipal law by the Namibian Constitution itself. Secondly, they may be excluded by an Act of Parliament.³¹ But for these two qualifications, the general rules of international law and treaties are directly incorporated into Namibian municipal law. These rules are directly enforceable by municipal institutions, particularly the courts. Likewise, individuals can directly invoke and rely on these rules in municipal legal proceedings. As alluded to above, the Namibian international law clause is also a clear indication of the proactiveness or friendliness of the Constitution to international law.³² Moreover, the inclusion of an international law clause in the Constitution effectively accords rules of international law a constitutional status. The clause is similar to section 231(4) of the 1996 Constitution of the Republic of South Africa which provides as follows:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

It is also worth noting that, in terms of Article 66(1) of the Namibian Constitution, the common law of Namibia in force on the date of independence remains valid to the extent to

³¹ For a detailed analysis of these exceptions, see above.

³² According to Devine (1995:17), the Constitution of the Republic of Namibia can be described as 'international-law-friendly' because it incorporates a number of the provisions which create this effect. For example, see Article 143, which deals with Namibia's succession to international agreements. See also Erasmus (1989/1990:93).

which such common law does not conflict with the Namibian Constitution or any other statutory enactment. This clause ensures continuity of legal rules from the period of South African rule to the independence period and beyond. It introduces a possibility, it is submitted, of considering the status and role of international law in Namibian municipal law on the same basis as it is under the South African Roman–Dutch common law.³³ Thus, Article 66(1) complements Article 144 of the Constitution, and reinforces the status of international law in Namibian municipal law.

Therefore, since general rules of public international law and international agreements are part of municipal law, that is, they have direct and automatic application in Namibian national law, the Namibian courts are obliged to take judicial notice of them. The Namibian courts are enjoined to have recourse to these rules as a source of national law. In essence then, the Namibian Constitution has adopted a monist approach regarding the relationship between international law and Namibian national law. It is important, thus, to distinguish between general rules of international law and international agreements or treaty rules.

(a) General rules of international law

The Namibian international law clause, Article 144, directly incorporates “general rules of public international law” into Namibian municipal law. It is significant to emphasise that this provision is a constitutional confirmation of the previous Roman–Dutch common law position, that general rules of public international law binding upon Namibian law have always been part of the country’s municipal law.³⁴

However, the phrase *general rules of public international law* raises several fundamental questions. Firstly, what do these general rules really entail? The reference in Article 144 to “general rules of public international law” should obviously refer to customary international law. The term *general* in this context means rules widely supported and accepted by the representatively large number of States. It denotes clear and certain rules that have attracted widespread support from the international community. It effectively makes all kinds

³³ For a detailed discussion of Article 66(1) of the Namibian Constitution, see Cottrell (1991:56) and Erasmus (ibid.).

³⁴ *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA at 949. See Maluwa (1996:69).

of rules of customary international law part of municipal law, except those specifically and expressly excluded by the Namibian Constitution or an Act of Parliament.³⁵

This interpretation has been placed on similar provisions found in other national Constitutions. The Basic Law of the German Federal Republic, which provides at Article 25 that “the general rules of public international law are an integral part of the federal law”, is widely understood to refer only to the rules of customary international law, not the rules embodied in international treaties or agreements.³⁶ Similarly, paragraph 1 in Article 10 of the Italian Constitution, which provides that “[t]he Italian legal order shall conform with the generally recognised rules of international law”, has been interpreted to refer to customary international law.³⁷

The second inquiry that emerges from Article 144 is whether *general rules of public international law* implies an automatic exclusion of regional or particular rules of customary international law. This is because the rights and obligations of States in the international plane may be of a general or particular character.³⁸ In this regard, this provision may be contrasted with Section 211(3) of the Constitution of the Republic of Malawi which declares that –

³⁵ Erasmus (1989/1990:98).

³⁶ Rupp, G Hans. 1976. “International law as part of the law of the land: Some aspects of the operation of Article 25 of the Basic Law of Germany”. *Texas International Law Journal*, 11:541; Rupp, G Hans. 1977. “Judicial review of international agreements: Federal Republic of Germany”. *American Journal of International Law*, 25:286; Vitanyi, Bela. 1977. “Some reflections on Article 25 of the Constitution of Germany”. *Netherlands Journal of International Law*, 24:578.

³⁷ Cassese (1985:370). A similar construction has been given to the provision in the French Constitution that general rules of international law are part of French municipal law. See Preuss, Lawrence. 1950. “The relation of international law to internal law in the French Constitution”. *American Journal of International Law*, 44:641.

