Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya

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Abstract

The face of international law has been changing. Historically, international law largely provided a mechanism through which states could preserve their sovereignty from external interference. More recently however, international law has tended towards a more co-operative engagement among states, through treaties and other international agreements. The result of this process has been the transference of norms by and among states, thereby increasing the range of shared transnational norms among the nations of the world. One result of this process has been the emergence of certain international minimum standards of conduct expected of individuals and states.

The Constitution of Kenya provides for international law to form part of the law of Kenya. By this requirement the makers of the Constitution sought to make international legal norms part of the Kenyan legal system. Kenya should in essence conform to the minimum standards required by transnational legal norms. This article discusses the implications of the constitutional requirements for the application of transnational norms in the Kenyan legal system. Part I will address the theoretical bases for the application of international law in municipal law. Part II of the paper examines the nature and application of general rules of international law in Kenya. It will be contended that the widespread notion that the 'general rules of international law', expressed in Article 2 of the Constitution, refers to customary international law is technically erroneous. Part III discusses the place of treaties and conventions as sources of law in Kenya; while part IV examines whether domesticated treaties and conventions should be interpreted as domestic law, or as international law in their own right. Part V will comprise of concluding remarks.

Part I: Theoretical Bases for Application of International Law in States

The application of international law in states has historically followed two philosophical lines. On the one hand is monism, which as a theory posits that law must be understood as a unity, irrespective of its source; the validity of law derives from one common source. Thus international law and municipal law have the same sphere of application, and affect the same subject matter, despite their different sources. On this theory, therefore, international law applies directly in the municipal sphere, and provided that it is self executing, does not require any legislative intervention to incorporate it.

The second theoretical approach is dualism. In its classical formulation dualism holds that international law is primarily aimed at regulating the conduct of states, while municipal law applies to individuals or groups of individuals. Accordingly the contents of international law and municipal law have different fields of application, sources and subjects. International and municipal laws thus constitute two different legal systems with different subjects; international law with states as subjects, and municipal law with individuals and private legal persons as subjects. The consequence is that before international law can apply within the municipal sphere of a state, it must be expressly incorporated by a sovereign act. In English law and legal systems which have English law parentage, dualism has been the prevailing approach towards the incorporation of international law into municipal law. Thus in *A.G of Canada v. A.G. of Ontario* during an appeal instituted to the Privy Council from a judgment of the Supreme Court of Canada on a reference by the Governor-General in Council, the constitutionality of certain labour legislation enacted by the Parliament of Canada pursuant to the Treaty of Peace by which the Covenant of the League of Nations required members to endeav our to maintain fair and humane conditions of labour, came into question. The Supreme Court stated:

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[1] Wolfgang Friedman, *The Changing Structure of International Law*, Stevens & Sons, London, 1964, 60-62.
[2] Article 2(5) and (6).
[3] Ian Brownlie, *Principles of Public International Law*, 7th ed., Oxford U.P., New York, 2008, 31-33.

> "Within the British Empire there is the well established rule that the making of a treaty is an executive act while the performance of its obligations, if they entail alteration of the existing domestic legislation, requires legislative action. *Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.*" (Italics added)

In English law therefore, international law may only become part of municipal law by specific legislation enacted to that effect. That has traditionally been the position in Kenya.

Part II. General Rules of International Law in Kenya

2.1. The Nature of General Rules of International Law

Article 2(5) of the Constitution of Kenya provides that 'the general rules of international law shall form part of the law of Kenya'. There are two schools of thought regarding the nature of these general rules. On the one hand is the school that holds that the general rules refer to customary international law rules. Examples of such rules are the equality of states, immunity of heads of states, non-interference in the internal affairs of other states, and the prohibition against use of force. The other school holds that general rules of international law is synonymous with general principles of international law. Brownlie explains general principles of international law as follows: "The rubric may refer to rules of customary law, to general principles of law as in Article 38(1) (c) [of the Statute of the International Court of Justice] or to logical propositions resulting from judicial reasoning on the basis of existing international and municipal analogies." Thus in many cases the principles are to be traced from state practice, but they are primarily abstractions from a mass of rules that have been so long and so generally accepted as to be no longer directly connected with state practice.

