

**THE LEGAL IMPLICATIONS OF ARTICLE 2(6) OF
THE CONSTITUTION OF KENYA 2010**

By

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DECLARATION

I, DAVID KENANI MARAGA, do hereby declare that this is my original and innovative work which has neither been submitted nor intended to be submitted for a degree in any other university in compliance with the regulations for an award of Masters Degree I LLM.

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List of Statutes

1. Constitution of Kenya, 2010.
2. Constitution of Kenya, 2008.
3. Constitution of United States of America.
4. German Constitution (Basic Law) 1949.
5. Constitution of South Africa, 1996.
6. Constitution of the Italian Republic.
7. Constitution of Uganda, 1995.
8. Constitution of The Netherlands.
9. Swedish Constitution.
10. Kenyan Children Act No. 8 of 2001.
11. Kenya Judicature Cap 8 of the Laws of Kenya.
12. South African Extradition Act, No. 67 of 1962.
13. Uganda Ratification of Treaties Act, Cap 204, Laws of Uganda.
14. French Constitution, 1958.
16. Geneva Conventions Act Cap 198, Laws of Kenya.
17. Diplomatic Privileges and Immunities Act, Cap 179, Laws of Kenya.
18. Breton Woods Agreements Act Cap 464, Laws of Kenya.
19. Investment Disputes Convention Act, Cap 522, Laws of Kenya.
20. Treaty for the Establishment of East African Community Act, No. 2 of 2000.
21. Rome Statute of the International Criminal Court. Vol. 2187 UNTS p. 3.

List of Cases

1. Okunda v. Republic, [1970] E.A. 453.
2. Charlton v Kelly, 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274, 1913.
3. Goldwater v Carter, 444 U.S. 533, 100 S. Ct. 533, 62 L. Ed. 2d 428.
4. Min. of State for Imm. & Ethnic Affairs v. Ah Hin Teoh [1995] HCA 20.
5. South Africa & Others v. Nello Quaglian & Others, [2009] ZACC.
6. Dole v. Carter 444 F. Supp. 1065 (D. Kan. 1977).
7. United States v. Belmont, 1937, 301 U.S. 324.
8. Maclaine Watson v. Dept. of Trade and Industry, [1989] 3 All ER 523.
9. RM & Another v AG Nairobi HCCC No. 1351 of 2002; [2006] eKLR.
10. Peter Nyong'o & 10 Others v AG & Another [2007] eKLR.
11. Re the Matter of Zipporah Wambui Mathara [2010] eKLR.
12. David Ndungo Maina v Zippora Wambui Mathara, Kangema SRMCC No. 19B of 2010.
13. Diamond Trust of Kenya Ltd v Daniel Mwema Mulwa, Nairobi HCCC No. 70 of 2002.
14. R v Chief Immigration Officer, Heathrow Airport Ex-parte Bibi [1976] 3 All ER 843.
15. Tavita v. Minister of Immigration [1994] 2 N.Z.L.R. 257 CA).
16. Court Ahani v. Canada [2002] 1 S.C.R. 72, 208 D.L.R. (4th) 57.
17. Sara Longwe v. International Hotels 1993 (4 LRC 221).
18. Keroche Industries Ltd v. KRA & 4 Others [2007] eKLR.
- 19. Republic v. Pest Control Product Board & 2 Others [2011] eKLR.**
20. Republic v. National Environmental Management Authority [2012] eKLR.

21. Govt. of SA & Others v. Grootboom & Others, 2000 SACLR LEXIS 126.
22. Soobramoney v. Minister of Health, [1998] (1) SA 765.
23. Port Elizabeth Municipality v. Various Occupiers 2005(1) SA 217.
24. Waithera Kariuki & 4 Others v. Town Clerk City Council of Nairobi, HC Const'l Petition No. 66 of 2010.
25. Mithu v. State of Punjab [1983] 2 SCR 690 at p.707.
26. Geoffrey Ngotho Mutiso v. Republic [2010] eKLR.
27. State v. T. Makwanyane & Another, Case No. CCT/3/94.
28. Reyes v. The Queen, [2002] 2 A.C. 235 (P.C.).
29. Francis Kafantayeni & 5 Others v. AG, Const'l Case No. 12 of 2005; [2007] MWHC 1.
30. Susan Kigula & 414 Others v. AG, Const'l Petition No. 6 of 2003.
31. Republic v. John Kimita Mwaniki Nakuru HCCRC No. 116 of 2007.
32. Republic v. Dickson Munene & Another Nairobi HCCRC No. 11 of 2009.
33. Murray v. The Schooner Charming Betsy 6 U.S. (2 Cranch) 64, 118 (1804).
34. Boyce v. The Queen, [2005] 1 A.C. 400 (P.C.2004).
35. The Kenya Section of the ICJ v. AG & Another, [2011] eKLR.
36. Jolly G. Varghese & Another v The Bank of Cochin AIR 1980 SC 470.

List of Abbreviations

1. UNTS- United Nations Treaty Series.
2. UN- United Nations.
3. JSCOT- Joint Standing Committee on Treaties.
4. ICCPR- International Covenant on Civil and Political Rights.
5. FCO- British Foreign and Commonwealth Office.
6. US- United States of America.
7. ICC- International Criminal Court.
8. IGAD- Inter-Governmental Authority on Development.
9. ICJ- International Commission of Jurists.
10. SCFAIT- Commons Standing Committee on Foreign Affairs and
International Trade.
11. JSCT- Joint Standing Treaty Committee.
12. UK- United Kingdom.

ABSTRACT

Prior to the promulgation of its 2010 Constitution, Kenya followed the dualist system in domesticating the treaties it ratified. Article 2(6) of the 2010 Constitution now incorporates into Kenyan law all treaties ratified by Kenya. This thesis examines what informed that change and the legal implications of that provision read together with the Ratification of Treaties Bill. It concludes that besides the switch from being a dualist to a hybrid system incorporating both dualist and monist aspects of domesticating treaties, Kenya is going to subject to public scrutiny and parliamentary approval all treaties it is party to including military alliances which may have security implications. Along with approval for ratification, Kenyan Parliament will legislatively domesticate treaties that it ratifies. Any ratified but undomesticated treaties or portions thereof will be justiciable. Despite delays that will be occasioned by the ratification process, the change will interrogate the implications treaties will have on Kenya before they are ratified and engender accountability.

CHAPTER ONE

INTRODUCTION

1.1 Background

The Independence Constitution of Kenya was virtually sacrosanct. It was a progressive liberal democratic constitution with largely devolved powers and elaborate checks on executive power. It provided for an independent judiciary, a comprehensive Bill of Rights as well as a multi-party democracy on the Westminster model and an extremely rigid amendment procedure.¹ The amendment of the entrenched provisions relating to citizenship, fundamental rights, the judiciary and land required a seventy five (75%) per cent vote in both second and third reading of the Lower House and ninety (90%) per cent vote in the Senate.² However, arguing that the Independence Constitution was simply meant to lead Kenya to self-government and not independence, the political elite, whose objective was to consolidate their power, managed to amend it about thirty times between 1964 and 1999, an average of once a year.³ The net effect of those amendments left the country with a Constitution whose political and constitutional space had severely

¹ Gichira, K., 2003. *The State of Constitutionalism in Kenya*. Available at: www.kituoachakatiba.org. [Accessed 17 September 2011].

² Okoth-Ogendo, H. 2001. The Politics of Constitutional Change in Kenya since Independence, 1963-69. In: The Constitutional of Kenya Review Commission. 2001. *Report of the Constitution of Kenya Review Commission*. Available at: <http://www.ldphs.org.za/resources/local-government-database/bycountry/kenya/commissionreports/Devolution%20and%20constitutional%20development%20papers.pdf> [Accessed September 17, 2011] pp. 276-298.

³ Macharia, M., 2001. Constitutional Development in Kenya, a Historical Perspective. In: The Constitutional of Kenya Review Commission. 2001. *Report of the Constitution of Kenya Review Commission*. Available at: <http://www.ldphs.org.za/resources/local-government-database/bycountry/kenya/commissionreports/Devolution%20and%20constitutional%20development%20papers.pdf> [Accessed September 17, 2011] pp. 338-48.

been constricted, its pluralistic Parliamentary base eliminated and its principles generally truncated.⁴

As a result, many Kenyans felt the Constitution had been so mutilated that it required a complete overhaul.⁵ In addition to that, the enlightenment of the citizenry, leading to the realization that the centralized power form of government ought to be subjected to more checks and balances to achieve greater accountability, equity in the distribution of economic resources, peace and tranquility, as well as the impact of global developments on the local scene, led to a demand for constitutional change.⁶ While agitating for that, experts reviewed various aspects of it and came up with suggestions of the areas that required attention. On environment, experts asserted the view that as it embodies the life support system, the conservation of the environment is “self-preservation and self-perpetuation.”⁷ They felt that besides expressly providing for and spelling out in the constitution the public’s right to natural resources and sustainable environment that ensures sustainability and respect for intergenerational equity as well as specifying that the state owns the country’s natural resources as trustee for and on behalf of the Kenyan public, the rights of the local communities to participate in their preservation should also be specified,⁸ as had been done in other countries.⁹ The civil society urged for provisions that would stem unequal development and address the underlying causes of social as

⁴ Ojwang J. B., 2001. Constitutional Reform in Kenya: Basic Constitutional Issues and Concepts. In: The Constitutional of Kenya Review Commission. 2001. *Report of the Constitution of Kenya Review Commission*. pp. 14-31.

⁵ Ibid.

⁶ Ibid.

⁷ Okidi, C.O. 2001. Environmental Rights and Duties in the Context of Management of National Resources. In: The Constitutional of Kenya Review Commission. 2001. *Report of the Constitution of Kenya Review Commission*, pp. 158 - 162.

⁸ Mumma, A. 2001. Constitutional Issues Relating to Natural Resources. In: The Constitutional of Kenya Review Commission. 2001. *Report of the Constitution of Kenya Review Commission*, pp. 163-4.

⁹ Okidi, C.O. 2001. *Supra*, pp. 158 - 162.

well as political ethnic conflicts¹⁰ and, in the process, under-gird the rights of the poor, women, children, workers, refugees and other vulnerable groups.¹¹ Constitutional lawyers felt that, like in the neighbouring countries of Uganda and Tanzania, the institution of Ombudsman should be added to the three basic organs of government to particularly address the public's non-justiciable administrative complaints.¹²

With regard to foreign policy, in the light of the broad developments in international law globally, experts suggested that new governance standards¹³ should be established and incorporated in the Constitution.¹⁴ Views were particularly expressed on Kenya's treaty-making practice. It was noted that it was haphazard.¹⁵ For instance, the issue of how Kenya chose to be party to some treaties and not others was not clear. Some of the "colonial treaties," such as the use of the Nile water in connection with which there has been controversial debate, needed to be addressed. It was, therefore, suggested that the whole process needed streamlining in the proposed new Constitution.¹⁶

Kenya's treaty making practice borrows heavily from the English practice where treaty making is the sole function of the executive. As under international law it is the state that

¹⁰ Kenya Section of the International Commission of Jurists, 2008. *Ethnicity, Human Rights and Constitutionalism in Africa*. Nairobi: ICJ-Kenya/Konrad Adenauer Stiftung at p. 27.

¹¹ Ngondi-Houghton, C. 2005. *The State of Human Rights in Kenya: A Baseline Survey Report for the Development of a National Action and Policy for Human Rights in Kenya*. Nairobi: KNCHR & MOJCA at p. 2.

¹² Ojwang, J. B. 2001. Organs of Government. In: *The Constitutional of Kenya Review Commission*. 2001. *Report of the Constitution of Kenya Review Commission*, pp. 86-90.

¹³ Ojwang, J. B. 2001. Ibid. These standards embody matters of great concern for human welfare everywhere, such as observance of human rights; giving fulfillment to the rights and welfare of the child; prudent stewardship over natural resources; environmental rights and sustainable development; popular participation and consent in the governmental process.

¹⁴ Ojwang, J. B. 2001. Ibid.

¹⁵ Ngondi-Houghton, C. 2005. *Supra* at p. 2.

¹⁶ Ngondi-Houghton, C. 2005. Ibid.

enters into and is bound by treaties,¹⁷ Kenya's conduct of international law issues was deemed to fall under the powers accorded to the President under section 23 of the former Constitution [now Article 131]. The negotiation, signing and ratification of treaties was the exclusive function of the Executive through the President involving the Ministry of Foreign Affairs and the parent ministry concerned. Parliament was only involved when the treaty was placed before it for domestication in order to give municipal effect to its provisions. Thus the executive commits the state on the international plane with obligations to be honoured even before domestication.¹⁸ Prior to the promulgation of the Constitution, Kenya followed a dualist system in the domestication of treaties it was party to and treaties became part of the law of Kenya after domestication by an Act of Parliament.¹⁹

Kenyans proposed a change in the mode of domestication of the treaties to which Kenya was and would continue to be a party. While noting that treaty-making was a function of the executive arm of the government, the experts observed that the trend in most countries these days was to follow a dualist approach which gives the legislative arms of government leverage over the approval for ratification of the treaties the executives enter into.²⁰ Kenyans told the Constitution of Kenya Review Commission that though Kenya should continue following the dualist system and the executive should retain the treaty-making power, they were of the view that the executive should not be left to saddle the

¹⁷ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509. See also Thorp, A. 2011. Parliament's New Statutory Role in Ratifying Treaties. Available at: www.parliament.uk/briefing-papers/SN05855.pdf [Accessed September 20, 2012].

¹⁸ Constitution of Kenya Review Commission. 2005. *The Final Report of the Constitution of Kenya Review Commission*. Nairobi: CKRC at p. 154-5.

¹⁹ Okunda v. Republic, [1970] E.A. 453 at p. 455.

²⁰ Ibid, at p. 155.

people of Kenya with obligations without public scrutiny and the approval of their elected representatives. They, therefore, suggested that treaties should be subject to public scrutiny and parliamentary supervision but that self-executing treaties should not require parliamentary approval before ratification.²¹ Except for those, they proposed that all the other treaties should be approved by Parliament before they are ratified by the executive.²²

Following these and other suggestions, Kenya entered into an elaborate constitutional review process, which culminated in the promulgation of the Constitution of Kenya 2010 on 27th August 2010. It was the proposal to review the mode of domestication of treaties that led to the enactment of Article 2(6) of the Constitution of Kenya 2010, which is the subject of this project paper. The Article provides that:

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

This provision read together with the Ratification of Treaties Bill 2011 makes it clear that once the Bill is enacted into law, Kenya will follow a hybrid system which is neither pure dualist nor pure monist in the domestication of treaties. This dissertation examines the implications of Article 2(6) of the Constitution in the light of the mode of domestication proposed in the said Bill.

²¹ Ibid, at p. 154-5.

²² Okoth-Ogendo, H. 2001. The Politics of Constitutional Change in Kenya since Independence, 1963-69. In: The Constitutional of Kenya Review Commission. 2001. *Report of the Constitution of Kenya Review Commission*, pp. 276-298.

1.2 The Problem Statement

The legislative authority of most democratic systems of government is vested in their people, but exercised on their behalf by their elected representatives. This is also the case with Kenya as enshrined in Article 94 of the Constitution of Kenya 2010 that vests the legislative authority in Parliament.²³ However, a departure from the above indicated governance principle relates to treaties, which are negotiated and entered into by the executive arm of government.²⁴

Until August 2010, Kenya, like most countries with the common law system, followed the dualist approach in the domestication of treaties it was party to.²⁵ Treaties became part of the law of Kenya after domestication by an Act of Parliament.²⁶ However, with the promulgation of the new Constitution, under Article 2(6), it would appear that Kenya has changed from a dualist to monist system in which no legislative action is required to domesticate treaties that it has and will in future ratify. The Ratification of Treaties Bill 2011, however, alters that view. Read together with the said Article, it is clear that Kenya is going to follow neither a pure dualist nor pure monist system. It appears set to follow an intermediate system between the dualist and monist approaches.

Previously, other than laying a treaty in Parliament for a period of 21 days just for information, the legislature was not involved in the ratification of treaties. The Ratification of Treaties Bill 2011 sets out an elaborate procedure of treaty approval by the National and County Assemblies before ratification.

²³ Article 94, Constitution of Kenya 2010. Nairobi: The Government Printer.

²⁴ Shaw, M. 2008. *International Law*, 6th ed. Cambridge: Cambridge University Press at p. 129.

²⁵ See Brindusa, M. 2010. *The Dualist and Monist Theories: International Law's Comprehension of These Theories*. Available at: http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf [Accessed on September 17, 2011].

²⁶ Okunda v. Republic, [1970] E.A. 453 at p. 455.

Whereas that may be seen as restoring the legislative authority to the people's representatives as envisaged by Article 94 of the Constitution, it is the executive, which negotiates and ratifies treaties. The questions then that arise and beg for answers are:

1. What does the change entail?
2. Which of the two arms of government can be said to control the treaty making process?
3. Are all the treaties going to require parliamentary approval and be made public?

1.3 Hypothesis

Prior to the promulgation of the Kenya Constitution 2010, the country followed the dualist approach in the domestication of treaties.²⁷ Article 2(6) of the current Constitution incorporates treaties ratified by Kenya into the domestic law of Kenya. That Article read together with the Ratification of Treaties Bill, makes it clear that, henceforth, Kenya is going to follow neither a pure monist nor a pure dualist system, but an intermediate approach between these two systems and in tandem with the current global practice its legislature is going to approve all treaties the country will be party to before ratification and enact domesticating legislations along with the approval of treaties.

Given Kenya's poor record in the domestication of treaties it has ratified,²⁸ the further hypothesis or assumption of this study is that the change introduced by the new

²⁷ See *Okunda v Republic*, [1970] E.A. 453, at 460.

²⁸ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field* (Unpublished: On file with author).

Constitution will render ratified treaties justiciable irrespective of whether or not they are legislatively domesticated. This is likely to raise legal and political challenges such as the country's capacity to implement all rights and obligations in treaties it ratifies like social and economic rights.

1.4 Research Questions

The primary research question that forms the basis of this thesis asks “[w]hat are the legal implications of Article 2(6) of the Constitution of Kenya, 2010? A number of secondary or supplementary research questions that arise from this one include:

1. What informed Kenya's change? In other words, what mischief did Article 2(6) of the Constitution of Kenya, 2010 seek to remedy?
2. Is Kenya going to follow a pure monist system or a caricature of monism and dualism in the domestication of treaties it enters into and ratifies?
3. Are all treaties, including defence pacts, going to be made public?
4. With the elaborate procedure of approval contained in the Ratification of Treaties Bill, is Kenya going to meet the deadlines in respect of treaties with timelines?
5. Shall ratified but undomesticated treaties or parts thereof be justiciable?

1.5 Theoretical Framework

In the current globalization, the role of states is a complex one.²⁹ Though states are sovereign and equal,³⁰ in reality, however, with the “[i]nterdependence and close-knit

²⁹ Shaw, M. 2008. *International Law*, 6th ed. Cambridge: Cambridge University Press at p. 99.

character of contemporary international commercial and political” affairs, no state can afford to act in isolation.³¹ Thus, issues like the jurisdiction of each state, especially in the high seas often arise.³² That calls into play the operation of international law to regulate global affairs and the question that then arises is the relationship between the international legal system and the internal legal orders of various states. This concern is normally presented as a clash between dualism and monism;³³ dualism is presented as positivist and monism as naturalist.³⁴

The natural law theory, amongst whose principal exponent was John Finnis, and which stemmed from Aristotle and developed through the writings of Cicero, Thomas Aquinas, Thomas Hobbes and Lon Fuller, “has always emphasized law’s groundedness in justice and the common good.”³⁵ The central claim of positivism, on the other hand, as can be gleaned from the works of Bentham, John Austin through those of Hans Kelsen, H.L.A. Hart, and Ronald Dworkin, “is that law is separate and distinct from morality.”³⁶

The examination of Article 2(6) of the Constitution of Kenya, 2010 in this case will, however, not be based on either of these two schools of jurisprudence. This is because law is dynamic and does not operate in a vacuum. It should always be contextualized within a society’s affairs. Hence, “[l]aw should not be treated as an autonomous, self-contained discipline, but should be set clearly and consistently in its social and economic

³⁰ See Jennings, R. and A. Watts. eds. 2008. *Oppenheim’s International Law*. 9th ed. London: Longmans, at p. 52.

³¹ Shaw, M. 2008. *Supra* at p. 99.

³² Brownlie, I. 2008. *Principles of Public International Law*. 7th ed. Oxford: Clarendon Press at p. 31.

³³ Brownlie, I. 2008. *Principles of Public International Law*. 7th ed. Oxford: Clarendon Press at p. 31.

³⁴ *Ibid* at p. 31-2.

³⁵ Simmonds, N. 2008. *Central Issues in Jurisprudence*. 3rd ed. London: Sweet & Maxwell at p.146.

³⁶ *Ibid* at p. 146-7.

context.”³⁷ This means that the socio-economic as well as political values of a society should be incorporated in that society’s legal framework.

Apart from this view, dualism and monism should not be presented as self-contained and absolutely closed regimes. That is now neither tenable nor desirable.³⁸ Instead, examining Article 2(6) of the Constitution of Kenya 2010 in this presentation is grounded on the doctrines of legal realism and the separation of powers.

Legal realism³⁹ is “the theory that law is based, not on formal rules or principles, but...on judicial decisions that should derive from social interests and public policy.”⁴⁰

It arose from the critique by scholars, such as John Chipman Gray, Oliver Wendell Holmes and Karl Llewellyn, of the doctrine of ‘Legal Formalism’ which holds the view that law is a set of clear rules, fair procedures and principles independent of other political and social institutions.⁴¹ A word on the historical background of this theory will be apposite.

The realists do not deny the normative character of legal rules. They contend that legal norms do not completely answer the actual behavior of courts or lawyers engaged in

³⁷ Freedman, M. 2008. *Lloyd’s Introduction to Jurisprudence*. 8th ed. London: Sweet & Maxwell at p. 1030.

³⁸ Paulus, A. 2003. *Beyond Monism – The Dualism Debate*. Available at: www.jur.uva.nl/template/downloadAsset.cfm [Accessed September 17, 2011].

³⁹ Legal realism started in America, not as school of jurisprudence, but as a historical phenomenon. In the late 19th and early 20th century, Laissez-faire was the dominant creed in America. That creed had reverence for logic and mathematics and *a priori* reasoning as applied to philosophy, economics and jurisprudence with no effort ‘to link these empirically to the facts of life.’ Lawyers regarded law as a profession, as a craft and as a body of rules but rarely bothered to figure out the relation between these phases. Statesmen knew law as enactments of the legislature which were a key aspect of society acting as a guide, tool, and as a limiting obligation without attempting to harmonize all these aspects. The dominant groups lorded it over the masses subjecting them to the formal rules thereby masking substantive differences and inequalities between them; see Freedman, M. 2008. *Lloyd’s Introduction to Jurisprudence*. 8th ed. London: Sweet & Maxwell at pp. 985, 1015 and 1029.

⁴⁰ Garner, B. ed. 1999. *Black’s Law Dictionary*. 7th ed. Minneapolis: West Group at p. 907.

⁴¹ See Cole, D. 2001. *Formalism, Realism and the War on Drugs*. Available at: <http://scholarship.law.georgetown.edu/facpub/71> [Accessed at September 17, 2011] at p. 242.

legal transactions. They have modified the Kelsenite view of law and argued that if the actual workings of law in society are to be understood, it is not enough to just peruse a collection of the relevant legal norms for these tell us little about actual legal behavior.⁴² Thus, the realist movement represents a sociological trend in jurisprudence in support of a new version of positivism known as pragmatism (what Justice Markandey Katju of the Indian Allahabad High Court calls “dynamic positivism”)⁴³ that seeks to see what law, as a means to an end, really is and how the rules of law work and not what they are on paper.⁴⁴

Its other achievements include the study of the American Constitution, not as it stands on paper, but as a living institution, which gives certain possibilities of action and function to certain sections of the population, recent investigations of the interrelations between criminal law and crime, and examination of business practice as a determining factor for decisions in commercial law.⁴⁵ Despite differences of opinion, the American realists, however, coalesced on one important aspect of law, namely, that there is more to the study of law than the mere study of a system of rules. Legal doctrine should be seen in the context of the legal processes and that it is desirable to adopt a broad perspective and consider the law in its social context.⁴⁶

After realizing that the independence constitution, with the numerous amendments which truncated its original principles, did not serve their contemporary needs, Kenyans,

⁴² Freedman, M. 2008. *Lloyd's Introduction to Jurisprudence*. 8th ed. London: Sweet & Maxwell at p. 996-7.

⁴³ Katju, M. 2001. The Hart-Fuller Debate. Available at: http://www.ebc-india.com/lawyer/articles/496_1.htm [Accessed September 20, 2012].

⁴⁴ Friedmann, W. 2003. *Legal Theory*, 5th ed. Delhi: Universal Law Publishing at p. 294.

⁴⁵ Ibid at p. 301.

⁴⁶ Freedman, M. 2008. *Lloyd's Introduction to Jurisprudence*. 8th ed. London: Sweet & Maxwell at p. 1032.

apparently sharing the American realists' view that "[t]he very purpose of legal institutions is to maximize the total satisfaction of valid human desires"⁴⁷, repealed their Constitution and enacted a new one⁴⁸ which provides, inter-alia, for new institutions like a bicameral parliament, a devolved system of government, a new court structure that includes a Supreme Court. Many of these reform ideas implicitly borrow from the theory of legal realism.

The doctrine of separation of powers is a constitutional principle designed to divide political power between the legislature (which is the law-making branch), the executive (which is the branch that executes the business of government), and judiciary (which interprets the law), to ensure that the functions, personnel and powers of these arms of government are not concentrated in any one arm. It provides a system of checks and balances which ensure that powers are not abused, thereby protecting the rights and liberties of citizens.

The doctrine of separation of powers derives its origins from Aristotle (384-385 BC) who propounded, in *The Politics*, that:-

There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element.⁴⁹

⁴⁷ Ibid at p. 1006.

⁴⁸ Constitution of Kenya 2010. Nairobi: The Government Printer.

⁴⁹ Aristotle. 1994. *The Politics*, Bk IV, XIV, 1297b35. Available at: <http://classics.mit.edu/Aristotle/politics.4.four.html> [Accessed 5 October 2012].

It was further supported by Montesquieu who stated that the three organs of government, the executive, legislature and judiciary, should each have a discrete and defined area of power and that there should be a clear demarcation of functions between them. He emphasized that:-

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, if the same man, or the same body, whether of the nobles of the people, were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individuals.⁵⁰

This is the clearest expression of the demand for a separation of functions. In states which have written constitutions, such as Kenya, the powers allocated to the three main arms of the government are clearly defined in the constitution. The clear demarcation of the functions of each arm of government does not, however, mean that each should work in isolation from the others. That would be impossible and would create a legal and constitutional deadlock. It is essential that there is interaction between the three arms. None should, however, usurp the functions of the other or others.

Though the legislative authority in Kenya is vested in its people, it is to be exercised on their behalf by their elected representatives.⁵¹ Treaties, however, are negotiated and

⁵⁰ Montesquieu, C. 1748 *De l'esprit des Lois/The Spirit of Laws*. Available at: <http://etext.lib.virginia.edu/toc/modeng/public/MonLaws.html> [Accessed 5 October 2012].

⁵¹ Article 94, Constitution of Kenya 2010. Nairobi: The Government Printer.

entered into by the executive arm of government.⁵² This paper analyses the import of Article 2(6) in the light of the doctrine of separation of powers.