³⁸ *The Asylum Case ICJ Reports*, 1950 at 266. The case of Peru and Colombia involved a local custom among the Latin American States relating to diplomatic asylum. Colombia wanted to invoke the custom in the case against Peru to justify its refusal to allow a safe conduct of the rebel leader, Haya Dela Torre, out of Peru. The court held that such a custom was not proven because the alleged practice between the States involved was inconsistent and uncertain. Nonetheless, the case establishes that customary international law may emerge from a local custom. See, generally, Brownlie (1990:4–11); Kopelmanas, Lazare. 1937. “Custom as a means of creation of international law”. *British Year Book of International Law*, 18:127–151; Kunz (1953:69); Shaw (2003:60–79).

[c]ustomary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application in Malawi.

This clause ensures the incorporation of customary international law in Malawian municipal law in its entirety.³⁹

It is submitted that, in line with the general positive attitude of the extant Namibian normative regime to international law, the local or regional customary rules, that is, rules developed in a particular region, should necessarily be included in the general rules of international law. This means that local or particular custom based on a proven constant and uniform practice should be captured under Article 144.⁴⁰ Commenting on the new South African Constitution, which has similarly adopted rules of customary international law binding upon the Republic of South Africa as part of South African municipal law, Devine has argued that –⁴¹

[i]t does not matter what kind of international customary law is under consideration, whether it be universal, general, local or particular. All kinds are in principle incorporated. There is no distinction as to the types of international law. This is a satisfactory provision.

The necessity for the inclusion of regional (local) rules of international law in Article 144 of the Namibian Constitution serves the significant purpose of broadening the scope of this provision. It ensures that, in discharging their interpretative role, courts should be free to invoke and apply customary international law in its totality. It avoids the adoption of a narrow construction of Article 144. The basic objective of this clause is to incorporate customary international law in general – except that which is expressly excluded for being incompatible with the Namibian Constitution or an Act of Parliament.

The Namibian Constitution does not, however, make all general rules of international law part of national law: it does so only for those rules which are “binding upon Namibia”. It is submitted that any determination of whether or not general rules of international law bind

³⁹ See Maluwa (1996:70–71). The Malawian Constitution is reprinted in Flanz, Gisbert H Ed). 1995. *Constitutions of the countries of the world*. Dobbs Ferry, NY: Oceana.

⁴⁰ Erasmus (1989/1990:98–99). For example, it is important to note that, within the southern African regional context, there is SADC, an organisation established in 1980 by southern African States to regulate and coordinate their economic, social and other affairs in what then became known as the *SADC region*. Namibia acceded to SADC on 17 August 1992, and is therefore bound by the organisation’s normative regional rules.

⁴¹ Devine (1995:12).

Namibia should meet the criteria set by international law itself. Certain rules of customary international law may not bind Namibia in international law where, for example, there is evidence that it has opted out of the rule during its formation due to its persistent objection.⁴²

(b) The Namibian courts and customary international law

One of the first cases that came before the Namibian courts after the Constitution was adopted – in which rules of international law and, implicitly, the monist theory emerged – was *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State*.⁴³ The case involved a petition by the Attorney-General to the Chief Justice of Namibia in terms of section 15(2) of the Supreme Court Act,⁴⁴ in which the Attorney-General sought the consent of the Chief Justice, or such other judge designated for the purpose by the Chief Justice, for the Supreme Court to exercise its jurisdiction to act as a court of first instance in hearing and determining a constitutional question which the Attorney-General sought to refer to the Supreme Court under the powers vested in him/her by Article 87(c) as read with Article 79(2) of the Namibian Constitution. The relevant question was whether corporal punishment by or on the authority of the organ of State contemplated in legislation was per se; or in respect of certain categories of persons; or in respect of certain offences or misbehaviours; or in respect of the procedure employed during the infliction thereof in conflict with any provisions of Chapter 3, entitled “Fundamental human rights and freedoms”, of the Constitution of the Republic of Namibia, particularly Article 8 thereof; and, if so, to deal with such laws as contemplated in Article 25(1) of the Constitution. The latter clause deals with the enforcement of fundamental rights and freedoms. The material Article 8(2)(b) of the Constitution provides that “No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment”. The corporal punishment in question fell into two categories: (1) legislation permitting judicial and administrative corporal punishment; and (2) corporal punishment in schools.

In examining whether or not the institution of corporal punishment as embedded in Namibian law was repugnant to the type of treatment or punishment outlawed by the Constitution, the court, per Mahomed AJA, began by analysing Article 8(2)(b). The court interpreted this

⁴² Brownlie (1990:10); Kunz (1953:662–669). See also *Anglo-Norwegian Fisheries Case ICJ Reports*, 1969 at 3; *Asylum Case ICJ Reports*, 1950 at 266.