Schachter identifies five categories of general principles that have been invoked in international law discourse and cases. First are general principles of municipal law 'recognised by civilized nations'. These are the principles expressed in Article 38(1)(c) of the Statute of the I.C.J. This first category refers to principles actually recognized and applied in national legal systems. These principles are not applied on the international plane as municipal law, but rather as analogies drawn from municipal legal systems to develop or supplement international. An example of these general postulates developed from municipal law is in the *Chorzow Factory Case* where the Permanent Court recognized that 'every violation of an engagement involves an obligation to make reparations'. However this category of general principles must be treated with caution because the use of municipal law must be appropriate for international relations. Thus a contention that the law of trusts could be used to interpret the mandate of South Africa over South West Africa did not win approval as international law in the International Court although it may still have had an indirect influence on the Court in its advisory opinion.

The second category of general principles is those principles derived from the specific character of the international community, that is, principles necessary for international coexistence. They include *pacta sunt servanda*, territorial integrity, self defence and the legal equality of states. Some of these principles may be found in the United Nations Charter, and are therefore part of treaty law, but others may be treated as principles required by the specific character of a society of sovereign independent members. Customary international law rules fall within this category. The third category of general principles is principles intrinsic to the idea of law and basic to all legal systems. It includes an empirical element, namely that it must be found in all legal systems, and a conceptual criterion, that is that it is intrinsic to the idea of law.

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[4] In *Foster v. Nelson*, (1829) 27 U.S. (2 Pet) 253, Marshall C.J. explained, "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."

[5] *Ibid* note 3.

[6] See for example Partsch, "Individuals in International Law", in Bernhardt (ed) *Encyclopaedia of Public International Law* (1995)2, 957, at 958, and Partsch, "International Law and Municipal Law", in Bernhardt (ed) *Encyclopaedia of Public International Law* (1995)2, 1183, at 1184.

[7] 1937 A.C. 326.

[8] *Id* at 347.

In the international courts and tribunals they are often expressed as 'basic' to all law, or as 'necessary' principles based on the logic of the law. They form a kind of substratum of legal postulates. These postulates are established by a logic or process of legal reasoning. Their underlying premise is that they are generally accepted. Principles such as *pacta sunt servanda*, *nemo plus iuris transfere potest quam ipse habet*, and even principles of interpretation such as *lex specialis* and *lex posterior derogat priori* fall within this category. General principles of law have also come to represent the idea of principles *jus rationale*, which are valid through all kinds of human societies. This is an association with natural law conception which considers the human person as a rational and social creature.

Thus the global movement against discrimination on race, colour and sex, the acceptance of human rights, and the increased fear of nuclear annihilation has strongly reinforced universal values represented by natural law. These universalistic principles are a material source of much of the development in treaty and customary law. The last category of general principles is represented by the principles of natural law. The concept is known in many municipal legal systems, but its international legal manifestation is two fold. First, in reference to minimal standards of decency and respect for the individual human being that is largely expressed in human rights instruments. Secondly, is in the idea of equity, which includes fairness, reciprocity, and considerations of the particular circumstances of the case. On account of the clear intention of the makers of the Constitution to embrace international law norms, the wider conception of general principles of law is preferable in the context of the Constitution of Kenya. Indeed this wider notion of general rules of international law enables a greater spectrum of international legal norms to be applied in Kenya, thereby propelling the country towards the application of common transnational legal standards, a necessity for any member of the community of nations.

2.2. Application of General Rules of International Law

Article 2(5) of the Constitution envisages the direct and automatic application of general rules of international law within the municipal law of Kenya, without further legislative intervention. In essence the rules would apply in their own right, and the article therefore excludes the application of the English law doctrines of incorporation and transformation which have traditionally defined the application of customary international law in municipal law in the United Kingdom.

2.3. Customary International Law

The basis of customary international law as law is Article 38.1(b) of the Statute of the International Court of Justice, which recognises 'international custom, as evidence of a general practice accepted as law'. That Article expresses the widely held view that custom is made up of two elements; general practice, or *usus* or *diuturnitas*, and the conviction that such practice reflects, or amounts to, law or is required by social, economic or political exigencies, *opinio juris et necessitas*. Thus in the *Continental Shelf* (*Libyan Arab Jamahirya/Malta*) the International Court observed,

> "It is axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinion juris* of states, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."