The debate in regard to the domestication of treaties has been framed by the dichotomy between monism/dualism and the attendant theories of natural and positive law. The research seeks to move beyond this, focusing on the legal realism (Kenya's constitutional context) and the doctrine of separation of powers between the three arms of government. Legal realism responds to the concrete circumstances and context of Kenya's political and socio-economic developments. The doctrine of separation of powers is central to any consideration of the relationship between the three arms of government and, in conjunction with concepts on legal realism, how this relationship has developed and could be optimized.

1.6 Justification

The Constitution of Kenya, 2010 was promulgated only on 27th August 2010. The Ratification of Treaties Bill 2012 is currently being debated in parliament and at the date of drafting this thesis was at the second reading phase. To date, there has not been any research on the implications of Article 2(6) or on the above indicated proposed enabling legislation. This necessitates an examination of this drastic shift in the country's approach to the transformation of treaties into municipal law. Consequently, this study provides information for the examination of the legal implications of Article 2(6) of the Kenya Constitution 2010 and, thus, provoke thought and further study on how the change will, in practical terms, play out in the country's legal system.

⁵² Shaw, M. 2008. *International Law*. 6th ed. Cambridge: Cambridge University Press. at p. 129.

1.7 Research Methodology

This research was mainly conducted by a desk review of both primary and secondary literature on the subject. The primary sources of information included the Kenya Constitution 2010, the Ratification of Treaties Act 2012 and Parliamentary Hansard Reports on the transformation of the treaties and conventions into the municipal law of Kenya, as well as those of the deliberations on the Constitutional Bill of 2010; minutes of the deliberations of the Constitutional Review Commission; and relevant statutes as well as Constitutions of other monist and dualist countries. The sources also included key informant interviews with members of the Committee of Experts who were involved in drawing the Kenya 2010 Constitution, staff at the Ministry of Foreign Affairs and the Attorney General's Chambers concerned with treaty negotiations and ratification and selected legal practitioners. Secondary sources of information include books, treatises, and law journal articles. Both these primary and secondary sources of information were obtained from a review relevant materials obtained in local libraries, from key informant individuals and institutions as well as through the conduct of Internet research.

1.8 Literature Review

A discussion of the legal implications of Article 2(6) of the Constitution of Kenya, 2010 throws into sharp focus the dichotomy between the doctrines of monism and dualism on which there is tremendous amount of literature. For purposes of this research, relevant parts of the utilized literature will be reviewed.

Henkin et al,⁵³ Malcolm Shaw,⁵⁴ Ian Brownlie⁵⁵ and Louis⁵⁶ as well as Anthony Aust,⁵⁷ discuss the distinction between monism and dualism. Henkin et al give the general distinction between the two systems. They argue that in explaining the relationship between international law and municipal law, two principal and separate approaches have evolved, that is, dualism and monism.⁵⁸ Shaw observes that the positivists, basing their view on the legal theory of sovereignty and equality of states, and that no state can exercise jurisdiction over another,⁵⁹ assert the supremacy of states' municipal law over international law and emphasize "the existence of wide differences between [the] two ... orders."⁶⁰ Discussing the principles of justiciability and non-justiciability, he argues that for a rule of international law to have legal force in the domestic or internal legal order, it must be transformed into municipal law by legislation. This is the theory of dualism which stresses the view that "international law and municipal law exist separately and cannot purport to have an effect on, or overrule the other."⁶¹ Municipal law governs domestic affairs between individuals and between individuals and the state organs, while international law governs international relations between states. Henkin et al add that once incorporated into municipal law, international law is subject to the municipal law constitutional limitations and can be amended by an Act of Parliament.

⁵³ Henkin, L. et. al. 1987. *International Law Cases and Materials*. 2nd ed. St. Paul, Minnesota: West Publishing Co. pp. 137-227

⁵⁴ Shaw, M. 2008. *International Law*. 6th ed. Cambridge: Cambridge University Press. Pp.99-136.

⁵⁵ Brownlie, I. 2008. *Principles of Public International Law*. 7th ed. Oxford: Clarendon Press. Pp. 31-53.

⁵⁶ Montesquieu, C. 1748 *De l'esprit des Lois/The Spirit of Laws*. Available at:

<http://etext.lib.virginia.edu/toc/modeng/public/MonLaws.html> [Accessed 5 October 2012].

⁵⁷ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge of University Press.

⁵⁸ Henkin, L. et. al. *Supra* at p. 140.

⁵⁹ Lord Pearson, in *Nissan v Attorney General* [1970] AC 179, at p. 239.

⁶⁰ Shaw, M. 2008. *International Law*. 6th ed. Cambridge: Cambridge University Press at p. 129.

⁶¹ *Ibid* at p. 129.

Shaw further explains that monists, who embrace the naturalist view, on the other hand, see “the primary function of all law as concerned with the well being of individuals.” Advocating “the supremacy of international law,”⁶² monists root for the unitary view of law and reject the strict division posited by the positivists. Starting with Britain and the US, Shaw distinguishes between self-executing and non-self-executing treaties and goes on to survey the modes adopted by various states in domesticating treaties.

Brownlie basically expresses the same views as those of Shaw and Henkin et al on this distinction between monism and dualism. On dualism, he emphasizes “the essential difference [between] international and municipal law...as consisting primarily in the fact that the two systems regulate different subject-matter.” Whereas international law regulates relations between sovereign states, municipal law, on the other hand, “applies within a state and regulates the relations of its citizens with each other and with the executive.”⁶³ “Each system is superior in its own field, and neither has hegemony over the other.”⁶⁴ On the issue of monism, according to the primacy of international law over municipal law, he says dualists regard “[s]uch doctrine...[as] antipathetic to the legal corollaries of the existence of sovereign states, and reduce municipal law to the status of pensioner to international law.”⁶⁵

Stating the monist view, Brownlie posits that monists assert “the supremacy of international law even within the municipal sphere” as both systems are based on international law as the basic or grundnorm. (Noting that Kelsen, the proponent of the grundnorm theory, does not himself support the primacy of international law over

⁶² Ibid at p. 131.

⁶³ Brownlie, I. 2008. *Principles of Public International Law*. 7th ed. Oxford: Clarendon Press at p. 32.

⁶⁴ Ibid, at p. 53.

⁶⁵ Ibid, at p. 32.

municipal law).⁶⁶ Brownlie adds that, like municipal law, international law imposes duties that both states and individuals cannot evade by pleading their constitutions or other municipal laws as defences. He gives examples of the International Military Tribunal at Nuremberg dismissing pleas of accused persons charged with war crimes and genocide as having “acted in accordance with their national laws.”⁶⁷ Henkin et al share the same view that monists regard both international and municipal law as simply parts of a single legal system with municipal law deriving its validity from international law which is higher in the hierarchy of legal norms.⁶⁸

After dealing with the scope of the Vienna Convention on the Law of Treaties 1969, Anthony Aust expounds on the meaning of the term ‘Treaty’ as defined by the Convention. He then deals with the treaty making process and covers the two major approaches to treaty transformation or domestication into municipal law. He gives the United Kingdom and Switzerland as the best examples of the dualist and monist systems, respectively, and describes the systems in the United States and South Africa as examples of states that implement a blend dualism and monism.

Various articles written on the distinction between the two systems and the modes adopted by various states to domesticate rules of customary international law, in general, and treaties in particular, include those by Richard Frimpong Oppong,⁶⁹ Somppng

⁶⁶ Ibid, at p. 33.

⁶⁷ Ibid, at p. 35.

⁶⁸ Henkin, L. et. al. 1987. *International Law Cases and Materials*. 2nd ed. St. Paul, Minnesota: West Publishing Co. at p. 141.

⁶⁹ Oppong, R. 2006. Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa. *Fordham International Law Journal*, 30, pp. 295-345.

Sucharitkul,⁷⁰ Melissa A. Waters⁷¹ Justice Dikgang Moseneke,⁷² Abdul Ghafur Hamid⁷³ and Francis Situma.⁷⁴ In his article, “Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa”⁷⁵, Richard Frimpong Oppong states that most common law jurisdictions in Africa follow the dualist system, while those of civil law follow the monist system. He explains, however, that member states of regional bodies, like East African Community and the Organisation for the Harmonisation of Business Law in Africa (OHADA), have, for economic considerations, to some extent, ceded their sovereignty through the execution of agreements that are directly applicable and enforceable municipally. The increasing use of unincorporated treaties by courts in Africa under the doctrine of legitimate expectation, thus in effect incorporating those treaties into the municipal laws, has also posed, and continues to pose, significant challenges that threaten to disturb the balance of power between the executive and legislative arms of government as regards law-making. While lauding the use of international decisions and ceding some sovereignty to regional bodies, Oppong concludes that those issues should be seriously thought out lest citizens of those countries be saddled with foreign law the making of which they have not participated in through their elected representatives.

⁷⁰ Sucharitkul, S. 2010. International Law as Law. *Annual Survey of International & Comparative Law*, 16(1) Article 5.

⁷¹ Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties. *Columbia Law Journal*, 107, pp. 628-705.

⁷² Moseneke, D. 2010. *The Role of comparative and public international law in domestic legal systems: a South African perspective*. Available at: <http://www.middletemple.org.uk/Downloads/3A%20-%20Dikgang%20Moseneke%20%20ROLE%20OF%20COMPARATIVE%20AND%20PUBLIC%20INTERNATIONAL%20LAW.pdf> [Accessed September 17, 2011].

⁷³ Hamid, A. 2005. Judicial Application of International Law in Malaysia: A Critical Analysis. *Asia-Pacific Yearbook of International Humanitarian Law*, 1, pp. 196-214.

⁷⁴ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field* (Unpublished: On file with author).

⁷⁵ Oppong, R. 2006. Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa.

Sompong Sucharitkul discusses the history of incorporation of international law into the domestic plane.⁷⁶ He gives an example of how the theory of incorporation was introduced in the United Kingdom by English courts incorporating customary rules of international law into common law.⁷⁷ Robyn Layton,⁷⁸ writing on “When and How can Domestic Judges and Lawyers use International Law in Dualist Systems”, gives the nature and characteristics of dualist systems, variations of dualism and the methods of incorporation as well as the courts’ use of unratified and/or unincorporated treaties and conventions.

Basing her views on the International Covenant on Civil and Political Rights (ICCPR), Melissa A. Waters in her article, “Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties”,⁷⁹ examines the common interpretive incorporation techniques and observes that “[c]ommon law judges are increasingly abandoning their traditional dualist orientation to treaties and are beginning to utilize human rights treaties despite the absence of implementing legislation giving domestic legal effect to the treaties.” She then examines empirical evidence of that trend in selected court decisions from common law jurisdictions.

In his article, “The Role of Comparative and Public International Law in Domestic Legal Systems: A South African Perspective”,⁸⁰ Justice Dikgang Moseneke contrasts the

⁷⁶ Sucharitkul, S. 2010. *International Law as Law* at p. 5.

⁷⁷ *Ibid* at p. 5.

⁷⁸ Layton, R. 2006. *When and How can Domestic Judges and Lawyers use International Law in Dualist Systems*. Available at: http://training.itcilo.it/ils/ils_judges/training_materials/english/Dualist_Systems_Layton.pdf [Accessed September 17, 2011].

⁷⁹ Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties. *Columbia Law Journal*, 107, pp. 628-705.

⁸⁰ Moseneke, D. 2010. *The Role of comparative and public international law in domestic legal systems: a South African perspective*. Available at: <http://www.middletemple.org.uk/Downloads/3A%20->

two broad approaches of monism and dualism in how international law binds domestic jurisdictions and states that South Africa adopts a mixed approach to the incorporation of international law into domestic law. “It assumes a dualist approach in relation to treaties and a monist stance in respect of customary international law”.⁸¹ It incorporates customary international law into municipal legislation unless it is inconsistent with its Constitution or any other national legislation. As regards treaties, save for those of ‘a technical, administrative or executive nature’ which do not require ratification or accession, all others have to be approved by a resolution of both houses of Parliament⁸² He then sets out the procedure adopted by South Africa in domesticating international treaties.

Abdul Ghafur Hamid, in his article, “Judicial Application of International Law in Malaysia: A critical Analysis”,⁸³ makes a clear distinction between the doctrines of incorporation and transformation while contrasting the theories of monism and dualism. He states that while the Malaysian Constitution is silent on the primacy of international law over the municipal law and vice versa, the country follows a dualist approach.

Writing on the extent to which Kenya has domesticated and/or implemented bilateral and multilateral environmental treaties and agreements, Situma states that Kenya follows the common law dualist system.⁸⁴ He posits that unlike Uganda, whose constitution⁸⁵ makes provision for treaty making and implementation and has legislation for

[%20Dikgang%20Moseneke%20%20ROLE%20OF%20COMPARATIVE%20AND%20PUBLIC%20INTERNATIONAL%20LAW.pdf](#) [Accessed September 17, 2011].

⁸¹ Ibid, at p. 64.

⁸² Ibid, at p. 65.

⁸³ Hamid, A. 2005. Judicial Application of International Law in Malaysia: A Critical Analysis. *Asia-Pacific Yearbook of International Humanitarian Law*, 1, pp. 196-214.

⁸⁴ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field* (Unpublished: On file with author).

⁸⁵ The Constitution of the Republic of Uganda, 1995, Article 123.

ratification,⁸⁶ the former Kenyan constitution had no such provision. He then gives a synopsis of how Kenya has hitherto domesticated treaties and conventions it has ratified and how it has and continues to handle them. The article gives instances of how Kenya has failed to implement or dragged its feet in the implementation of some of the international treaties and conventions. This may provide the rationale behind the enactment of Article 2(6) of the Constitution. Though quite useful and informs the analysis of the issues in this project, this literature review covers the general treaty-making process under both the monist and dualist systems. It does not zero down to the proposed Kenyan practice. In that regard, reference will also be made to case decisions in Kenya and other jurisdictions when analyzing the legal implications of Article 2(6) of the Constitution of Kenya 2010.

1.9 Chapter Outline

This thesis comprises of five chapters which cover the introduction; treaty making process under both monist and dualist systems; Kenya's past and present treaty making practice; the legal implications of Article 2(6) of the Kenya Constitution 2010; and conclusion and recommendations.

1.9.1 Introduction

Chapter one introduces the research topic and gives an overview of the background of the research, including the theoretical framework as well as the methodology that will be employed in carrying out the research.

⁸⁶ Uganda Ratification of Treaties Act, Chapter 204, Laws of Uganda, Act No. 5 of 1998.

1.9.2 Treaty Making under Monist and Dualist Systems

Chapter two examines the theoretical approaches, in international law on both dualism and monism systems and undertakes a comparative study of the systems adopted by various civil and common law jurisdictions.

1.9.3 Kenya's Past and Present Treaty Making Practice

Chapter three discusses Kenya's treaty making process including the negotiation of treaties, ratification, and domestication as well as implementation of international treaties and conventions prior to and after the promulgation of the Kenya Constitution 2010. It also discusses the Ratification of Treaties Act, 2011.

1.9.4 The Legal Implications of Article 2(6) of the Kenya Constitution 2010

Chapter four critically examines the rationale for and the legal implications of Article 2(6) of the 2010 Constitution and the Ratification of Treaties Act 2011.

1.9.5 Conclusion and Recommendations

Chapter five will make concluding remarks as well as recommendations on the challenges likely to arise in the course of applying the provision.

CHAPTER TWO

2 MONISM VERSUS DUALISM

2.1 Introduction

Article 2(6) of the Constitution of Kenya, 2010 introduced a fundamental change in approach from dualism to neither pure dualism nor pure monism. A pure dualist system requires that once a treaty has been ratified, domestic legislation must be enacted to enable the provisions therein to be applicable domestically. A pure monist system suggests that treaties, once ratified by the Executive, are automatically applicable domestically without any need for enabling municipal legislation. The system proposed in the Ratification of Treaties Bill 2012 is monist insofar that ratified treaties will be immediately applicable domestically. However, it takes principles from the dualist system in that in order for ratification to be executed by the Executive, a stringent process of parliamentary scrutiny must be complied with.

To appreciate this change, it is imperative to understand the two approaches that underpin the theoretical explanation of the domestication of international law. It has already been highlighted that though states are sovereign and equal,¹ in reality, however, due to the inter-dependence in international commercial and political affairs, no state can afford to act in isolation. Nevertheless, the relationship between the international legal system and the internal legal orders of various states is normally presented as a clash

¹ See Jennings, R. and A. Watts. eds. 2008. *Oppenheim's International Law*. 9th ed. London: Longmans at p. 52.

between dualism and monism.² Hence, the traditional monism/pluralism divide assumes a hierarchy between competing legal orders.

Under monism, the international order trumps domestic norms, while under dualism, the domestic order determines the rank and extent of international law in the domestic setting. Hence, the monist tradition, unlike dualism, does not draw a sharp distinction between domestic and international law. Monism seeks to put international law on par with domestic or internal law. The distinction between monism and dualism seems to boil down to the importance that international law is given in a particular legal system. Thus, whereas monist/incorporative legal orders give more precedence to international law, the dualist/transformational legal systems give more significance to domestic or internal laws.

This chapter seeks to revisit the debate on this clash in an endeavor to set the theoretical foundation for this research paper.

2.2 Monism

There are three schools of thought in the monist theory. The first one, whose major exponent is Hersch Lauterpacht, teaches that both international and municipal laws are ultimately concerned with the conduct and welfare of people and sees individuals as subjects of international law. This school advocates “the supremacy of international law even within the municipal sphere.”³ Thus, according to this school, international law is

² Jennings, R. and A. Watts. eds. 2008. *Oppenheim's International Law*. 9th ed. London: Longmans at p. 52.

³ Kaczorowska, A. 2010. *Public International Law*. 4th ed. New York: Taylor & Francis at p. 147.

superior to national law⁴ and trumps conflicting domestic law.⁵ The second school, which does not advocate the supremacy of international law over municipal law, is based on Kelsen's theory of the basic norm or grundnorm. It holds that international law is the grundnorm upon which all law, including municipal law, derives its validity.⁶ The third school, which resembles Kelsen's idea of a universal basic norm, is the monist-naturalist theory which postulates the supremacy of natural law and views both international and municipal legal orders as subordinate to natural law.⁷

Despite the divergence of opinion, the monists are, however, "united in accepting a unitary view of law as a whole and are opposed to the strict division posited by positivists."⁸ Their theory holds that international law and national law are manifestations of a single conception of law and are thus part of a single order. This approach tends to view all law as emanating from the same unitary natural law source.⁹ It teaches that law is indivisible; that all law, whether of domestic or international origin, is one and that international law is thus incorporated directly or automatically into municipal law with no need of a specific act of adoption.¹⁰ Thus, under this approach, international law is directly and immediately applicable in the national legal order and there is therefore no need for any domestic implementing legislation. As such, municipal

⁴ Oppong, R. 2006. Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa at p. 317.

⁵ Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties, *Columbia Law Journal*, 107, pp. 628-705. at p. 641; Hamid, A. 2005. Judicial Application of International Law in Malaysia: A Critical Analysis at pp.196-214.

⁶ Brownlie, I. 2008. *Principles of Public International Law*. 7th ed. Oxford: Clarendon Press, at p. 32.

⁷ Ibid, at p. 32.

⁸ Shaw, M. 2008. *International Law*. 6th ed. Cambridge: Cambridge University Press at p. 131.

⁹ Waters, M. 2007. *Supra*, at p. 641.

¹⁰ Ibid.

courts are bound to directly apply international law without any recourse to adoption by courts or transformation by the legislature.¹¹

2.3 Dualism

In contrast to the monist theory is the dualist theory whose major exponents are the positivists. It holds that international law and domestic law are separate legal systems (hence a ‘dual’ system). According to this theory, there are two different spheres of operation. International law is a separate legal system from that of domestic law. The rules of the two systems operate “separately and cannot purport to have an effect on, or overrule, the other.”¹² This is because international law governs relations between sovereign states while municipal law “applies within a state and regulates the relations of its citizens with each other and with the executive.”¹³ To the dualist, international law cannot claim supremacy within the domestic legal system, although it is supreme in the international legal system.¹⁴ The justification for dualism has resided mainly with arguments of a country retaining sovereignty over its citizens.¹⁵ This rationale arises from the reasoning that an international treaty, covenant or convention entered into, which is ratified, establishes obligations which are addressed to the state, but not to individuals.

¹¹ Opong, R. 2006. Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa, at p. 297.

¹² Shaw, M. 2008. *International Law*. 6th ed. Cambridge: Cambridge University Press at p. 129.

¹³ Brownlie, I. 2008. *Principles of Public International Law*. 7th ed. Oxford: Clarendon Press, at p. 32.

¹⁴ Opong, R. 2006. Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa, at p. 298.

¹⁵ Jennings, R. and A. Watts. eds. 2008. *Oppenheim's International Law*. 9th ed. London: Longmans at p. 53.

The dualist view is, therefore, anchored on the doctrine of sovereignty and is generally associated with common law countries.¹⁶ It holds that for a convention to operate and be enforceable by individuals within the domestic legal system, there must be an ‘act of transformation’, that is, a government action by the state incorporating the convention norm into domestic law. Thus, statutory incorporation is mandatory for an international convention to acquire the force of law in the country. After incorporation, the international convention can be directly applied as it then becomes part of the domestic law to the extent of the incorporation. It, therefore, follows that if international law is not transformed into national law through legislation, national courts cannot apply it.¹⁷

Thus, states maintain supreme authority within their jurisdictions and only permit the operation of international law in their spheres on sufferance. In other words, for international law to be applicable in the national legal order, it must be received through domestic legislative measures, the effect of which is to transform the international rule into a national one. It is only after such a transformation that individuals within the State may benefit from or rely on the international (then national) law.

2.4 Treaties

This research is on the legal implications of Article 2(6) of the Kenya Constitution, 2010 which deals with treaties which Kenya is to ratify. It is, therefore, important to understand the meaning and history of treaties.

¹⁶ African civil law countries have traditionally been seen as monist and common law countries as dualist; See Petersen, N. 2009. *The Reception of International Law by Constitutional Courts Through the Prism of Legitimacy*. Bonn: Max Planck Inst. for Research on Collective Goods at p. 3.

¹⁷ Killander, M. and H. Adjolohoun. 2010. International Law and Domestic Human Rights Litigation – An Introduction. In Killander, M. ed. *International Law and Domestic Human Rights Litigation in Africa*. Pretoria: Pretoria University Press at p.11.

The first documented treaties date back to the classical period where in 1272 BC Greek, Egyptian and Hittite kings concluded a treaty between them. Numerous bilateral and multilateral treaties have since been concluded with some 54,000 treaties registered with the United Nations by 1945 with many others not registered;¹⁸ today, there are hundreds of thousands of concluded treaties across the globe. But what is a treaty and who can enter it?

The Vienna Convention 1969 on the Law of Treaties defines a ‘treaty’ as:

an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.¹⁹

Henkin et al define it as being “in its nature a contract between two or more nations, not a legislative act.”²⁰ The Ratification of Treaties Bill 2011 defines a treaty in the same terms as those used in the Vienna Convention cited above.²¹ This definition limits treaties to agreements concluded between states. Treaties, however, can also be concluded between a state and another subject of international law, such as international organizations or between such organizations.²² This research is concerned with treaties between states.

Save for Kenya, this paper is not concerned with the process of negotiating, concluding, adopting and authenticating or coming into force of treaties. It focuses on the effect of

¹⁸ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press at p. 1.

¹⁹ The Vienna Convention on the Law of Treaties. Vol. 1155 UNTS p. 331, Article 2(1)(a).

²⁰ Henkin, L. et. al. 1987. *International Law Cases and Materials* St. Paul, Minnesota: West Publishing Co., at pp. 199 & 205.

²¹ The Kenya Ratification of Treaties Bill, 2011, Clause 2.

²² Aust, A. 2007. *Supra*, at p. 18

the treaties ratified by Kenya. For this purpose, suffice it to say that treaties are entered into by heads of state, heads of government or foreign ministers (all referred to in diplomatic parlance as ‘the Big Three’).²³ They are also entered into by heads of diplomatic missions or accredited representatives with full powers to bind their respective countries.²⁴

Save where it is specifically stated in the treaty instrument itself that a treaty comes into force upon execution, which is rare, states express their consent to be bound by treaties they conclude by ratification.

2.4.1 Ratification

Ratification is the process by which a state expresses its intention to be bound by the terms of a treaty.²⁵ Article 2(1)(b) of the Vienna Convention on the Law of Treaties defines ratification as “the international act so named whereby a State establishes on the international plane its intention to be bound by a treaty.”²⁶ Though, as stated above, the intention can be expressed by the state representative’s signature on the treaty instrument depending on the wording of the instrument, the intention is normally expressed in ratification.

Some states require parliamentary approval before ratification or even signing of a treaty. Others require legislation to precede ratification. Neither of those are acts of ratification. Those are entirely domestic processes of approval.²⁷ Normally treaties do

²³ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, at p. 78.

²⁴ *Ibid*, at pp. 78-79.

²⁵ *Ibid*, at p. 103.

²⁶ The Vienna Convention on the Law of Treaties. Vol. 1155 UNTS p. 331, Article 2(1)(b).

²⁷ These are mostly civil countries such as Switzerland, France, Poland, Germany etc.

not take effect before they are ratified. “Ratification consists of (1) the execution of an instrument of ratification by the executive and (2) either its exchange for the instrument of ratification of the other state (bilateral treaty) or its lodging with the depositary (multilateral treaty).”²⁸

There are several reasons for requiring ratification after adoption and execution of a treaty. As stated, a constitution or other legislation of a country may require parliamentary approval, legislation or some other procedure, like publication, before ratification. But most importantly, the ratification process accords states opportunities to soberly reflect on the implications of the treaty before they commit themselves to be bound by it.²⁹ Once that is accomplished, the instruments of ratification are signed by either ‘the Big Three’, or the heads of diplomatic missions, or accredited representatives with full powers to bind their respective states.

Except where it is stated in the treaty instrument, there is no time limit for ratification of treaties.³⁰ Some states take several years. For example, the United States ratified the Genocide Convention after 40 years, while Libya and the UK took 65 and 80 years respectively to accede to the Hague Convention on the Pacific Settlement of Dispute 1907.³¹ Consent to be bound is effective from the date of exchange of treaty instruments, in the case of bilateral treaties, or deposit of the instruments of ratification, in the case of multilateral treaties. Any of those is known as the date of ratification.³²

²⁸ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, at p. 10.

²⁹ *Ibid*, at p. 105.

³⁰ *Ibid*, at p. 105.

³¹ *Ibid*, at p. 106.

³² *Ibid*, at p. 106.

2.4.2 Accession

Accession is the means by which a state, eligible to enter into the treaty concerned, can express its consent to become a party to a treaty it has not signed. This normally happens in multilateral treaties that have deadlines and the state concerned does not ratify before the deadline.³³ If after the deadline a state decides to be bound by a treaty, it accedes to it.

2.4.3 Reservations

A reservation to a treaty or convention is defined as:

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State.³⁴

But it cannot be allowed to “incompatible with the object or purpose of the treaty.”³⁵

Reservations have their origin from the nature of the process of making multilateral treaties. Due to the varying domestic legal systems, national policies and languages, arriving at an agreement on a text requires compromise to accommodate all the different interests and concerns of the States Parties. In most circumstances, the purpose of making reservations is to adjust the reserving State’s obligations under the treaty in

³³ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press, at p. 110.