⁴³ 1991 (3) SA 76 (Nm SC). Generally see Naldi, J Gino. 1994. “Some reflections on the Namibian Bill of Rights”. *African Journal of Comparative and International Law*, 6:45, 54–56.

⁴⁴ No. 15 of 1990.

provision disjunctively in relation to seven distinct conditions, namely torture, cruel treatment, cruel punishment, inhuman treatment, inhuman punishment, degrading treatment, and degrading punishment, and held that the imposition of any corporal punishment by any judicial or quasi-judicial authority, or directing any corporal punishment upon any person, was unlawful and in conflict with Article 8 of the Namibian Constitution. In the process, the court had recourse to, and relied upon, international human rights norms embodied in treaties such as the ECHR.⁴⁵ Finally, the court held that whipping, whether by organs of State or in respect of certain offences or persons, constituted degrading and inhuman treatment.

However, the court did not expressly affirm that the prohibition of whipping had matured into customary international human rights law, which forms part of Namibian municipal law. It also did not make any specific reference to Article 144 of the Namibian Constitution. It is submitted that this case presented the court with an opportunity to positively and expressly confirm the status of customary international law in Namibian municipal law, and allowed it to give effect to and define the exact parameters of Article 144.

By contrast, specific and express reference to the Namibian international law clause was made in *Government of the Republic of Namibia & Another v Cultura 2000 & Another*.⁴⁶ The Namibian High Court had to determine the constitutionality of domestic legislation in relation to Article 16 of the Constitution protecting the right to culture. Cultura 2000, the first respondent, and the Chairman of its Board of Directors, the second respondent, brought an application against the appellants, the Government of the Republic of Namibia and others, for an order, inter alia, declaring the State Repudiation (Cultura 2000) Act⁴⁷ – which authorised the repudiation of the loans granted to them, the respondents, by the association called the *Administration for Whites*, a body established for the cultural activities of the ‘whites’, and divesting them to the State – to be unconstitutional.

The first respondent was an association incorporated under the Companies Act.⁴⁸ The association’s main object was the preservation of the culture of the Afrikaans, English, German, Portuguese, and other communities of European descent. In his founding affidavit, the second respondent alleged that the main object in forming the first respondent was the

⁴⁵ 1991 (3) SA 75 (Nm SC) at 87.

⁴⁶ 1994 (1) SA 407 (Nm SC).

⁴⁷ No. 32 of 1991.

⁴⁸ No. 61 of 1973 (Republic of South Africa).

maintenance, development and promotion of the culture of the West European cultural groups. In furtherance of its proclaimed objective, the first respondent solicited and obtained funds from the pre-Independence second-tier government structure known as the *Administration for Whites*.⁴⁹ In March 1989, just one year before Namibia's independence and during the transitional period leading up to it, the first respondent received valuable assets from the Administration for Whites. On 28 March 1989, Cultura 2000 also received a donation of R4 million⁵⁰ from the same authority. On the same date, a further sum of R4 million was paid by the same authority to the first respondent as a loan, bearing interest of 1% per annum, and repayable in 76 instalments half-yearly. On 28 February 1990, approximately three weeks prior to Namibia's formal independence, the R4 million donated on 28 March 1989 was converted into a loan by the then Administrator-General, appointed by the South African Government to do its bidding in the colony.

In court, the appellants argued that the payments to the first respondent were made as a deliberate stratagem to support the operation of Cultura 2000 in order to frustrate the anticipated results of the election, and "because of the apprehension of a new democratic society in which privilege on a racial basis would not be permitted". They further argued that the funds had been allocated in pursuance of a policy of compulsory, pseudo-ethnic and racial classification. They argued, therefore, that it was perfectly in order for the Namibian Parliament to pass legislation (the said State Repudiation [Cultura 2000] Act) repudiating the loans and divesting them to the Namibian Government.

In holding that the State Repudiation (Cultura 2000) Act violated the respondents' cultural rights and was as such unconstitutional, the Namibian High Court made the following remark concerning Article 144, and particularly in respect of general rules of international human rights law.⁵¹

It is manifest that the constitutional jurisprudence of a free and independent Namibia is premised on the values of a broad and universalist human rights culture which has begun to emerge in substantial areas of the world in recent times. *Article 144 of the Constitution* sought to give expression to the intention of the Constitution to make Namibia part of the international community. [Emphasis added]

⁴⁹ There were a number of such bodies under the former apartheid administration, the rest of which targeted other groups in the country based on their ethnicity.

⁵⁰ 1 South African Rand = 1 Namibia Dollar.

⁵¹ No. 61 of 1973 (Republic of South Africa), at 412.

