

# The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective

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## Summary

*The prominent use of international human rights law in a state's domestic legal system depends on the hierarchical place occupied by international law in general, and international human rights law in particular, among the sources of law in that particular legal system. Two systems of receipt of international law in the domestic legal systems have been used by different states: monism, which looks to directly incorporate ratified international law treaties in a state's domestic legal system; and dualism, which entails the transformation of international law into the domestic legal system through the domestication of ratified international law treaties by means of the enactment of parliamentary legislation. Kenya, as a Commonwealth country, has always primarily followed a dualist approach which requires that domesticating legislation be enacted by parliament for ratified international law treaties to have application in the domestic legal system. However, with the promulgation of the new Constitution in August 2010, international law has been given a more prominent role in the domestic legal system through the inclusion in the Constitution of a provision directly incorporating ratified treaty law into the Kenyan legal system as a legitimate source of law. This article is primarily focused on analysing the hierarchical place of international law, specifically international human rights treaty law, in the Kenyan domestic*

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*legal system in the context of the new constitutional dispensation. It recommends that in order for international human rights law to have a prominent place in the governance of the country, article 2(6) of the Constitution should be interpreted progressively so as to give international human rights law norms an infra-constitutional but a supra-legal status in the domestic legal system. In this way, international human rights law will act as a bulwark against recession to totalitarian rule, as well as safeguard the democratic and fundamental rights protection gains that were won in the struggle for constitutional change.*

## 1 Introduction

International law, specifically international human rights law, has had an unenviable history in the Kenyan domestic legal system.<sup>1</sup> The 1963 Independence Constitution did not provide for its direct application in the Kenyan legal system, with Kenya, similarly to other common law countries, adopting a dualist approach to international law.<sup>2</sup> With the adoption of the dualist approach, Kenya espoused the doctrine of transformation, which envisioned that international law could only be applicable in the domestic legal system if it had been domesticated by parliamentary legislation.<sup>3</sup> The doctrine of transformation meant that, hierarchically speaking, ratified international treaties, once

1 This article is primarily focused on international human rights law because of its *sui generis* nature of aiming to afford practical and effective protection to individuals and groups who are not parties to the relevant international instruments. The import of this article is, therefore, to make recommendations for the purposive interpretation of art 2(6) of the 2010 Kenyan Constitution so as to achieve the practical and effective protection of individuals and groups, the purpose and objective of international human rights law.

2 F Viljoen *International human rights law in Africa* (2012) 522; M Killander & H Adjohoun 'Introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 3 11. Dualism envisages the complete separation of national and international legal systems, and that for rules of international law to apply in the national legal system, they must be transformed, through domestication, and thus apply as part of domestic national law and not as international law. Monism, on the other hand, envisages international law and national law as part of one legal system, and that international law is directly incorporated into the national legal system without any difficulty in its application as international law within the domestic legal system. For a more elaborate analysis of monism and dualism, see TM Frank & AR Thiruvengadam 'International law and constitution making' (2003) 2 *Chinese Journal of International Law* 470; WM Gibson 'International law and Colombian constitutionalism: A note on monism' (1942) 36 *The American Journal of International Law* 614; G Slyz 'International law in national courts' (1995-1996) *New York Journal of International Law and Politics* 65 67.

3 See JO Ambani 'Navigating past the "dualist doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in Killander (n 2 above) 26. The doctrine of transformation was aptly captured by Justice Atkin in the case of *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271, 295 where he stated: 'International law as such can offer no right cognisable in the municipal courts. It is only in so far as the rules of international law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.'

domesticated, only had application in the domestic legal system at the same level as other domestic legislation, and they could be amended by a simple legislative majority.<sup>4</sup> This indifferent treatment of international law was replicated in the Kenyan Judicature Act which, in enumerating Kenya's sources of law, did not earmark it as a source of law in Kenya's domestic legal system.<sup>5</sup> The situation had been exacerbated by the poor domestication practice of the Kenyan legislature, with most of the ratified treaties having had no force of law in Kenya due to the absence of domesticating legislation.

Due to this *lacuna*, the Kenyan courts had developed an inconsistent practice in relation to international law, with the courts generally shying away from directly applying international law.<sup>6</sup> The prevailing judicial position on the applicability of international law in the Kenyan domestic legal system prior to the enactment of the 2010 Constitution was established in the case of *Rono v Rono & Another* by the Court of Appeal, then the highest court in the country.<sup>7</sup> In this case, the Court affirmed that as a member of the international community, Kenya subscribed to international customary law and ratified international treaties.<sup>8</sup> It acknowledged the long-standing debate on the applicability of international law in the Kenyan domestic legal system, and affirmed that 'Kenya subscribes to the common law view that international law is only part of domestic law

4 See Frank & Thiruvengadam (n 2 above) 477 483 485, who affirm this equal hierarchal status of ratified and domesticated treaties *vis-à-vis* domestic legislation in a dualist system in their discussion of the prevailing situation in Italy, the United Kingdom and India respectively. See also Ambani (n 3 above) 30, who is of the opinion that prior to the enactment of the 2010 Kenyan Constitution, international law was hierarchically lower in rank than both the Constitution and domestic legislation in the Kenyan domestic legal system. This, however, could not have been the case with domesticated treaties, as the domesticating legislation had equal hierarchical status to any other parliamentary legislation and could only be overridden by subsequent legislation.

5 The Judicature Act of Kenya, Cap 8 (Revised Edition 2007 (2003)) <http://www.kenyalaw.org/Downloads/GreyBook/3.%20Judicature%20Act.pdf> (accessed 22 April 2013), which in sec 3 enumerates sources of law in Kenya as the Constitution, Acts of Parliament, the common law, doctrines of equity, the statutes of general application, and African customary law so long as it is not repugnant to justice and morality or inconsistent with any written law.

6 This judicial attitude is exemplified by the case of *Okunda v Republic* [1970] EA 512, where the High Court held that since international law was not included in the Judicature Act as a source of law in Kenya, it did not have any legal force in the domestic legal system. In the High Court case of *Pattni & Another v Republic* [2001] KLR 262, the Court similarly held that even though international law norms could have persuasive value and that the courts could take account of relevant international law values in adjudication, they were not binding sources of law in the Kenyan domestic jurisdiction unless they were transformed into Kenyan law by the Constitution or other written law.

7 *Mary Rono v Jane and William Rono*, Court of Appeal at Eldoret, Civil Appeal 66 of 2002, 29 April 2005 (*Rono v Rono*).

8 Paras 19-20 *Rono v Rono* (n 7 above).

where it has been specifically incorporated'.<sup>9</sup> Despite this dualist position, the Court went on to hold as follows:<sup>10</sup>

However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation.

In reaching its decision, the Court foreshadowed the impending change in the situation of international law in the Kenyan domestic legal system through the adoption of a new constitutional dispensation by pointing to the then Draft Constitution of Kenya which clearly provided for international customary and treaty law to form part of the laws of Kenya.<sup>11</sup> The Court then proceeded to make its finding by relying on both national law and relevant ratified international human rights law, especially the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), even when it had not been domesticated by Kenya.<sup>12</sup>

However, with the promulgation of the 2010 Constitution, with a provision envisaging the direct application of international law as contained in ratified treaties, the place of international law in the Kenyan domestic legal system has shifted significantly. The challenge facing Kenyan courts at the moment, and which is the main focus of this article, is how this constitutional provision directly incorporating international law norms in ratified treaties in the Kenyan domestic legal system should be interpreted, especially in relation to ratified international human rights treaties, and the hierarchical status that should be given to international human rights norms contained in ratified treaties in Kenya. After this brief introduction, the article in part 2 undertakes an analysis of the prevailing treatment of international human rights law in the Kenyan domestic legal system after the promulgation of the 2010 Kenyan Constitution. Parts 3 and 4 of the article delve into a comparative analysis of the interpretation of constitutional provisions directly incorporating international law into domestic law in two jurisdictions: the United States of America and Colombia respectively. These two jurisdictions are chosen because, even though both have constitutional provisions directly

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9 Para 21 *Rono v Rono*.