³⁴ The Vienna Convention on the Law of Treaties. Vol. 1155 UNTS p. 331, Article 2(1)(d).

³⁵ The Vienna Convention on the Law of Treaties. Vol. 1155 UNTS p. 331, Article 19(c).

order for it to conform to its domestic law and its political, social and cultural practices.³⁶

Reservations cannot, by definition, be made to bilateral treaties because of the nature of such treaties that are similar to contracts. There are only two parties involved, and they must agree to the terms before the treaty can bind them. A party seeking to make reservations would be asking for modifications to the treaty in its favour and for the treaty to be binding, the other State has to give its consent. If the legislature of one of the States refuses to domesticate the treaty as it is, then the recommended step is to renegotiate the treaty or part of it.

To have effect, a reservation must be in accordance with Articles 19, 20 and 23 of the Vienna Convention on the Law of Treaties. Article 20(2) requires all the State Parties to a plurilateral treaty to consent to the reservations. Article 19 provides for the right to formulate reservations except in circumstances where (a) the reservations are prohibited by the treaty; (b) the treaty provides for only specified reservations and the reservation in question is not included;³⁷ (c) if a reservation does not fall under the aforementioned two situations,³⁸ it will be subjected to the compatibility test.³⁹

³⁶ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press, at p. 110.

³⁷ During the negotiation of treaties it may be necessary to give certain states an opportunity to avoid one or more provisions so as to get a consensus. It is thus preferable to specify expressly the matters on which reservations are allowed failure to which reservations are then subjected to the compatibility test.

³⁸ It is common for treaties to provide expressly that reservations are not permitted. For example the International Labour Organization Constitution prohibits making reservations to ILO Conventions due to their unique, trilateral negotiating structure of the ILO which comprises of trade unions, employers' associations and governments.

³⁹ This would be examining whether making the reservation will defeat the object and purpose of the treaty.

A contracting State can object to a reservation even if it is not prohibited under Article 19. The basis for the objection could be that the reservation contradicts general international law or any other grounds. There need not be reasons given for objecting to a reservations, but it is common practice to include reasons for the objection. Article 20 provides for exceptions where reservations have been expressly authorized. That the reservation is prohibited or it has failed the compatibility test are the usual grounds for objections.

There is a challenge in determining whether a reservation is permissible or indeed it passes the compatibility test in that there is no global competent standing tribunal or organ to decide on this. Some regional human rights treaties, however, such as the European Convention on Human Rights and the American Convention on Human Rights,⁴⁰ have each a standing court for this purpose.

The chapeau to Article 19 provides for reservations to be formulated during signing, ratifying, accepting, approving or acceding of a treaty. It does not, however, prohibit a reservation being made at any time, though the current practice providing for reservations calls for them to be made during the ratification process. The practice is often to give a separate text at the depositary at the time of the signature unless the reservation is brief in nature. The UN Secretary General discourages writing reservations on the treaty itself as it may be lengthy or illegible or both.

⁴⁰ 1144 UNTS 144 (No. 17955); ILM (1970) 673; UKTS (1980) 58. See Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press, at pp. 246-50.

2.4.4 Withdrawal of Consent to be Bound Before Entry into Force

Upon adopting, signing and consenting to be bound, Article 24(4) of the Vienna Convention on the Law of Treaties provides for the rights and obligations that arise under a treaty prior to its entry into force, the most obvious being the matters required to facilitate entry into force. The others are provided for in Article 18 thereof, mainly to refrain from any act that can defeat the object of the treaty. Except those, there are no binding obligations under a treaty even after ratification, before entry into force. A good example of this is the signing of the International Criminal Court (ICC) Statute by the US. Before entry into force, on 6th May 2002, the US sent a diplomatic note to the depositary that it did not wish to be party to the treaty. The US is thus not a party to the Rome ICC Statute.

2.4.5 Entry Into Force

Treaties are in the form of contracts. Thus, except those that reflect rules of customary international law, upon entry into force, treaties bind only States Parties that have consented to be bound by them. A treaty enters into force as provided for under the treaty itself or as the negotiating states may agree.⁴¹ The provided or accepted modes of entry into force include exchange of documents (for bilateral treaties), notification by each signatory state on or before the specified date or on signature by all the negotiating states. Generally, however, treaties enter into force upon ratification by a given number of states. Examples are the Vienna Convention which required ratification of at least

⁴¹ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press, at pp. 162-163.

thirty-five states, the International Criminal Court Statute required at least sixty⁴² and the Kyoto Protocol of 1997 required at least fifty-five⁴³ all of which entered into force after the minimum number of States Parties had ratified them. Once it has ratified a treaty and the same has entered in force, a state is internationally bound by its terms whether or not it has domesticated or implemented it.⁴⁴

2.4.6 Termination

International law permits States Parties to terminate treaties on account of important breach by the other side or on account of a fundamental change in circumstance, often referred to as the principle of *rebus sic stantibus*. Breach alone, however, does not render the treaty void but voidable. A good example of this arose in the US case of *Charlton v Kelly*⁴⁵ in which, by a writ of habeas corpus, the petitioner, a fugitive from justice in Italy, argued that as a US citizen, he was not extraditable to Italy as Italy had refused to extradite Italian fugitives to the United States. Dismissing that contention, the US Supreme Court held that although Italy had breached the relevant Extradition Treaty, that breach alone did not automatically terminate it. It gave the US the option not to comply with it; as the US had not expressly abrogated it, the treaty was still valid and enforceable. Though not expressly stated, international law also recognizes the States parties' power to breach treaties, but face the consequences thereof.⁴⁶

⁴² Rome Statute of the International Criminal Court. Vol. 2187 UNTS p. 3. Article 126.

⁴³ Kyoto Protocol to the United Nations Framework Convention on Climate Change. Vol. 2303 UNTS p. 148. Article 25.

⁴⁴ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed., Cambridge University Press, at p. 165.

⁴⁵ 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274, 1913.

⁴⁶ Henkin, L. et. al. 1987. *International Law Cases and Materials* St. Paul, Minnesota: West Publishing Co., at p. 210.

In the US, except where at the time of granting its consent it conditions termination by the President upon approval of the Congress,⁴⁷ neither the Senate nor the judiciary has power to terminate a treaty. As stated, once they taken effect, treaties become part of the supreme law of the United States. They can, therefore, be lawfully terminated by the President by breach or by entering subsequent inconsistent treaties. For instance, in 1979, several US Senators challenged the President's act of terminating the Mutual Defence Treaty of 1954 with China in the case of *Goldwater v Carter*.⁴⁸ The US Supreme Court held that, coterminous with the power to recognize foreign governments, the President has power to terminate treaties. Congress could also terminate treaties by inconsistent subsequent legislation or approval of inconsistent subsequent treaties that fell within its mandate under the Constitution, like treaties that relate to war-or-peace or those requiring financial outlay.⁴⁹

2.5 Domestication

It is important to note that, save for monist jurisdictions, the provisions of a treaty do not form part of the law of a state party or start operating in the municipal jurisdictions upon entry into force. As observed, international law and domestic law operate on different planes.⁵⁰ Treaties, especially those that confer rights or impose obligations on individuals, become enforceable after they are domesticated into municipal law. For instance “the immunities and privileges granted to diplomatic missions and their staff by

⁴⁷ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p. 212.

⁴⁸ 444 U.S. 533, 100 S. Ct. 533, 62 L. Ed. 2d 428.

⁴⁹ Henkin, L. et. al. 1987. *Supra*, at p. 211.

⁵⁰ Brownlie, I. 2008. *Principles of Public International Law*. 7th ed. Oxford: Clarendon Press, at p. 32.

the Vienna Convention on Diplomatic Relations of 1961” become effective only after the receiving party has enacted the implementing legislation.⁵¹

The Vienna Convention on the Law of Treaties does not provide for how a treaty is to be transformed into domestic law. As a result, the domestication of international law in both civil and common law countries is a debate that has raged on from the last century. The distinction between the two systems boils down to the importance that international law is given in each system. Under monism, the international order always trumps domestic norms,⁵² while under dualism, the domestic order determines the rank of international law in the domestic setting.⁵³ Thus, whereas the monist legal orders give more precedence to international law, the dualist legal systems give more significance to domestic or internal laws.

This dualist/monist dichotomy plays out distinctly in the doctrines of incorporation and transformation as modes of domestication of international law into municipal law. According to the ‘*doctrine of incorporation*’, international law is regarded as *ipso facto* part of and is automatically incorporated into municipal law and may be applied as such by the municipal courts; this is the monist approach. The ‘*doctrine of transformation*’, on the other hand, expresses the opposite view that “international law is not *ipso facto* part of municipal law. A rule of international law will form part of municipal law only

⁵¹ Vienna Convention on Diplomatic Relations. Vol. 500 UNTS p. 95; Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed., at p. 178.

⁵² Petersen, N. 2009. *The Reception of International Law by Constitutional Courts Through the Prism of Legitimacy*. Bonn: Max Planck Inst. for Research on Collective Goods at p. 2.

⁵³ *Supra*, note 8 at p. 131.

after...transformation into municipal law by means of a statute or Act of Parliament;”⁵⁴
this is the dualist approach.

There is, nevertheless, some uniformity within this differentiation. For instance, both systems embrace the principle of *pacta sunt servanda* contained in Article 26 of the Vienna Convention on the Law of Treaties. The principle, which is fundamental to the law of treaties, simply means that agreements, which are legally binding, must be carried out in good faith. Under Article 27 of the Convention, a party cannot invoke its internal law or change of government as justification for its failure to implement the terms of a treaty.

Although the two systems are presented as being dichotomous, that is not entirely correct as many states incorporate both.⁵⁵ While Britain and Switzerland present pure dualist and monist systems, respectively, the United States combines both.⁵⁶ The following is a brief examination of domestication under both monism and dualism giving further examples of states that adopt either or both of them.

2.5.1 Domestication under Monism

Although the essence of the monist approach is that treaties and international conventions should become part of the municipal law once they enter into force, nevertheless, under constitutions of many states, legislation, preceded by parliamentary approval of treaties, is required to implement them. A distinction is made on the nature and subject matter of treaties. Self-executing treaties do not require legislation, but non

⁵⁴ Abdul Ghafur Hamid, of International Islamic University of Malaysia, “Judicial Application of International Law in Malaysia: A critical Analysis”⁵⁴, Asia-Pacific Yearbook of International Humanitarian Law, Vol. 1 (2005) (published in 2006), 196-214.

⁵⁵ Supra note 21 at p. 182.

⁵⁶ Ibid.

self-executing do. In some states self-executing treaties constitute supreme law, in which case they override any inconsistent existing or future domestic legislation. In others, especially those in which parliament is supreme, future legislations override even self-executing treaties.⁵⁷

There is no clear definition of what a self-executing treaty is. Each treaty has to be interpreted on its own.⁵⁸ But generally, self-executing treaties are those which, by their own nature and wording or stipulations, are directly and immediately applicable and do not require implementing legislation in order to become fully effective.⁵⁹ Examples of these kinds of treaties include friendship, commerce, and navigation treaties as well as bilateral investment treaties. Other examples are treaties that create obligations to restrain from acting. In such cases, it is obvious that a treaty which provides that certain acts shall not be done, or that certain limitations shall not be disregarded or exceeded, courts or any other authorities will not require any legislative action to enforce it.⁶⁰

Non self-executing treaties, on the other hand, are those that require implementation legislation. For instance, if the subject matter of a treaty falls within the exclusive law-making power of the American Congress, like appropriation of funds, it will not take effect until Congress passes appropriate legislation.⁶¹ Some treaties also specifically require parties to enact domestic implementing legislation. An example of these is the

⁵⁷ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press, at p. 183.

⁵⁸ Ibid at p. 197.

⁵⁹ Henkin, L. et. al. 1987. *International Law Cases and Materials* St. Paul, Minnesota: West Publishing Co., at p. 205

⁶⁰ Ibid, at p. 202.

⁶¹ For instance the American Constitution, Article I, Section 7 provides that “[a]ll bills for raising revenue shall originate in the House of Representative.” So no treaty involving expenditure of public funds can take effect without Congress’s legislative action.

Genocide Convention, Article V of which requires contracting parties to enact “necessary legislation to give effect to the provisions of the Convention and, in particular, to provide effective penalties for persons guilty of genocide.”⁶²

The others are those that require parties to take some action for example punishing hijacking. If any of the contracting parties do not have domestic legislation that criminalizes hijacking, they will have to pass legislation to implement the treaty. The following are examples of the domestication of treaties in countries following the monist system.

2.5.1.1 Switzerland

The Swiss constitution confers treaty-making powers on the Executive, which is the Federal Council, even on matters within the competence of the constituent units of the Confederation (the cantons). Although the Swiss constitution requires treaties to be approved by the Federal Assembly before ratification, in practice, the Federal Council has wide discretion on whether to seek approval or not. However, treaties requiring adherence to collective security or those establishing a supranational body must be submitted to a referendum of Swiss citizens. Those of indefinite duration which provide for participation in an international organization or concern multilateral law making, must be submitted to the referendum of all the Swiss people, if 50,000 citizens or eight cantons so demand.⁶³

Whether or not approved by the Federal Assembly, once a self-executing treaty enters into force for Switzerland, it becomes part of the Swiss law and does not require any

⁶² Convention on the Prevention and Punishment of the Crime of Genocide. Vol. 78 UNTS p. 277.

⁶³ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press, at p. 186

legislative act of incorporation. Once it is part of the Swiss law, it can be invoked in courts provided that its terms are precise enough for courts to apply it. It follows that non self-executing treaties require legislation to be incorporated into the domestic law.⁶⁴

2.5.1.2 France

Like the Swiss Constitution, the French Constitution of 1958, also confers the treaty-making power on the executive. It authorizes the President to negotiate and ratify treaties. However, treaties that would amend or have the effect of amending existing legislation, concern peace and trade, concern an international organization, which has the power to restrict the exercise of French sovereignty, concern expenditure not budgeted for, or the individual status or territory, require the National Assembly and the Senate to approve (normally, though not always, by legislation) their ratification. If at the request of the President, the President of the National Assembly, or sixty members of the National Assembly or Senate, the Constitutional Court rules that a treaty or international agreement contradicts the Constitution, such treaty can only be approved or ratified if the Constitution is amended.⁶⁵ Self-executing treaties that affect the rights and obligations of individuals must be published in the official journal before they can be applied by courts. Upon entry into force, all self-executing treaties form part of French law and do not require any legislative act. Non self-executing ones, like the 1989 Vienna Convention on the Rights of the Child and those incapable of application without legislation, require Acts of Parliament before courts can enforce them.⁶⁶ The provisions

⁶⁴ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press., at p. 187

⁶⁵ Article 129 in the Rules of Procedure.

⁶⁶ Aust, A. 2007. *Supra*, at p. 185.

of a treaty are superior to domestic law if that is the case with the other party or parties to the treaty.⁶⁷ Article 55 of the French Constitution reads:

Treaties or agreements duly ratified or approved shall, upon their publication, have authority superior to that of the laws, subject for each agreement to its application by the other party.

2.5.1.3 Germany

The Germany Constitution (Basic Law) provides that the general rules of international law take precedence over municipal law. Article 25 thereof reads:

The general rules of international law shall form part of the federal law. They shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory.

The Constitution also grants the executive power to enter international treaties without involvement of the Bundestag (the German Parliament). Nevertheless, treaties the implementation of which requires legislation and those affecting local legislation or those of great political importance, require the involvement of the Bundestag through legislation. In such cases, the German Constitution requires that the Foreign Relations Committee of Parliament should be informed when a treaty is concluded, which then secures parliamentary approval.⁶⁸

As to what is a political treaty is not quite clear. A treaty is, however, regarded as political if it relates to the survival of the State, or its borders and independence, or its status in the international community, and if its objective is to control the State's

⁶⁷ French Constitution 1958, Article 55.

⁶⁸ Article 59 of the German Basic Law. 1949 (last amended July 2010).

political relation.⁶⁹ In this context therefore, “Political Treaties” include military alliances, disarmament treaties, and peace treaties.

Whether or not a treaty requires the authority of Parliament is a matter for the constitutional court, but if the Foreign Relations Committee considers that Parliament’s consent is required, it is normally sought. Save for these requirements, once a treaty is ratified, it becomes part of German law without any ado,⁷⁰ but in status it ranks no higher than a federal law and can be challenged in court if it contradicts the constitution.⁷¹ Any subsequent law supersedes preexisting treaties.⁷²

2.5.1.4 The Netherlands

Except for treaties to implement an already existing treaty; is for a period of less than a year; involves no substantial obligation or in exceptional circumstances is in the interest of the states or is confidential, under the Netherlands constitution all treaties require approval of Parliament. After ratification, all self-executing treaties prevail over existing and future legislation.⁷³ Articles 93 and 94 of the Netherlands Constitution provide:

Article 93. Provisions of treaties and resolutions by international institutions, which may be binding on all persons by virtue of their contents, shall become binding after they have been published.

Article 94. Statutory regulations within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

⁶⁹ Yoo, J. 2003. Participation in the Making of Legislative Treaties: The United States and Other Federal Systems. *Columbia Journal of Transnational Law*, 41, pp. 455-488.

⁷⁰ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press, at p. 184.

⁷¹ Shaw, M. 2008. *International Law*. 6th ed., Cambridge University Press, at p. 123.

⁷² Henkin, L. et. al. 1987. *International Law Cases and Materials* St. Paul, Minnesota: West Publishing Co., at p. 207.

⁷³ Aust, A. 2007. *Supra*, at p. 185.

2.5.1.5 Poland

Unless its application depends on legislation, under Article 91 of the Polish Constitution of 1997, once a treaty is ratified following the grant of consent by Parliament and enters into force, it becomes part of Polish law after publication in the official Gazette and takes precedence over laws inconsistent with it.⁷⁴

2.5.1.6 Russia

Due to the complex nature of the constitutional structure of its Federation, in 1995 Russia adopted a new elaborate Federal law on international treaties.⁷⁵ Though the executive has authority to enter into treaties, treaties which need new laws or changes to existing law, and those concerning human rights, territorial demarcation, defence and international security, and participation in international organizations, involving transfer of power of the Russian Federation, and treaties that may be binding on the Federation require to be made subject to ratification by a parliamentary legislative act. Once ratified and officially published, treaties become an integral part of the Russian legal order upon entry into force without any legislative act of incorporation and trump any inconsistent municipal law.⁷⁶ Unlike customary international law, treaties have a higher status than municipal law.⁷⁷

2.5.2 Domestication under Dualism

Unlike those of the monist states as shown above, constitutions of dualist states accord treaties no special treatment. Treaties have no legal effect in the domestic scene until they are transformed into municipal law by Acts of Parliament. This principle is a

⁷⁴ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge University Press, at p. 185.

⁷⁵ Ibid, at p. 186.

⁷⁶ Ibid, at p. 187.

⁷⁷ Shaw, M. 2008. *International Law*. 6th ed. Cambridge University Press, at p. 126.

product of the seventh-century English constitutional struggle between the King and Parliament, resulting in the vesting of complete legislative power in the latter and the conduct of foreign relations and treaty-making in the former. This division of powers was inherited by most former colonies of the United Kingdom, including the United States.⁷⁸

Under dualism, the provisions of transformed treaties enjoy no primacy. They have status similar to any domestic law and can be amended or repealed by later legislation. When that happens, there would be breach of the treaty provisions, but there would be no remedy in the national legal system. The following are examples of the practice in countries that follow the dualist system.

2.5.2.1 United Kingdom

The UK is the best exemplification of the dualist system. The treaty-making power is vested in the executive, the Secretary of State for Foreign and Commonwealth Affairs or foreign minister. Although the Crown does not require any parliamentary authority to enter into any treaty, under a constitutional practice (known as the Ponsonby Rule) a treaty which requires ratification or analogous procedure like one which has budgetary ramifications, “is ‘laid before’ (notified to) both houses of Parliament, with a short explanatory memorandum, for twenty-one days while Parliament is sitting.”⁷⁹ If it so wishes, Parliament can debate it, though this seldom happens except where a treaty requires legislation or relates to a matter of great political importance. In such a case, the government arranges for the debate.

⁷⁸ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, at p. 188.

⁷⁹ *Ibid*, at p. 188.

Since 2000 when the British Government adopted recommendations of Parliament's Procedure Committee Report on the 'Parliamentary Scrutiny of Treaties',⁸⁰ copies of treaties that require Parliamentary approval are sent to the relevant departmental committees. If primary or subsidiary legislation is required to implement a treaty, the government will not ratify it until such legislation has been passed.⁸¹

Under the British Constitution no provision of any treaty, including the European Convention on Human Rights which was fully incorporated by the Human Rights Act 1998, and the European constituent treaties which are applied to Britain by the European Communities Act 1972, can be effective in its municipal law without legislation. However, Britain is obliged, under Article 46(1) of the European Convention on Human Rights to which it is a party, to comply with judgments of the European Court of Human Rights and those of the European Court of Justice.

2.5.2.2 Australia

Although the Australian Constitution does not stipulate which organ of state enters into treaties, in practice, the executive is authorized to enter into treaties and ratify them, but it is only after Parliament domesticates them by legislation that they have the force of law. In *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh FC*⁸² the High Court of Australia, basing itself on the principle of separation of powers, held that provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions are incorporated into municipal law by statute.

⁸⁰ Parliamentary Select Committee on Procedure. 2000. *Second Report: Parliamentary Scrutiny of Treaties*. Available at: <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmproced/210/21003.htm> [Accessed 5 October 2012].

⁸¹ Shaw, M. 2008. *International Law*. 6th ed., at p. 112.

⁸² [1995] HCA 20.

The practice is that the executive lays the proposed text of a treaty, together with an explanation on how it affects the national interest (the “National Interest Analysis”) including the amendments of treaties, or withdrawal from them, are laid on the table of Parliament for at least 15 sitting days before they are ratified.⁸³ In other words, before Australia ratifies any treaty, the same is tabled in Parliament with an explanation from the relevant department on how the treaty will serve the national interest. The Joint Standing Committee on Treaties (JSCOT) considers it, invites views from the general public, holds public hearings and, as Australia is a Federal State, considers the views of the States and then writes a report to Parliament recommending whether or not the treaty should be ratified. It is after all those stages are passed that the government decides to ratify a treaty. This procedure is departed from only when the Foreign Secretary declares a treaty as urgent or sensitive, and involves foreign trade, or is strategic for foreign policy interests. Though the executive has the right to ratify a treaty whether or not JSCOT does not recommend its ratification, however, as stated, it cannot have the force of law until it is domesticated by Parliament through legislation.⁸⁴

2.5.2.3 Denmark

The Danish Constitution authorizes the King to deal with international matters.⁸⁵ However, an act that affects the territorial status of the State, a treaty that requires the

⁸³ Twomey, A. 2000. *Federal Parliament’s Changing Role in Treaty Making and External Affairs*. Available at:

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP15 [Accessed September 20, 2012].

⁸⁴ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509.

⁸⁵ Kingdom of Denmark Constitution 1992, Article 19.

cooperation of the Folketinget (the Danish Parliament), the use of armed forces against a foreign country other than defence against military attack, and any obligation of crucial importance as well as withdrawal from an international treaty that had been approved by the Folketinget require consent of the Folketinget. Whatever its nature, however, each treaty requires to be domesticated by legislation before it can have the municipal force of law.⁸⁶

2.5.2.4 Finland

Other than issues of war and peace, treaties of a legislative nature, treaties affecting the Constitution and any other important treaty, which require the approval of the Riksdagen (the Finish Parliament), the Finish Constitution authorizes the President and the Government to conduct the foreign affairs of the State. Except for a commitment that is of a constitutional nature, which requires two-thirds majority, consent of the Riksdagen is given by a simple majority. Whatever the case, the Constitution authorizes the Parliamentary Foreign Affairs Committee to demand from the Government a report regarding foreign and defence policies.⁸⁷

2.5.2.5 Ireland

The Irish Constitution obliges the Government to obtain Parliamentary approval for all treaties that require expenditure of public funds before entering into them. Save for those, the Irish Constitution authorizes the Government to enter into and ratify all other

⁸⁶ Kingdom of Denmark Constitution 1992, Article 19.

⁸⁷ Finland Constitution 2000, Chapter 8 (Sections 93-97).

international treaties but it has to lay them in Parliament the only exemption in this regard being those of a technical or administrative nature.⁸⁸

2.5.2.6 Italy

The Italian Constitution provides that the general rules of international law are supreme to domestic law⁸⁹ and the courts enforce them. Article 10 thereof stipulates that: “[t]he Italian Judicial System conforms to the generally recognized principles of international law.”⁹⁰ The Italian Constitution requires ratification by Parliament, that is by legislation,⁹¹ of only the treaties of a political nature, and those with provisions on arbitration or judgment, changing the State territory, treaties that impose financial obligations, and those that require amendments of existing legislation.⁹²

2.5.2.7 Antigua and Barbados

Antigua and Barbados enacted the Ratification of Treaties Act in 1989 which gives the executive exclusive powers to enter into treaties, but requires treaties concerning the international status of the country, its security, sovereignty or membership of an international organization, to be approved by its legislature. The Act makes it explicit that no provision of any treaty shall become part of the law of that country “except by or under an Act of Parliament.”⁹³

⁸⁸ Constitution of Ireland 1999, Article 29.

⁸⁹ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p. 207.

⁹⁰ Constitution of the Italian Republic, Article 10, par. 1.

⁹¹ Constitution of the Italian Republic, Article 72.

⁹² Constitution of the Italian Republic, Article 80.

⁹³ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, at p. 194.

2.5.2.8 South Africa

The 1996 South African Constitution has both monist and dualist elements. While negotiation and signature of the treaties is the function of the President,⁹⁴ ratification is a function of both Houses of Parliament. Ratification of important treaties requires the approval of the National Assembly as well as the National Council of the Provinces.⁹⁵ However, international agreements of a technical, administrative or executive nature, or agreements that do not require ratification, commonly referred to as self-executing treaties, which are not inconsistent with its constitution or other legislation, automatically form part of the law of South Africa. Self-executing agreements are those whose provisions are capable of enforcement on their own without further legislative action.⁹⁶ These two types of agreements must, however, be laid on the table of Parliament. All others require legislation. Section 231 of the South African Constitution, which provides for treaties, states:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the National Assembly and the Council within a reasonable time.

⁹⁴ South African Constitution 1996, Article 82(1)(i).

⁹⁵ South African Constitution 1996, Article 231.

⁹⁶ See *The President of the Republic of South Africa & Others v. Nello Quaglian & Others*, [2009] ZACC 1.

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

The Rules of Procedure require a copy of an international agreement together with an explanatory note to be presented to the Speaker of the National Assembly who lays it on the table of the House. The Speaker then refers it to the House Committee concerned or any other Committee that the House may decide for examination and reporting. After examining the agreement, the relevant Committee, in consultation with the Foreign Affairs Committee and any other Committee whose ministry may be affected by it, then presents a report to Parliament recommending its approval or rejection. The Speaker also refers all agreements of a technical, administrative and executive nature, or those that do not require ratification or accession to the relevant Committees for the receipt of information.

Besides self-execution agreements, extradition treaties do not require legislation to become part of the domestic law. In the *President of the Republic of South Africa & Others Vs Nello Quaglian & Others*⁹⁷, applicants who faced extradition from and to the United States of America contended that the Extradition Treaty between South Africa and the United States of America was not enforceable as it had not been domesticated by legislation. Rejecting that contention, the South African Constitutional Court (Sachs J) held that as the South African Extradition Act⁹⁸ authorized the President to enter into extradition treaties with foreign governments and that such agreements would take effect

⁹⁷ [2009] ZACC1.