The court's remark confirms the significance of universal human rights norms in Namibian municipal law. The pronouncement also represents a firm judicial recognition that universal human rights norms and values are part of Namibia national law. This means that, as a member of the international community, Namibia should abide by these norms. Most importantly, the pronouncement underlines the effect of the Namibian international law clause being to make these norms part of national law. It creates unity between these norms and the Namibian legal order. The pronouncement clearly demonstrates that, in line with the classical monist theory, Namibian courts have begun to explicitly act upon the international law clause in the Constitution. This clause provides a platform for the courts to give life, value and substance to the automatic incorporation of customary international law in national law.

It is submitted, however, that more and more regular judicial activity is necessary if these norms are to be firmly secured, and if Article 144 is to be given substantial effect in Namibian municipal law insofar as it domestically incorporates customary international law.

(c) International agreements

According to Article 144 of the Namibian Constitution, "international agreements binding upon Namibia ... shall form part of the law of Namibia". This provision assigns all international treaties that are binding upon Namibia automatic operation in Namibian domestic law. It effectively means that national institutions, and courts in particular, can directly apply and enforce international treaties that are binding on Namibia without having been translated into municipal law by legislative and other mechanisms to the same effect. It similarly means that such treaties can be directly relied upon by individuals before national courts and other related institutions.

The provision, however, raises two main questions. The first of these concerns when treaties become binding on Namibia, while the second concerns when such binding treaty becomes part of Namibian municipal law. These questions require Article 144 to be reconciled with other provisions of the Constitution, especially those concerning Namibia's participation in international agreements.

As regards the first question, that is, when treaties become binding on Namibia, in terms of the 1969 Vienna Convention on the Law of Treaties, a treaty is binding on a State once it

has expressed consent to be bound by the treaty.⁵² This constitutes international ratification, whereby a treaty is binding between one State and others. Thus, for a treaty to become binding on Namibia at international level, it would have to comply with the requirements laid down in Namibian municipal law, particularly the Constitution. Article 32(3)(e) of the Constitution empowers the President of Namibia to “negotiate and sign international agreements, and to delegate such power”. The meaning of this provision is not entirely clear. Read in isolation, it conveys the impression that the President can, following negotiation, sign treaties that enter into force upon signature and bind Namibia without the approval of Parliament. This, however, is not the case because, according to Article 63(2)e) of the Constitution, the National Assembly of Namibia –

... shall agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof.

Thus, for treaties that have been negotiated and signed by the President or his/her delegate or representative in terms of Article 32(3)(e) to be binding on Namibia externally or at international level they require parliamentary approval.⁵³ These treaties can only be binding on Namibia internationally once they have been ratified or acceded to by the Namibian Parliament. It is the latter body that expresses consent to be bound by treaties on the international plane. In other words, the signature of the President or his/her delegate alone is not sufficient for a treaty to bind Namibia externally. Additional parliamentary approval is necessary for such a treaty to bind Namibia in relation to other States that are parties to the treaty. This situation may be compared with the position in South Africa, for example. Section 82(1)(i) of the South African Constitution grants the South African President the power to “negotiate and sign” international agreements. However, this power is subject to approval by Parliament – both in the international and constitutional senses. In terms of section 231(2) of the South African Constitution, –

... an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

⁵² Article 11. The Vienna Convention was adopted on 23 May 1969, and entered into force on 27 January 1980. See United Nations. 2009. *Multilateral treaties deposited with the Secretary General of the United Nations*. New York: United Nations, 1155:331.

⁵³ Erasmus (1989/1990:103); Mtopa (1990/1991:109-110).

Subsection (3) provides as follows:⁵⁴

An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

The second question, that is, regarding when international treaties really become part of Namibian municipal law, depends upon whether a treaty enters into force upon mere signature or by ratification. A treaty that enters into force upon ratification becomes part of Namibian municipal law as soon as the legislature ratifies it or expresses its consent to be bound thereby by a resolution in Parliament. However, a treaty that enters into force on mere signature is not automatically part of Namibian law. The treaty requires enabling legislation for it to become part and parcel of Namibian municipal law.⁵⁵ The signature of the President or his/her delegate is not enough to translate it into Namibian law.

It essentially means that, although the Namibian international law clause, that is, Article 144, purports to make all international treaties automatically effective in Namibian municipal law, it does not completely erode the sovereign power of the Namibian legislative authority to transform treaties. In fact, provisions similar to that found in the Namibian Constitution appear in the Constitutions of other countries. The interpretation that has been posited to these provisions is that they do not take away the sovereign power of Parliament to enact treaties into municipal law.⁵⁶

Moreover, it is submitted that the automatic application of treaties in the Namibian national legal order does not apply to all sorts of treaties, i.e. irrespective of the nature and purposes of the treaty involved. The role of the Namibian Parliament to transform treaties, at least in relation to some categories of treaties, has not been completely withered away. The argument advanced here is not that Namibia should fall back to the pre-existing legal position in terms of which all treaties required parliamentary approval. Quite the contrary: the argument is mainly that a distinction could be made between those treaties requiring

⁵⁴ For a detailed discussion of section 231(2) and (3), see Devine (1995) and Maluwa (1993/1994:72–73).