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[9] Godfrey Musila contends that contends that 'general rules of international law in article 2(5) refer to customary rules of international law': See Musila G., "We Don't Need a Referendum to Withdraw from the Hague Treaty", *Daily Nation*, December 20, 2010, 12.
[10] *Id*.
[11] *Id* note 3, 16.
[12] *Ibid*.
[13] Schachter, *International Law in Theory and Practice*, 1991, 50-55.
[14] *Factory at Chorzow* (Germany v. Poland), 1927 P.C.I.J. (ser. A) No.9 at 21.
[15] *Advisory Opinion on the International Status of South West Africa*, (1950) I.C.J. Reports 148
[16] Schachter, *id* note 13, 51.
[17] Schachter, *id* note 13, 52.
[18] Schachter, *id* note 13, 53.
[19] Schachter, *id* note 13, 54.
[20] Musila, *id* note 9 above, states: "These customary rules, are superior rules and automatically form part of Kenyan law."

The elements of customary international law were recognised in the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Netherlands)* where the International Court had to establish whether the principle of equidistance embodied in Article 6 of the 1958 Geneva Convention on the Continental Shelf, as a method for delimiting the continental shelf as between adjacent states had become a rule of customary international law, and was consequently binding on the Federal Republic of Germany, a state not party to the Convention. The Court answered the question in the negative, noting that although little time had elapsed since the Convention had come into force, in 1964;

> "…an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specifically affected, should have been both extensive and virtually uniform… and moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

It is however not necessary that the practice should 'show a general recognition that a rule of law or legal obligation is involved', as the International Court put it in the case. Both elements of customary international law, state practice and the corresponding view of states that the practice is mandatory need not be both present at the same time. Indeed usually, in the initial stage, a practice evolves among certain states under the impulse of economic, political, or military demands, and as such the practice may be regarded as being imposed by economic, social or political needs, *opinio necessitas*.

If the practice does not encounter strong and consistent opposition from other states but is increasingly accepted, or acquiesced in, a customary rule gradually crystallizes. At this later stage, it may be held that the practice is dictated by international law, *opinio juris*. In other words, at this stage states begin to believe that they must conform to the practice not so much, or not only, out of economic, political or military considerations, but because an international rule enjoins them to do so. At this moment, although the rule may be difficult to pinpoint exactly since it is the result of a continuous process, a customary rule may be said to have evolved.

It would seem that it is only with regard to this stage in the gradual formation of a customary rule that it is necessary to have 'a belief that... [a given] practice is rendered obligatory by the existence of a rule of law requiring it', with the consequence that the 'states concerned must…feel that they are conforming to what amounts to a legal obligation' Moreover the role of both elements of a customary rule during the development of the rule may also vary depending on the circumstances. Thus whenever there are conflicting interests at the outset, there is a tendency for the *usus* element to acquire greater importance for the formation of the rule, while the *opinio* assumes a prominent role because it is based on evident and inherently rational grounds, such as customary rules prohibiting genocide, slavery, torture or racial discrimination.

How then will the existence of a customary international law rule be established by courts in Kenya?

The material sources of custom are numerous and include diplomatic correspondence, policy statements, press releases, the opinions of official legal advisors, official manuals on legal questions such as on military law, executive decisions and practices, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.

Part III. The Place of Treaties and Conventions in the Law of Kenya

The basis for the application of treaties and conventions in Kenya is Article 2(6) of the Constitution which provides:

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[21] The doctrine of incorporation postulates that customary international law rules are to be considered part of the law of the land and enforced as such with the qualification that they are incorporated so far as they not inconsistent with Acts of Parliament and prior judicial decisions of final authority. A contrasting doctrine is transformation which holds that customary international law is part of the law of England only insofar as the rules have been clearly adopted and made part of the law of England by legislation, judicial decisions or established usage: See Brownlie, *id* note 3 above, at pages 42-43.

[22](1985) I.C.J. Reports, 13, 29-30, para 27.

[23] (1969) I.C.J. Reports 3.

[24] *Id* par 74.