⁹⁸ South African Extradition Act, No. 67 of 1962, Section 2.

once agreed to by Parliament, and the extradition treaty with the United States of America having met those criteria, no separate legislation was required. If that were to be the case, all of South African extradition treaties with other countries, and they are many, would require separate pieces of legislation most likely with identical which would make no sense.

It was also decided in the above case that once the President has decided to enter into a particular treaty, he can delegate the formal details of negotiations, execution and ratification to any member of the national executive, like the Minister for Foreign Affairs.

2.5.2.9 United States of America

The Constitution of the United States of America deals with treaties in what has been described as ‘remarkably complex’.⁹⁹ It is described as remarkably complex because it provides for a unique monist system in which both the legislature and the executive, unlike other countries, have all along been involved in treaty making.¹⁰⁰ Article II of the Constitution vests the executive power in the President. Some provisions of that Article have been held to give the President power to make international agreements other than treaties without the consent or authority of the Senate. These provisions include the Executive Power Clause in Section 1; the Commander-in-Chief Clause in Section 2; and the power to receive ambassadors and other public officials in Section 3. Where the powers granted in this Article are exclusive, like the Commander-in-Chief powers, the President may solely make international agreements commonly referred to as “executive

⁹⁹ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, at p. 194 at p. 157.

¹⁰⁰ See also Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p 194.

agreements”. *Dole v. Carter*¹⁰¹ is a classic example of the exercise of such authority. In that case, Senator Dole challenged President Carter’s authority to return to Hungary coronation regalia through an executive agreement, arguing that that required a bilateral treaty duly approved by the Senate. The District Court held that “[a]s a matter of law ... the President’s agreement to return the Hungarian coronation regalia is not a commitment requiring the advice and consent of the Senate under Article II, Section 2, of the Constitution.” On appeal, the American Court of Appeals asserted that the President’s action of returning the Hungarian property to the people of Hungary “uniquely demanded [the] single voiced statement of the Government’s views.”¹⁰² In the case of *United States v. Belmont*,¹⁰³ the Supreme Court of the United States held that the powers of the President of the United States in the conduct of foreign affairs included the power, without the consent of the Senate, not only to recognize Russia and establish diplomatic relations with it, but to also “to determine the foreign policy of the United States with respect to the Russian nationalization decrees.”¹⁰⁴ In that case, by a decree enacted in 1918, the Soviet Government, inter alia, nationalized and appropriated all of its property and assets of every kind and wherever situated including the deposit account with Belmont. As result, the deposit became part of the property of the Soviet Union until 1933 when, through exchange of diplomatic correspondence, in order to bring about a final settlement of the claims and counter claims between the Soviet Government and the United States, the Soviet Government released and assigned to the United States Government all amounts due to that government from American nationals

¹⁰¹ 444 F. Supp. 1065 (D. Kan. 1977), 569 F. 2d 1109 (10th Cir. 1977).

¹⁰² *Dole v. Carter*, 569 F.2d at 1110.

¹⁰³ *United States v. Belmont*, 1937, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134.

¹⁰⁴ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p. 218.

including the deposit in Belmont. That notwithstanding, Belmont refused to release the deposit and in a suit by the United States, the District Court held that it would be contrary to the controlling public policy of the State of New York to release the deposit. On appeal, the US Supreme Court overturned that decision and held, inter-alia the President had powers, without the consent of the Senate, to make such executive agreement with a foreign government.

Executive agreements are international compacts dealing with any matter falling within the purview of his independent power under the American Constitution that the President of the United States has power to make without the approval of the Senate. There is no express provision in the American Constitution authorizing them. The power has arisen from “constitutional usage of long standing” which, as stated in the above cases, has been recognized by the American Supreme Court.¹⁰⁵ Although their scope is not clearly defined, it is not mutually exclusive with the scope of the treaty-making power. They can be concluded in any area in which ordinary treaties can be made. Where prompt action is required and where the subject matter of the agreement requires frequent amendments, the President is authorized to invoke those powers when he believes that an international agreement is necessary in the national interest and when the treaty making procedure, which is normally quite long, is impracticable or likely to render ineffective an established national policy. They are also made in national security matters that require to be held in confidence.

Save for non self-executing executive agreements the implementation of which may require financial outlay which, ipso facto, require implementing legislation, all self-

¹⁰⁵ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p. 218.

executing executive agreements come into force upon execution.¹⁰⁶ Like all other international agreements or treaties, under the supremacy clause in the American Constitution,¹⁰⁷ they become part of the supreme law of the United States of America and supersede prior inconsistent legislation. They may also be superseded by any inconsistent Acts of the Congress.¹⁰⁸

Except for ‘executive agreements’ which, as stated, the constitution impliedly authorizes him to make, the American Constitution grants the President power to make international treaties, but only in consultation and by a resolution of at least two thirds of members of the Senate present. The Constitution provides that “[h]e [the President] shall have power, by and with the advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.”¹⁰⁹ The consent of the Senate is required at the end of the process before a treaty is ratified. If the Senate deems it fit, it is entitled to condition its approval upon certain conditions or reservations or declarations.¹¹⁰ The Senate Rules of Procedure stipulate the procedure to be followed in the referral of treaties to relevant Committee (with a majority being required at every stage) and their examination.¹¹¹ Once the Senate accords its consent to the making of a treaty, it has no power to recant such consent.¹¹²

¹⁰⁶ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p. 218.

¹⁰⁷ US Constitution Article VI, Section 2.

¹⁰⁸ Henkin, L. et. al. 1987. *Supra*, at p 219.

¹⁰⁹ US Constitution Article II, Section 2

¹¹⁰ Yoo, J. 2003. Participation in the Making of Legislative Treaties: The United States and Other Federal Systems. *Columbia Journal of Transnational Law*, 41, pp. 455-488 at p. 458.

¹¹¹ Rule XXX of the Rules of Procedure.

¹¹² See Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p. 211.

The treaties that the US makes fall into two broad categories, namely, self-executing and non self-executing treaties. The distinction between self-executing and non self-executing is made on political considerations. For instance, where a treaty relates to acquisition of territory and financial arrangements, those are said to be political questions of definition or exposition which should be left to the legislature and should not have automatic operation.¹¹³

Where implementing legislation is required in respect of a treaty that the Senate has approved, the American practice is to delay ratification until such legislation is passed. Once ratified, all self-executing treaties apply directly as part of the supreme law of the land, whereas non self-executing conventions are legally enforceable after legislative transformation.¹¹⁴ As is the case with the UK, although “there is a presumption that Congress will not legislate contrary to the international obligations of the state”, the American legislature can, however, take action the effect of which will be a breach of treaty obligations.¹¹⁵ In such case, the later legislation prevails within the American jurisdiction, but internationally the country would be liable for breach of that treaty.¹¹⁶ In *Diggs v. Schultz*,¹¹⁷ the court declared that: “under our constitutional scheme, Congress can denounce treaties if it sees it fit to do so, and there is nothing the other branches of government can do about it.” Similarly, a provision in a treaty that US enters

¹¹³ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co. at p. 211.

¹¹⁴ Shaw, M. 2008. *International Law*. 6th ed. Cambridge University Press, at p. 118.

¹¹⁵ *Ibid*, at p. 120.

¹¹⁶ Henkin, L. et. al. 1987. *Supra*, at p. 206.

¹¹⁷ 470 F.2d 461, 466-7 (1972); 60 ILR, pp. 393,397.

into and is effective as part of the US law supersedes any inconsistent preexisting legislation or treaty.¹¹⁸

Whatever the nature of the treaty, whether it is an executive agreement made by the President of the United States without the approval of the Senate or Congress, or it is a self-executing or non self-executing treaty, once ratified treaties automatically become part of the American supreme law. Article VI Section 2 of the US Constitution provides that:

All Treaties made or which shall be made with 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.¹¹⁹

With the foregoing comparative examples of state practice in other countries, we now move to consider what Kenya's position has been prior to promulgation of the new constitution on 27th August 2010 before the present position is considered. A comparative analysis of the foregoing systems and the Kenyan position will be in Chapter Four.

¹¹⁸ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p. 206.

¹¹⁹ US Constitution Article II.

CHAPTER THREE

3 RATIFICATION OF TREATIES IN KENYA

3.1 The Kenyan Position on Treaty Law Before August 2010

Prior to August 2010, the Kenyan Constitution did not have any express provision for treaty making and implementation. Section 23 of the former Constitution, which vested the executive powers in the President was silent on treaty-making. Kenya, nonetheless, entered into treaties and acceded to others although the exact number is not known. It is estimated that as of December 2010, Kenya had entered into about 218 treaties. Having been a former British colony it followed the British system¹ under which treaty making is a function of the executive and treaties become part of municipal law after they are domesticated by legislation. The British position has been made clear in several cases. For example, in *Maclaine Watson v. Department of Trade and Industry*,² where claims seeking to enforce treaty obligations, which had not been incorporated into English law were made, dismissing the appeal, Lord Oliver of the English House of Lords stated:

as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation.³

¹ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

² [1989] 3 All ER 523.

³ *Maclaine Watson v. Department of Trade and Industry* [1989] 3 All ER 523 at pp. 544-5.

Following this dualist system, treaties become part of the Kenya's domestic law when domesticated by appropriate legislation.⁴ This was made clear by the Court of Appeal in the case of *Okunda v. Republic*⁵ where it stated that:

the provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya.

The issue in that case was whether or not section 8(1) of the then East African Community Official Secrets Act, enacted under the East African Community Treaty to which Kenya was a party, could override section 26 of the Kenya Constitution. The Kenyan High Court held that it could not. While striking out an appeal arising there from on grounds of jurisdiction and incompetency, the Court of Appeal for Eastern Africa further observed:

If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the constitution, then to the extent of such conflict such provisions are void.

This point was recently reiterated by High Court of Kenya in the cases of *RM & Another v Attorney General*⁶ and *Peter Anyang' Nyong'o & 10 Others .v Attorney General & Another*.⁷ The claim in the former case was that by shielding from parental responsibility fathers of children born out of wedlock, section 24(3) of the Children Act was

⁴ Constitution of Kenya Review Commission Report, 2007, p. 150.

⁵ See Court of Appeal decision in *Okunda v. Republic* [1970] E.A. 453, at 460.

⁶ Nairobi HCCC No. 1351 of 2002; [2006] eKLR.

⁷ Nairobi HC Constitutional Petition No. 46 of 2007; [2007] eKLR.

discriminatory and therefore unconstitutional⁸ and contrary to the United Nations Convention on the Rights of the Child which prohibits discrimination⁹ and the African Charter on the Rights and Welfare of the Child which expressly states that “no child shall be deprived of maintenance by reference to the parents’ marital status.”¹⁰ Focusing on the latter, the court held that that provision was unenforceable as it had not been domesticated into the Kenyan municipal law.

In the *Anyang Nyongo case* the court stated:

There is no doubt that the ...[executive] has full powers to negotiate and conclude treaties with foreign states and that, the making of a treaty being an act of state, treaty obligations cannot be enforced in a municipal court [before they are domesticated].¹¹

In that case, the governments of Kenya, Uganda and Tanzania had on 14th December 2006, amended the Treaty for the Establishment of the East African Community of 1999, pursuant to Article 150(6) thereof, to establish the East African Court of Justice and Kenya’s Minister for Foreign Affairs had, on 29th December, 2006, after laying the amendment before Parliament as required, ratified the same. The petitioners challenged the Minister’s authority to do that, arguing that the amendment or protocol was in effect an amendment to the Treaty for the Establishment of the East African Community Act, No. 2 of 2000, which function is a preserve of the Kenyan Parliament. The Kenyan High Court (Justice Nyamu) quite correctly rejected that argument and held that treaty making is the preserve of the executive arm of government and that the court has no jurisdiction

⁸ Constitution of Kenya 2008, Section 82(2).

⁹ United Nations Convention on the Rights of the Child. Vol. 1577 UNTS p. 3. Article 2(1).

¹⁰ The African Charter on the Rights and Welfare of the Child. OAU Doc. CAB/LEG/24.9/49 (1990). Article 18(1).

¹¹ Nairobi HC Constitutional Petition No. 46 of 2007; [2007] eKLR.

to interfere with it. Accordingly, until they were domesticated into municipal law by legislation, treaties did not form part of the law of Kenya that courts could enforce.¹²

Prior to the promulgation of the Kenya Constitution on 27th August 2010, the only sources of law in Kenya were the Kenyan Constitution, the Kenyan legislations, various customary laws, the English Common law and some English Acts of general application. This was made clear by section 3(1) of the Judicature Act¹³ which provides that:-

[t]he jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with-

- a) the Constitution;
- b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the schedule to this Act, modified in accordance with Part II of that schedule;
- c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law; the doctrines of equity and the statutes of general application in force in England on 12th August, 1897, and the procedure and practice observed in courts of justice in England on that date.

The other sources included case law. The application of common law and the doctrines of equity imported into Kenya the general principles of customary international law. This, however, excluded treaties to which Kenya was a party from automatically becoming part of the municipal law of Kenya until after domestication by legislation. With the new Constitution, however, ratified treaties are shall now form part of the law of Kenya.

The Vienna Convention on the Law of Treaties does not provide for the domestication of treaties into municipal law. In the circumstances, various states adopt their own

¹² Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

¹³ Cap 8 of the Laws of Kenya.

procedures to domesticate provisions of treaties they enter into. Kenya has not domesticated all the treaties that it has entered into and ratified.¹⁴ Except for the Geneva Conventions Act,¹⁵ the Diplomatic Privileges and Immunities Act,¹⁶ the Bretton Woods Agreements Act,¹⁷ the Investment Disputes Convention Act,¹⁸ and the Treaty for the Establishment of East African Community Act,¹⁹ to which the entire provisions of the respective treaties were annexed as schedules, the other pieces of domesticating legislation contain provisions of treaties without specifically referring to those treaties. In some cases, provisions of one treaty are contained in more than one Act.²⁰

3.2 The Kenyan Position on Treaty Law After August 2010

Although it is not a legal requirement as it is governed by international law, like the old Constitution, the Constitution of Kenya 2010 does not expressly vest the treaty making power on any organ of state or individual. But this is not unique. Only a few constitutions of other countries in the world, such as those of the United States and the Republic of South Africa, are explicit on the exercise of that function. For instance, the U.S. Constitution provides that the President “shall have power, by and with the advice and consent of the Senate, to make treaties provided two-thirds of the Senators present concur.”²¹ The Constitution of South Africa, on its part, expressly provides that “[t]he negotiating and signing of all international agreements is the responsibility of the

¹⁴ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

¹⁵ Chapter 198, Laws of Kenya (Revised Edition 1970).

¹⁶ Chapter 179, Laws of Kenya (Revised Edition, 1984).

¹⁷ Chapter 464, Laws of Kenya (Revised Edition, 1991).

¹⁸ Chapter 522, Laws of Kenya (Revised Edition, 1967).

¹⁹ Act No. 2 of 2000.

²⁰ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

²¹ US Constitution Article II, Section 2.

national executive.”²² Most others are implicit on the treaty making being a function of the executive arm of government.

Clause 3 of the Kenya Ratification of Treaties Bill, 2011 simply talks of treaties “concluded by Kenya.” Although it does not state which organ of state will make treaties, however, Clause 4 of the Bill, which requires “a memorandum outlining the objects of the treaty in respect of which approval for ratification is sought” to be prepared by “the relevant State Department” and their initial approval by the Cabinet implies that treaties are going to continue being negotiated and concluded by the executive.

As stated such a provision does not have to expressly stated in would constitutions or other legislations as treaty making is governed by international law under which it is understood to be a function of the executive arms of government.²³

3.3 Kenya’s Proposed Mode of Ratification of Treaties

The Constitution does not provide for the mode of ratification. That, however, has now been set out in the Ratification of Treaties Bill, 2011.²⁴ The following is a brief comment on that Bill which Kenya is about to enact to provide for the ratification of treaties.

Previously, the state had no legislation governing treaties to which it was a party. The memorandum setting out the objects of the Bill makes quite clear:

²² Constitution of South Africa, Section 231(1).

²³ Thorp, A. 2011. Parliament’s New Statutory Role in Ratifying Treaties. Available at: www.parliament.uk/briefing-papers/SN05855.pdf [Accessed September 20, 2012].

²⁴ The Ratification of Treaties Bill, 2011.

The object of this Bill is to provide for a standardized procedure for ratification of international treaties by the Government of the Republic of Kenya. Although this procedure has been lacking in Kenya for several years leading to lack of clarity as to the exact number and identity of international instruments which have a binding effect on the citizens of this country, the need for a law to regulate this area has been aggravated by Article 2(6) of the new Constitution which requires that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution.

Although the main object of the proposed Act is “to provide for a standardized procedure for ratification of international treaties by the Government” of Kenya, the enactment will be a milestone. The Bill provides for the creation, within the State Department responsible for foreign affairs, of a department with a full-fledged Registry of Treaties (the Registry) under the leadership of the Registrar of Treaties (the Registrar).²⁵

Treaties will be negotiated by various Ministries, which are, under the 2010 Constitution, known as State Departments. Clause 10 of the Ratification of Treaties Bill requires all State Departments to deposit in the Registry copies of all treaties they negotiate and enter into, giving the status of each. For the ones the Government has already ratified, but has not been domesticated, the Bill requires the relevant Cabinet Secretaries to raise Bills within 18 months of its commencement for their domestication.²⁶ If that is done, in about two years after the enactment of the Ratification of Treaties Act, Kenya will have a register of all the treaties it has entered into and their implementation status will be clear. That will not only be useful to the legal practitioners, but also to the courts when called upon to enforce any of them.

²⁵ The Ratification of Treaties Bill 2011, Clause 10.

²⁶ The Ratification of Treaties Bill 2011, Clause 16(2).

Currently, nobody can tell for sure the exact number and/or the nature of the many treaties that Kenya has entered into, as there is no record of the same.²⁷ However, according to the records held by Department of Foreign Affairs,²⁸ which may not be quite accurate, as at the end of 2010, Kenya had ratified 139 treaties, excluding Protocols and amendments as well as annexes. The list of treaties Kenya entered into as at 30th August 2012 is annexed to this dissertation as Annex No. 1 for ease of reference.

If and when the Bill becomes law, ratification will thereafter be preceded by the approval of any treaty by both the Cabinet and Parliament. As stated, it is not the State Department for Foreign Affairs that negotiates and concludes treaties. Each State Department deals with the treaties that fall within its purview. Previously, the Ministry concerned, in consultation with the Attorney General as chief legal adviser of the Government, prepared and presented to the Cabinet a memorandum outlining the object of the treaty and the advantages or disadvantages, if any, the country would gain or suffer by entering into the treaty. Upon approval by the Cabinet, it was laid before Parliament, for information and debate if necessary.²⁹

To a large extent, this procedure will be retained. Before the treaty is presented to Parliament for approval for ratification, Clause 4 of the Bill requires the same to be approved by the Cabinet. It provides that the relevant State Department, presumably after completing the negotiations, adopting and signing of the treaty, shall be required to

²⁷ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

²⁸ Discussion had with Mr. Rotiken the Third Secretary in the Ministry of Foreign Affairs at his office on 21st August, 2012.

²⁹ Stating this position to Parliament in response to a question on the relationship between the European Economic Community and the three East African countries, Mr. Mwai Kibaki, then Minister for Commerce and Industry, stated that once a treaty was approved by the Cabinet it was laid on the table of Parliament for information "just in case there is any debate about it." See the Hansard, Kenya National Assembly Official Reports, September, 1968. Vol. XVI.

consult with the Attorney General and prepare a memorandum to seek the approval of the Cabinet. Besides having “a schedule setting out in full the provisions of the treaty proposed to be ratified”, the memorandum shall be required to outline the objects of the treaty and point out the constitutional implications, if any, that the treaty entails and the “national interests which may be adversely affected.” In other words, the memorandum shall have to state whether or not the treaty will require any amendment to the Constitution, and whether or not there are any reservations that the state would like to make to the treaty and, if so, specify those reservations and their implications. This is important because Clause 5(5) of the Bill outlaws the approval for ratification of any treaty or reservation or part thereof that is contrary to the Constitution or “negates any of the provisions of the Constitution even if the reservation is permitted under the relevant treaty.” This appears to have been the position before. In the case of *Okunda v. Republic*³⁰, the Court of Appeal for Eastern Africa stated that:

[i]f the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the constitution, then to the extent of such conflict such provisions are void.

Further, the relevant State Department’s memorandum will be required to expressly affirm that the ratification of the treaty will “be in keeping with or otherwise advances” the values and objectives contained in the Constitution.³¹

As opposed to the previous procedure of merely informing Parliament of a treaty that the Government proposes to ratify,³² the Ratification Bill requires mandatory Parliamentary

³⁰ See Court of Appeal decision in *Okunda v. Republic*, [1970] E.A. 453, at 460.

³¹ Kenya Constitution, 2010, Article 10.

approval of all treaties before ratification. So upon approval of a treaty by the Cabinet, paragraph 2 of Clause 4 requires the relevant Cabinet Secretary to consult with the Attorney General and prepare, within three months of the Cabinet approval, a Bill for consideration by Parliament. The Bill shall be accompanied by a schedule setting out in full the provisions of the treaty sought to be ratified and a memorandum similar to the one presented to the Cabinet. That memorandum shall, in addition, contain an affirmation that the treaty does not contradict, but advances the constitutional values of the State and any reservations the State wishes to make to the treaty.

Clause 5(2) of the Bill requires the relevant parliamentary committee, during the consideration of the Bill for ratification of a treaty, “to ensure public participation in accordance with the laid down parliamentary procedures.” This will obviously be as provided by Parliamentary Standing Order No.180 which provides:

All committee proceedings shall be open to the public except-

- (a) where the Committee otherwise decides;
- (b) when the Committee is considering its recommendations for the purposes of writing and compiling its report.³³

Depending on the subject matter of the treaty, Clause 5(1) of the Ratification of Treaties Bill provides that a Bill seeking the approval of a treaty shall be considered by either or both Houses of Parliament. This presupposes that treaties relating to matters exclusively affecting County Governments shall be considered by the Senate as well as the National Assembly. Those relating only to national issues, like allocations and expenditure of national revenue between the various levels of Government, shall be considered by the

³² By laying the treaty before Parliament for a period of 21 days.

³³ Republic of Kenya National Assembly. 2008. *Standing Orders*. Nairobi: Government Printer.

National Assembly while those relating to national issues, like amendments to the Constitution, shall be considered by both Houses of Parliament.³⁴

Approval by the Senate of treaties affecting particular counties is analogous to the procedure followed by countries like Canada and Australia with federal forms of government, which also require approval of the federal units concerned.³⁵ If Parliament deems it fit to ratify a treaty with reservations, then the same shall be incorporated into the Act to be passed³⁶ and the ratification shall be subject to those reservations.³⁷

The proposed Act will also codify the grant of authority, referred to as the grant of “full powers”, to a person or persons designated by a competent state authority to negotiate, adopt, or authenticate the text of a treaty for ratification.³⁸ The actual ratification of treaties is to be done by the Cabinet Secretary for Foreign Affairs. Clause 7(1) provides that if Parliament passes the Bill, the Cabinet Secretary for Foreign Affairs shall prepare, sign and seal the instrument of ratification and thereafter deposit it with the requisite international body and send a copy to the Registrar of Treaties for filing. It is important to note that where Parliament rejects any such Bill, the Government shall not ratify the treaty.³⁹ Clause 9 of the Bill criminalises ratification of any treaty that has not been

³⁴ Kenya Constitution, 2010, Articles 94, 95 and 96.

³⁵ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509.

³⁶ The Ratification of Treaties Bill, Clause 5(4).

³⁷ The Ratification of Treaties Bill, Clause 6(2).

³⁸ The Ratification of Treaties Bill 2011, Clause 8.

³⁹ The Ratification of Treaties Bill, Clause 6(3).

approved by Parliament and provides a stiff sentence for anyone found to have contravened that provision.⁴⁰

After the treaty has been ratified and copies thereof deposited with the Registrar and the relevant international depositary, Clause 12(2) requires the Cabinet Secretary of the relevant State Department to notify the public, through publication in at least two newspapers of nationwide circulation, which treaties in any way bind or to which Kenya is a party. The relevant State Department in respect of each treaty is also required “to take measures to inform and create awareness to the public about the effects and benefits of the treaty.”⁴¹

Some treaties may require the State to take some specific action. In such a case, Clause 12(1) requires that once in every financial year, the Cabinet Secretary for Foreign Affairs “shall cause to be laid before the National Assembly...a report containing records of all treaties which Kenya has ratified and which may in any way bind Kenya to specific actions.”⁴² Where a treaty provides for submission of periodic reports as part of its monitoring mechanisms, that should be done by the relevant State Department under the supervision of the Cabinet Secretary for Foreign Affairs.⁴³ Any amendments to the treaty shall follow the procedure outlined herein above.⁴⁴

The denunciation provisions in Clause 14 of the Bill are important given the recent efforts Kenya made to have the cases before the International Criminal Court (ICC)

⁴⁰ Imprisonment for a term not exceeding 15 years or to a fine not exceeding twenty million shillings or to both.

⁴¹ The Ratification of Treaties Bill 2011, Clause 12(3).

⁴² The Ratification of Treaties Bill 2011,12(1).

⁴³ The Ratification of Treaties Bill 2011,Clause 13.

⁴⁴ The Ratification of Treaties Bill, 2011, Clause 7(1).

involving its subjects withdrawn and remitted to it for trial or at least deferred for one year.⁴⁵ Sub-clause (1) provides that:-

[w]here Kenya wishes to withdraw from a treaty, the relevant Cabinet Secretary shall prepare a cabinet memorandum indicating the reasons for such an intention.

As provided by sub-clause (2) thereof, such withdrawal is, however, subject to the approval by both the Cabinet and Parliament. Even with those approvals being accorded, the withdrawal will further be governed by the provisions of the treaty itself. For instance, Article 127 of the Rome Statute of the International Criminal Court⁴⁶ allows withdrawal only after one year's notice. It provides that:-

[a] State party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the receipt of the notification, unless the notification specifies a later date.

It is perhaps due to this provision that the Government of Kenya reneged on its intention to withdraw from the Statute. So much for the Ratification of the Treaties Bill. Chapter Four examines the implications of Article 2(6) and Chapter Five makes concluding remarks and proffers recommendations.

⁴⁵ The cases against Uhuru Kenyatta, Francis Muthaura, Hussein Ali, William Ruto, Henry Kosgey and Joshua Sang.

⁴⁶ Rome Statute of the International Criminal Court. Vol. 2187 UNTS p. 3.

CHAPTER FOUR

4 LEGAL IMPLICATIONS OF ARTICLE 2(6) OF THE KENYA CONSTITUTION 2010

4.1 Introduction

The treaty making function is the preserve of the executive arms of government. In dualist states, unlike under monism where the legislatures are heavily involved in the approval of treaties prior to ratification, the legislatures play a minimal role. Like the former Constitution, the current Kenyan Constitution is silent on the state organ vested with the authority to make treaties. However, from its practice, Kenya has been a dualist state. Now under Article 2(6) of the Kenyan Constitution 2010 “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya.”¹ And in the Ratification of Treaties Bill, Kenya proposes to have all treaties it enters into approved by Parliament. Has Kenya now changed from a dualist to a monist state or to a hybrid system? If so, what prompted the change and what are the implications of the change? Will the proposal not offend the doctrine of separation of powers? Are ratified treaties going to create legal rights and obligations directly justiciable before they are domesticated? The Ratification of Treaties Bill also makes public participation an integral part of the process of approval of treaties for ratification. Are all treaties including defence pacts with national security implications going to be discussed in public? Is the proposed procedure not going to create delays in the treaty making process? These are the issues which this chapter discusses.