⁵⁵ See Mtopa (1990/1991:111–112).

⁵⁶ See Cassese (1985:370); Preuss (1950:641–669; 888–899).

legislative incorporation, and those which do not. The obvious example of treaties requiring parliamentary approval would be those affecting the liberties and duties of private citizens. Treaties of this kind would in most cases require legislation to implement them, given that international treaties are largely drafted in vague and general terms. The specific details on the modes of implementation would require special legislation.⁵⁷

Thus, although the Namibian international law clause may attract commendation for making treaties a source of municipal law, problems abound as to whether all treaties of a wide-ranging variety should be treated as part of the law of the land. It is entirely possible that Namibia will continue to ratify and incorporate treaties notwithstanding Article 144 of the Constitution in order, for instance, to ensure democratic control of the nation's conduct of its foreign relations, and also make possible the implementation of treaties. Hence, it is necessary to distinguish between those treaties which require parliamentary approval and those which do not.

In this regard it is worth noting that, even after the Namibian Constitution's adoption in 1990, Article 144 has been reinforced by the country's participation in international conventions. Since becoming an independent State, Namibia has ratified and acceded to a number of international conventions. These include ratification of the United Nations Charter on 23 April 1990, the Organisation of African Unity Charter (now the *African Union Constituent Instrument*), and the SADC Treaty.⁵⁸ Treaties to which Namibia has acceded include –

- the Convention on the Prevention and Punishment of the Crime of Genocide, 1948
- the Convention relating to the Status of Refugees, 1951⁵⁹
- the International Covenants, 1966⁶⁰
- the International Convention on the Elimination of All Forms of Racial Discrimination, 1966
- the Convention on the Suppression and Punishment of the Crime of Apartheid, 1973
- the Convention on the Elimination of All Forms of Discrimination against Women, 1979
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

⁵⁷ Maluwa (1993/1994:36–37).

⁵⁸ Namibia was admitted to SADC on 17 August 1990, the same day on which it acceded to the SADC Treaty.

⁵⁹ (ibid.).

⁶⁰ Namibia acceded to both Covenants on 29 November 1991. See United Nations (2009).

- the Convention on the Rights of the Child, 1989
- the Optional Protocol to the International Covenant on Civil and Political Rights, 1966, and
- the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1989.⁶¹

However, Namibia has not acceded to the 1967 Protocol Relating to the Status of Refugees, or to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Thus, Namibia has become party to all these international agreements despite the international law clause.

(d) The Namibian courts and international agreements

The significance of Article 144 of the Namibian Constitution, insofar as it makes international agreements part of Namibian municipal law, has received positive confirmation and reinforcement from Namibian courts. It was reinforced in *Kauesa v Minister of Home Affairs & Others*.⁶² Commenting on the domestic status of the African Charter on Human and Peoples' Rights (ACHPR), 1981, the Supreme Court of Namibia noted the following.⁶³

The Namibian Government has, as far as can be formally established[,] recognised the African Charter in accordance with art 143 read with art 63(2)(d) of the Namibian Constitution. The provisions of the Charter have therefore become binding on Namibia and form part of the law of Namibia in accordance with art 143, as read with art 144 of the Namibian Constitution.

In other words, according to the court, Namibia's ratification of the ACHPR meant that the Charter was directly applicable in Namibian national law. It directly created rights and duties for individuals in municipal law. It could, therefore, be given domestic effect by Namibian courts.⁶⁴ Similarly, in *Government of the Republic of Namibia & Another v Cultura 2000 & Another*, the Namibian Supreme Court emphasised that –⁶⁵

⁶¹ Generally, see United Nations (ibid.).

⁶² 1995 (1) SA 51 (Nm SC). This case is discussed in detail below.

⁶³ (ibid.:86).

⁶⁴ Although the court opined that the ACHPR formed part of Namibian municipal law, it is significant to emphasise that the Namibian Parliament has yet to pass legislation making the ACHPR part of Namibian national law.

⁶⁵ 1994 (1) SA 407 (Nm SC) at 412.

Article 144 of the Constitution sought to give expression to the intention of the Constitution to make Namibia part of the international community by providing that ... international agreements binding upon Namibia ... shall be part of the law of Namibia.