10 As above. In its decision, the Court relied on Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms which states as follows: 'It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.'

11 Para 23 *Rono v Rono*.

12 Para 24 *Rono v Rono*. See also Viljoen (n 2 above) 525. The position in *Rono v Rono* has been affirmed and followed by the Kenyan Courts in subsequent cases such as *Re The Estate of Lerionka Ole Ntutu (Deceased)* (2008) eKLR and *Rose Moraa & Another v The Attorney-General* (2006) eKLR.

incorporating international law into their domestic legal systems, they have adopted differing approaches to the interpretation of these constitutional provisions, with the result that the hierarchical place of international law in the two comparative systems are also different. The United States has, over the years, restricted the direct incorporation and use of international human rights law in its domestic jurisdiction using the self- and non-self-executing doctrine, while Colombia has continued a practice of direct incorporation of international human rights law and the reliance on international human rights standards to enhance the national protection of human rights and fundamental freedoms. The comparative study of these two jurisdictions is thus intended to indicate the two alternative approaches that can be adopted in the interpretation of article 2(6) of the 2010 Kenyan Constitution, and the effects that a choice of any of the alternative interpretations will have on the hierarchical place of international human rights law in the Kenyan domestic legal system and, consequently, the protective value of international human rights norms in Kenya. Part 5 entails a proposal regarding the hierarchical status that international human rights law should be accorded in the Kenyan domestic legal system, if the objective of the drafters of the Constitution that international human rights law should play a prominent role in governance in Kenya, is to be realised. Part 6 contains a short conclusion.

## 2 Place of international human rights treaty law in Kenya's domestic legal system after the promulgation of the 2010 Constitution

The promulgation in August 2010 of the new Kenyan Constitution has radically changed the position of international human rights law in the Kenyan domestic legal system, as discussed above. With the promulgation, international human rights law in ratified treaties have been directly incorporated into the Kenyan domestic legal system through article 2(6)<sup>13</sup> of the Constitution.<sup>14</sup> The entrenchment of the

13 Art 2(6) provides that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'. This provision has similarities with art 144 of the 1990 Namibian Constitution which provides that '[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'. For an interpretation of art 144 of the 1990 Namibian Constitution, see O Tshosha 'The status of international law in Namibian national law: A critical appraisal of the constitutional strategy' (2010) 2 *Namibia Law Journal* 11. Tshosha contends that the inclusion of the clause directly incorporating international law in the Namibian domestic jurisdiction effectively accords international law a constitutional status in Namibia.

14 The practice of directly incorporating international law into the domestic legal system in art 2(6) of the Kenyan Constitution is comparatively similar to the 1991 Colombian Constitution, art 93, which provides that international human rights treaties ratified by Colombia take precedence over domestic law. See M Sepulveda

primacy of international human rights law into the Kenyan legal system, a system that has been plagued by almost four decades of totalitarian rule, is not a strangely Kenyan phenomenon, but has been witnessed worldwide, and is based on the importance of a commitment to international human rights protective values at the highest level possible with the hope of non-regression to totalitarian rule.<sup>15</sup>

The change in the reception of international law in the Kenyan legal system from transformation to incorporation was confirmed by Justice Martha Koome in the High Court case of *Re The Matter of Zipporah Wambui Mathara*,<sup>16</sup> concerning article 11 of the International Covenant on Civil and Political Rights (ICCPR). She held that article 2(6) imported the provisions of international treaties and conventions that Kenya has ratified into Kenyan law as part of the sources of Kenyan law.<sup>17</sup> This was similarly affirmed in the High Court case of *Beatrice Wanjiku & Another v The Attorney-General & Another*,<sup>18</sup> where the Court stated as follows:

Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular articles 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law.

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'The Constitutional Court's role in addressing social injustice' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 145-146. Similarly, art 15(4) of the the Russian Constitution of 12 December 1993, article 15(4) incorporates international law into the Russian legal system by providing that '[t]he commonly recognised principles and norms of international law and international treaties of the Russian Federation shall be a competent part of its legal system. If an international treaty ... stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply'. Similar provisions are also included in the new East European states' Constitutions, such as Estonia, Azerbaijan, Armenia, Kazakhstan, Tadjikistan, Turkmenistan, Moldova and Belarus. See VS Vereshtin 'New constitutions and the old problem of the relationship between international law and national law' (1996) 7 *European Journal of International Law* 34; A Peters 'Supremacy lost: International law meets domestic constitutional law' (2009) 3 *International Constitutional Law Journal* 171; GM Danilenko 'Implementation of international law in CIS states: Theory and practice' (1999) 10 *European Journal of International Law* 52-53.

15 Vereshtin (n 14 above) 29-30; GL Neuman 'The use of international law in constitutional interpretation' (2004) 98 *American Journal of International Law* 85.

16 *David Ndungo Maina v Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, [http://kenyalaw.org/Downloads\\_FreeCases/77605.pdf](http://kenyalaw.org/Downloads_FreeCases/77605.pdf) (accessed 8 October 2011).

17 n 16 above 4. See also *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition 15 of 2011 6-7; and *Ibrahim Songor Osman v Attorney General & 3 Others*, High Court Constitutional Petition 2 of 2011 8-10, where the High Court affirmed that, since Kenya has ratified ICESCR, it has become part of Kenyan law by dint of art 2(6) of the Constitution.

18 High Court of Kenya at Nairobi, Petition 190 of 2011 para 17.

Further affirmation of the changed situation in relation to the applicability of international law in Kenya after the promulgation of the 2010 Constitution was provided by the Kenyan Court of Appeal in the case of *David Njoroge Macharia v Republic*,<sup>19</sup> and by the Supreme Court of Kenya in the dissenting opinion of Chief Justice Willy Mutunga in the One-Third Gender Representation Advisory Opinion as follows:<sup>20</sup>

From article 27, and from CEDAW, it is clear that disenfranchisement of the Kenyan women in the political arena is a form of discrimination. CEDAW applies through the operation of Article 2(6) of the Constitution of Kenya, having been acceded to by Kenya on 9th March 1984. These provisions collectively call for the immediate removal of this discrimination through the empowerment of women representation in political office, with CEDAW calling for stop-gap measures to be put in place to reverse the negative effects on our society through the operation of this systemic discrimination.

This direct incorporation of international human rights law into the domestic legal system, as per the 2010 Constitution, is in line with the prevailing jurisprudence of international treaty bodies such as the Committee on Economic, Social and Cultural Rights (CESCR Committee) which, in General Comment 9, has recommended to member states the immediate and direct application of binding international human rights instruments in the domestic legal systems of states so as to enhance the ability of individuals to seek effective, accessible, affordable and timely enforcement of their rights in domestic courts and tribunals.<sup>21</sup>

However, progressive as it may seem, the change in the system of applicability of international law from a system of transformation to a system of incorporation portends great challenges in the implementation of the 2010 Constitution. The lack of clear constitutional safeguards in relation to the interpretation and operationalisation of article 2(6), coupled with the lack of a clear constitutionally-entrenched role for parliament in the treaty-adoption process,<sup>22</sup> raises concerns about the limitation of Kenya's sovereignty

19 Criminal Appeal 497 of 2007 15, [http://kenyalaw.org/Downloads\\_FreeCases/81236.pdf](http://kenyalaw.org/Downloads_FreeCases/81236.pdf) (accessed 23 June 2013). See also CEDAW Committee Concluding Observation to Kenya's 7th Periodic Report, 5 April 2011 para 4, where the Committee contends that the promulgation of the 2010 Constitution ensured the immediate domestication of the Convention.

20 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012 Dissenting Advisory Opinion of Chief Justice Willy Mutunga, para 11.1. The opinion of the Chief Justice is in line with the arguments made by the parties in the case, especially the Centre for Multi-Party Democracy, Kenya Human Rights Commission and Federation of Women Lawyers-Kenya, that by dint of art 2(6) of the Constitution, CEDAW has constitutional force in Kenya; paras 5.7-5.8.