> "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

It is undisputed that the purpose and effect of Article 2(6) of the Constitution, is to recognise ratified treaty law as being part of the law of Kenya. At first sight it may seem that the article engenders monism in the application of treaties and conventions within the municipal law of Kenya. But it will be noted that the article is differently rendered from Article 2(5) by the addition of the words 'under this Constitution'. The theory governing the application of treaties and conventions within the municipal law of Kenya may best be discerned by first addressing two pertinent issues which arise in relation to treaties and conventions ratified by Kenya. First, what are the constitutional requirements for the ratification of treaties? Secondly, what is the legal significance of the phrase 'under this Constitution' in Article 2(6)?

3.1. Ratification of Treaties

Ratification is not defined in the Constitution, nor is the procedure described therein. International law also does not lay down any specific requirements for the ratification of treaties. Indeed the Vienna Convention on the Law of Treaties lumps the terms 'ratification', 'acceptance', 'approval', and 'accession' together in the definitions article to mean 'the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty'. The Treaty Making and Ratification Act of Kenya, defines ratification as the international act by which the state signifies its consent to be bound by a treaty, and includes acceptance, approval and accession where the treaty provides for it; thereby adopting the approach of the Vienna Convention.

Article 11 of the Convention provides that ratification is one of the means by which consent to be bound may be expressed, while Article 14 dealing specifically with ratification provides that it signifies consent to be bound when the treaty provides this, it is otherwise established that the parties agreed to this, the state representative signed the treaty subject to ratification, or the representative's full powers indicate that the state intended the treaty to be subject to ratification, or this was made clear during negotiations.

In addition, Article 16 of the Treaty provides that instruments of ratification establish the consent of states to be bound by a treaty when they are exchanged between contracting states, they are deposited with the depository, or, if so agreed, the depository or the contracting states are notified of the ratification. No provision is however made in the treaty for the actual procedure by which ratification must or may be effected, nor is the form of the instrument of ratification provided.

In British and Commonwealth parliamentary practice, no legislative approval is required for treaty ratification. This is the position adopted by the Constitution of Kenya which has no requirement for the legislature to ratify treaties, unlike in the United States and South African model. Ratification of treaties is, therefore, by Kenya's Constitution entirely an executive prerogative. The Parliament of Kenya has however claimed for itself a role in the ratification of treaties through the Treaty Making and Ratification Act. The preamble to the Act provides that it is an Act of Parliament to give effect to the provisions of Article 2(6) of the Constitution, and to provide for the procedure for the making and ratification of treaties and for connected purposes. Presumably, the Act, in seeking to give effect to the provisions of Article 2(6), sought to make treaties or conventions ratified by Kenya "part of the law of Kenya". It is pertinent to evaluate whether it in fact did so. This issue will be adverted to later.

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[25] Cassesse Antonio, *International Law*, 2nd Ed., Oxford U.P., New York, 2005, 157-158.
[26] *Ibid.*
[27] Damrosch L., Henkin L., Murphy S. and Smit H., state' "Thus, a nascent period of formation of a rule would not exhibit opinion juris generalis but with repeated instances, states come to treat the practice as law"; *International Law, Cases and Materials*, 5th ed., West Publishing Co., Minnesota, 2001,
[28] *Ibid.*
[29] *North Sea Continental Shelf Cases*, *id* note 24, par. 77.
[30] *Id* note 21 above at 158.
[31] In its *Advisory Opinion in the Genocide Case* the ICJ referred to the practice of the Council of the League of Nations in the matter of reservations to multilateral conventions; (1951) I.C.J. Reports, 25.
[32] Brownlie, *id* note 3, at 6. See also *The Paquete Habana*,[1] where the United States Supreme Court stated: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act

3.1.1. Ratification of Treaties in Kenya

The Treaty Making and Ratification Act provides that when the Government wants to ratify a treaty, the relevant state department in consultation with the Attorney-General should submit to the Cabinet, the treaty and an explanatory memorandum for approval. If the cabinet approves the ratification of the treaty, the cabinet secretary then submits the treaty and the explanatory memorandum to the Speaker of the National Assembly. Depending on the subject matter (when the treaty involves counties the Senate would be involved), the treaty may be considered by one or both houses of Parliament. Parliament may then approve the ratification of the treaty with or without reservation. The Parliament of Kenya is however bound not to approve the ratification of a treaty which, or part of which, is contrary to the Constitution, nor should it approve a treaty which, or part of which, negates any of the provisions of the Constitution. It should also not approve a reservation to a treaty which, or part of which, negates any of the provisions of the Constitution. A treaty approved by Parliament without reservations may thus be ratified as it is, while that approved with reservations is ratified with the reservation to the corresponding articles of the treaty, and when Parliament refuses to approve the ratification of a treaty, the Government is bound not to ratify it.