Furthermore, in *S v Mushwena & Others*⁶⁶ involving the apprehension, abduction and deportation of 13 respondents from Botswana and Zambia by security and immigration officials from both countries to Namibia where they were charged, inter alia, with treason and murder allegedly committed in Namibia, reference was made to international agreements such as the International Covenant on Civil and Political Rights, 1951; the Convention Relating to the Status of Refugees, 1951; and the 1967 Protocol Relating to the Status of Refugees, and to Article 144 of the Namibian Constitution. The court stated that –

[a]s a matter of fact, as I have shown ... the [International Convention on Civil and Political Rights] and the UN Covenant and the Protocol Relating to the Status of Refugees have become part of public international law and by virtue of art. 144 have become part of the law of Namibia.

According to the court, these instruments had not only “become part of Namibian domestic law by virtue of the Namibian Constitution”, but some of their basic principles have been incorporated into the Namibian laws.

As with customary international law, it is clear that, since the adoption of the Namibian Constitution, the judiciary has given domestic effect to its international law clause in relation to international agreements. In so doing, the judiciary has affirmed its significance and role in Namibian national law. Importantly, however, this has only occurred in relatively few cases. Moreover, no judicial decision has so far attempted to critically analyse Article 144 of the Namibian Constitution insofar as it makes treaties self-operative in municipal law in order to define its scope and precise parameters. It is submitted that the Namibian courts have a pivotal role to play in domestically effectuating Article 144. This clause enables the courts and similar tribunals to enrich national law and jurisprudence with international standards. It also provides an opportunity for the judiciary to take international normative standards into account in developing national law.

Exceptions to direct incorporation of international law

⁶⁶ SAFLII 2004 (SC).

According to Article 144 of the Namibian Constitution, general rules of public international law and international agreements form part of the law of Namibia unless otherwise provided by the Constitution or an Act of Parliament. Thus, Article 144 creates two main exceptions to direct and automatic application of customary and treaty rules in Namibian municipal law: constitutional supremacy and legislative sovereignty.

Constitutional supremacy

Article 144 recognises that automatic and direct application of international law, customary and conventional, in Namibian municipal law may be excluded by the Namibian Constitution itself. Thus, a clear and unambiguous clause in the Constitution overrides or, rather, limits the direct operation of international law in municipal law.⁶⁷ In *Kauesa v Minister of Home Affairs & Others*, Justice O'Linn, commenting on this exception, aptly observed the following:⁶⁸

The specific provisions of the Constitution of Namibia, where specific and unequivocal, override provisions of international agreements which have become part of Namibian law.

The conditioning of the automatic application of international law by the doctrine of constitutional supremacy underscores the predominant nature of the Namibian Constitution. It further underlines the significance attached by the Namibian people to the Constitution as a compact that enshrines their goals and aspirations.

However, the Constitution does not provide guidelines on how it or a provision therein may exclude the operation of customary and treaty rules in Namibian municipal law. This means that all sorts of possible situations may be invoked to exclude the operation of customary international law and treaties in Namibian municipal law on the basis that the Constitution provides otherwise. For instance, if an international agreement were in conflict with any clause in the Constitution, then the treaty in question would not form part of municipal law. Thus, if a treaty duly entered into or executed by the relevant executive authority and confirmed by the Namibian Parliament conflicted with the substantive provisions of the Constitution, it would be possible to challenge it in municipal courts. In other words, it would

⁶⁷ This exception is almost similar to that found in the South African Constitution of 1996; see section 213(4). For the discussion of the South African provision, see Devine (1995:11).

⁶⁸ 1995 (1) SA 51 (Nm HC) at 86.

be argued that, since the treaty in question conflicted with some substantive clause(s) of the Constitution, such treaty would be overridden by the Constitution – notwithstanding the treaty being binding on Namibia under international law.⁶⁹ There is an example of this situation arising from Ireland. In *Christopher McGimpsey & Michael McGimpsey v Ireland & Others*,⁷⁰ it was held that the treaty – which was fully binding at international law – could be challenged on the grounds of conflict with a substantive constitutional provision. But the Court proceeded to warn that such a challenge would not be lightly entertained by the courts since there was a presumption in favour of the constitutionality of treaties in particular, and of international law in general.

Whether or not the Namibian Constitution or a provision thereof is in conflict with an international law rule will depend on each case, and the issue will have to be decided by the Namibian courts.⁷¹ Significantly, in effectuating this exception, it is submitted that Namibian courts will have to bear in mind the responsibility incumbent upon the country not to violate its international obligations. They will have to construe Namibian law – particularly a constitutional rule – so as not to be in conflict with Namibia's international obligations. After all, as stated elsewhere in this discussion, the Constitution provides that the Republic of Namibia is committed to international law and to fulfilling its international obligations.