21 CESCR General Comment 9: The domestic application of the Covenant, 3 December 1998, E/C 12/1998/24 para 4, <http://www.unhcr.org/refworld/docid/47a7079d6.html> (accessed 2 June 2013).

22 The 2010 Kenyan Constitution, in art 94(1), vests the legislative authority of the state in parliament, and further provides in sub-art 5 that no person or body has

*vis-à-vis* international law.<sup>23</sup> These concerns are, however, too broad to be adequately and comprehensively discussed in this article. The main concern of this article is the hierarchy or place of international human rights law in ratified international treaties in relation to other sources of law in the Kenyan domestic legal system. To respond to this main concern, a brief analysis of a few of the jurisdictions with provisions incorporating international law into their domestic legal system is imperative.

### 3 International law in the United States domestic legal system

The supremacy of international law in the domestic legal system of the United States (US) was affirmed as early as 1804 when the then Chief Justice Marshall, in his interpretation of article VI of the US Constitution,<sup>24</sup> held that '[a]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains'.<sup>25</sup> This was affirmed by the US Supreme Court in 1895 and 1900 when it held that '[i]nternational law is part of our law, and must be ascertained and administered by the courts of

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the power to make law in Kenya, except under authority conferred by the Constitution or legislation. The Kenyan Constitution and the prevailing practice, unlike in the United States and in Colombia, does not require the approval of parliament as a condition precedent before the executive ratifies a treaty, and thus direct application of treaties as law in the Kenyan domestic jurisdiction will be tantamount to legislation by the executive. However, a new law, The Treaty-Making and Ratification Act 45 of 2012, has been developed with a view to plugging this gap, as is discussed more elaborately in sec 5 below.

- 23 Gibson (n 2 above) 614; Slyz (n 2 above) 67, who argues that in monist states, legislatures are circumscribed by international law requirements when making decisions, the executive is obliged to ensure that international law obligations are faithfully realised, and the courts must take into account and give effect to international law in their decisions. A further argument against direct incorporation of international law principles (customary international law) is that such incorporation interferes with democratic governance as no democratically-elected institution evaluates their desirability and acts affirmatively to adopt them. See PR Dubinsky 'International law in the legal system of the United States' (2010) 58 *American Journal of Comparative Law* 464. This cautious approach towards the incorporation of recent international law customs, especially modern international human rights law, was affirmed in 2004 by the US Supreme Court in *Sosa v Alvarez Machain* 542 US 692 (2004).
- 24 Art VI of the US Constitution provides that '[a]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding'. See the Constitution of the United States, <http://constitutioncenter.org/633876696043236250.pdf> (accessed 5 April 2013).
- 25 *Murray v The Schooner Charming Betsy* 6 US (2 Cranch) 64 118 (1804), quoted in H Hongju-Koh 'International law as part of our law' (2004) 98 *American Journal of International Law* 44.

justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination'.<sup>26</sup>

However, international law jurisprudence in US courts has progressively shifted towards a nationalist leaning.<sup>27</sup> Three reasons have been given for this nationalist shift: first, the perceived different nature of international law from, and its potentially pervasive effects on, domestic law; second, the perception that fundamental tenets of the domestic legal order, as enshrined in the Constitution, cannot be altered by a body of law which does not exclusively emanate from a national societal body;<sup>28</sup> and, third, an understanding of constitutions as emerging from, espousing and responding to a nation's particular history and traditions.<sup>29</sup> This shift has led to the development of the doctrine of self-executing and non-self-executing treaties. The doctrine commenced with the decision of Chief Justice Marshall in the case of *Forser & Elam v Neilson*,<sup>30</sup> where he held as follows:

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.

Following on this holding of Chief Justice Marshall, the US courts proceeded to develop criteria for the determination of the self-executing nature of a treaty, which included the following: the purpose of the treaty and the objective of its creators; the circumstances surrounding its execution; the nature of obligations imposed by the agreement; the existence of domestic procedures and institutions appropriate for direct implementation; the availability and feasibility of alternative enforcement methods; and the immediate and

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26 See *Hilton v Guyot* 159 US 113 (1895); *The Paquete Habana* 175 US 677 (1900) 700, quoted in Hongju-Koh (n 25 above) 43. See also XF Torrijo 'International and domestic law: Definitely an odd couple' (2008) 77 *Revista Juridica Universidad de Puerto Rico* 485, who affirms that the supremacy clause in the US Constitution allows for the direct incorporation of ratified treaties, making them applicable, in principle, by national courts.

27 A Bianchi 'International law and US courts: The myth of Lohengrin revisited' (2004) 15 *European Journal of International Law* 754; Frank & Thiruvengadam (n 2 above) 471.

28 As above.

29 S Choudhry 'Globalisation in search of justification: Towards a theory of comparative constitutional interpretation' (1999) 74 *Indiana Law Journal* 822, who expounds on the doctrine of 'legal particularism' and 'legal hegemony' as some of the interpretive attitudes militating against the use of international law in the interpretation of constitutional provisions in the US, 830-832.

30 27 US (2 Pet) 253 (1829) 314. For a discussion of the development of this doctrine, see Slyz (n 2 above) 78-80; D Sloss 'Non-self-executing treaties: Exposing a constitutional fallacy' (2002) 36 *University of California Davis Law Review* 1.

long-term implications of self- or non-self-execution.<sup>31</sup> These criteria were reaffirmed in the Third Restatement of the Foreign Relations Law of the US, which provided the following three conditions, any of which makes a treaty non-self-executing: if it manifests an intention not to be an effective domestic law without implementing legislation; if Congress or the Senate requires implementing legislation; or if the Constitution requires implementing legislation.<sup>32</sup>

The development of the doctrine of self-executing treaties signified that for non-self-executing treaty provisions to provide concrete litigable rights to individuals, the US Congress must pass implementing legislation.<sup>33</sup> The US Supreme Court, faced with the question of the status of article 94 of the UN Charter and as a consequence the status of the International Court of Justice (ICJ)'s decision in the *Avena* case,<sup>34</sup> decided in *Medellin v Texas* (2008)<sup>35</sup> that the *Avena* decision was not self-executing within the US legal system. The Court, in a six-to-three decision, held as follows:<sup>36</sup>

An ICJ judgment creates legal obligations for the United States under public international law and should be accorded 'respectful consideration' within the US domestic legal system, but is not to be accorded the status of binding law to be applied by US courts in the absence of either implementing legislation or an intent, clearly expressed in the treaty text, for the provision at issue to be incorporated into US law without action by Congress.

Slyz contends that this is a prudent way of avoiding the question of the supremacy of one system of law over the other, as they do not share a common field of application.<sup>37</sup> Bianchi, however, disagrees, contending that it detracts from, and waters down, the intended protection envisaged by international human rights and humanitarian law, as was exemplified by the lack of international law protection given to Guantanamo Bay detainees in the context of the so-called war on terror.<sup>38</sup>

31 See *People of Saipan v United States Department of the Interior* 502 F2d 90 (9th Cir 1974); and *Frolova v USSR* 761 F2d 370 (7th Cir 1985).

32 For a more elaborate discussion of the criteria for the determination of the self-executing or non-self-executing nature of a treaty in the US, see Slyz (n 2 above) 78-80; Frank & Thiruvengadam (n 2 above) 472-474.

33 Slyz (n 2 above) 67-68 78. He gives the example of the US Genocide Convention Implementation Act of 1987 secs 1091-1093, which proscribe the statute from creating any substantive or procedural right enforceable by law by any party in any proceedings; 68 fn 15.

34 *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, <http://www.icj-cij.org/docket/files/128/8190.pdf> (accessed 12 April 2013).

35 552 US 491 (2008).

36 Dubinsky (n 23 above) 461.

37 Slyz (n 2 above) 68.

38 Bianchi (n 27 above) 758. He cites the case of *Hamdi v Rumsfeld*, where the 4th Circuit Court held that the Geneva Convention III on Prisoners of War was non-self-executing and could not create enforceable private rights of action in US domestic courts, 764.