3.2.2. Application of Treaties in Kenya

Does a treaty or convention which has been ratified by the Government of Kenya form part of the law of Kenya? As previously indicated, this would seem to be the assumption made in enacting the Treaty Making and Ratification Act. Nevertheless, while ratification signifies consent by a state to be bound by a treaty, whether a treaty or convention forms part of the law of Kenya thereafter, and therefore applies in Kenya, depends on the significance of the words 'under this Constitution' in Article 2(6). Musila contends that the words mean 'as provided by the Constitution': "In other words, the Constitution provides how treaties and conventions form part of the law of Kenya'. It is significant that Article 94(5) of the Constitution provides that no 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. It is submitted that based on Article 94(5), treaties and conventions ratified by the executive, whether with prior Parliamentary approval or not, do not by the mere act of ratification form part of the law of Kenya; Parliament has to domesticate them by legislation. The Constitution of Kenya therefore adopts a philosophy of dualism in relation to treaties and conventions which are to form part of the law of Kenya.

Part IV. Interpretation of Treaties and Conventions by Municipal Courts

How then should courts in Kenya interpret treaties and conventions which have been domesticated? Are they to be deemed as international agreements governed by international law, or are they to be interpreted as pieces of municipal legislation? Brownlie expressed the latter case as follows,

> "When municipal law provides that international law applies in whole or in part within the jurisdiction, this is merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law."

That this is an important distinction is evident on account of the approaches to interpretation of treaties followed by municipal courts.

4.1. The Literal Approach

On this approach, if a treaty is considered as municipal legislation, the normal rules of interpretation of statutes will apply. This traditional approach of English courts is summarized in *Salomon v. Commissioner of Customs and Excise* which recognises that the first task of a court is to interpret legislation, not the treaty;

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or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what law ought to be, but for trustworthy evidence of what law really is."

[33] Vienna Convention on the Law of Treaties, (1969) 8 *ILM* 679.

[34] Treaty Making and Ratification Act, No. 45 of 2012.

[35] *Id*, Section 2.

> "If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties… and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts."

In this traditional approach therefore, one is dealing not with treaty interpretation, but with normal statutory interpretation. Indeed Lord Diplock in the above case stated two conditions for resort to a treaty to enable the court make a choice between the possible meanings of the words, since there is a presumption that the legislature does not intend to act in breach of international law; (a) when the terms of the legislation are not clear but are reasonably capable of more than one meaning, and (b), when there is cogent extrinsic evidence that an enactment was intended to fulfil obligations under the particular treaty even where there is no express reference to the treaty in a statute. When the two conditions exist, the treaty becomes an aid to interpretation, so as to enable the court resolve ambiguities and obscurities in the statute.

4.2. The Schematic and Teleological Approach

If however the court is dealing with a treaty, other considerations and methods of interpretation come into play. In *James Buchanan & Co. Limited v. Babco Forwarding and Shipping Co. UK* a schematic and teleological approach was adopted. The Court stated,

> "…so also in interpreting an international convention…we should interpret it in the same spirit and by the same methods as judges of the other countries do. So as to obtain uniform results (sic)."

The case involved the question of construction of UK statute which gave effect to a European Convention. In the view of the court since a treaty relates to rights and obligations involving other states, whatever interpretation was adopted must be one consistent with norms shared with other states party to the treaty. This can only be achieved by taking heed of the intent and purpose, rather than a literal interpretation.