¹ Constitution of Kenya, 2010, Article 2(6).

4.2 The Treaty Making Authority

Under the doctrine of separation of powers, the legislative function is a role of the parliament. That is why Article 94(1) of the Kenya Constitution 2010 expressly vests the people's legislative authority in Parliament. It asserts that:

[n]o person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

Through agreements reached between states, new rules on diverse subjects, like defence, criminal law, finance, trade and investment as well as the environment and human rights, emerge that are adopted and generate new law and policy. Once ratified, treaties are, therefore, a significant source of law in most countries of the world today.² In the United States of America, for example, "treaties...often have effect as law like acts of Congress."³ To that extent, one can therefore say that, in its treaty making function, the executive also legislates.

This, however, does not in any way offend the doctrine of separation of powers. As noted above, traditionally, the treaty making power resides with the executive. This is because, under international law, it is the executive arm of government that makes treaties.⁴ Diplomats, under the executive arms of government world over, determine foreign policies and enter into and ratify treaties. The legislatures play no role in foreign

² Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509.

³ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at p. 194.

⁴ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament. See also Thorp, A. 2011. Parliament's New Statutory Role in Ratifying Treaties. Available at: www.parliament.uk/briefing-papers/SN05855.pdf [Accessed September 20, 2012].

policy, leave alone treaty making, except in enacting implementing legislation in respect of non-self-executing treaties.⁵ Save for the United States of America, South Africa, Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, and Sweden, which, under their respective Constitutions, involve their legislatures in the treaty making, most of the other states, especially the Commonwealth States, follow the British constitutional tradition under which parliament is not involved in the treaty making function.

Besides being the legal position under international law, there is also good reason for vesting the treaty making power in the executive. It is practically impossible for legislatures to enter into treaties. As a matter of fact, the 18th century jurists thought it was impossible for the people represented by their respective legislatures to be involved in treaty making. Expressing the common view of the time, the legendary 18th century lawyer, Sir William Blackstone stated:-

It is impossible that individuals of a state, in their collective capacity, can transact the affairs of the state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of the people are united, and form by that union a consistency, splendour, and power, and that make him feared and respected by foreign potentates; who would scruple to enter into any agreements, that must afterwards be reviewed and ratified by a popular assembly.⁶

⁵ Mason, D. 2007. *The Constitutional Evolution of Deliberative Democracy in Treaty Making*. Available at: http://www.treatylaw.org/documents/The%20Constitutional%20Evolution%20of%20Deliberative%20Democracy%20in%20Treaty%20Making%20%207_%20July%202010.pdf [Accessed September 20, 2012].

⁶ Sir William Blackstone in his legal classic *Commentaries on Laws of England* (1765-1769), Book 1, Chapter 7, as cited in Mason, D. 2007. *The Constitutional Evolution of Deliberative Democracy in Treaty Making*, Ibid, at p. 9.

Sir William Blackstone was not alone in this view. Even Alexis de Tocqueville, the great populist of early American democracy, saw democracy with the strict separation of powers and the role of law-making reserved for the legislatures only as inefficient in external affairs and therefore inimical to good foreign policy. He stated:-

Foreign policy demands scarcely any of those qualities, which are peculiar to a democracy; on the contrary it calls for the perfect use of almost all those qualities in which a democracy is deficient. Democracy ... fortifies the respect for law in all classes of society, but it can only with great difficulty regulate the details of an important undertaking, persevere in a fixed design, and work out its execution in spite of serious obstacles. It cannot combine its measures with secrecy or await their consequences with patience. These are qualities, which are more characteristic of an individual or aristocracy.⁷

In the middle of the twentieth century, Harold Nicholson, the renowned diplomatic theorist, argued that the ordinary masses cannot be involved in the treaty making process as they have no knowledge of foreign policy.⁸ He observed that it is impossible for diplomats to negotiate treaties in public, that is, to take instructions from a large number of people who may have conflicting views on the subject matter of a treaty. He said treaty making requires the certainty and celerity of a diplomat who negotiates for a single well informed executive.

Giving his views to the Constitution of Kenya Review Commission, Dr. Bonaya Adhi Godana, then assistant minister for foreign affairs, said most people make rational

⁷ Tocqueville, A. 1835. *Democracy in America* cited in Mason, D. 2007. *The Constitutional Evolution of Deliberative Democracy in Treaty Making*, Available at: http://www.treatylaw.org/documents/The%20Constitutional%20Evolution%20of%20Deliberative%20Democracy%20in%20Treaty%20Making%20%207_%20July%202010.pdf [Accessed September 20, 2012].

⁷ Kenya Constitution 2010, Articles 118 and 196 respectively.

⁸ Tocqueville, A. 1835. *Democracy in America* cited in Mason, D. 2007. *The Constitutional Evolution of Deliberative Democracy in Treaty Making*. Ibid.

decisions about things within their own experience.⁹ The more remote an issue is from one's personal experience, the less likely one is able to make a rational decision on such an issue. As foreign policy issues are complex and involve matters that are not in their immediate or direct interest, ordinary citizens are not competent to make rational decisions in such matters. In his view, therefore, it is a waste of time to involve ordinary citizens in treaty making processes.¹⁰

In respect of Australia, it was argued that opening up the treaty making function to either parliament or the civil society or both would diminish Australian sovereignty and that the Australian diplomacy would not only be hamstrung by the legislature, but that the Joint Standing Committee on Treaties (JSCOT) would also “add a further layer of useless bureaucracy to the treaty-making process,”¹¹ thus making it uncertain and inefficient.

These objections are nowadays an almost forgotten issue. Over the years, as democracy has developed and technology has improved the capacity of ordinary people to cooperate on international issues, the domestic constituencies have increasingly influenced the treaty making processes.¹²

The traditional dualist view, which reserves the treaty making function for the executive arms of government with the legislatures only being involved in enacting implementing

⁹ Godana, B. 2001. Constitutionalisation of Foreign Policy and Diplomatic Relations. In: The Constitutional of Kenya Review Commission. 2001. *Report of the Constitution of Kenya Review Commission*, at pp. 165-170.

¹⁰ Ibid.

¹¹ Mason, D. 2007. *The Constitutional Evolution of Deliberative Democracy in Treaty Making* Available at: <http://www.treatylaw.org/documents/The%20Constitutional%20Evolution%20of%20Deliberative%20Democracy%20in%20Treaty%20Making%20%207%20July%202010.pdf> [Accessed September 20, 2012].

¹¹ Kenya Constitution 2010, Articles 118 and 196 respectively, at p. 20.

¹² Mason, D. 2007. *Supra*, at p. 25.

legislation, has also increasingly been influenced by the burgeoning human rights internationalism of the modern era which demands that in order to comply with their international law obligations, states must ensure that the treaties they are party to as well as the rulings of supranational bodies like the Human Rights Committee are implemented in their domestic legal systems¹³ thus requiring parliamentary involvement.

The intervention of legislatures, and even that of individual members of the public, in the approval of treaties for ratification, is therefore a norm being increasingly embraced by many states world over these days. This has no doubt also been influenced by the views of people like Edmund Burke who observed that good policy (no doubt including foreign policy) has to be based on public opinion.¹⁴

As a result, nowadays, though states still control foreign policy, with the globalizing world increasingly embracing democratic governments, in most countries Parliament plays an important role in treaty ratification. Many countries of the world, some by legislative authority¹⁵ and others simply by mere policy and practice,¹⁶ have and are opting for legislative involvement in the treaty ratification process. For instance in countries like the Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, South Africa and Sweden, Parliament approves all treaties and certain agreements.

The need for Parliamentary involvement in the treaty ratification process is both constitutional and historical. Constitutionally, under the Westminster-style and the

¹³ Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties *Columbia Law Journal*, 107, pp. 628-705, at p. 637.

¹⁴ Payne, E. ed. 1790. *Selected Works of Edmund Burke: Volume II*. Available at: <http://www.econlib.org/library/LFBooks/Burke/brkSWv2c0.html> [Accessed September 20, 2012] at p. 39.

¹⁵ For example Antigua and Barbuda whose have in their Ratification of Treaties Act of 1987 given Parliament authority to approve treaties before they are ratified.

¹⁶ Example are Britain, Canada and Australia. See Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament.

doctrine of separation of powers, the law making function resides with the legislature. Under the Kenya Constitution 2010 for instance, Article 94(1) vests the people's legislative authority in Parliament. However, as under international law it is the executive arms of government which handle the foreign policy of most states, and despite that treaties are a significant source of both domestic and international law, it is the executives, that make treaties.¹⁷ As stated through agreements reached between states, new rules on diverse subjects, like defence, criminal law, finance, trade and investment as well as the environment and human rights, emerge that are adopted and generate new law and policy. Once ratified, treaties are, therefore, a significant source of law in most countries of the world today¹⁸ which are not only binding on state parties, but must also be performed in good faith.¹⁹

As some of the treaties that states enter into contain serious obligations that have military and economic sanctions, expenditure of colossal sums of public funds, far-reaching political implications and affect individual human rights, over the years, many people have held the view that it is an anomaly (referred to in Canada as a “democratic deficit”) to exclude legislatures, as the law making bodies, from being involved, at least in the ratification of treaties. Governments in many countries, therefore, seek parliamentary approval or consent in the treaty making processes.²⁰

Historically, legislators have also resented their exclusion from the scrutiny and approval of treaties prior to ratification. In the US for example, although its system

¹⁷ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509.

¹⁸ Harrington, J. 2005. Ibid.

¹⁹ The Vienna Convention on the Law of Treaties. Vol. 1155 UNTS p. 331, Article 26.

²⁰ Harrington, J. 2005. Supra, pp. 465-509.

allows more parliamentary scrutiny than most dualist states, the House of Representatives has for a long time, nonetheless, bristled over its exclusion from treaty making describing it as “undemocratic anachronism.”²¹

The civil society has also raised its voice in a number of issues and demanded public participation in the approval of treaties. For instance, the Ottawa Convention on the Prohibition of Anti-Personnel Mines,²² which had been signed by over 150 states, resulted from the pressure exerted by the International Campaign on Ban Landmines, a non-governmental organization launched in 1992.²³

In Britain, the history of parliamentary involvement in treaty making goes back to the Ponsonby Rule of 1924. Prior to that year, appalled by the consequences of the secret treaties of alliance entered into by Britain and other states prior to the first World War, Arthur Ponsonby had long campaigned for parliamentary control over foreign affairs and against secret diplomacy. As a radical Liberal Party MP, he was a leading member of an anti-war organization, which opposed Britain’s involvement in the first World War. In 1924 when he was under-secretary for Foreign Affairs, during the debate on the Treaty of Peace (Turkey) Bill in the House of Commons, he undertook to inform Parliament of all other “agreements, commitments and undertakings, which may in any way bind the nation to specific action in certain circumstances.”²⁴ Since then, a rule has developed requiring the depositing of treaties on the table of both the Houses of Parliament for a

²¹ Henkin, L. et. al. 1987. *International Law Cases and Materials*, St. Paul, Minnesota: West Publishing Co., at pp. 194 & 216.

²² Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. Vol. 2056 UNTS p. 211.

²³ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509.

²⁴ U.K., H.C., Parliamentary Debates, 5th ser., vol. 171, col. 2005 (1 April 1924).

period of at least 21 working days after they have been adopted and signed but before they are ratified, the rationale being that if need be, Parliament can debate the proposed treaties and express its opinion on them.

Even with that rule, the British Parliament had no formal role in the ratification of treaties in the United Kingdom. However, after the enactment of the Constitutional Reform and Governance Act 2010 which came into force on 11th November 2010, besides laying treaties on the table in both Houses of Parliament for a period of 21 sitting days before it ratifies them, the British Government is now required to publish all treaties requiring ratification like major political, military and diplomatic issues, as well as those that require legislation to implement and expenditure of public funds.²⁵

The rule of laying treaties before Parliament was copied by the British colonies, which have retained it even after independence. Some of them, like Canada and Australia, have, by practice, also made changes and now require parliamentary approval of many treaties, especially those of great national importance, and public participation before they are ratified. This is besides enacting parliamentary involvement in the treaty implementation legislation.²⁶

As stated above, Kenya, as a former British colony and following its dualist system, has traditionally also laid treaties on the table of Parliament for at least 14 days before ratification. However, to be relevant, and effective, Kenyans, no doubt realizing that any

²⁵ See English Constitutional Reform and Governance Act 2010, Chapter 2, Part 2.

²⁶ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509.

nation's constitution must adapt to the order of its times and its world,²⁷ demanded that its entire Constitution be reviewed to be in tandem with those of other countries.²⁸ They told the Constitution of Kenya Review Commission that though Kenya should continue following the dualist system and the executive should retain the treaty-making power, except for the self-executing treaties, all treaties should be subject to public scrutiny and parliamentary approval before ratification.²⁹ Consequently, with the review of the Constitution, the Ratification of Treaties Bill proposes that all treaties entered into by the executive are going to require parliamentary approval before ratification.³⁰ Following the tradition of states with federal governments, such as Canada and Australia and the quasi-federal British government,³¹ the Bill also proposes that the Kenyan Senate be involved in the approval of treaties that will particularly affect Counties.³²

With this constitutional and historical background, it is therefore not surprising that Kenya now proposes to have more parliamentary involvement in its treaty making process. Besides public demand that the Kenyan executive should not be allowed to saddle the country with treaty obligation without involving people's representatives, the proposed change has also been informed by the global trend requiring parliamentary approval of treaties prior to ratification.

²⁷ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty law Making: (Re-)Establishing a Role for Parliament at pp. 154-5.

²⁸ Ngondi-Houghton, C. 2006. *Access to Justice and the Rule of Law in Kenya: A Paper Developed for the Commission for the Empowerment of the Poor*. New York: Commission on the Legal Empowerment of the Poor at p. 45.

²⁹ Constitution of Kenya Review Commission. 2005. *The Final Report of the Constitution of Kenya Review Commission*. Nairobi: CKRC at p. 154-5.

³⁰ See Clauses 4 and 5 of the Ratification of Treaties Bill, 2011.

³¹ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty law Making: (Re-) Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509.

³² See Clause 5(2) of the Ratification of Treaties Bill, 2011.

As stated, Kenya is slow in enacting domesticating legislation.³³ As is clear from the annexed list of treaties Kenya entered into up to 30th August 2012, there are numerous treaties that Kenya has ratified but has not domesticated. The change is also intended to address this mischief. The issue that then arises and needs to be addressed is whether or not, with the ratification of all treaties requiring prior parliamentary approval, Kenya is now a pure dualist, pure monist or it has a hybrid system?

4.3 Is Kenya now a Pure Dualist, Pure Monist or a Hybrid System?

Article 2(6) of the Constitution of Kenya, 2010 introduced a fundamental change in approach in the domestication of treaty provisions from dualism to neither pure dualism nor pure monism. Pure monism views all law as emanating from the same unitary natural law source. This theory holds that international law and national law are manifestations of a single conception of law and are thus part of a single order.³⁴ It teaches that law is indivisible; that all law, whether of domestic or international origin, is one and that international law is thus incorporated directly or automatically into municipal law with no need of a specific act of adoption.³⁵ In other words, monism puts international law at par with domestic or internal law. International law is directly applicable in the national legal order and there is, therefore, no need for any domestic implementing legislation. As such, municipal courts are bound to directly apply

³³ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

³⁴ Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties *Columbia Law Journal*, 107, pp. 628-705, at p. 641.

³⁵ *Ibid*.

international law without any recourse to adoption or transformation by the legislature.³⁶

A good example of a monist state is Switzerland whose constitution provides that once a self-executing treaty is ratified and enters into force for Switzerland, it becomes part of the Swiss law and does not require any legislative act of incorporation. Once it is part of the Swiss law, it can be invoked in courts provided that its terms are precise enough for courts to apply it.³⁷ Other countries with monist systems include, France, Germany, The Netherlands and Poland.

In contrast to the monist theory is the dualist view, which is generally associated with common law countries,³⁸ and is anchored on the doctrine of sovereignty under which states maintain supreme authority within their jurisdictions and each country retains sovereignty over its citizens.³⁹ The theory holds that international law and domestic law are separate legal systems whose rules operate “separately and cannot purport to have an effect on, or overrule, the other”⁴⁰ hence a ‘dual’ system. International law governs relations between sovereign states while municipal law “applies within a state and regulates the relations of its citizens with each other and with the executive.”

A pure dualist system requires that once a treaty has been ratified, domestic legislation must be enacted to enable its provisions to be applicable domestically. It holds that for a convention to operate and be enforceable by individuals within the domestic legal system, there must be an act of transformation, that is, a government action by the state

³⁶ Oppong, R. 2006. Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa, at p. 297.

³⁷ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press.

³⁸ African civil law countries have traditionally been seen as monist and common law countries as dualist; See Petersen, N. 2009. *The Reception of International Law by Constitutional Courts Through the Prism of Legitimacy*. Bonn: Max Planck Inst. for Research on Collective Goods at p. 3.

³⁹ Jennings, R. and A. Watts. eds. 2008. *Oppenheim's International Law*. 9th ed. London: Longmans at p. 53.

⁴⁰ Shaw, M. 2008. *International Law*. 6th ed. Cambridge: Cambridge University Press at p. 129.

incorporating the convention norm into domestic law. Thus, statutory incorporation is mandatory for an international convention to acquire the force of law in the country. An example of a dualist state is Britain whose constitution requires treaties to be domesticated by legislation before they have municipal force of law.⁴¹ Other countries with dualist systems include Australia, Denmark, Finland and Canada.

Article 2(5) of the Kenya Constitution 2010 incorporates general rules of international law into the law of Kenya. It, however, does not give any supremacy to international law as Germany, for instance, does.⁴² Article 2(6) incorporates treaties that Kenya ratifies into Kenyan law. The Ratification of Treaties Bill 2011 requires Parliamentary approval of all treaties Kenya enters into prior to their ratification. This, considered in the light of the above analysis, makes it clear that if and when the Ratification of Treaties Act is enacted, Kenya will be neither a pure monist nor a pure dualist. Like the United States of America and South Africa, both of whose constitutions require parliamentary approval for treaties followed by domesticating legislation before the treaties form part of their municipal legal systems, Kenya is going to follow a system that is neither pure dualism nor pure monism. It is going to follow a hybrid system, which embraces aspects of these two systems. For instance, Clause 4 of the Bill, which makes parliamentary approval of all treaties mandatory reflects monism. Paragraph 2 of the same Clause requires the relevant Cabinet Secretary, in consultation with the Attorney General, to prepare a Bill, to which shall be annexed a schedule setting out in full the provisions of the treaty, for consideration by Parliament before approval of the treaty. This makes it clear that along

⁴¹ *Maclaine Watson v. Department of Trade and Industry* [1989] 3 All ER 523 at pp. 544-5

⁴² Article 25 of the Germany Constitution provides that “[t]he general rules of international law shall form part of the law of the federal law. They shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory.”

with granting its approval to a treaty, Parliament shall enact domesticating legislation. That is a dualist practice. It follows that Kenya will embrace aspects of both monism and dualism.

The procedure proposed in the Ratification of Treaties Bill relates to treaties entered into after the promulgation of the Constitution on 27th August 2010 and the enactment of the proposed Ratification of Treaties Act. Along with granting its approval to a treaty, Parliament shall enact legislation domesticating each treaty it approves. There is not going to be a separate process of enacting domesticating legislation. Approval and domestication are going to be accomplished in one process prior to ratification. What about those ratified before that date, in view of the wording of Article 2(6) that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya ...”?

4.4 Treaties Ratified Before the Promulgation of 2010 Constitution

As is clear from the annexed list of treaties that Kenya has entered into, there are numerous treaties, which have already been ratified, but not yet domesticated. The Bill has, however, one fundamental omission. It does not have transitional provisions. What then will be the status of past treaties under the 2010 Constitution?

Two schools of thought arise from the provisions of Article 2(6) of the Constitution. The first one is that from the plain reading of Article 2(6), upon ratification, all treaties form part of the law of Kenya with or without any domesticating legislation. This will be the position if the Article is interpreted as having a retrospective effect and also if the Ratification of Treaties Bill 2011 is not enacted into law.

With regard to retrospectivity, the general principle is that other than for procedural and merely declaratory pieces of legislation, all others “are prima facie prospective.”⁴³ A statute is not to be given a retrospective effect unless from its express words or necessary implication retrospectivity appears to be the intention of the legislature. However, with regard to constitutions which often look forward and backwards as they re-engineer their respective countries’ social orders, they may embody retrospective effects. But then even in constitutions, it all depends on the wording of a particular provision. “If the words used ...are forward looking, and do not contain even a whiff of retrospectivity,” then the court should not import it into a provision.⁴⁴ Applying this principle to Article 2(6) of the Kenya Constitution, the issue then is whether or not it can be said to have retrospective effect. It is submitted that from the plain language of the Article that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya,” it can be argued that a retroactive effect can reasonably be implied. That view is reinforced when the Article is read together with Clause 16(2) of the Ratification of Treaties Bill. It can of course also be argued that the provision is not express on that and that past treaties or conventions ratified by Kenya shall form part of the law of Kenya when legislatively domesticated as has been the practice before. Clause 16(2) of the Ratification of Treaties Bill will also reinforce that argument.

The other view is that, in view of Clauses 4 and 16(2) of the Ratification of Treaties Bill, all treaties (including even those entered into prior to the promulgation of the Constitution) require domesticating legislation before they can have the municipal force

⁴³ Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, Civil Application No. 2 of 2011 [Supreme Court of Kenya], at par. 61.

⁴⁴ *Ibid*, at par. 62

of law. This will be the position if the Bill is passed into law. As the Bill does not have retrospective effect, Clause 16(2) requires all past ratified but undomesticated treaties to be legislatively domesticated. As stated, with regard to treaties entered into after the promulgation of the Constitution on 27th August 2010, Clause 4 requires that along with granting its approval to a treaty, Parliament shall enact legislation domesticating each treaty it approves.

Before settling on either of these views, it is important to recap on the distinction between self-executing and non-self-executing treaties. As pointed out above, self-executing agreements are those whose provisions are clear and capable of enforcement on their own without prior legislative action⁴⁵ while non-self-executing ones are those incapable of application without legislation and require Acts of Parliament before courts can enforce them.⁴⁶

In the above legislative domestication view, the question that begs for an answer is: when will the legislation be passed?

With regard to past treaties that the state has already ratified but has not domesticated, the Bill simply requires the relevant Cabinet Secretaries to raise Bills within 18 months of its commencement for their domestication.⁴⁷ This may or may not be done. In event that all ratified past treaties are not domesticated within the required period or at all, what will be the status of the unratified treaties?

⁴⁵ See *The President of the Republic of South Africa & Others v. Nello Quaglian & Others*, [2009] ZACC 1.

⁴⁶ Aust, A. 2007. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, at p. 185.

⁴⁷ The Ratification of Treaties Bill 2011, Clause 16(2).

Strictly speaking under Article 2(6), domestication is not mandatory in respect of all treaties, whether past, present or future. Self-executing treaties, whose provisions are clear and capable of enforcement on their own, should automatically form part of the law of Kenya and need no prior legislative action before they can be enforced. So Parliament can grant its approval without enacting legislation domesticating them. Non-self-executing treaties whose provisions are not clear and not capable of enforcement on their own will, however, require incorporating legislation before they are justiciable and as stated, going by the provisions of Clause 5 of the Ratification of Treaties Bill,⁴⁸ Parliament will and should, along with the approval of non-self-executing treaties, enact legislation to domesticate and implement those treaties.

From the above analysis, it is submitted that on the wording of Article 2(6), all treaties, past, present and future, once ratified, shall form part of the law of Kenya and become justiciable with or without any domesticating legislation. Although the Ratification of Treaties Bill provides that no treaty shall be ratified without prior parliamentary approval, it is submitted that on the wording of Article 2(6), all treaties, once ratified, shall form part of the law of Kenya and become justiciable with or without any domesticating legislation. So even if no domesticating legislation is passed in respect of past treaties, they can still be enforced.

4.5 Likely Court Actions

One of the major implications of Article 2(6) of the Constitution will be attempts to interpret and implement treaties that Kenya ratified prior to the promulgation of the 2010 Constitution on 27th August 2010 and those it will ratify after that date. In that regard,

⁴⁸ The Ratification of Treaties Bill 2011, Clause 5(3).

several issues, some calling for strained interpretation not only of Article 2(6) itself, but also those of other statutory provisions as well as those of treaties, are bound to arise. This has already happened in a few cases.

In the cases of *Re the Matter of Zipporah Wambui Mathara*⁴⁹, *Beatrice Wanjiku & Another v Attorney General & Others*⁵⁰ and *Diamond Trust of Kenya Ltd v Daniel Mwema Mulwa*,⁵¹ the plaintiffs, relying on Article 11 of the International Covenant on Civil and Political Rights (ICCPR),⁵² challenged orders of their respective committal to civil jail for failure to settle monetary decrees made against them. Two issues were raised in all those cases. The first one related to the supremacy of the Article 11 of the ICCPR. It was argued that Article 2(6) being in the supremacy clause in the Constitution, treaties and, in this particular case, Article 11 of the ICCPR, rank pari-passu with the Constitution and should therefore be regarded as part of the supreme law of the land. Koome J (as she then was) did not address that issue in the first case, but Justices Majanja and Njagi, who decided the second and third cases respectively, quite correctly dismissed that argument. They said mere situation of the international treaties in the supremacy clause in the Constitution does not accord them any primacy. If that were the case, like the American Constitution,⁵³ the Kenya Constitution could have expressly so stated. Justice Njagi held that the highest rank Article 11 of the ICCPR can enjoy is being ranked in parity with an ordinary Act of Parliament.

⁴⁹ *David Ndungo Maina v Zippora Wambui Mathara*, Kangema SRMCC No. 19B of 2010.

⁵⁰ *Beatrice Wanjiku & Another v. Attorney General & Others* Nairobi HCCC. Petition No. 190 of 2011.

⁵¹ *Diamond Trust of Kenya Ltd v Daniel Mwema Mulwa*, Nairobi HCCC No. 70 of 2002.

⁵² International Covenant on Civil and Political Rights. Vol. 999 UNTS p. 171.

⁵³ Constitution of the United States of America, Article VI Section 2.

The second issue raised by the plaintiffs in those cases was the constitutionality of section 38 of the Civil Procedure Act⁵⁴ as well as Order 21 Rule 35 of the Civil Procedure Rules both of which provide for a judgment debtor's committal to civil jail for failure to settle a decree. They separately petitioned the High Court for declarations that Kenya having ratified the ICCPR and its provisions having been imported into Kenya by Article 2(6) of the Kenya Constitution 2010, committal of a judgment debtor to civil jail for failure to pay a civil debt is unconstitutional. In the first case of *Re the Matter of Zipporah Wambui Mathara*,⁵⁵ Koome J (as she then was) held that an order of civil jail which "is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt" fouts Article 11 of the ICCPR which Kenya ratified on 1st May 1972 and is, by virtue of Article 2(6) of the Kenya Constitution 2010, part of the laws of Kenya, and granted the plea. On their part, Justices Njagi and Majanja once again and quite correctly rejected that argument, with Justice Njagi holding in the *Diamond Trust of Kenya case* that "for as long as section 40 [he must have meant section 38] 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."