On the place of international law in relation to the Constitution and domestic legislation, the US Constitution is the supreme law of the land, and envisages that human rights treaty law provisions inconsistent with the Constitution will not have the force of law in the US.<sup>39</sup> On the relationship between federal statutes and international law, the US courts, on the basis of the supremacy of the Constitution, have held that federal statutes and self-executing treaty provisions have equal status as sources of domestic law.<sup>40</sup> Therefore, in case of a conflict between them, the courts have used the 'last-in-time' doctrine to hold the validity of the subsequent instrument, be it the treaty or the statute.<sup>41</sup> The similarity in hierarchy between self-executing treaties and domestic statutes in the US was aptly captured in the case of *Whitney v Robertson*,<sup>42</sup> where the Supreme Court held as follows:

By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavour to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.

A reading of article 2(6) to infuse this type of interpretation in the Kenyan jurisdiction is possible, taking into account article 21(4) of the 2010 Constitution which calls on the state – that is parliament and the executive respectively – to enact and to implement legislation aimed at fulfilling its international human rights obligations.

An interpretation placing international human rights norms in ratified international human rights treaties at the same hierarchical level as national legislation was adopted in the Kenyan High Court case of *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa*,<sup>43</sup> a case

39 *Bianchi* (n 27 above) 780. This position was espoused as early as 1957 in *Reid v Covert* 354 US 1 16-17 (1957), where the Supreme Court stated as follows: '[N]o agreement with a foreign nation can confer power on congress, or any other branch of government, which is free from the restraints of the Constitution ... The prohibitions of the Constitution were designed to apply to all branches of the national government and they cannot be nullified by the executive or the executive and the senate combined.'

40 *Slyz* (n 2 above) 84; *Dubinsky* (n 23 above) 458.

41 DL Sloss *et al* (eds) *International law in the US Supreme Court: Continuity and change* (2011) 58. However, to minimise congressional abuse of the 'last-in-time doctrine', US courts have purposed to construe statutes so as not to conflict with international law and have strived to reconcile subsequent statutes with international law (the *Charming Betsy* rule of statutory construction). Thus, in *United States v Palestinian Liberation Organisation* 695 F Supp 1456 (SDNY 1988), the Court held that 'in order for a subsequent statute to supersede a treaty, the explicit purpose of the statute must be to supersede the treaty' (1459). See also *Bianchi* (n 27 above) 761-763.

42 124 US 190 (1887).

43 (2010) eKLR, quoted in *Beatrice Wanjiku & Another v The Attorney-General* (n 18 above) para 16.

which concerned the constitutionality of a provision of the Civil Procedure Act of Kenya which permitted the comital of a judgment debtor to civil jail contrary to article 11 of ICCPR, which was incorporated into Kenyan law through article 2(6) of the Constitution. In dealing with the issue of the hierarchy of international human rights norms in ratified international human rights instruments *vis-à-vis* national legislation, the Court held as follows:

We have in this country a three tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws are subservient. Next in rank are Acts of Parliament, followed by subsidiary legislation at the bottom of the pile. The Civil Procedure Act is an Act of Parliament which provides for procedure in Civil Courts. Section 40 thereof makes provision for the arrest and detention of judgment debtors ... To the extent that this Section provides for the arrest and detention of a judgment-debtor, it is clearly in conflict with Article 11 of the [ICCPR]. The two are contradictory. This raises several issues. Can the two provisions co-exist? If so, how can they operate side by side? And if any cannot co-exist, which of them should take precedence over the other? In my view, article 11 of the [ICCPR] cannot rank *pari passu* with the Constitution. The highest rank it can possibly enjoy is that of an Act of Parliament. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of section 40 of the Civil Procedure Act. Nor for that matter, can it render section 40 unconstitutional. For that reason for as long as section 40 remains in the statute book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts. Since, however, section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other.

Despite the Court holding that international human rights norms were in parity with national legislation, it failed to adopt the last-in-time doctrine, as has been adopted in the United States, a doctrine which would have ensured that the international human rights norms contained in ICCPR override the provisions of the Civil Procedure Act due to the fact that ICCPR was incorporated into the Kenyan domestic legal system at a later date via article 2(6) of the Constitution. An adoption of the last-in-time doctrine also would have ensured that the Court does not abdicate its responsibility as the protector of the fundamental rights in the Constitution by contending as follows:<sup>44</sup>

In the spirit of the new constitutional order, it is more likely than not that Kenyans would prefer a system in which there is no threat of civil jails. Until a decision is taken at a proper forum, section 40 of the Civil Procedure Act will continue to haunt the liberal freedoms enshrined in the Constitution until it is repealed or found to be unconstitutional at a proper forum.

The viability of the continued application of this approach in the interpretation of article 2(6) of the Kenyan Constitution is discussed more elaborately in part 5 below.

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44 As above. This holding by the Court begs the question of which other forum is better placed to declare the unconstitutionality of legislative provisions that violate the fundamental rights of individuals and groups than the court itself.

#### 4 International law in the Colombian domestic legal system

Colombia, a country with a similar constitutional provision incorporating international law directly into the domestic legal system, provides a different practice to the US in relation to the applicability of international law in the domestic legal system. Monism has been entrenched in the Colombian constitutional jurisprudence as far back as 1914, with the Supreme Court of Colombia insisting that in instances of conflict between treaty provisions and provisions of municipal law, treaty provisions prevailed.<sup>45</sup> The import of this decision was affirmed by Nagle who, in his analysis of the decision, contended that once ratified, international law in treaties were superior to domestic law and that in instances of conflict, domestic law had to yield to international law.<sup>46</sup> He contended that the import of the 1914 decision was that 'the domestic law of Colombia, including the Constitution, was subject to the terms and conditions of international treaties'. This is still the prevailing situation after the adoption of the 1991 Constitution, which in article 93 provides as follows:

International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically.

The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.

An interpretation of article 93 affirming the supremacy of international human rights law in the Colombian domestic jurisdiction was delivered in 2010 by the Constitutional Court of Colombia (CCC).<sup>47</sup> In its commentary on *Decision C-376/10*, the International Network for Economic, Social and Cultural Rights (ESCR-Net) contends that the decision is significant as it (the decision) 'restates that human rights treaties and comments by [human rights treaty] bodies regarding

45 Challenge to the Constitutionality of Law 14 of 1914, decision of 6 July 1914, 23 *Gaceta Judicial* (1915), analysed in Gibson (n 2 above) 614-615.

46 LE Nagle 'The rule of law or the rule of fear: Some thoughts on Colombian extradition' (1991) 13 *Loyola of Los Angeles International and Comparative Law Journal* 862-863

47 *Decision C-376/10* (in Spanish) [http://www.escr-net.org/usr\\_doc/C-376\\_10\\_in\\_spanish.pdf](http://www.escr-net.org/usr_doc/C-376_10_in_spanish.pdf) (accessed 6 April 2013). In arriving at its decision, the Court used a plethora of international legal instruments such as the Universal Declaration, art 26; ICESCR, art 13; the Protocol of San Salvador, art 13; and ESCR Committee General Comments 11 & 13; see ESCR Committee Justice, Monthly Case Law Update 'Colombian Constitutional Court issues a landmark decision on the right to education' (November 2010) <http://www.agirpourlesdesc.org/english/esc-rights-caselaw/article/colombian-constitutional-court> (accessed 6 April 2013).