4.3. Article 2(6) of the Constitution and Interpretation of Treaties

It is also important to note that Article 2(6) of the Constitution provides that it is the treaty of convention which forms part of the law of Kenya. Thus what a court called upon to interpret a treaty 'under this constitution' would be facing is an international agreement which forms part of municipal law in its own right. It would have undergone no magical mutation transforming it into municipal legislation, but has remained what it was, a treaty. The practical relevance to the courts of the fact that they would be interpreting a treaty rather than a piece of municipal legislation is that just as a municipal legal system has its rules for the interpretation of a statute, so too does international law have rules for the interpretation of a treaty. The *vade mecum* of treaties is the Vienna Convention on the Law of Treaties. Significantly, based on the incorporation of the customary international law as part of the law of Kenya, the rules of interpretation set out in the Vienna Convention should apply in the interpretation of treaties. In *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* the International Court of Justice expressly stated that, "…the Court will recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties…" The Court thereby recognized that the rules of interpretation in the Vienna Convention are a codification of customary international law governing interpretation of treaties.

The fact that customary law has been embodied in a treaty does not change the norms into treaty law. As the International Court of Justice observed in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,* the same rule may exist in both a treaty and in customary international law without affecting the essential nature of either;

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[36] *Ibid* note 34.
[37] Section 7.
[38] Section 8(1).
[39] Section 8(2).
[40] Section 8(4).
[41] Section 8.
[42] *Ibid.*

> "Customary international law continues to exist and apply, separately from international treaty law, even when the categories of law have an identical content."

4.4. Interpretation of Treaties under the Vienna Convention on the Law of Treaties

It is submitted that only the adoption of the approach prescribed in the Vienna Convention will enable courts in Kenya to fully give effect to the import of treaties which now form part of the law of Kenya.

4.4.1. The Basic Rule of Interpretation

Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty should be interpreted in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", while Article 31(2) provides in part that the context of a treaty for purposes of interpretation comprises, in addition to the text of the treaty, including its preamble, and annexes, any agreement made between all the parties, or instrument made by one or more parties and accepted by the other parties, in connection with the conclusion of the treaty. The Vienna Convention therefore gives primacy to the meaning of the text of the treaty according to the ordinary or apparent signification of its terms. Thus the text is placed above all the basic material for interpretation, and as shall be noted, the *travaux preparatoires* are only taken into account as a secondary or supplementary means of interpretation.

The process of interpretation therefore begins with an analysis of the specific provisions of the treaty concerning the question in dispute, then goes on to consider the context, that is to say, other provisions of the treaty, including its preamble, annexes and related instruments made in connection with the conclusion of the treaty, taking into account the object and purpose of the treaty, as it appears from these intrinsic materials. In the *Advisory Opinion on the Polish Postal Service in Danzig*the Permanent Court observed that the Postal Service which Poland was entitled to establish in Danzig under treaty was not confined to operation inside the postal building since 'postal service' must be interpreted 'in its ordinary sense so as to include the normal functions of a postal service'.In the same respect, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Hertzegovina v. Serbia and Montenegro*) the International Court had to interpret provisions of the Genocide Convention including the undertaking to prevent and punish genocide in Article 1.

To determine the obligations of the parties under the Genocide Convention, the Court affirmed the 'humanitarian and civilizing purpose' of the Convention, and its 'moral and humanitarian principles'. It found that the ordinary meaning in the term 'undertake' is frequently used in the sense of formal legal obligation. Accordingly, the undertaking to prevent and punish genocide creates obligations, not only to prevent and punish genocide, but also on account of the established purpose of the Convention, not to commit genocide themselves. The ascription of meaning to the terms by the International Court is comparable with Article 94(1) of the United Nations Charter, which provides that each member of the United Nations 'undertakes to comply with the decision' of the International Court of Justice in any case in which it is a party. The terms 'undertakes to comply' in Article 94(1) of the Charter has been interpreted by the United States Supreme Court in *Medellin v. Texas*, in which the Court approved the position of the executive branch of the United States on the interpretation of the Article and stated that the phrase denotes a commitment on the part of members of the United Nations to take future action to comply with a decision of the International Court.

Article 31(3) of the Vienna Convention indicates further intrinsic materials to be taken into account together with the context. These are subsequent agreements by the parties regarding the interpretation of the treaty or application of its provisions, subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding the interpretation, and relevant rules of international law.

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[43] Section 9.
[44] Section 9(3).
[45] Musila, *ibid* note 9 above.
[46] Musila, *ibid*, states: "Constitutionally Parliament's powers are limited to legislation which includes translating treaties into Kenyan law.'
[47] Ian Brownlie, *Id* note 3 at 32.