In both *Re the Matter of Zipporah Wambui Mathara* and *Beatrice Wanjiku & Another v Attorney General & Others*, the issue of domestication did not arise. Although, as a matter of fact the ICCPR forms part of the political rights domesticated by Article 48 of the current Constitution, no reference was made to that Article, although reference was made to the Constitution itself. The assumption in those cases appears to have been that

⁵⁴ Cap 21 of the Laws of Kenya.

⁵⁵ *David Ndungo Maina v Zippora Wambui Mathara*, Kangema SRMCC No. 19B of 2010

Kenya having ratified the ICCPR in 1972, long before the promulgation of the 2010 Constitution, the provisions of that Covenant are part of the laws of Kenya and are justiciable without domesticating legislation.

With this kind of arguments being raised, we should also expect varied decisions, some of which may be wrong but will be reversed on appeal and that is how jurisprudence develops. For instance, contrary to the view implied by lady Justice Koome in the above case of *Re the Matter of Zipporah Wambui Mathara*, international treaties do not rank higher than and cannot oust or supersede the provisions of any local legislation. Article 11 of the ICCPR, which was under consideration in that case, outlaws imprisonment “merely on the ground of inability to fulfill a contractual obligation.” Justice Koome did not consider section 38 of the Civil Procedure Act, or Order 21 Rule 35 of the Civil Procedure Rules, both of which have similar provisions on the prerequisites for making an order of committal to civil jail. It is also not clear from her judgment whether or not the lower court had committed the Applicant to civil jail “merely on the ground of inability” to pay the decretal sum. Those provisions do not permit committal to civil jail “merely on the ground of inability” to pay the decretal sum. A committal order can only be made under those provisions if the judgment debtor:

with the object...of obstructing or delaying the execution of the decree is likely to abscond or has after the institution of the suit in which the decree was passed dishonestly transferred...or committed any other act of bad faith in relation to his property or has had...means to pay the amount of the decree [but] has refused to pay.⁵⁶

⁵⁶ Proviso to section 38(a)(ii) and Order 21 Rule 35(2)(a)(ii).

The other issue likely to arise in court actions is whether or not, pursuant to the principle of “the one later in point of time,”⁵⁷ treaties will be interpreted to supersede prior inconsistent legislations or they will themselves be superseded by later inconsistent legislations. Under the Netherlands 1983 revised Constitution treaties supersede all domestic law and any municipal legislation, “whether enacted prior to or subsequent to any international agreement,” is void to the extent of any inconsistency.⁵⁸

Given the proposals in the Ratification of Treaties Bill requiring memoranda on whether or not the provisions of the treaties sought to be ratified contravene the Constitution,⁵⁹ and implementing legislation to be passed along with Parliamentary approval of treaties, it is unlikely that ratified treaties will contravene provisions of the Constitution or other legislation. Like in the US where there are decisions that Parliament is presumed not to legislate contrary to its international obligation,⁶⁰ it is hoped that the Kenyan Parliament will not enact legislation that will contradict treaties the executive will have entered into and ratified. But the conflict cannot be ruled out as slips in the treaty making process may omit to take into consideration prior legislations or subsequent legislations may overlook provisions of prior inconsistent treaties.

⁵⁷ See Henkin, L. et. al. 1987. *International Law Cases and Materials*, , St. Paul, Minnesota: West Publishing Co., at pp. 206-207.

⁵⁸ Articles 93 and 94 of the Netherlands 1983 revised Constitution. See also Shaw, M. 2008. *International Law*. 6th ed., at p. 124.

⁵⁹ Ratification of Treaties Bill, Clause 4(4).

⁶⁰ In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) Chief Justice Marshall stated the “an Act of the Congress ought never to be construed to violate the law of nations, if any other possible construction remains...”

4.6 Court Action to Enforce Ratified but Undomesticated Treaty Obligations

4.6.1 Judicial Incorporation Under Article 2(6) of the Constitution

Another major issue likely to engage our courts will be petitions seeking to enforce undomesticated treaty provisions especially of those treaties ratified before the promulgation of the 2010 Constitution. This is in the basis of Article 2(6) which simply states that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” As stated, strictly speaking, on the wording of this Article, implementing legislation is otiose. However, as pointed out above, non-self-executing will require domesticating legislation. As Kenya is slow in enacting domesticating legislation,⁶¹ there is no guarantee that treaties ratified prior to the enactment of the 2010 Constitution will be domesticated within eighteen months as proposed in the Ratification of Treaties Bill.⁶² In such eventuality, nothing will stop the enforcement of provisions of undomesticated treaties. In case of non-self-executing treaties whose wording will be unenforceable, courts will be called upon to order relevant State Departments to have appropriate legislation passed. That will raise other issues relating to the doctrine of separation of powers that the courts cannot direct Parliament to pass legislation.

Even when treaties are domesticated, some domesticating legislations in most cases do not even allude to the relevant treaties⁶³ and at times omit some of the provisions of

⁶¹ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

⁶² Ratification of Treaties Bill, Clause 16(2).

⁶³ For instance the present Constitution does not mention the ICCPR in Articles 27 and 48 which domesticates some of its provisions.

those treaties.⁶⁴ If that trend continues, courts are likely to continue being petitioned to enforce provisions of undomesticated treaties. This happened in the case of *RM & Another v. Attorney General*⁶⁵ even before the promulgation of the Constitution on 27th August 2010.

In that case the issue was whether or not, under the African Charter on the Rights and Welfare of the Child,⁶⁶ which Kenya had ratified but had not fully domesticated, the father of a child born out of wedlock could be held liable to maintain such child. It was argued for the child that the Charter accords primacy to the rights of the child and that Article 18(3) thereof specifically states that “[n]o child shall be deprived of maintenance by reference to the parents’ marital status.” In the circumstances, it was further argued, by failing to so state, section 24(3) of the Kenyan Children Act⁶⁷ is discriminatory and should be declared unconstitutional. For the father, it was argued that failure to domesticate the Article 18(3) of the Charter was a deliberate act on the part of Parliament, as paternity of children born out of wedlock has to be established before their fathers are held responsible, and the provision having not been domesticated by the Children Act or any other legislation, it was unenforceable. Relying on paragraph 57 of the United Nations Human Rights Committee’s General Comments, Nyamu and Ibrahim JJ (as they both then were) held that section 24(3) of the Children Act was not discriminatory as the distinction it made in relation to children born out of wedlock was pursuant to a legitimate claim of placing immediate parental responsibility on the mother of the child pending the determination of the child’s paternity. By the nature of things,

⁶⁴ The Children Act omits Article 18(3) of the African Charter on the Rights and Welfare of the Child. OAU Doc. CAB/LEG/24.9/49 (1990) whose provisions and those of the UN Convention on the Rights of the Child it domesticates.

⁶⁵ [2006] 1 KLR (G&F) 574.

⁶⁶ The African Charter on the Rights and Welfare of the Child. OAU Doc. CAB/LEG/24.9/49 (1990).

⁶⁷ Act No. 8 of 2001.

where the paternity of a child is contested, the matter must be heard and determined. That may take a long time, and yet the interest of the child cannot wait or be held in abeyance. The court was also concerned that Parliament, having deliberately not domesticated Article 18(3) of that Convention, the same was unenforceable as it did not form part of the law of Kenya.

If that case were decided after the promulgation of the Constitution, in the light of Article 2(6), the focus would have been on the conflict between Article 18(3) of the Charter, which the Applicant could have argued is part of the law of Kenya, on the one hand, and Article 27 of the Constitution which outlaws discrimination as well as section 24 of the Children Act, on the other. It is submitted that the court could still have dismissed the claim as the paternity of the child, who had been born out of wedlock, was in issue.

4.6.2 Judicial Incorporation under the Doctrine of Legitimate Expectation

Under the doctrine of legitimate expectation that the state will domesticate ratified treaties and comply with their provisions, undomesticated provisions of treaties ratified by Kenya are likely to be domesticated into the municipal law of Kenya through judicial incorporation on the basis of Article 2(6) of the Constitution. As stated, if the above case of *RM & Another v. Attorney General*⁶⁸ were decided after the enactment of the current Constitution, and if the paternity of the child had not been in issue, chances are that the court could have simply incorporated Article 18(3) of the African Charter on the Rights

⁶⁸ Nairobi HCCC No. 1351 of 2002; [2004] eKLR.

and Welfare of the Child⁶⁹ into the municipal law on the basis of Article 2(6) of the Constitution. This scenario would have arisen and is likely to arise in the application of the doctrine of legitimate expectation. The doctrine arises from the argument that a country having participated in the negotiations of a treaty, and thereafter adopted, signed and ratified it, its citizens expect their countries to honour provisions of such treaties. Under that expectation, any citizen of such country can enforce provisions of such treaty.

The doctrine of legitimate expectation comes out clearly in the Bangalore Principles.⁷⁰

What are the Bangalore Principles and how do they come to the scene in such cases?

Over the years the common law dualism has increasingly been influenced by the burgeoning human rights internationalism of the modern era which demands that in order to comply with their international law obligations, states must ensure that human rights treaties they are party to and the rulings of supranational bodies, like the Human Rights Committee and the European Court of Human Rights, interpreting those treaties are implemented in their domestic legal systems. It all started from the transnational judicial dialogue in the Interights Colloquia. Noting that national legislatures of most common law countries had evinced little interest in legislatively incorporating human rights treaties, between 1988 and 1998, a series of eight judicial colloquia were held specifically to address the issue of how (if at all) the common law courts could utilize treaties that have not been legislatively incorporated into domestic legal systems. Judges and legal practitioners attending those colloquia agreed that courts have a special

⁶⁹ The African Charter on the Rights and Welfare of the Child. OAU Doc. CAB/LEG/24.9/49 (1990).

⁷⁰ The Bangalore Principles of Judicial Conduct. 2002. Available at: http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf [Accessed 5 October 2012].

contribution to make in fostering universal respect for fundamental human rights and freedoms. The views emerging from those colloquia concretized in statements that have become known as the Bangalore Principles.⁷¹

While the Bangalore Principles require that courts should take into account local laws, they at the same time acknowledge that norms contained in the undomesticated international human rights instruments should be widely recognized in national courts. Principle 7 of those Principles requires courts in common law countries, most of which follow the dualist system, to take into account undomesticated provisions of treaties their states are party to under the doctrine of legitimate expectation for purposes of removing any ambiguity in local legislations. It states:

It is within the proper nature of the judicial process and well established functions of national courts to have regard to international obligations which a country undertakes –whether or not they have been incorporated into the domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law.⁷²

Even under the English law, where international treaties are not justiciable in courts of law until they are incorporated into English law by legislation, in *R v Chief Immigration Officer, Heathrow Airport Ex-parte Bibi*⁷³ the court took into account an undomesticated treaty to interpret ambiguous provisions in the English municipal law. The doctrine was also applied in the Australian case of *Minister for Immigration and Ethnic Affairs v.*

⁷¹ See Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties *Columbia Law Journal*, 107, pp. 628-705, at p. 645.

⁷² Bhagwati, P. 1988. Developing Human Rights Jurisprudence: Bangalore Principles. Concluding statement of the Judicial Colloquium held in Bangalore, India from 24-26 February 1988. Available at: http://www.genderandtrade.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf [Accessed September 20, 2012].

⁷³ [1976] 3 All ER 843.

Teoh,⁷⁴ the New Zealand case of *Tavita v. Minister of Immigration*.⁷⁵ The decision of the Canadian Supreme Court *Ahani v. Canada*⁷⁶ where it was not applied has widely been criticized.⁷⁷

The rationale for applying ratified but undomesticated treaties also stems from the argument that no country can justify breaches of its international treaty obligations on the contention that it has not domesticated them.⁷⁸ Failure to domesticate treaties or some of their provisions does not render ratification of a treaty a platitudinous or ineffectual act. Ratification is:

⁷⁴ [1994-1995] 183 CLR 273, 287. Manson CJ and Deane J. A single Judge of the Australian Federal Court had ordered the deportation of Teoh, Malaysian citizen without caring about the interests of his children who are Australians. On appeal, the High Court granted a stay of the deportation order holding that the ratification of an international convention, the Convention on the Rights of the Child, though not domesticated, was a basis for the existence of a legitimate expectation that the child's interest must be a primary consideration.

⁷⁵ [1994] 2 N.Z.L.R. 257, 266 (CA). In that case, the Applicant faced deportation but had a child who would remain in the country. The Minister refused to exercise his discretion under the Act to cancel the deportation order on humanitarian grounds. In court Tavita argued that both the ICCPR and the CRC required the Minister to make the best interests of the child the primary consideration in exercising his discretion under the Act. On his part the Minister, relying on New Zealand's traditional dualist approach to treaties, argued that as neither the ICCPR nor CRC had been legislatively incorporated into domestic law, he was not obliged to take into account their provisions. Ignoring an earlier immigration decision (*Ashby v. Minister of Immigration*, [1981] 1 N.Z.L.R. 222 (CA)) in which it had acknowledged strict dualist limitations on human rights treaties, the court strongly rejected that argument terming it "unattractive" and held that administrative policymakers have an obligation to consider human rights treaty obligations regardless of the formal domestic status of the treaties concerned. The court also relied on New Zealand's then recent accession to the Optional Protocol, which gives New Zealand citizens the right to petition the United Nations Human Rights Committee for redress of human rights violations by the New Zealand government.

⁷⁶ [2002] 1 S.C.R. 72, 208 D.L.R. (4th) 57.

⁷⁷ Prof. Joanna Harrington of the University of Western Ontario said Canada acted in bad faith and in breach of its international obligations under the ICCPR and its Optional Protocol as lack of the enforcement mechanism did not make less binding on it. (Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament). That was a case in which the petitioner, an alleged Iranian assassin, contested his deportation to Iran on the ground of risk of torture in Iran. The Canadian Supreme Court refused to apply the provisions of International Covenant on Civil and Political Rights ("ICCPR") on the ground that neither the ICCPR nor its protocol (the side agreement providing for the right of individual petition), to both of which Canada was a party, had been domesticated and had therefore no legal effect in Canada.

⁷⁸ Vienna Convention on the Law of Treaties. Vol. 1155 UNTS p. 331, Article 27.

a positive statement by the executive government of [a] country to the world and to the people [of that country] that the executive government and its agencies will act in accordance with the Convention.⁷⁹

This rationale came out clearly in the case of *Sara Longwe v. International Hotels* in which Justice Musumali of the High Court of Zambia stated:

Ratification of such (instruments) by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (a Treaty). Since there is that willingness, if an issue comes before this court, which would not be covered by local legislation but would be covered by International Instruments, I would take judicial notice of that Treaty or Convention in my resolution of the dispute.⁸⁰

Absent statutory provisions to the contrary, the act of ratification therefore gives rise to a legitimate expectation by a person affected that his country will act in conformity with the treaty it has ratified in circumstances relating to his case.

In Kenya courts have issued orders based on promises and conduct leave alone ratified treaties. In *Keroche Industries Ltd v. Kenya Revenue Authority & 4 Others*⁸¹ the court stated that legitimate expectation arises where a member of the public, as a result of a promise or other conduct, expects that he will be treated in a certain way and when a public body purports to renege on its promise, it will be estopped from so doing. In that case, the Applicant had around 1996/1997 applied to the tax authorities for a licence, to manufacture wines. A licence was issued classifying the Applicant's products under the Harmonised System Code Tariff Heading 22.04 and the Applicant had been paying tax

⁷⁹ Layton, R. 2006. *When and How can Domestic Judges and Lawyers use International Law in Dualist Systems*. Available at: http://training.itcilo.it/ils/ils_judges/training_materials/english/Dualist_Systems_Layton.pdf [Accessed September 17, 2011] at p. 8.

⁸⁰ 1993 (4 LRC 221).

⁸¹ Nairobi HCC Application No. 743 of 2006; [2007] eKLR. This was a case where the Kenya Revenue Authority attempted to change a tax tariff from the one it had given the public including the applicant. The court issued an order of certiorari quashing the new tariff.

on its wines under that Tariff. On 29th November 2006, the Respondents assessed tax on the Harmonised System Code Tariff Heading 22.06 which attracted more tax claiming that the Applicant's products had wrongly been classified under Tariff 22.4 instead of 22.06. The Applicant obtained orders of certiorari to quash that assessment and prohibition to prohibit the Respondent from removing the Applicant's fortified wine products from the Harmonised System Code Tariff Heading 22.04 on the grounds, inter alia, that a license having been issued under Tariff 22.04, the Applicant had a legitimate expectation that it could not be required to pay tax on a higher tariff. Other cases on legitimate expectation include *Republic v. Pest Control Product Board & 2 Others*⁸² and *Republic v. National Environmental Management Authority*.⁸³

It should be noted that the courts should consider several factors in applying unincorporated treaties. These include, the reservations, if any, attached to the treaty; whether or not, despite lack of implementing legislation, the policymakers have taken any actions suggestive of support for the treaty; and whether or not there are positive references to the treaty in the local scene.

Another scenario that we should expect is that pursuant to Article 20(3)(b) of the Constitution, courts are likely not only to enforce the undomesticated treaty obligations, but also "to adopt the interpretation that most favors the enforcement of a right or fundamental freedom"⁸⁴ in respect of those obligations which are not set out in legislation with sufficient clarity.

⁸² Nairobi HC Judicial Application No. 375 of 2010; [2011] eKLR.

⁸³ Mombasa HC Judicial Review No. 54 of 2011; [2012] eKLR.

⁸⁴ Justice Majanja in the case of Beatrice Wanjiku & Another v. Attorney General & Others Nairobi HCCC. Petition No. 190 of 2011 at par.23.

4.7 Enforcement of Socio-Economic Rights

The Government of Kenya ratified the International Covenant on Economic, Social and Cultural Rights⁸⁵ on 1st May 1972. Article 11 thereof recognizes the right of everyone to an adequate standard of living, including food, clothing and housing. This right has been defined by the UN Committee on Economic, Social and Cultural Rights, the body mandated to monitor the implementation of the Covenant, as

“... the right to live somewhere in security, peace and dignity. For the housing to be adequate, there must be secure legal tenure and available services, materials, facilities and infrastructure. The housing must also be affordable, habitable, accessible, appropriately located and cultural adequate.”⁸⁶

The right to housing is also contained in other international covenants ratified by Kenya including the Convention on the Rights of the Child,⁸⁷ the Convention on the Elimination of all Forms of Discrimination Against Women⁸⁸ and the OAU Charter on Human and People’s Rights (The Banjul Charter).⁸⁹ The International Covenant on Civil and Political Rights also provides for the right to respect of home and privacy.⁹⁰

Pursuant to the requirement that Governments of state parties should take steps to progressively realize this right to housing, Kenya has domesticated these rights in its

⁸⁵ International Covenant on Economic, Social and Cultural Rights. Vol. 993 UNTS p. 3.

⁸⁶ United Nations Committee on Economic and Social Rights. 1991. General Comment 4. E/1992/23.

⁸⁷ United Nations Convention on the Rights of the Child. Vol. 1577 UNTS p. 3.

⁸⁸ Convention on the Elimination of All Forms of Discrimination against Women. Vol. 1249 UNTS p. 13.

⁸⁹ African Charter on Human and Peoples' Rights. 1981. OAU Doc. CAB/LEG/67/3 rev. 5. The African Commission on Human and People’s Rights stated that: ‘Although the right to housing or shelter is not explicitly provided for under the African Charter, ... the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing...’ See *SERA C v Nigeria*, African Commission on Human and Peoples’ Rights, Decision 155/ 96 at para. 60. 12. See for example *Marzari v Italy* (1999) 28 EHRR CD 175 (European Court of Human Rights).11 16(3).

⁹⁰ International Covenant on Civil and Political Rights. Vol. 999 UNTS p. 171, Article 17.

Constitution.⁹¹ Like in South Africa where several court actions have been taken,⁹² enforcement of these rights has⁹³ is going to attract numerous court actions in which, while interpreting the relevant provisions, resort is, no doubt, going to be had not only to the relevant treaty provisions but also to the decisions of supranational bodies like Human Rights Committee, Human Rights Committee, the UN Committee on Economic, Social and Cultural Rights and the African Commission on Human and Peoples Rights.

Such actions are likely to raise legal and policy challenges. While considering what reliefs to grant, courts will have to take into account not only the country's economic capability to implement all rights and obligations under treaties but will also consider the policies, if any, the state will have put in place to comply with the constitutional requirement of progressively⁹⁴ implementing Article 43 of the Constitution.

4.8 Death Penalty

Another area likely to feature in court actions in Kenya on the basis of unratified treaty obligations is the mandatory death penalty for capital offences. The death penalty,

⁹¹ Kenya Constitution 2010, Article 43. These rights are also in other legislations like the Children Act.

⁹² See the cases of *Govt. of SA & Others v. Grootboom & Others*, 2000 SACLR LEXIS 126, *Soobramoney v. Minister of Health, [1998] (1) SA 765* and *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC).

⁹³ On the right to housing, two notable court actions have been taken. The first one is the case of *Waithera Kariuki & 4 Others v. Town Clerk City Council of Nairobi, HC Const'l Petition No. 66 of 2010* in which the petitioners sought, inter-alia a conservatory order to restrain their eviction from a road reserve in parklands area and a declaration that if indeed the land they occupied was a road reserve then that is public land which they are entitled to occupy and they are protected against arbitrary eviction and treatment. The Court was called upon to determine inter-alia breach of the petitioners' socio-economic rights enshrined in Article 43 of the Kenya 2010 Constitution. Conservatory orders issued in favour of the petitioners pending hearing and determination of their petition. The second case is that of *Muungano Wa Wanavijiji & Others v AG & 17 Others, Nairobi HC Petition No. 403 of 2012* in which Mukuru kwa Njenga slum dwellers have filed a suit against the government, former President Moi and others seeking an injunction restraining the registered owners from evicting more than 100,000 squatters and a declaration that the sale by the government of that land to private developers was illegal and unconstitutional. As at the time of completing the writing this paper on 10th October 2012, the matter was still pending but the court had, pending the hearing of the case, granted an injunction restraining the eviction of the Petitioners and disposal of the land by way of sale, lease or use as collateral.

⁹⁴ Kenya Constitution 2010, Article 21

particularly the mandatory death penalty, has been and will no doubt continue to be a controversial issue globally. The pivotal point of the controversy is the differential culpability of the crime committed and the imposition of the death penalty, the argument being that the mandatory death penalty deprives the court of the right to consider mitigating circumstances. The argument is that since “[n]o simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion,”⁹⁵ despite the urge for retribution against those who commit what society considers as heinous crimes, the mandatory death penalty is “barbaric and incompatible with the modern ‘civilised’ society.”⁹⁶ This point was succinctly expressed by the Indian Supreme Court in the case of *Mithu v. State of Punjab* in which Chandrachud CJ sated that:

...a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair.⁹⁷

The controversy also arises from the interpretation of Articles 6 and 7 of the International Convention on the Civil and Political Rights (the “ICCPR”) (which has been domesticated into the municipal legal systems of many member states) as read together with the Second Protocol to that Convention as well as what has been described

⁹⁵ English Royal Commission (1-2 Minutes of Evidence, p 13(1949)).

⁹⁶ Nyamboga, E. 2011. Death Penalty Steers Debate Towards Global Best Practice. *The Nairobi Law Monthly*, 2(11).

⁹⁷ [1983] 2 SCR 690 at p.707.

as “the best sentencing practice”⁹⁸ and the “standards of decency that mark the progress of a maturing society.”⁹⁹

The ICCPR itself does not outlaw the death penalty. Instead it permits the penalty for the crime of genocide and serious crimes in countries that have not abolished it but requires that the execution thereof be carried out in accordance with that convention. Article 6(1) thereof states:

- (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
- (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present covenant and to the Convention on the Prevention and Punishment of the crime of Genocide. This penalty shall only be carried out pursuant to a final judgment rendered by a competent court. [Emphasis supplied].

The provisions of that Covenant include Article 7 which states that “[n]o one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment.” Most States parties to the ICCPR have domesticated Article 7 thereof in their constitutions. The 2010 Kenya Constitution has not simply domesticated that provision. It has gone further and categorically stated, inter alia, that the “freedom from torture and cruel, inhuman or degrading treatment or punishment...shall not be limited.”¹⁰⁰

In interpreting Article 7 of the ICCPR or its equivalent, courts from a good number of world jurisdictions have held the death penalty as violating that provision and declared it

⁹⁸ Nyamboga, E. 2011. Death Penalty Steers Debate Towards Global Best Practice.

⁹⁹ Privy Council in the case of Reyes v. The Queen, [2002] 2 A.C. 247.

¹⁰⁰ Kenya Constitution 2010, Article 25(a).

unconstitutional.¹⁰¹ Others have held that what violates that provision is not the sentence per se but the inhumane manner of carrying it out.¹⁰²

Prior to the promulgation of the 2010 Constitution, the Kenya Court of Appeal had in the case of *Geoffrey Ngotho Mutiso v. Republic*¹⁰³ considered the provisions of Article 7 of the ICCPR, which had been domesticated by section 74(1) of the former Constitution. Although the Court of Appeal was in that case concerned with the issue of whether or not the mandatory death penalty was constitutional and not whether the execution of the death penalty was per se is inhuman and degrading, when it ultimately outlawed the mandatory death penalty for offences of murder, it described it as “antithetical to the Constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial.” [Emphasis supplied].

That was on 30th July 2010. On 10th June 2011, Justice Anyara Emukule of the Kenya High Court, while sentencing the accused in *Republic v. John Kimita Mwaniki*¹⁰⁴, whom he had found guilty of murder, followed the Court of Appeal decision in the *Ngotho case* (supra) but was of the view that the death penalty “is inconsistent with the right to life preserved under Article 26(1) of the Constitution.” The same view had been expressed by the South African Constitutional Court in the case of *State v. T. Makwanyane &*

¹⁰¹ Examples are the decision of the South African Constitutional Court in *State v. T. Makwanyane & Another*, Case No. CCT/3/94, *Reyes v. The Queen*, [2002] 2 A.C. 235 P.C (Belize), Francis Kafantayeni. & 5 Others v. AG, Const'l Case No. 12 of 2005; [2007] MWHC 1 (Malawi) and Susan Kigula & 414 Others v. AG, Const'l Petition No. 6 of 2003 (Uganda).

¹⁰² In the Makwanyane case (supra), it was suggested that its execution by asphyxiation in a gas chamber or by lethal injection may not be cruel and degrading.

¹⁰³ [2010] eKLR.

¹⁰⁴ Nakuru HCCRC No. 116 of 2007.

Another¹⁰⁵ in which several cases from other jurisdictions, which have held the mandatory death penalty as inhuman, cruel and degrading punishment were considered.

Although in *Republic v. Dickson Munene & Another*¹⁰⁶ Justice Warsame of the Kenya High Court subsequently expressed the view that as long as the death penalty remains in our statute books, the same should be meted out, the above stated observations in the two earlier cases suggest that the Kenyan courts and the legal fraternity at large¹⁰⁷ are inclined to support the global campaign for the total abolition of the death penalty. This is particularly clear from the words of the Court of Appeal in the *Ngotho case*. While observing that despite the global campaign to abolish the death penalty the Kenya Constitution 2010 nevertheless retains it, in its statement that “the dynamism of society will take care of future developments,” the Court of Appeal made it clear that it may in the not distant future, abolish the death penalty.