[SERs] are part of the Colombian legal system and, within it, have a superior standing compared with the remaining regulations'.<sup>48</sup>

A further elaboration of this expansive use of international law in Colombia is exemplified by Decision C-355/2006 of the CCC which dealt with women's rights to reproductive health and especially the right to abortion. In her analysis of this case, Ordolis chronicles the broad use of international human rights law, and an affirmation by the Court that since women's sexual and reproductive rights had been recognised as human rights under international law, they as such became part of Colombian constitutional rights.<sup>49</sup> She argues that the Court's reliance not only on international human rights law instruments,<sup>50</sup> but other soft law instruments,<sup>51</sup> enabled it to espouse a progressive approach to reproductive rights. These instruments formed the basis for the recognition and protection of women's reproductive health rights by the Court.<sup>52</sup>

Olaya, in analysing the health rights jurisprudence of the CCC, furthermore contends that the Court has developed the notion of 'constitutional blocks' which entails the incorporation of norms, standards and principles espoused in ratified international human rights instruments, and even interpretive documents issued by international human rights-monitoring bodies, when reviewing the constitutionality of laws or when interpreting fundamental rights.<sup>53</sup> This has been affirmed by Chowdhury, who submits that international human rights treaties ratified by Colombia are at the same level as the Colombian Constitution with regard to the hierarchy of sources of law, and that the provisions of ICESCR must be used when interpreting the relevant articles of the Constitution.<sup>54</sup>

Taking into account the plain reading of article 2(6) of the 2010 Kenyan Constitution, an interpretation that harmonises national and international human rights law is possible in the Kenyan context. The

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48 ESR-Net 'Decision C-376/10 of the Colombian Constitutional Court' [http://www.esr-net.org/caselaw/caselaw\\_show.htm?doc\\_id=1407210](http://www.esr-net.org/caselaw/caselaw_show.htm?doc_id=1407210) (accessed 6 April 2013).

49 E Ordolis 'Lessons from Colombia: Abortion, equality and constitutional choices' (2008) 20 *Canadian Journal of Women and the Law* 267.

50 Instruments relied on include the Universal Declaration; ICCPR; ICESCR; CEDAW; the American Convention on Human Rights; and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention Belem do Para). See Ordolis (n 49 above) 267.

51 The Court used the definition of reproductive health adopted in the 1994 UN International Conference on Population and Development (ICPD). See Ordolis (n 49 above) 268.

52 Ordolis 68.

53 MA Olaya 'The right to health as a fundamental and judicially-enforceable right in Colombia' (2009) 10 *ESR Review* 16-17, [http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr\\_review](http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr_review) (accessed 2 April 2013).

54 J Chowdhury 'Judicial adherence to a minimum core approach to socio-economic rights – A comparative perspective' (2009) *Cornell Law School Inter-University Graduate Student Conference Papers*, Paper 27 8, [http://scholarship.law.cornell.edu/lps\\_clacp/27](http://scholarship.law.cornell.edu/lps_clacp/27) (accessed 2 April 2013).

next part of this article thus proposes an interpretation that should be given to article 2(6) taking into account the two differing practices of the US and the Colombian domestic systems.

## 5 Proposed hierarchy of international law in the Kenyan legal system

As indicated by the comparative analysis of the US and Colombia above, countries with constitutional provisions directly incorporating international human rights law into their domestic legal systems have adopted varying interpretations of those provisions; with the result that international human rights law is accorded a different hierarchical status *vis-à-vis* domestic law, depending on the interpretation adopted. As we saw in part 3 above, the US, due to its nationalist leaning, has progressively given more prominence to its domestic law at the expense of international human rights law with the adoption of the self-executing and non-self-executing doctrine to the direct application of treaties, and has further placed treaties at hierarchically the same level as domestic legislation. This has led to the application of the last-in-time doctrine, with the result that the subsequent instrument supersedes the previous one, be it a self-executing treaty or domestic legislation. This 'American exceptionalism' in relation to international human rights law norms and standards has generally detracted from the comprehensive human rights protection and accountability standards that have been set at the international level, with the result that the rights of individuals are more easily violated, as was the case with the rights of the war-on-terror detainees in Guantanamo Bay.<sup>55</sup> It is submitted that, if the international human rights norms and standards contained in ratified international human rights treaties are to enhance the protection of the rights and fundamental freedoms of the Kenyan people, this restricted application of international human rights law norms should not be adopted in the Kenyan domestic legal system.

Colombia, on the other hand, as shown in part 4 above, has chosen to give prominence to international human rights law in its domestic legal jurisdiction, with some commentators contending that international human rights law is at the same level as the Colombian Constitution and that the interpretation of the Constitution must thus take into account the norms and principles of international human rights law.<sup>56</sup> As a result, the Colombian courts have been more willing

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55 The ability of the US approach to erode the protection of rights and fundamental freedoms is seen in the US's practice of entering reservations and declarations during its ratification of ICCPR, the Convention on the Prevention and Punishment of Genocide, the Convention against Torture and the Convention on Racial Discrimination, to the effect that these important international human rights instruments were non-self-executing in US domestic law. See Franck & Thiruvengadam (n 2 above) 473.

56 See Chowdhury (n 54 above) 8; Nagle (n 46 above) 863.

to accept international human rights law as a prominent source of legal obligations, especially in the adjudication of human rights violations, providing a proper accountability mechanism to ensure that the political institutions of the state fulfil Colombia's internal and external obligations emanating from binding international human rights law. It is this prominent application of international human rights law in the domestic legal system that Kenya should aspire to, and it should thus adopt a progressive interpretation of the constitutional provisions directly incorporating international law in Kenya's domestic legal system in such a manner that international human rights law can enhance government accountability regarding the respect, protection, promotion and fulfilment of human rights and fundamental freedoms at the domestic level.

There are several possibilities of how article 2(6) of the 2010 Constitution can be interpreted so as to accord a prominent status to international human rights law in the Kenyan domestic jurisdiction.<sup>57</sup> Due to time and space constraints, only three of the interpretive possibilities will be considered in this article: first, an interpretation that gives international human rights law norms a constitutional hierarchy; secondly, an interpretation that gives international human rights law norms an infra-constitutional and infra-legal hierarchy; and thirdly, an interpretation that gives international human rights law norms an infra-constitutional but supra-legal hierarchy.

The first possibility is the interpretation that gives international human rights law a constitutional hierarchy, that is, an interpretation placing international human rights law at the same level as the other constitutional provisions.<sup>58</sup> This first possibility is supported by Peters, who provides two arguments as to why international human rights law must be placed at the same hierarchical level as the provisions of

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57 Even though only these two positions are considered as viable in the Kenyan context, international law can also have a higher status than all national legislative Acts, including the Constitution, or it may have an equal hierarchical status to national legislative Acts, or even have a lower status than both the Constitution and national legislative Acts. For a discussion of these possibilities, see Viljoen (n 2 above) 525-527.

58 For a comparative argument in support of this proposal, see Danilenko (n 14 above) 64, who submits, taking into account the debate on the interpretation of art 17 of the Russian Constitution, that international law has the same status as constitutional provisions in Russia. This is the position in Argentina, whose Constitution in art 75 also provides clearly that some ratified international treaties (especially most of the international human rights law treaties) are at the same level as the Constitution and should be considered as complementary to the rights in the Constitution. Commenting on art 75 of the Argentinian Constitution, the UN Housing Rights Programme Report emphasises the importance of giving international law a prominent role at the national level, especially in the interpretation, implementation as well as enforcement of fundamental human rights, and encourages the inclusion of such clauses into the constitutional frameworks of other countries. See UN Housing Rights Programme Report 1, *Housing rights legislation: Review of international and national legal instruments* (2002) 39-40, <http://www.ohchr.org/Documents/Publications/HousingRightsen.pdf> (accessed 19 April 2013). See also Franck & Thiruvengadam (n 2 above) 513-514; Torrijo (n 26 above) 491.

national constitutions. First, she argues for the abandoning of a formal hierarchy between constitutional provisions and international human rights law provisions by stating that, due to the increasing permeability and convergence of state constitutions (constitutional cross-pollination) resulting in vertical and horizontal harmonisation (that is, with international law and with other state constitutions respectively), it matters little whether a court applies a domestic fundamental right or an international human rights provision, because both sets of norms tend to acquire the same content and scope.<sup>59</sup> She thus calls for the adoption of a 'substance-oriented perspective' where norms are ranked in accordance with their substantive weight and significance, with less significant state constitutional provisions giving way to important international human rights norms in instances of conflict.<sup>60</sup> Second, she argues that '[i]n a strictly legal positivist and schematic perspective, a hierarchically inferior norm cannot have an impact on the reading of a higher norm'.<sup>61</sup> She contends that in accordance with this understanding, the idea of the supremacy of domestic constitutional law over international law is irreconcilable with the requirement that national constitutions must be interpreted in conformity with international human rights law.<sup>62</sup> Therefore, for international human rights law to have the desired effect and impact on the development of national constitutional and domestic law, it must of necessity be ranked at the same level as constitutional provisions.