Legislative sovereignty

The new municipal legal order of Namibia also recognises that an Act of Parliament may operate to exclude the application of international law in municipal law. According to Article 144 of the Constitution, –

[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

This provision conditions the automatic municipal application of international law on the doctrine of legislative sovereignty. It recognises the sovereign power of the National Assembly of Namibia to override direct application of international law in the domestic legal scene.

⁶⁹ Devine (1995:10).

⁷⁰ (1988) 1 R 567.

⁷¹ Erasmus (1989/1990:103); *Kauesa v Minister of Home Affairs* 1994 (3) SA at 76; Naldi (1994:29).

It should be noted that this exception existed in the pre-Independence legal dispensation and was endorsed by the judiciary at the time.⁷² However, unlike in the previous Namibian law where legislative sovereignty only excluded the domestic operation of rules of customary international law, the present Namibian law has extended it to exclude treaty rules as well. Article 144 empowers the Namibian Parliament to pass legislation overriding the direct automatic operation of international law – both customary and conventional – in Namibian municipal law. Significantly, the provision not only makes the new legal position clearer: it also elevates Namibian legislative supremacy in this regard to a constitutional status. In other words, when it comes to excluding the direct operation of international law in national law, both the Constitution and legislation are at par.

Exclusion of the automatic application of international law in municipal law by legislative sovereignty may arise where, for instance, an international law rule embodied either in a treaty or custom is inconsistent with an Act of Parliament. Under these circumstances, an Act of Parliament predominates and the operation of an international law rule in Namibian municipal law is excluded. The *legislative sovereignty* qualification serves to underscore the sovereignty of the Namibian Parliament, and signifies the supremacy of the will of the legislature within the Namibian municipal legal sphere.⁷³

Notably, qualifying the incorporation principle with the will of Parliament entails that the adoption of international law in Namibian municipal law is not radical, but cautious. It is a manifestation of a moderate submission to the will of the international community. The enactment of a statute to exclude a rule of international law from operating in municipal law may in certain instances amount to an implied opposition to a rule of international law. Thus, if it is obvious that legislation may operate to exclude a rule of international law from operating in municipal law, it means that national legislation is higher in rank. The effect of this ranking would be to lessen the effectiveness of international law in national law. On the other hand, an unqualified domestic application of international law does not seem to be a

⁷² It was affirmed in *Binga v Administrator-General, South West Africa & Others* 1984 (3) SA at 949. In determining whether the League of Nations Mandate, as a treaty, formed part of Namibian municipal law, Justice Strydom noted that rules of customary international law were subject to the will of the Namibian Parliament. See also *S v Acheson* 1991 (2) SA 805 (Nm HC).

⁷³ Lauterpacht, Hersch. 1973. "Is international law a part of the Law of England?". *Transactions of the Grotius Society*, 1939 at 23, 51.

preferable option, since that would undermine State sovereignty by allowing rules of international law to operate unsupervised in the municipal law of Namibia.

However, it is not abundantly clear whether the limitation applies to earlier or later statutes, or both. It is submitted that, as regards earlier statutes that are inconsistent with a rule of international law binding on Namibia, the effect of Article 144 is to accord international law a predominant position. Statutes falling under this category are superseded by a rule of both customary and conventional international law. But certainly, a later unambiguous and clear statute duly passed by the Namibian Parliament would override a rule of both customary and conventional international law that has become part of the law of Namibia. This is in accordance with the *lex posterior derogat priori* principle.⁷⁴ Parliament's intention to violate a rule of international law in question should be manifestly clear and unequivocal. However, the presumption that the legislature will not violate the State's obligation in international law will continue to apply. Courts will have to construe a municipal law provision in order to give domestic effect to Namibia's international legal obligations.

The rationale for this presumption is that Namibia will in any case remain bound by its international obligations, irrespective of whether or not a treaty provision fails to be given effect because of its inconsistency with municipal legislation. A State cannot invoke its municipal law as a defence for an inability to perform its international obligations.⁷⁵ This was specifically enunciated in the *Greco-Bulgarian Communities* case, in which the Permanent Court of International Justice noted the following:⁷⁶

[I]t is a generally accepted principle of international law that[,] in the relations between Powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

The important point to note, however, is that the effectiveness of this exception will largely depend on the approach of the judiciary. In practice, domestic courts endeavour as much as is practicably possible to reconcile domestic legislation with a treaty or customary rule in

⁷⁴ Cunningham, J Andrew. 1994. "The European Convention of Human Rights, customary international law and the Constitutions". *International and Comparative Law Quarterly*, 43:537–567).

⁷⁵ Brownlie (1990:35); *Advisory Opinion on Treatment of Polish Nationals in Danzig* 1932 PCIJ Reports Series A/B, No. 44 at 22; Erasmus (1989/1990:95); Vitanyi (1977:580).