Although Kenya has not ratified the Second Optional Protocol to the ICCPR which calls upon states parties to abolish the death sentence except for serious crimes of a military nature committed during wartime, if the above observations are anything to go by, and Kenya having ratified the ICCPR itself, we should expect calls for Kenya to ratify the Protocol and the campaign to abolish the death penalty altogether to be a serious implication of Article 2(6) that will engage our courts. Kenya having ratified the ICCPR, and on the basis of Article 2(5) of the Constitution which incorporates the “general rules of international law” into the Kenyan municipal law, Kenyan courts are most likely

¹⁰⁵ Case No. CCT/3/94.

¹⁰⁶ Nairobi HCCRC No. 11 of 2009.

¹⁰⁷ In his article, ‘Death Penalty Steers Debate Towards Global Best Practice’, Erneo Nyamboga described Justice Warsame’s said view as “retrogressive.” Conceding the Ngotho Appeal, Mr. Keriako Tobiko, the Director of Public Prosecutions, invited the Court to read the mandatory term “shall” in section 204 of the Penal Code in respect of the death sentence as “may.”

going to be bombarded with arguments that the death penalty does not serve any penological purpose and inundated with petitions to outlaw the death penalty on basis of the Rights-Conscious Charming Betsy Principle alongside the said claw back clause in Article 7 of ICCPR.

The Charming Betsy Principle arose from the US Supreme Court decision in *Murray v. The Schooner Charming Betsy*¹⁰⁸ where it was held that courts should construe ambiguous federal statutes in such a manner as to avoid violation by US of its treaty obligations or customary international law.¹⁰⁹ Applying that principle in the case of *Boyce v. The Queen*,¹¹⁰ where the issue was also the constitutionality of the Barbadian statute providing for a mandatory death sentence when its constitution outlawed inhuman treatment or degrading punishment, the Privy Council stated:

[I]nternational law can have a significant influence upon the interpretation of the Constitution because of the well established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the state's international obligations.... [I]f the legislation is ambiguous (in the sense that it is capable of a meaning which either conforms to or conflicts with the [treaty] the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty.

¹⁰⁸ 6 U.S. (2 Cranch) 64, 118 (1804).

¹⁰⁹ In that case, the US Supreme Court stated that “[a]n act of the Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” In essence, advocates of this cannon urge the application of the Bangalore Principles to constitutional interpretation, asserting that “[w]here the constitution is ambiguous, a [court] should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation that would involve a departure from such rights.” [Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties *Columbia Law Journal*, 107, pp. 628-705, at p. 679]. Courts in other countries have followed suit. In *Puli'uvea v. Removal Review Authority*, [1996] 3 N.Z.L.R. 538, 542 the New Zealand Court of Appeal held that “[t]he Court cannot should strive to interpret legislation consistently with treaty obligations of New Zealand. The result is that interpretation by reference to treaty law is no longer optional, but required, unless the domestic statute is unambiguously incompatible with the treaty obligation.”

¹¹⁰ [2005] 1 A.C. 400 at 414-5 (P.C.2004).

Given the wording of Article 25 of the Constitution that, inter alia, the “freedom from torture and cruel, inhuman or degrading treatment or punishment” “shall not be limited,” Kenyan courts will most likely also share the above view together with what the Privy Council also said in *Reyes v. The Queen*, [2002]¹¹¹ that:

the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual rights, unless it is clear, on a proper interpretation of the Constitution, that it does.

Although it remains to be seen how the Kenyan courts will handle the issue, the optional death penalty itself is not going to be abolished altogether soon. This is because, as stated, the ICCPR itself retains it for the crime of genocide and the cases cited in *Ngotho v. Republic* (supra), in particular the said South African case of *Makwanyane*,¹¹² suggest that many countries still retain the sentence for heinous crimes of murder, aggravated robbery and crimes against humanity.

4.9 Likely Delays in the Treaty Ratification Process

The Ratification of Treaties Bill does not exempt any treaty from approval by both the Cabinet and Parliament before ratification. Clause 6(3) categorically states that if Parliament rejects any Bill for ratification, then the Government shall not ratify such treaty. And it is an offence under Clause 9 of the Ratification of Treaties Bill to ratify

¹¹¹ [2002] 2 A.C. 247. In that case, the Criminal Code of Belize, one of the Caribbean Islands, provided that “Every person who commits murder shall suffer death.” Its Constitution, however, like the ICCPR, outlawed inhuman or degrading treatment or punishment. The accused challenged the death penalty. On appeal to the British Privy Council, which still serves as the final court for several countries in the region, in spite of the fact that the ICCPR does not expressly prohibit the mandatory death sentence, relied on it and other treaties and struck down the penal code provision, holding inter alia that “A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court . . . is required to . . . ensure contemporary protection of [those] right[s] in the light of standards of decency that mark the progress of a maturing society.”

¹¹² *State v. T. Makwanyane & Another*, Case No. CCT/3/94.

any treaty that has not been considered and approved by both the Cabinet and Parliament. That means all the treaties that Kenya will enter into will have to be approved before they are ratified and enter into force. What does this entail? This entails a long and may be, protracted procedure.

The treaty approval procedure in Kenya at the moment is that after the international secretariat concerned contacts the Kenyan foreign office, the latter refers the matter to the relevant State Department. The relevant State Department then considers the pros and cons of the proposed treaty and submits its views to the foreign office. If the matter affects more than one State Department, the Cabinet Secretary first seeks the views of all State Departments concerned after which he convenes an inter-ministerial meeting, which considers the proposed treaty and prepares a memorandum for consideration by the Cabinet.¹¹³

The procedure proposed to be adopted is even longer. Clause 4 of the Bill requires the relevant State Department to prepare and present to the Cabinet a memorandum outlining the objectives of the treaty and set out any constitutional issues and national interests that may be adversely affected. Such memorandum shall be prepared in consultation with the Attorney General. After approval by the Cabinet, the relevant Cabinet Secretary shall within three months prepare and publish a Bill for consideration by Parliament. Depending on the subject matter of the treaty, the Bill shall be considered by both or the relevant House of Parliament. This means that any treaty whose implementation shall particularly affect a County or Counties, its approval shall be by

¹¹³ This is according to Mr. Rotiken, the Third Secretary in the Ministry of Foreign Affairs. Discussion held with him in his office on 21st August, 2012.

both the National Assembly and the Senate. All other treaties that affect the entire country shall be approved by the National Assembly only.

Clause 5(2) of the Bill obliges the relevant parliamentary committee to ensure there is public participation during the consideration of the Bill. It is after the Bill goes through all these stages and is passed and assented to that the treaty shall be ratified.

The entire process of approval is therefore bound to take a long time. From the foreign office, the matter will go to the line ministry; then back to the foreign office; to the Attorney General's office; to the Cabinet; back to the line ministry and the Attorney General for preparation and publication of the Bill for consideration by both or one of the Houses of Parliament, with public participation and, when the Bill is finally passed, it goes to the President for assent before the instruments of ratification are signed.

Each of these offices and the personalities involved have their own schedules. Parliament and the President, particularly, have tight schedules. To make matters worse, as a country, we are not known to be particularly time conscious. Matters pend in offices for inordinately long periods. It is therefore going to take quite a long time for any treaty to be approved. The issue then is what happens with urgent treaties with timelines like the Kyoto Protocol.¹¹⁴ Is Kenya not going to lose out on trade opportunities, for instance?

Despite delay, the above outlined approval stages are nonetheless inevitable. As stated above, the global trend these days, even among countries that follow the dualist system, which hitherto rarely involved their legislatures before ratification of treaties, is to seek

¹¹⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change. Vol. 2303 UNTS p. 148. Article 3.

parliamentary approval of treaties. The United Kingdom is a good example; in 2010, it enacted the Constitutional Reform and Governance Act under which most treaties have to be approved by Parliament before they are ratified.¹¹⁵

4.10 Public Participation

The requirement in the Ratification of Treaties Bill for public participation in the approval of treaties, is not new or unique to Kenya. Since 2000, the British Foreign and Commonwealth Office (“FCO”) sends copies of treaties requiring ratification to relevant select committees which in turn initiate inquiries and public participation in treaties under consideration. The inquiries often generate oral and written submissions from the government and non-governmental community as well as individuals with interests in the subject matter. Good examples of UK’s extra-parliamentary consultations with the public was the discussion on the Rome Statute of the International Criminal Court¹¹⁶ in the year 2000 prior to ratification and the position to be adopted with respect to amending the 1972 Biological and Toxin Weapons Convention¹¹⁷ which were conducted between April and September 2002.¹¹⁸

In the Kenyan case, the issue that needs consideration is whether or not all treaties should be subject to public scrutiny. Is the country going to have all treaties including military alliances and those dealing with acquisition of arms, which have security

¹¹⁵ English Constitutional Reform and Governance Act, section 25.

¹¹⁶ Rome Statute of the International Criminal Court. Vol. 2187 UNTS p. 3.

¹¹⁷ Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. Vol 1015 UNTS.

¹¹⁸ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509.

implications, discussed in public prior to their ratification? It is suggested that Kenya should, subject to making suitable provisions for accountability, follow the example and the practice in the United States of America and exempt public participation in those kinds of treaties. In the US, the President has power to make executive agreements in security matters that he binds the Congress to hold as confidential if the President deems public disclosure prejudicial to national security.¹¹⁹

Despite these legitimate security concerns, there are positive aspects of public participation in the treaty approval process. First and foremost, public participation will generate oral and written submissions from the government and non-governmental community as well as individuals who are experts in areas affected by treaties. This can only be effective if Kenya borrows a leaf from the practice of the Australian Joint Standing Committee on Treaties (JSCOT). JSCOT considers a proposed treaty, invites views from the general public, holds public hearings and, as Australia is a Federal State, considers the views of the States and then writes a report to Parliament recommending whether or not the treaty should be ratified. It is after all those stages are passed that the government decides to ratify a treaty.¹²⁰

Secondly, public participation, which itself is a constitutional requirement in the business of both the national and county assemblies¹²¹ also engenders accountability,

¹¹⁹ Henkin, L. et. al. 1987. *International Law Cases and Materials*, , St. Paul, Minnesota: West Publishing Co., at p. 222.

¹²⁰ Mason, D. 2007. *The Constitutional Evolution of Deliberative Democracy in Treaty Making*.

Available at:

<http://www.treatylaw.org/documents/The%20Constitutional%20Evolution%20of%20Deliberative%20Democracy%20in%20Treaty%20Making%20%207%20July%202010.pdf> [Accessed September 20, 2012].

¹²¹ Kenya Constitution 2010, Articles 118 and 196 respectively.

which is also one of the most important principles of good governance enshrined in the Constitution.¹²²

4.11 Applications to Withdraw From Certain Treaties

One of the implications of Article 2(6) of the Constitution will be the Kenyan State's likely wish or consideration to withdraw from some treaties it may find embarrassing. Given the unsuccessful efforts the Kenyan State made to have the cases before the International Criminal Court (ICC) involving its subjects withdrawn and remitted to it for trial¹²³ and the strenuous opposition it had to the application¹²⁴ to have Omar Bashir, the Sudanese President, arrested and handed over to International Criminal Court (ICC) in event he sets foot in Kenya, Kenya is likely to consider withdrawing from embarrassing international treaties it has ratified.

In the Bashir case, the ICC had issued two warrants of arrest against the Sudanese President and made requests to States Parties to the ICC treaty, including Kenya, to arrest him and hand him over to ICC to stand trial for war crimes, crimes against humanity and genocide all arising from orchestration of atrocities he allegedly committed in the Western Province of Darfur in Sudan. On 27th August 2010, at the invitation of the Kenya Government, Mr. Bashir graced the occasion of the promulgation of the Kenya Constitution, 2010 and was not arrested. Following media reports that he was again going to come to Kenya to attend the Intergovernmental

¹²² Kenya Constitution 2010, Articles 201(a) and 232(1)(e).

¹²³ The cases against Uhuru Kenyatta, Francis Muthaura, Hussein Ali, William Ruto, Henry Kosgei and Joshua Sang.

¹²⁴ The Kenya Section of the International Commission of Jurists v. Attorney General & Another, [2011] eKLR.

Authority on Development (IGAD) meeting that Kenya was going to convene and host, the Kenya Chapter of the International Commission of Jurists (ICJ) petitioned the Kenyan High Court to issue a warrant of arrest and direct the Kenyan authorities to arrest him. Despite the State's strong opposition on the ground that issuing a warrant of arrest was going to sour diplomatic relations between Kenya and Sudan, the court held that having failed to arrest Mr. Bashir as requested by the ICC, Kenya had flouted not only the ICC Statute, which required States Parties to comply with ICC's requests to arrest suspects and convicts,¹²⁵ but also the Kenya International Crimes Act of 2008.¹²⁶ Embarrassed by that decision, the state has appealed against it and as the matter is still sub judice,¹²⁷ at the time of writing this dissertation, no comment can be made on the decision.

Conventions like the UN Charter, have no provision for withdrawal. The applications to withdraw from treaties, will therefore be governed by the provisions of the treaty in question if it makes provision for withdrawal. In respect of treaties with those provisions, the denunciation provisions in Clause 14 of the Ratification of Treaties Bill will also be thrust into focus in the state's withdrawal applications. Sub-clause (1) of that Clause provides that:-

[w]here Kenya wishes to withdraw from a treaty, the relevant Cabinet Secretary shall prepare a cabinet memorandum indicating the reasons for such an intention.

¹²⁵ Such requests are made under the Rome Statute of the International Criminal Court. Vol. 2187 UNTS p. 3, Articles 91 and 92.

¹²⁶ See International Crimes Act, No. 16 of 2008, sections 29 and 30.

¹²⁷ The matter is the subject of Criminal Appeal No. 105 of 2012 pending before the Court of Appeal.

The state will not easily obtain such approvals. As provided by sub-clause (2) thereof, such withdrawal is subject to approval by both the Cabinet and Parliament. Parliament will not readily approve any such a move. Even if such approvals are accorded, the withdrawal will still have to be governed by the provisions of the treaty that the State will seek to withdraw from. For instance, Article 127 of the Rome Statute of the International Criminal Court allows withdrawal only after one year's notice. It provides that:-

[a] State party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the receipt of the notification, unless the notification specifies a later date.

It is perhaps due to this provision that the Government of Kenya reneged on its intention to withdraw from the Statute.

In conclusion, it is observed that Article 2(6) of the Constitution incorporates into the Kenyan legal system all treaties ratified by Kenya. The procedure proposed by the Ratification of Treaties Bill relates to the mode Kenya will follow in ratifying treaties it will enter into. Whether the Bill will be passed and the procedure proposed therein will be followed, it is submitted that all ratified treaties are and shall continue to be justiciable with or without any prior domesticating legislation. It remains to be seen how the state and more particularly the judiciary will handle ratified but undomesticated treaties.

CHAPTER FIVE

5 CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

The provisions of Article 2(6) incorporating treaties ratified by Kenya into the Kenyan law together with the proposed procedure requiring all treaties that Kenya will enter into to be approved by Parliament before ratification is a drastic change with significant legal implications. The most outstanding one is that once the proposed Ratification of Treaties Act is enacted, like the United States of America and South Africa, Kenya is going to follow neither a pure dualist nor a pure monist state. It will follow a hybrid system that embraces aspects of both of these systems of incorporating international treaties into its municipal law. Unless the procedure is going to be altered, all treaties including military alliances with security implications, will be approved by Parliament and made public.

Besides public demand that the Kenyan executive should not be allowed to saddle the country with treaty obligation without involving people's representatives, the proposed change has also been informed by the global trend requiring parliamentary approval of treaties prior to ratification. As stated, Kenya is slow in enacting domesticating legislation.¹ The annexed list of treaties Kenya entered into up to 30th August 2012 shows that there are numerous treaties that Kenya has ratified but has not domesticated. The change is also intended to address this mischief. From the language of the Article, on the principle of retroactivity, one can argue that all past ratified treaties are already part of the law of Kenya. One can also pose an opposite view and argue that the Article

¹ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

is not express on the retroactivity and as the Bill itself does not have retrospective effect, past ratified treaties will have to be domesticated within 18 months of the passing of the Ratification of Treaties Act. With regard to future treaties, Kenya is now not going to have a different process of domesticating treaties. Along with approving treaties for ratification, the Kenyan Parliament will pass legislations to domesticate treaties it will enter into.

Other significant implications include delays that will ensue from Parliamentary approvals and legal actions on undomesticated treaty obligations as well as enforcement of socio-economic rights as well as political and cultural rights. Knowing how busy some institutions like Parliament and the office of the President can be, the entire process of approval with the concomitant public participation is bound to take a long time. From the foreign office, the matter will go to the line ministry; then back to the foreign office; to the Attorney General's office; to the Cabinet; back to the line ministry and the Attorney General for preparation and publication of the Bill for consideration by both or one of the Houses of Parliament, and, when the Bill is finally passed, it goes to the President for assent before the instruments of ratification are signed. Despite delays, however, the process has several advantages. Besides accountability, public participation will lobe into treaties expert views which will interrogate the implications of proposed treaties before they are ratified.

Litigations to enforce rights and obligations under undomesticated treaties are likely to arise and raise serious challenges like the country's capacity to implement socio-economic rights. Such actions will force the courts to consider the policies the state will have formulated to progressively implement such rights as required by the Constitution.

From such litigation, we should expect considerable jurisprudence on both domesticated and undomesticated treaty provisions.

Having seen the likely implications of Article 2(6) of the Constitution, a few concluding remarks and recommendations on some aspects are in order.

5.2 RECOMMENDATIONS

5.2.1 Need for Treaty Making Committee

Treaties are concluded on subjects varying from commerce and trade, science and technology, environment, security to even agriculture. Effective handling of the treaty making function therefore requires expertise.

As stated, the Ratification of Treaties Bill requires all treaties that Kenya will enter into after the promulgation of the Constitution on 27th August 2010 to be approved by Parliament for ratification. Demands on any modern Parliament are numerous. Because of its busy schedule, on 21st August 2012, the Kenyan Minister for Justice and Constitutional Affairs said for the Kenyan Parliament to enact relevant legislation for the implementation of the Constitution by the deadline of 27th August 2012, it had to burn the midnight oil.² Needless to say therefore that it is not possible for Parliament to consider in detail every proposed treaty that will be presented to it for approval. To effectively discharge the added portfolio of approving treaties, the Kenyan Parliament has no option but to establish a committee, preferably a standing committee, charged with the responsibility of examining all treaties and reporting to the two houses of

² This was in his address at the Judicial Marches function on 21st August 2012 where the writer was.

Parliament on the implications of each treaty and whether or not the country should ratify it.

This will not be anything new. Practically all legislatures in democratic countries rely on committees to conduct their businesses. The US Congress, for example, is known for its strong Congressional Committees followed by the legislatures of Germany, Sweden and the UK in that order.³ Committees are “small groups of legislators who are assigned, on either a temporary or permanent basis, ... [the duty of examining] matters more closely than could the full chamber.”⁴ Their functions include, review of proposed legislation; oversight of the activities of the executive arm of government; examination of and reporting on policy matters; and special investigations. As most of them operate under less formal rules of procedure, committee members are able to develop collegial relationships which enable them to smoothly transact their business. If they are standing committees, unlike ad hoc committees, which are appointed to investigate specific matters and cease to exist once they have accomplished their tasks, over time, members of permanent committees gain considerable experience and become authorities in their respective areas.

The Kenyan Parliament also has usually various standing committees including the Public Accounts, Public Investments, House Business and Powers and Privileges Committee. Apart from these types of committees, most countries have established specific parliamentary committees charged with the responsibility of examining

³ Petersen, R. E. 2005. *Parliament and Congress: A Brief Comparison of the British House of Commons and the U.S. House of Representatives*. Available at:

http://assets.opencrs.com/rpts/RL32206_20050519.pdf [Accessed on 10 October 2012].

⁴ National Democratic Institute for International Affairs. 1996. Committees in Legislatures: A Division of Labour. Legislative Research Series, Paper No. 2. Available at:

http://www.accessdemocracy.org/files/030_ww_committees.pdf [Accessed September 20, 2012].

proposed treaties before they are executed and ratified. A good example of this is the Australian Joint Standing Committee on Treaties (“JSCOT”).⁵ The other countries with similar committees include the US which has the Senate Foreign Relations Committee⁶, the UK with the Foreign and Commonwealth Office, and Canada which has the House of Commons Standing Committee on Foreign Affairs and International Trade (“SCFAIT”)⁷ to name just but a few. Kenya, with a bicameral legislature, should also establish a Joint Standing Treaty Committee (“JSTC”) to seriously examine all treaties that Kenya enters into.

Besides the establishment of the JSTC, Kenya needs to establish a strong “Treaty Secretariat” with a reasonable staff of professionals with expertise in treaty making business to augment the efforts of various departmental treaty committees. Without such standing committee and secretariat, Parliament’s approval of treaties is going to be a mere rubberstamp exercise, which will defeat the whole purpose of parliamentary scrutiny.

5.2.2 Treaty Registry

The proposal in Clause 10 of the Ratification of Treaties Bill for the establishment of a registry of treaties is a welcome one. Currently, nobody can say for sure how many treaties Kenya has entered into leave alone tell the status of each.⁸ Besides the Registry

⁵ Mason, D. 2007. *The Constitutional Evolution of Deliberative Democracy in Treaty Making*. Available at:

http://www.treatylaw.org/documents/The%20Constitutional%20Evolution%20of%20Deliberative%20Democracy%20in%20Treaty%20Making%20%207_%20July%202010.pdf [Accessed September 20, 2012].

⁶ Henkin, L. et. al. 1987. *International Law Cases and Materials*. 2nd ed. St. Paul, Minnesota: West Publishing Co. at p. 212.

⁷ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament at p. 478. *McGill Law Journal*, 50, pp. 465-509.

⁸ Mr. Rotiken, the Third Secretary of the Ministry of Foreign Affairs whom the writer had a word with on 20th August 2012 says some treaties are currently kept by the relevant ministries but an effort is being made to have all of them in his office and an up-to-date status of each.

of Treaties being the local depository of all treaties to which Kenya is a party, that Clause requires the Registrar of Treaties to keep a record, inter-alia, of “all treaties in such manner as may be prescribed.”⁹ It does not state who is going to prescribe the manner in which the record will be kept and whether or not it will be readily accessible to the public.

In other countries, besides the publications (known in Britain¹⁰ and Canada¹¹ as the Treaty Series), treaties are posted on their respective websites. Britain even publishes online the explanatory memoranda setting out the objects of proposed treaties.¹² It is recommended that Kenya should follow suit and publish treaties it is party to in the internet to obviate court action under the Freedom of Information Act if and when passed.¹³

5.2.3 Executive Agreements

Besides ordinary international treaties, Governments also enter into “ordinary agreements”. There is a clear distinction between the two. An ordinary agreement takes effect and binds the states that are party to it upon its execution by the representatives of those states. A treaty on the other hand only takes effect and binds the states, which are party to it after ratification. This important distinction is made to facilitate the executive arms of government in their appropriate international contacts so that they do not have to seek parliamentary approval for every international involvement. The ordinary agreements are what in America are known as “Executive Agreements.” There does not

⁹ The Ratification of Treaties Bill 2011, Clause 10(1)(b).

¹⁰ Harrington, J. 2005. Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament. *McGill Law Journal*, 50, pp. 465-509, at p. 490.

¹¹ Ibid, at p. 481.

¹² Ibid, at p. 488.

¹³ Freedom of Information Bill, 2012.

appear to be any provision in the Ratification of Treaties Bill for these kinds of agreements and Kenya has never entered into any.¹⁴ It is recommended that appropriate legislation be enacted to authorize the Kenyan President to make executive agreements in some strategic areas.

5.3 Judicial Activism.

If the past experience¹⁵ is anything to go by, Kenya is likely to drag its feet in domestication of treaties by legislation. Even where it domesticates, there could be situations, like in the above-mentioned case of *RM & Another v Attorney General*,¹⁶ where it will partially domesticate the provisions of a treaty. To enable Kenyans enjoy the full benefits of the treaties their government ratifies, some judicial activism will, in the circumstances, be necessary. However, like in India, the omitted treaty provisions or those that are not clearly spelt out in later legislation, should be applied only when they are not inconsistent to the Constitution.

India follows the dualist system of domestication of treaties and international law generally so that in the absence of domestic legislation, India's international obligations under any treaty are not justiciable in Indian courts. But the Indian judiciary, has embraced broad interpretation strategies, especially in Public Interest Litigation, "that have transformed it from a positivist dispute-resolution body into a catalyst for socio-

¹⁴ Discussion had with Mr. Rotiken the Third Secretary in the Ministry of Foreign Affairs at his office on 21st August, 2012.

¹⁵ Situma, F. 2008. *Kenya's Treaty Practice in International Environmental Field*.

¹⁶ [2008] 1 KLR (G&F) 574.

economic change and protector of human rights and environment.”¹⁷ Under that proactive approach, it is now a fundamental principle of statutory interpretation in India that if the terms of a legislative provision are ambiguous or capable of more than one meaning, taking the view that there is a prima facie presumption that India does not intend to breach its international treaty obligations, the Indian courts apply any international treaty consonant with one of the meanings of the provision, whether domesticated or not, as long as it is consistent with fundamental human rights under and in harmony with the spirit of the Indian Constitution.¹⁸ In *Jolly George Varghese & Another v The Bank of Cochin*,¹⁹ for instance, the Indian Court of Appeal was faced with the interpretation of Section 51 of the Indian Civil Procedure Code, which permitted the committal to civil jail of a debtor who had, since the date of the decree, had means to pay the decretal sum but had failed. Using Article 11 of the ICCPR which India was party to but had not domesticated, the court held that imprisonment could only be justified if there was evidence of willful failure to pay and absence of more terribly pressing claims on the debtor’s means such as medical bills for grave diseases like cancer.

5.4 The Flipside of Judicial Incorporation of undomesticated Treaty Provisions

Rosy as it may appear, the doctrine of judicial incorporation of undomesticated treaties has a downside. The judicial shift towards monism raises legitimate concerns, which

¹⁷ Agarwal, S. n. d. *Implementation of International Law in India: Role of Judiciary*. Available at: http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf [Accessed September 20, 2012].

¹⁸ Agarwal, S. n. d. *Implementation of International Law in India: Role of Judiciary*. Available at: http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf [Accessed September 20, 2012].

¹⁹ AIR 1980 SC 470.

cannot be ignored. Strict application of the above discussed Bangalore Principles will have the effect of subordinating all domestic law to international human rights law. Some scholars regard as counter-majoritarian when domestic courts use international human rights law to declare legislative acts invalid, thus effectively overruling the will of the people expressed through their representatives in parliament.²⁰ This has, for example, led to criticisms in the USA and from policy makers throughout the common law world as well as the jurisprudentially conservative judges. These groups view interpretive incorporation of human rights norms as an improper attempt to legislate through the “judicial back door” what should be done through the legislative front door.²¹

Kenya is a democratic society, which cherishes the doctrine of the separation of powers. While discharging its judicial mandate, the Kenyan judiciary will inevitably “legislate” when filling up gaps in statutes and interpreting others. It should nonetheless consider itself as deeply rooted in the domestic legal regime and be careful not to usurp the legislative authority, which belongs to Parliament.

The Kenyan judiciary has also to remember that the Constitution in particular vests the judicial authority in the people of Kenya to be exercised by the courts.²² Unincorporated treaty provisions are not authoritative expressions of the domestic polity. It is from domestic constitutional provisions and not from vague notions of global judicial

²⁰ Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties. *Columbia Law Journal*, 107, pp. 628-705.