An argument adopting this first approach was advanced by a petitioner and adopted by the High Court of Kenya in *Re – The Matter*

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59 Peters (n 14 above) 197. This is the doctrine espoused by the universalist model of constitutional interpretation through the use of comparative international and foreign law sources, which provides that constitutional guarantees are cut from a universal cloth and constitutional interpretation is an engagement in the identification, construction and application of the same set of principles. See Choudhry (n 29 above) 833; DM Beatty 'Law and politics' (1996) 44 *American Journal of Comparative Law* 131; RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2007) 30 *Fordham International Law Journal* 299, who argues that with the convergence of interests protected by both national and international law, that is, the securing of the well-being of individuals, it is practically inappropriate to isolate national and international law; and C L'Heureux-Dube 'The importance of dialogue: Globalisation and the international impact of the Rehnquist Court' (1998-1999) 34 *Tulsa Law Journal* 24, who avers that since human rights law, national and international, is cut from the same cloth and is drawn from similar earlier documents, it makes sense for judges to engage with the expertise, experience and reasoning of interpreters of similar documents from other jurisdictions.

60 Peters (n 14 above) 197.

61 Peters (n 14 above) 181.

62 Peters 177-178. She gives the examples of the 1976 Portuguese Constitution, art 16(2); the 1978 Spanish Constitution, art 10(2); and the 1991 Romanian Constitution, art 20(1), as those constitutions which require that their provisions are interpreted in conformity with international law. See also K Young *Constituting economic and social rights* (2012) 23, who similarly contends that domestic constitutional rights must be interpreted compatibly with international human rights law.

of *Zipporah Wambui Mathara*.<sup>63</sup> The petitioners argued that article 2, of which article 2(6) is a part, not only provides for the supremacy of the Constitution, but also provides for the hierarchy and sources of law in Kenya, thus incorporating international treaties ratified by Kenya into the Kenyan domestic system as sources of law.<sup>64</sup> The petitioners went on to argue that, due to the hierarchy of laws created under article 2, the Constitution with its incorporation of ratified international law treaties as sources of law in Kenya was supreme, and that the provisions of the Civil Procedure Act, which permitted the committal of civil debtors to jail, were against the spirit of the Constitution and of international human rights law as contained in article 11 of ICCPR.<sup>65</sup> In deciding the case, the Court held as follows:<sup>66</sup>

Principally I agree with counsel for the Debtor that by virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties and Conventions that Kenya has ratified are imported as part of the sources of the Kenyan Law. Thus the provision of Article 11 of the [ICCPR] which Kenya ratified on 1st May 1972 is part of the Kenyan law. This covenant makes provision for the promotion and protection of human rights and recognises that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed ... An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the [ICCPR] that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development.

In this case, the Court gave constitutional force to international human rights law norms contained in ratified international human rights treaties as per article 2(6) of the Constitution, a reading of the *Mathara* case that was affirmed by the High Court in the case of *Beatrice Wanjiku & Another v The Attorney-General & Another* as follows.<sup>67</sup>

Justice Koome seemed to suggest that the provisions of the Civil Procedure Act and Rules were subject to ICCPR and that they could be invalidated on that basis that they were inconsistent with its provisions.

A similar argument on the constitutional hierarchy of ratified international human rights law norms was also made by the Centre for Multi-Party Democracy (CMD) and other interested parties in the Supreme Court of Kenya in relation to the interpretation of the one-third gender rule entrenched in articles 27(6) and 27(8) of the 2010 Kenyan Constitution.<sup>68</sup> Although the Supreme Court went ahead to rely on international human rights law norms in both the majority

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63 *Mathara* (n 16 above).

64 *Mathara* para 3.

65 *Mathara* para 4.

66 *Mathara* paras 9-10.

67 *Beatrice Wanjiku & Another v The Attorney-General* (n 18 above) para 15.

opinion and the dissenting opinion of the Chief Justice, they did not make any pronouncement with regard to the hierarchical place of international human rights law in the Kenyan domestic legal system.

Despite the illuminating arguments by Peters, the High Court pronouncement in the Mathara case and the proposition by CMD that international human rights law norms have constitutional force in Kenya due to their constitutional entrenchment in article 2(6), the interpretation placing international human rights law at the same hierarchical status as the constitutional provisions may not be very viable in the Kenyan domestic legal system due to the supremacy clause of the Constitution, as is shown more elaborately in the discussion of the third possibility of interpretation below.

The second possible interpretation is that of placing international human rights law norms at an infra-constitutional and infra-legal hierarchical position, that is, human rights norms in ratified international treaties being below both constitutional norms and national legislation. This is the approach that was adopted in the Kenyan High Court case of *Beatrice Wanjiku & Another v The Attorney-General & Another* as follows:<sup>69</sup>

I take the position that the use of the phrase 'under this Constitution' as used in Article 2(6) means that the international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94. Article 1 places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional set up.

The view adopted by the judge in the *Wanjiku* case above is *per incuriam* as it is not supported by the judge's engagement with any comparative national or international judicial jurisprudence or based on the writings of any national or international commentator on the hierarchy of international human rights law in national jurisdictions. Reliance on the sovereignty of the people argument in article 1 of the Constitution has also been overtaken by events and cannot stand due to the adoption of the Treaty-Making and Ratification Act, 2012, which provides a clear role for parliament as well as the people generally, though the requirement of public participation in the treaty

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68 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012, para 42; Dissenting Opinion of the Chief Justice Willy Mutunga (n 20 above) paras 5.7-5.8.

69 *Beatrice Wanjiku & Another v The Attorney-General* (n 18 above) para 20.

ratification process, to oversee the ratification of treaties, as is discussed more elaborately below.

It is submitted here that the adoption of this approach does not change the position and the function of international human rights law norms as was envisaged by the drafters of the 2010 Constitution.<sup>70</sup> In fact, it provides for retrogressive application of international human rights law in the Kenyan domestic legal system as, prior to the adoption of the 2010 Constitution, ratified and domesticated international human rights treaties shared a similar hierarchical status to national legislation, and not a lower status as is envisaged by the Court's infra-legislative interpretation in the *Wanjiku* case.<sup>71</sup> The protection of human rights and fundamental freedoms enshrined in international human rights norms is the basic minimum protection that should be accorded to human beings if they are to live as human beings. International human rights law envisages and does not prohibit higher standards of human rights protection that are adopted at national levels for the protection of human rights and fundamental freedoms of individuals and groups. What it prohibits is the adoption of national legislative and other measures that detract from the basic protection that should be accorded to individuals and groups at the national level. States are thus not limited by international human rights standards if they want to adopt more progressive protective national measures for the realisation of human rights. In adopting an interpretation that places international human rights norms contained in ratified international human rights treaties at a hierarchically-lower position than national legislation, the judge in the *Wanjiku* case permits the legislative adoption of retrogressive national measures that go below the basic level of human rights protection espoused in international human rights law. This standard, which is lower than the restrictive standard adopted in the US, a state which places international human rights law at the same level as national legislation, should not be adopted in Kenya as it has the potential to lower the standard of protection of human rights and fundamental freedoms envisaged in the 2010 Constitution.

The third possibility, and which is the favoured interpretive choice in this article, is an interpretation that gives international law a hierarchical status slightly lower than the constitutional provisions, but

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70 For arguments on the importance of international human rights law in the Kenyan domestic legal system, see the arguments in the texts accompanying nn 87-91 below.