In *Oil Platforms* (*Iran v. United States*) Iran invoked a 1955 Treaty of Amity, Economic Relations and Consular Rights in claiming that attacks by the United States on Iranian oil platforms during the 1981-1988 Iran-Iraq war had violated treaty based freedom of navigation. Article XX (1) (d) of the treaty excluded from the treaty's scope 'measures necessary to protect [a party's] essential security interests'. In arguing that Article XX (1) (d) foreclosed Iran's claim, the United States maintained that so long as its actions fell within the scope of the Article, the Court could proceed no further and specifically should not analyze whether its conduct violated general rules of international law in the use of force. The International Court disagreed holding that the general rules of international law as reflected in Article 31(3) of the Vienna Convention on the Law of Treaties required that interpretation of a treaty must take into account any relevant rules of international law applicable in the relations between the parties. Accordingly Article XX (1)(d) of the treaty in question was not intended to operate independently of the relevant rules of international law on the use of force. The application of the relevant rules of international law relating to the use of force thus forms an integral part of the task of interpretation entrusted to the Court by [the jurisdictional article] of the 1955 treaty, even where there is a claim for breach of the treaty in relation to an unlawful use of force. Accordingly, the Court proceeded to analyze why the conduct of the United States violated the norms contained in a different treaty, the United Nations Charter.

4.4.2. Supplementary Means of Interpretation

When the textual approach either leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to further means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion. Moreover, such recourse may be had to verify or confirm a meaning that emerges as a result of the textual approach. Nevertheless the International Court has in general refused to resort to preparatory work if the text is sufficiently clear in itself. In addition, in *Jurisdiction of the International Commission of the River Oder*, the Permanent Court ruled that preparatory work relevant to the interpretation of the disputed articles of the Treaty of Versailles was inadmissible because three of the states involved in the proceeding had not taken part in the conference which had prepared the treaty. It is however doubtful if the International Court will today follow the rule in the River Oder Case, and it has been rejected by the International Law Commission.

Part V. Conclusion

The Constitution of Kenya has accorded international law a new and important role in Kenya. The application of international law provides an opportunity for Kenya to effectively incorporate supranational standards in the conduct of its affairs, and thereby to fully play its role as a member of the community of nations. This is however only possible if international law is accorded its due status as law in its own right, both in interpretation and application, without modification aimed at suiting the restricted national objectives.

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[48] (1966) 3 All ER 871.
[49] *Ibid*, at 875.
[50] *Ibid*.
[51] *Id* note 37 above at 876.
[52] (1977) 1 All ER 518; Lord Denning at pages 522-523 stated: "The schematic and teleological method of interpretation…All it means is that judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come to a situation which is to their minds within the spirit-but not the letter-of the legislation, they solve the problem by looking at the design and purpose of the legislature-at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect."
[53] *Id*, at 523.
[54] (1994) 33 *ILM* 571.
[55] *Id* at 581, par. 41.
[56] (1986) ICJ Reports 14, reproduced in (1986) 25 *ILM* 1023.
[57] *Id*, par. 179.
[58] Jimenez De Arechaga, "International Law in the Past Third of a Century" (1978-I) 159 *Recueil des Cours* 42-48.
[59] (1925), PCIJ, Ser. B, no. 11.
[60] *Id* at 37.
[61] (2007) I.C.J. Reports, 191.
[62] The words were used by the Court in the *Advisory Opinion on Reservations to the Genocide Convention*, (1951) I.C.J. Reports, 15, at 24.
[63] *Id* note 61, par. 162.

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[64] 128 S. Ct. 1346 (2008).

[65] *Id* at pages 1358-59, 1373, 1376 and 1383-84.

[66] (2003) I.C.J. Reports 161.

[67] *Id* par. 41.

[68] Vienna Convention on the Law of Treaties, Article 32.

[69] See for example Convention of 1919 concerning the Work of Women at Night, (1932), PCIJ, Ser. A/B, no. 50, 380.

[70] In *Conditions of Admission of a State to Membership in the United Nations*, the International Court declined to "deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself"; (1948) I.C.J. Reports, 63.

[71] (1929) P.C.I.J. (ser. A) no. 23.

[72] International Law Commission, Commentary, (1964) II *Yearbook of the International Law Commission*, 205.