⁷⁶ (1930) PCIJ Series B, No. in order 17 at 32. See also *Free Zones of Upper Savoy and the District of Gex* 1932 PCIJ Series A/B, No. in order 46.

question with a view to ensuring that the international obligation of the State is fulfilled.⁷⁷ The intention to repudiate a treaty must be clear and unequivocal, although the courts would have to try to harmonise the treaty with municipal law.⁷⁸ It is only where it is explicitly clear that Parliament wanted to disregard international law that the courts have no choice but to apply legislation. They would not want to allow their own predilections to supersede legislative will.

It is submitted that, although this exception – and constitutional supremacy – ensures that international law should not have an absolute and unregulated operation in Namibian national law, its net effect is to limit the role of international law, both customary and conventional, in municipal law. It weakens the effectiveness of Namibia's newly adopted monist approach to the interrelation between international law and national law. Also, it demonstrates Namibia's cautious approach of according international law a firm place and function in its municipal law.

Concluding remarks

The extant Namibian legal order has fundamentally improved and enhanced the domestic status and role of international law. A constitutional strategy has been adopted to directly incorporate customary and treaty rules into the municipal law of Namibia. These rules do not only enjoy statute-like effect in Namibian municipal law, they have also been accorded a constitutional status. This device makes Namibian municipal law international-law-friendly. It enhances unity and interaction between the two legal regimes. It also makes international law more effective in municipal law. Individuals can invoke and rely directly on international norms before national institutions such as national courts and other bodies with similar trappings, under acceptable limitations. There is recognition of individuals both as objects and as subjects of international law, capable of claiming international norms independently of the State of Namibia.

Thus, Namibia has embraced a monist approach in its domestic treatment of both customary and treaty rules. As regards customary international law, Namibia has not altered its pre-Independence legal position, namely that customary international law is directly applicable in municipal law. The domestic position of treaties, on the other hand, has been fundamentally

⁷⁷ Erasmus (1989/1990:95).

⁷⁸ (ibid.).

changed. Unlike in the pre-existing law, where treaties were governed by traditional dualist theory, under the new 1990 constitutional and legal dispensation, they are regulated by monism. This theory implies that it is not necessary to legislatively incorporate treaties into the municipal law of Namibia: they are self-executing. The monist approach seeks to erode the power of Parliament to transform treaties. However, if Namibia's international law clause is reconciled with other constitutional provisions, particularly those on the powers of the President and Parliament in relation to treaties, it is clear that treaties – especially those that come into force upon signature – require parliamentary ratification in order to be part of Namibian law. Moreover, Namibia will continue to ratify and incorporate certain kinds of treaties, notwithstanding Article 144. Human rights treaties, for example, require legislation that is sufficiently clear in order to implement them in national law. Therefore, Article 144 does not completely displace the transformation theory requiring treaties or certain category of treaties to be internally legislated.

It also emerges from Article 144 that the automatic application of international law in Namibian law is not absolute. It can be excluded by the Constitution or by statute. These are the only recognised exceptions to, and limitations upon, the automatic incorporation of international law into Namibian law. These exclusions have displaced the act of State doctrine and stare decisis rule which, under the pre-existing law, were also recognised as capable of excluding the domestic operation of customary international law. The abandonment of these exceptions can potentially raise problems, however, especially for the judiciary and executive. Firstly, the stare decisis rule is a significant aspect of any legal system, particularly one with common law attributes such as Namibia's. Namibian lower courts would have to follow the precedent of higher courts, even where their decisions are in conflict with a rule of international law – especially customary international law. Secondly, there are certain matters with respect to which the executive arm of government should have a final say. A typical example is national security. However, given the proactiveness of Namibian national law in relation to international law, the courts would reasonably be expected to reconcile Namibia's international obligations with these two rules, and to ensure that they effectuated the former.

It is submitted that the Namibian constitutional strategy is an attractive and highly preferable mode of incorporating international law into domestic law. It ensures clarity, certainty and predictability. Most significantly, as the supreme law of the land, the Constitution commands universal national respect. Moreover, as a social compact, it would not be easily disregarded and whimsically tampered with in order to reduce the effectiveness of international law in municipal law.

That said, it is important to note that Namibian courts have yet to reinforce the significance of Article 144 in Namibian law. This clause in particular and international law – both customary and conventional – in general have been discussed in comparatively few and isolated cases. They have only been referred to incidentally in cases dealing with the interpretation of the human rights provisions of the Constitution and in some legislation. Thus, Namibian courts have yet to internalise the Namibian monist theory. It is submitted that municipal courts should adopt a positive and proactive attitude towards international law generally, so as to accord it a firm position in municipal law. Furthermore, this approach gives additional impetus and force to the newly adopted Namibia's monist theory.