71 See D Shelton 'Introduction' in D Shelton (ed) *International law and domestic legal systems: Incorporation, transformation and persuasion* (2011) 5, who affirms that most dualist common law states, as Kenya was prior to the enactment of the 2010 Constitution, generally rank ratified treaties as equivalent to domestic legislation. See also Franck & Thiruvengadam (n 2 above) 476 477-478, who affirm, in relation to Germany, that since incorporation of international treaties in Germany takes place through federal legislation, treaties in German law are equivalent in rank to federal statutes. They further note that despite this equality of rank, the courts in Germany and Italy have in practice purposed to uphold treaties even in instances of contradictory subsequent federal legislation.

superior to domestic legislation (infra-constitutional but supra-legal hierarchy) in the new constitutional dispensation.<sup>72</sup> This is due to the supremacy clause in the 2010 Constitution which not only provides in article 2(1) that it is the supreme law of the land binding on all persons and all state organs, but also provides that its validity is not subject to any challenge, and that any other law, custom, act or omission inconsistent with the Constitution is void to the extent of the inconsistency, as per articles 2(3) and (4).<sup>73</sup> It is submitted that, taking into account a holistic reading of article 2 of the Constitution, in incorporating international law as part of Kenyan law in article 2(6) within the supremacy clause, the drafters intended that international law, as long as it is consistent with the purport, spirit and the provisions of the Constitution,<sup>74</sup> should have a prominent place in the Kenyan domestic legal system.

The requirement that international law contained in treaties must be compatible with the Constitution if they are to have direct application in the Kenyan domestic legal system can be drawn from article 2(6) itself, which provides that treaties form part of the laws of Kenya 'under this Constitution'. The phrase 'under this Constitution' can be interpreted as a requirement that a proper constitutional analysis be undertaken before the ratification of a treaty to ensure that it is in compliance with the Constitution and that the processes leading to the ratification of a treaty must be accomplished in accordance with the Constitution.<sup>75</sup> This interpretation is supported by the arguments of Korenika and Doli who, writing in the context of

72 See T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *Comparative and International Law Journal of Southern Africa* 302-303. Some of the comparative jurisdictions that have an infraconstitutional but supralegal hierarchy of international law *vis-à-vis* domestic legislation include France (as well as the francophone African countries who have directly replicated art 55 of the 1958 French Constitution), Japan, China, Albania and Cape Verde. The jurisdictions in which international law and domestic legislation have equal status include the US, Germany, Italy and India. For an elaborate discussion of these jurisdictions, see Frank & Thiruvengadam (n 2 above) 471-489; Viljoen (n 2 above) 518-522; Killander & Adjolahoun (n 2 above) 5-7; Oponng (n 59 above) 322-323; and F Korenika & D Doli 'The relationship between international treaties and domestic law: A view from Albanian constitutional law and practice' (2012) 24 *Pace International Law Review* 103.

73 Kabau & Njoroge (n 72 above) 294 298-300.

74 See eg JH Jackson 'Status of treaties in domestic legal systems: A policy analysis' (1992) 86 *American Journal of International Law* 317, who contends that there is a possibility that a treaty binding under international law may be invalid under the constitution of a state if it conflicts with the provisions of the domestic constitution. In such instances, the treaty cannot have a direct application and will be invalid to the extent of its inconsistency with the domestic constitution. He further argues that for the issue of the hierarchy of norms to surface in relation to treaty law, it must first be determined that the treaty is valid both internationally and domestically (not inconsistent with the constitution), must be directly applicable (reliance on the treaty provisions by the courts and other government institutions as a source of law) as well as invocable by parties in litigation (318).

75 See *Beatrice Wanjiku & Another v The Attorney-General* (n 18 above) para 20, where the Court held that 'the phrase "under this Constitution" as used in article 2(6)

the Albanian Constitution, contend that for treaties to have direct application, they must be constitutional, and that an *a priori* process of analysis of the constitutionality of the treaty is undertaken by the Albanian Constitutional Court before the ratification of the treaty in question.<sup>76</sup> Although the 2010 Kenyan Constitution has no express provision requiring *a priori* review of treaties for constitutionality, a similar procedure has been developed through the adoption of the Treaty-Making and Ratification Act 45 of 2012, an Act of Parliament adopted to give effect to article 2(6) of the Constitution in relation to the procedure for the making and ratification of treaties.<sup>77</sup> The Act entrusts the general responsibility for the initiation, negotiation and ratification of treaties on the executive arm of government.<sup>78</sup> The Act in Part III envisions the *a priori* approval by both the cabinet and parliament before a treaty is ratified, requiring the drafting of a memorandum to the cabinet, and subsequently to parliament after the approval of the cabinet, on the objectives and the subject matter of the treaty.<sup>79</sup> The memorandum submitted to the cabinet and subsequently to parliament must contain a detailed explanation of the following important requirements:<sup>80</sup>

- (a) the objects and subject matter of the treaty;
- (b) any constitutional implications including -
  - (i) any proposed amendment to the Constitution; and
  - (ii) that the treaty is consistent with the Constitution and promotes constitutional values and objectives;
- (c) the national interests which may be affected by the ratification of the treaty;
- (d) obligations imposed on Kenya by the treaty;
- (e) requirements for implementation of the treaty;
- (f) policy and legislative considerations;
- (g) financial implications;
- (h) ministerial responsibility;
- (i) implications on matters relating to counties;
- (j) the summary of the process leading to the adoption of the treaty;
- (k) the date of signature;
- (l) the number of states that are party to the treaty;
- (m) the views of the public on the ratification of the treaty;
- (n) whether the treaty sought to be ratified permits reservations and any recommendations on reservations and declarations;
- (o) the proposed text of any reservations that should be entered when ratifying the treaty in order to protect or advance national interests or ensure conformity with the Constitution; and
- (p) whether expenditure of public funds will be incurred in implementing the treaty and an estimate, where possible, of the expenditure.

The Act further requires public participation in the ratification of treaties, demanding that the relevant parliamentary committees

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means that the international conventions and treaties are "subordinate" to and ought to be in compliance with the Constitution'.

76 Korenika & Doli (n 72 above) 110-117.

77 <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads> (accessed 5 October 2013).

78 The Treaty Making and Ratification Act, Part II, secs 4-6.

79 The Treaty Making and Ratification Act, secs 7-9.

80 The Treaty Making and Ratification Act, sec 7.

involve the public in the ratification process in accordance with the laid-down parliamentary procedures.<sup>81</sup> It requires parliament not to approve the ratification of any treaty which is contrary to the Constitution or any reservations to a treaty which negate any of the provisions of the Constitution.<sup>82</sup> The Act also places these safeguards when the state is seeking to denounce or withdraw from a treaty.<sup>83</sup> The practice of *a priori* review of the constitutionality of a treaty by the legislature has taken root in many of the countries with constitutional provisions requiring the direct incorporation of ratified treaties into the domestic legal system, such as in Namibia,<sup>84</sup> the US, Germany, Italy, Japan, France, China<sup>85</sup> and Colombia.<sup>86</sup>

The direct application of international human rights law in the Kenyan domestic legal system, together with the proposal that international human rights law norms should have a supra-legal status in Kenya, are aimed at ensuring that important democratic governance standards as well as human rights and fundamental freedoms contained in international law are sufficiently entrenched in the Kenyan domestic legal system, and are not left to the whims of the ruling majority of the day to change at their own convenience through legislative amendments.<sup>87</sup> This reasoning is supported by the 2010 Constitution in articles 255 to 257, which pinpoint the supremacy clause as one of the clauses that can only be changed through a referendum, and not by a simple majority in parliament. In this way, the drafters of the Constitution intended to safeguard the democratic and fundamental rights protection gains that were won in the struggle for constitutional change and to preclude a relapse to totalitarian rule.<sup>88</sup> Slaughter and Burke-White outline some of the ways in which international human rights law can enhance democratic governance and improve the respect for as well as the

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81 The Treaty Making and Ratification Act, sec 8(3).

82 Sec 8(9).

83 Sec 17.

84 The 1990 Namibian Constitution, art 63(2)(e), which provides that '[t]he 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'. This article has been interpreted as requiring that for international law contained in treaties to be binding on Namibia externally and internally, it must be approved by parliament. See Tshosha (n 13 above) 19-21.

85 See Frank & Thiruvengadam (n 2 above) 471-489.

86 See Nagle (n 46 above) 859-861.

87 The importance of a strong incorporation of international law in the domestic legal system is also affirmed in the context of Russia, where it is argued that it is a part of a general policy of enhancing the rule of law, democracy and the respect for human rights and fundamental freedoms. See Franck & Thiruvengadam (n 2 above) 506-507.

88 Torrijo (n 26 above) 491, who avers that '[d]omestic legislation should not be allowed to untie what has been tied through the incorporation of international law into domestic law', and that to achieve this, international law should be placed beyond the reach of domestic law; Jackson (n 74 above) 322-323 331. He contends that '[i]f citizens of a nation have a higher degree of trust in the international institutions and treaties than they do in their own governmental structures, they will prefer [directly applicable international norms with higher

protection of human rights, which include the following:<sup>89</sup> First, it helps in the strengthening of domestic institutions through the formalisation and inclusion of 'government networks' as mechanisms of global governance so as to enhance accountability and effectiveness at the national level; secondly, it provides a mechanism for the backstopping of national governments in instances of their unwillingness or failure to act through international law rules and principles such as the international criminal law duty to prosecute or extradite (*aut dedere aut judicare*), the complementarity principle enshrined in the Rome Statute establishing the International Criminal Court, as well as the requirement that national remedies be available and effective for the principle of the exhaustion of local remedies to be applicable in filing individual communications in international treaty-monitoring bodies;<sup>90</sup> and, thirdly, it can serve as a mechanism for the compelling of national governments to act to address new transnational threats through the enactment of national legislation domestically criminalising certain transnational acts such as terrorism, money laundering and piracy.<sup>91</sup>

Therefore Kenya, in its effort to respect, protect, promote and fulfil the fundamental human rights and freedoms of the people, must not only take into account its constitutional human rights obligations, but must also enforce its international human rights obligations as entrenched in ratified international legal instruments. Kenyan courts are thus under an obligation to take judicial notice of international human rights norms in ratified treaties as legitimate and prominent sources of law in the Kenyan domestic jurisdiction. As Kenya already has an extensive constitutionally-entrenched catalogue of human rights based on generally-recognised international human rights standards, the practice should be that in litigation for the vindication of human rights violations, the litigants should primarily premise their

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status than national legislative norms] as a conscious or implicit check on their government. Thus, it is entirely understandable that some persons in recently autocratic countries might favour an international regime to protect human rights' (332). This adequately summarises the Kenyan situation and supports the constitutionalisation as well as the prominent status given to international law in the 2010 Constitution. See also D Shelton (n 71 above) 2, who affirms that due to the post-war emphasis on human rights and democratic governance, international law has been given a prominent status in domestic legal jurisdictions as a form of 'international safety net'.

89 AM Slaughter & W Burke-White 'The future of international law is domestic (or the European way of law)' (2006) 47 *Harvard International Law Journal* 333-346.

90 The importance of the backstopping role is twofold: first, to provide a second line of defence when national institutions fail and, secondly, the ability of the international process to catalyse action at the national level. See Slaughter & Burke-White (n 89 above) 341-342.

91 A case in point is the United Nations Security Council Resolution 1373; the International Convention for the Suppression of the Financing of Terrorism; and the International Convention for the Suppression of Terrorist Bombing, which, in an effort to combat global terrorism, require states to enact legislation criminalising the financing of terrorism, the freezing of terrorists' assets by national authorities and the use of domestic courts to bring to justice individuals involved in terrorist acts. See Slaughter & Burke-White (n 89 above) 344-345.

case on the constitutional provisions relevant to their case, and should only use international human rights law to support their arguments based on the violation of their constitutional rights. In adjudicating on such cases, courts must take into account the relevant international human rights law provisions as well as the relevant interpretive devices that have been developed in relation to the relevant international human rights law norms, such as the general comments of the relevant treaty bodies, international guidelines dealing with the issue at hand, and other soft law materials from the relevant international treaty bodies.<sup>92</sup> This will ensure that there is a harmonised development of the entrenched constitutional rights in line with international human rights law, as well as an enhanced fulfilment of both the constitutional and the international human rights obligations of the state. However, in instances of a real gap in the domestic constitutional provisions, international human rights law norms should be applied directly to cover the deficit.

In the interpretation of domestic legislative Acts, taking into account the superior hierarchical status of international human rights law *vis-à-vis* domestic legislation as proposed above, the courts must interpret domestic legislation to ensure their conformity with international human rights law. As such, in instances of a conflict between national domestic legislation and international human rights law norms, the courts should resort to the use of the *Charming Betsy* doctrine of constitutional interpretation, discussed in part 3 note 42 above, and interpret the domestic legislation, as far as possible, to conform to international human rights standards, failing which international human rights law norms should triumph.<sup>93</sup>

## 6 Conclusion

Prior to the promulgation of the 2010 Kenyan Constitution, the use of international law in the Kenyan domestic legal jurisdiction was limited as Kenya followed the dualist system of transformation of treaties into the domestic legal system through the enactment of domesticating

92 See Kabau & Njoroge (n 72 above) 300-301; Danilenko (n 14 above) 62.

93 The Kenyan courts can also benefit from the experience of the Russian Constitutional Court in its use of international law in the interpretation of constitutional and other domestic laws, such as *Case Concerning Certain Normative Acts of the City of Moscow and Some Other Regions*, VKS 1996 2 42, where the Court held that art 17 of the 1993 Russian Constitution recognises and guarantees human rights in accordance with the general principles and norms of international law, and emphasised that the right to freedom of movement is not only guaranteed by the Constitution, but also by ICCPR, art 12, and other international human rights instruments, including art 2 of Protocol 4 to the European Convention on Human Rights. For more such Russian cases, see Danilenko (n 14 above) 57-59 68; GM Danilenko 'The new Russian Constitution and international law' (1994) 88 *American Journal of International Law* 451; J Henderson 'Reference to international law in decided cases of the first Russian Constitutional Court' in R Mullerson *et al* (eds) *Constitutional reforms and international law in Central and Eastern Europe* (1998) 59.

legislation. However, with the promulgation of the Constitution, the system of transformation has been replaced by a system of direct incorporation, where international human rights law norms in ratified treaties are expected to form an integral part of sources of law in Kenya as per article 2(6) of the Constitution.

This article has proposed that, in order to give international human rights law a prominent place in the Kenyan legal system and to ensure domestic accountability for the realisation of Kenya's international human rights obligations, article 2(6) of the Constitution must be interpreted in a progressive manner to give international human rights law a higher status hierarchically as compared to domestic legislative Acts. To achieve this, it has been proposed that Kenya adopts an interpretation that accords international human rights law norms an infra-constitutional but supra-legal hierarchical status in the Kenyan domestic system. This will mean that, for international human rights law to be applicable directly in the Kenyan domestic jurisdiction, it must be compatible with the Constitution, which is the supreme law of the land. In relation to the interpretation of national legislative Acts, the proposal that international human rights law norms be accorded a supra-legal status means that international human rights law will be superior to these national legislative Acts, and that should there be any irreconcilable conflict between them, international human rights law norms would prevail. In this way, the human rights and fundamental freedoms as well as the democratic and good governance standards enshrined in international human rights law will be safeguarded from the whims of the prevailing parliamentary majorities, with a strong international human rights law buffer to guard against relapse to totalitarian rule.<sup>94</sup> This approach is envisaged by the 2010 Kenyan Constitution, especially article 20(2), which provides for the enjoyment of rights in the Constitution to the greatest extent consistent with the nature of the rights. It is further buttressed by article 20(3)(b), which calls for the adoption of an interpretation that most favours the enforcement of rights.<sup>95</sup>

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94 Hongju-Koh (n 25 above) 53; E Benvenisti 'Reclaiming democracy: The strategic use of foreign and international law by national courts' (2008) 102 *American Journal of International Law* 242; Peters (n 14 above) 173-174. She argues that the reception of international standards, such as human rights protection, good governance and democracy, into national constitutions leads to the vertical convergence of constitutional and international law; that is 'the globalisation of state constitutions and the constitutionalisation of international law'.

95 See also the 2010 Kenyan Constitution, art 259(1), which calls for the construction of the provisions of the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law and the fundamental rights in the Bill of Rights; permits the development of law; and contributes to good governance.