²¹ Waters, M. 2007. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties. *Columbia Law Journal*, 107, pp. 628-705.

²² Kenya Constitution 2010, Article 159(1).

community that the judiciary obtains its legitimacy and authority. Thus, it is to the domestic legal framework, and not to international human rights treaties, that they owe their final allegiance. Bearing that in mind the courts should therefore explore on case-to-case basis the extent to which they can legitimately use unincorporated international treaty provisions. In doing that they should also be alive to the fact that the jurisprudential approaches deemed appropriate for one nation may not be appropriate for another. They should therefore develop approaches that balance these competing concerns and accommodate significant differences in history and the domestic realities.

ANNEXTURE: TREATIES TO WHICH KENYA IS A PARTY

Charter of the United Nations

Signed, San Francisco:	26 October 1945
Entry into force:	24 October 1945
U.S.A.	
Kenya	16 December 1963, admission Art 4

Declaration of Acceptance of the Obligations Contained in the Charter of the United Nations

See Charter of the United Nations

Statute of the International Court of Justice

see Charter of the United Nations

Declaration Recognising as Compulsory the Jurisdiction of the International Court of Justice

Art 36 paragraph 2 of the Statute
Kenya 19 April 1965

Amendments to the Charter of the United Nations, Arts 23, 27 and 61

Adopted UNGA	17 December 1963
Entry into force	31 August 1965
Kenya	28 October 1964 <i>ratification</i>

Amendment to the Charter of the United Nations Art 109

Adopted:	UNGA	20 December 1965
Entry into force:		12 June 1968
Kenya		16 June 1966 <i>ratification</i>

Convention on the Privileges and Immunities of the United Nations

Adopted:	UNGA	13 Feb 1946
Entry into force:		for each state on date of deposit
Kenya:		1 Jul 1 965 <i>ratification</i>
Domestication:		Immunities and Privileges Act Cap 179

Convention on the Privileges and Immunities of the Specialised Agencies

Adopted: UNGA 21st November 1947
Entry into force: for each State on date of deposit
Kenya 1 July 1965 *accession*
Domestication: Immunities and Privileges Act Cap 179

General Convention on Privileges and Immunities of the OAU

Done: Accra 25 October, 1965
Entry into force: 25 October, 1965
Kenya: 17 January, 1967
Domestication: Immunities and Privileges Act Cap 179

Vienna Convention on Diplomatic Relations

Done: Vienna 18 April 1961
Entry into force: 24 April 1964
Kenya: 1 July 1965 *accession*
Domestication: Immunities and Privileges Act Cap 179

Optional Protocol to the Vienna convention on Diplomatic Relations Concerning the Acquisition of Nationality

Done: Vienna 18 April 1961
Entry into force: 24 April 1964
Kenya 1 July 1965 *accession*

Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes

Done: Vienna 18 April 1961
Entry into force: 24 April 1964
Kenya: 1 July 1965 *accession*

Vienna Convention on Consular Relations

Done: Vienna 24 April 1963
Entry into force: 19 March 1967
Kenya 1 July 1965 *accession*
Domestication: Immunities and Privileges Act Cap 179

Optional Protocol to the Vienna Convention on Consular Relations Concerning Acquisition of Nationality

Done: Vienna 24 April 1963

Entry into force: 19 March 1967
Kenya: 1 July 1965 accession

**Optional Protocol to the Vienna Convention on Consular Relations
Concerning the Compulsory Settlement of Disputes**

Done: Vienna 24 April 1963
Entry into force: 19 March 1967
Kenya: 1 July 1965 accession

HUMAN RIGHTS

**International Convention on the Elimination of All forms of Racial
Discrimination**

Opened for Signature: 7th March, 1966 New York
Entry into force: 4th January, 1969
Depositary: Secretary of the United Nations
Kenya: 13th October 2001 Accession

**Declaration Regarding Article 14 (Concerning the Competence of the
Committee for the Elimination of Racial Discrimination)**

Entry into force: 3rd December, 1982

International Convention on Economic, Social and Cultural Rights

Adopted: 16th December, 1966
Entry into force: 3rd January, 1976
Depositary: Secretary of the United Nations
Kenya: 1st May 1972 accession declaration

International Covenant on Civil and Political Rights

Adopted: 16th December, 1966
Entry into force: 23rd March, 1976
Depositary: Secretary General of the United Nations
Kenya: 1st May, 1972 accession

**International convention on civil and political rights optional protocol
1 on the individual complaint**

Adopted 16th December 1966
Entry into force 23rd march 1976

Depositary Secretary General of the United Nations
Kenya not ratified.

**International Convention on Civil and Political Rights Optional
protocol 2 on the abolition of death penalty**

Adopted 15th December 1989
Entry into force 11th July 1991
Depositary Secretary General of the United Nations
Kenya not ratified

**Declaration Regarding Article 41 (Concerning the Competence of...)
The International Covenant on Civil And Political Rights**

Status: As above
Kenya: No action

**Optional Protocol to the International Covenant on Civil and Political
Rights**

Adopted: 16th December, 1966
Entry into force: 23rd March, 1976

**Convention on Non-Applicability of Statutory Limitations to War Crimes and
Crimes Against Humanity**

Adopted: 26th November 1968
Entry into force: 11th November 1970
Kenya: 1st May 1972

**Declaration Regarding Article 41 (Concerning the Competence of...)
The International Covenant on Civil And Political Rights**

Status: As above
Kenya: No action

**Optional Protocol to the International Covenant on Civil and Political
Rights**

Adopted: 16th December, 1966
Entry into force: 23rd March, 1976
Kenya: No action

International Convention on the Suppression and Punishment of the Crime of Apartheid

Adopted: 26th November 1973
Entry into force: 11th November 1976
Kenya: 1st May 1974 Signature

International Convention Against Apartheid in Sports

Adopted: 10th December 1985
Entry into force: 3rd April 1988
Kenya: 16th May 1986 Signature

Convention on the Elimination of All Forms of Discrimination Against Women

Adopted: 18th December 1979
Entry into force: 3rd September 1981
Kenya: 9th March 1984 Accession

Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women

Adopted 6th October 1999
Entry into force 22nd December 2000
Depositary Secretary General of the United Nations
Kenya not ratified

Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Adopted: 10th December 1984
Entry into force: 26th June 1987
Kenya: 21st February 1997 Accession

Convention on the Rights of the Child

Adopted: 29th November 1989
Entry into force: 2nd September 1990
Kenya: 30th July 1990 Ratification
Domestication: Children Act 2001 (March 2001)

Optional Protocol to the Convention on the Right of the Child on the Involvement of Children in Armed Conflict

Adopted: New York 25th May 2000
Entry into force: 12th February 2002

Kenya: 8th September 2000 Signature
28th January 2001 Ratification
Domestication: Children Act 2001 (March 2001)

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

Adopted: New York 15th May 2000
Entry into force: 18th January 2002
Kenya: 8th September 2000 Signature
Domestication: Children Act 2001 (March 2001)

Convention on the Rights of Persons with Disabilities

Adopted 13th December 2006
Entry into force 12th May 2008
Depositary Secretary General of the United Nations
Kenya 12th May 2008

REFUGEES AND STATELESS PERSONS

Convention Relating to the Status of Refugees

Adopted: 28th July, 1951
Entry into force: 12th April, 1954
Depositary: Secretary General of the United Nations
Date: 16th May, 1966 Accession declaration
Domestication: Refugees Act 2006

Protocol Relating to the Status of Refugees

Adopted: 31st January, 1967
Entry into force: 4th October, 1967
Depositary: Secretary General of the United Nations
Kenya: 13th November, 1981 Accession

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

Adopted: 10th September, 1969
Entry into force: 20th June, 1974
Depositary: Secretary General of OAU
Kenya: 4th February, 1993
Domestication: The Refugees Act 2006

INTERNATIONAL HUMANITARIAN LAW

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

Adopted: 12th August 1949
Entry into force: 21st October 1950
Kenya: 20th September 1966 Accession

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

Adopted: 12th August 1949
Entry into force: 21st October 1950
Kenya: 20th September 1966 Accession

Geneva Convention Relative to the Treatment of Prisoners of War

Adopted: 12th August 1949
Entry into force: 21st October 1950
Kenya: 20th September 1966 Accession

Geneva Convention Relative to the Protection of Civilian Persons in time of War

Adopted: 12th August 1949
Entry into force: 21st October 1950
Kenya: 20th September 1966 Accession

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts

Adopted: 1977
Entry into force: 7th December 1978
Kenya: 23rd February 1999 Accession

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts

Adopted: 1977
Entry into force: 7th December 1978
Kenya: 23rd February 1999 Accession

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

Adopted: Oslo 18th September 1997
Entry into force: 1st March 1999
Kenya: 23rd January 2001 Ratification

NARCOTICS AND PSYCHOTROPIC SUBSTANCES

Single Convention on Narcotic Drugs

Adopted: New York 30th March 1961
Entry into force: 13th December 1964
Kenya: 13th November 1964 Accession
Domestication: Narcotic Drugs and Psychotropic Substances Control Act 1994

Protocol Amending the Single Convention on Narcotic Drugs

Adopted: Geneva 8th August 1975
Entry into force: 8th August 1975
Kenya: 9th February 1973 Accession

Single Convention on Narcotic Drugs, 1961, as Amended by the Protocol Amending the Single Convention on Narcotic Drugs

Adopted: New York 8th August 1975
Entry into force: 8th August 1975
Kenya: 9th February 1973
Domestication: Narcotic Drugs and Psychotropic Substances Control Act 1994

Convention on Psychotropic Substances

Adopted: Vienna 21st February 1971
Entry into force: 16th August 1976
Kenya: 18th October 2000 Accession
Domestication: Narcotic Drugs and Psychotropic Substances Control Act 1994

United Nations Convention against Illicit trafficking in Narcotic Drugs and Psychotropic Substances

Adopted: Vienna 8th August 1975
Entry into force: 8th August 1975
Kenya: 9th February 1973 Accession

Domestication: Narcotic Drugs and Psychotropic Substances
Control Act 1994

INTERNATIONAL TRADE AND DEVELOPMENT

Agreement Establishing the African Development Bank

Done: Khartoum 4 Aug 1963
Entry into force: 10 Sep 1964
Kenya: 4 Aug 1963 Signature
24 Jan 1964 Ratification

Amendments to the Agreement Establishing the African Development Bank

Adopted: 17 May 1979
Entry into force: 7 May 1982
Kenya: 25 July 1979 Acceptance

Agreement Establishing the African Development Bank Done at Khartoum on 4 Aug 1963 As Amended by Resolution 05 - 79 on 17 May 1979

Concluded: Lusaka 7 May 1979
Entry into force: 7 May 1982
Kenya: 7 May 1982

Agreement Establishing the International Fund for Agricultural Development

Concluded: Rome 13 Jun 1976
Entry into force: 30 Nov 1977
Kenya: 30 Mar 1977 Signature
10 Nov 1977 Ratification

Constitution of the United Nations Industrial Development Organisation

Concluded: Vienna 8 Apr 1979
Entry into force: 21 Jun 1985
Kenya: 28 Oct 1981 Signature,
13 Nov 1981 Ratification
Notification under Art 25

International Convention to Facilitate the Importation of Commercial Samples and Advertising Materials

Done: Geneva 7 Nov 1952

Entry into force: 20 Nov 1955
Kenya 3 Sep 1965 Accession

Agreement Establishing the WTO

Concluded: Marrakesh, Morocco 15th April 1994
Entry into force: 1st January 1995
Kenya 15th April 1994 Acceptance

INTELLECTUAL PROPERTY

Convention Establishing the World Intellectual Property Organization

Done: Stockholm 14th July 1967
Amended 28th September 1979
Entry into force: 1970
Kenya¹ 5th October 1971 Accession

Paris Convention for the Protection of Industrial Property

Done:	Paris	1883
Revised ² :	Brussels	1900
	Washington	1911
	The Hague	1925
	London	1934
	Lisbon	1958
	Stockholm	14 th July 1967
Amended:	Paris Union	1979
Kenya	14 th June 1965 Accession to Paris Convention	
	26 th October 1971 Accession to Stockholm Act	
Domestication:	Industrial Property Act 2001	

Berne Convention for the Protection of Literary and Artistic works

Done:	Berne	1886
Completed:	Paris	1896
Revised:	Berlin	1908
Completed:	Berne	1914
Revised:	Rome	1928

¹ Kenya is also a member of the International Union for the Protection of industrial Property (Paris Union) founded by the Paris Convention for the Protection of Industrial Property and also a member of the International union for the Protection of Literary and Artistic Works (Berne Union) founded by the Berne Convention for the Protection of Literary and Artistic Works

² The revisions led to Enactment of Acts named after the place in which the revision took place e.g Brussels Act.

	Brussels	1948
	Stockholm	1967
	Paris	1971
Amended:	Berne Union	1979
Kenya	11 th June 1993	Accession to the Convention
	11 th June 1993	Accession to the Paris Act
Domestication:		Copyright Act 2001

Madrid Agreement Concerning the International registration of Marks

Done:	Madrid	1891
Revised:	Brussels	1900
	Washington	1911
	The Hague	1925
	London	1934
	Nice	1957
	Stockholm	1967
Amended	28 th September 1979	
Kenya	26 th June 1998 Accession	
Domestication:	Trade Marks Act Cap 506	

Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks

Done:	Madrid 1989
Amended:	2006
Kenya	26 th June 1998 Accession

Hague Agreement Concerning the International Registration of Industrial Designs

Done:	Hague 1925
Revised:	London 1934
	Hague 1960 ³
	Monaco (Additional Act) 1961
	Stockholm (Complementary Act) 1967
	Geneva Protocol 1975 ⁴
Amended:	(Hague Union) 1979
	Geneva Act 1999 ⁵
Kenya	Not a party

Nice Agreement of the International Classification of Goods and Services for the Purposes of the Registration of Marks

Done:	1957
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³ This Protocol is not yet in force

⁴ The Protocol of the Geneva (1975) in accordance with Article 11(2)(a) thereof ceased to have effect as of 1st August 1984. However as provided by Article 11(2)(b), states bound by the Protocol (Belgium, France, Germany, Hungary, Liechtenstein, Luxembourg, Monaco, Netherlands, Senegal, Suriname and Switzerland are not relieved of their obligations there under in respect of Industrial Designs whose date of international deposit is prior to 1st August 1984).

⁵ The Geneva (1999) Act to the Hague Agreement was adopted on 2nd July 1999 and entered into force on 23rd December 2003

Revised: Stockholm 1967
Geneva 1977
Amended: (Nice Union) 1979
Kenya Not a party

Lisbon Agreement for the Protection of Appellations of Origin and their International Registration

Done: Lisbon 1958
Revised: Stockholm 1967
Amended: (Lisbon Union) 1979
Kenya Not a party

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

Done: Rome 1961
Kenya Not a Party

Locarno Agreement Establishing an International Classification for Industrial Designs

Done: Locarno, Switzerland 1968
Amended: (Locarno Union) 1979
Kenya Not a Party

Patent Cooperation Treaty

Done: Washington 1970
Amended 1979
Modified: (PCT Union) 1984 & 2001
Kenya 8th June 1994 Accession
Domestication: Industrial Property Act 2001

Strasbourg Agreement Concerning the International Patent Classification

Done: Strasbourg, France 1971
Amended: (IPC Union) 1979
Kenya Not a party

Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms

Done: Geneva 1971
Kenya 21st April 1976 Accession

Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite

Done: Brussels 1974
Kenya 25th August 1979 Accession

Budapest Treaty on the International recognition of the deposit of Microorganisms for the Purposes of Patent procedure

Done: Budapest 1977
Modified: (Budapest Union) 1980
Kenya Not a party

Nairobi Treaty on the Protection of the Olympic Symbol

Done: Nairobi 1981
Kenya 25th September 1982 Ratification

Trademark Law Treaty

Done: Geneva 1994
Kenya Not a party

World Intellectual Property Organization (WIPO) Copyright Treaty

Done: Geneva 1996
Kenya Not a party

WIPO Performances and Phonograms Treaty

Done: Geneva 1996
Kenya Not a party

Patent Law Treaty

Done: Geneva 2000
Entry into force: 28th April 2005
Kenya Not a party

Singapore Treaty on the Law of Trademarks

Done: Singapore 27th March 2006
Entry into force: Not yet in force
Kenya Signature

International Convention for the Protection of New Varieties of Plants⁶

Done: 1961
Revised: Geneva 1972, 1978, 1991
Kenya 13th May 1999 Accession to the Convention
13th May 1999 Accession to the 1978 Act

Convention for the protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms

Concluded: Geneva 29th October 1971
Entry into force: 18th April 1973
Kenya: 4th April 1972 Signature,
6th January 1976 Ratification

TRANSPORT AND COMMUNICATION

United Nations Convention on the Carriage of Goods by Sea

Concluded: 31 Mar 1978
Entry into force: 1 Nov 1992
Kenya: 31 Jul 1998 Accession
Domestication: Carriage of Goods by Sea Act Cap 392

Convention on the International Maritime Organisation

Done: Geneva 6 Mar 1948
Entry into force: 17 Mar 1958
Kenya: 22 Aug 1973 Acceptance
Depositary: United Nations and IMO

Amendments to the Convention on the International Maritime Organisation Art 17 and 18

Adopted: 15 Sep 1964
Entry into force: 6 Oct 1967
Kenya: 22 Aug 1973 Acceptance (UN)

Amendment to Article 28 of the Convention

Adopted: 28 Sep 1965
Entry into force: 3 Nov 1968
Kenya: 22 Aug 1973 Acceptance (UN)

⁶ This Convention established the International Union for the Protection of New Varieties of Plants (UPOV), an independent intergovernmental organization. WIPO provides administrative services to UPOV

Amendments to Articles 17, 18, 20 and 51 of the Convention

Adopted: 15 Nov 1979
Entry into force: 10 Nov 1984
Kenya: 7 April 1983 (IMO), 19 April 1983 (UN)

Convention on a Code of Conduct for Liner Conferences

Concluded: Geneva 6 Apr 1974
Entry into force: 6 Oct 1983
Kenya: 27 Feb 1978 Accession
CIVIL AVIATION

Convention on International Civil Aviation

Adopted: Chicago 7th December 1944
Kenya: 31st May 1964 Accession

Convention on International Recognition of Rights in Aircrafts

Adopted: Geneva 19th June 1948
Kenya: 15th April 1997

Convention on Damage Caused by Foreign Aircraft to Third parties on the Surface

Adopted: Rome 7th October 1952
Kenya: 3rd October 1999

Protocol to Amend the Convention on damage caused by Foreign Aircraft to Third Parties on the Surface

Adopted: Montreal 23rd September 1978
Entry into force: 25th July 2002
Kenya: 23rd October 2002

Convention for the Unification of Certain Rules relating to International Carriage by Air

Adopted: Warsaw 12th October 1929
Kenya: 12th December 1963

Protocol to Amend the Convention for the Unification of certain Rules relating to International Carriage by Air

Adopted: The Hague 28th September
1955
Kenya: 4th October 1999

Additional Protocol No. 1

Adopted: Montreal 25th September 1975
Kenya: 4th October 1999

Additional Protocol No. 2

Adopted: Montreal 25th September 1975
Kenya: 4th October 1999

Additional Protocol No. 3

Adopted: Montreal 25th September 1975
Kenya: 4th October 1999

Convention for the Unification of Certain Rules for International Carriage by Air

Adopted: Montreal 28th May 1999
Entry into force: Not yet
Kenya: 7th January 2002 Ratification

Convention on Offences and Certain other Acts Committed on Board Aircraft

Adopted: Tokyo 14th September 1963
Entry into force: 4th December 1969
Kenya: 20th December 1970 Accession

Convention for the for the Suppression of Unlawful Seizure of Aircraft

Adopted: The Hague 16th December 1970
Entry into force: 14th October 1971
Kenya: 19th February 1977 Accession

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

Adopted: Montreal 23rd September 1971
Entry into force: 26th January 1973
Kenya: 10th February 1977 Accession
Domestication: Civil Aviation Act Cap 394

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

Adopted: Montreal 24th February 1988
Entry into force: 6th August 1989
Kenya: 4th November 1995

Domestication: Civil Aviation Act Cap 394

Convention on the Marking of plastic Explosives for the purpose of Detection

Adopted: Montreal 1st March 1991
Entry into force: 21st June 1998
Kenya: 21st December 2002 Accession

EDUCATION AND CULTURE

Agreement on the Importation of Educational, Scientific and Cultural Materials

Opened for signature: New York 22nd Nov 1950
Entry into force: 21st May 1952
Kenya: 15th Mar 1967 Accession

Cultural Charter for Africa

Adopted: Port Luis 5th July 1976
Entry into force: 19th September, 1990
Kenya: 5th November, 1981 Ratification

Agreement on the Importation of Educational, Scientific and Cultural Materials

Opened for signature: New York 22nd Nov 1950
Entry into force: 21st May 1952
Kenya: 15th Mar 1967 Accession

Cultural Charter for Africa

Adopted: Port Luis 5th July 1976
Entry into force: 19th September, 1990
Kenya: 5th November, 1981 Ratification

TERRORISM

Convention on the Physical Protection of Nuclear Materials

Adopted: Vienna 3rd March 1980
Entry into force: 1987
Kenya: 2001

International Convention for the Suppression of Terrorist Bombings

Adopted: UNGA New York 15th December 1997
Entry into force: 23rd May 2001
Kenya: 16th November 2001 Accession

International Convention for the Suppression of the Financing of Terrorism

Adopted: UNGA New York 9th December 1999
Entry into force: 10th April 2000
Kenya: 4th December 2001 Accession

MISCELLANEOUS PENAL MATTERS

International convention Against the Taking of Hostages

Adopted: UNGA 17 Dec 1979
Entry into force: 3 Jun 1983
Kenya: 8 December, 1981 Accession,
declaration/reservation Article 16 par 1
Depositary: UN

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents

Opened for Signature: New York 14th December 1973
Entry into force: 20th February 1977
Kenya: 16th November 2001 Accession

COMMODITIES

Agreement Establishing the Common Fund for Commodities

Concluded: Geneva 27th June 1980
Entry into force: 19th June 1989
Kenya: 10th March 1982 Signature,
6th April 1982 Ratification

International Sugar Agreement

Concluded: Geneva 20th March 1992
Entry into force: 20th January 1993
Kenya: 6th November 1995 Accession
Depositary: UN
Domestication: Sugar Act 2001

International Coffee Agreement, 2001

Adopted: International Coffee Council
Entry into force: 10th October, 2001
Kenya: November, 2001
LAW OF THE SEA

Convention on the Territorial Sea and the Contiguous Zone

Done: Geneva 29th April, 1958
Entry into force: 10th September, 1964
Kenya: 20th June, 1969 Accession

Convention on the High Seas

Done: Geneva 29th April, 1958
Entry into force: 30th September, 1962
Kenya: 20th June 1969 Accession

Convention on Fishing and Conservation of the Living Resources of the High Seas

Done: Geneva 29th April, 1958
Entry into force: 20th March, 1966
Kenya: 20th June, 1969 Accession

Convention on the Continental Shelf

Done: Geneva 29th April, 1958
Entry into force: 10th June, 1964
Kenya: 20th June, 1969 Accession
Domestication: Continental Shelf Act 1975

United Nations Convention on the Law of the Sea

Concluded: Montego Bay Jamaica, 10th December, 1982
Entry into force: 16th November, 1994
Kenya: 10th December, 1982 Signature,

2nd March, 1989 Ratification.

Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea

Adopted: General Assembly 28th July, 1994
Entry into force: 16th November, 1994, provisionally
Kenya: 16th November 1994 Provisional application by virtue of ratification of the Agreement; 29th July 1994 definitive signature.

COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Done: New York 10th June, 1958
Entry into force: 7th June 1959
Kenya: 10th February, 1989 accession, declaration Art. I (3)

LAW OF TREATIES

Vienna Convention on the Law of Treaties

Concluded: Vienna 23rd May 1969
Entry into force: 27th January, 1980
Kenya: 23rd May 1969 Signature

TELECOMMUNICATIONS

Convention Relating to the Distribution of Programme carrying Signatures Transmitted by Satellite

Concluded: Brussels 21st May 1974
Entry into force: 25th August, 1979
Kenya: 21st May 1974 Signature,
6th January, 1976 Ratification
Depositary: United Nations

DISARMAMENT

Comprehensive Nuclear - Test - Ban Treaty

Adopted: New York 10th September 1996

Entry into force: Not yet
Kenya: 14th November 1996 Signature
30th November 2000 Ratification

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

Opened for signature: Oslo 18th September 1997
Entry into force: 1st March 1999
Kenya: 5th December 1997 Signature,
23rd January 2001 Ratification.

ENVIRONMENT

Vienna Convention for the Protection of the Ozone Layer

Concluded: Vienna 22nd March, 1985
Entry into force: 22nd September, 1988
Kenya: 9th November, 1988 Accession
Domestication: Environmental Management and
Coordination Act 1999

Montreal Protocol on Substances that Deplete the Ozone Layer

Concluded: Montreal 16th September, 1987
Entry into force: 1st January, 1989
Kenya: 16th September, 1987 Signature,
9th November, 1988 Ratification.

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer

Adopted: Second Meeting of Parties, London 29th
June, 1990
Entry into force: 10th August, 1992
Kenya: 27th September, 1994 ratification

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer

Adopted: Fourth Meeting of Parties, Copenhagen,
25th November, 1992
Entry into force: 14th June, 1994
Kenya: 27th September, 1994 Ratification

Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer Adopted by the Ninth Meeting of the Parties

Adopted: Montreal 17th September 1997
Entry into force: 10th November 1999
Kenya: 12th July 2000 Ratification

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

Concluded: Basel 22nd March, 1989
Entry into force: 5th May, 1992
Kenya: 1st June 2000 Accession
Domestication: Environmental Management and Coordination Act

Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, and their Disposal 1989

Adopted: Third Meeting of Parties Geneva 22nd September, 1995
Entry into force:
Kenya:

United Nations Framework Convention on Climate Change

Concluded: New York 9th May, 1992
Entry into force: 21st March, 1994
Kenya: 12th June, 1992 Signature,
30th August, 1994 Ratification

Convention on Biological Diversity

Opened for Signature: Rio de Janeiro 5th June, 1992
Entry into force: 29th December, 1993
Kenya: 11th June 1992 Signature
26th July, 1994 Ratification

United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa

Opened for signature: Paris 14th October, 1994
Entry into force:
Kenya: 14th October, 1994 Signature,
Ratification.

Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora

Adopted: Ministerial Meeting Lusaka 8th
September, 1994
Entry into force:
Kenya: 9th September, 1994 signature
Ratification

Cartagena Protocol on Biosafety to the Convention on Biological Diversity

Adopted: Montreal 29th January 2000
Entry into force: Not yet
Kenya: 15th May 2000 Signature
24th January 2002 Ratification

Convention on fishing and Conservation of the Living resources of the High Seas

Adopted: Geneva 29th April 1958
Entry into force: 20th March 1966
Kenya: 20th June 1969 Accession

Convention of the High Seas

Adopted: Geneva 29th April 1958
Entry into force: 30th September 1962
Kenya: 20th June 1969 Accession

Convention on the African Migratory Locust

Adopted: Kano, Nigeria 23rd May 1962
Entry into force: 13th April 1963
Kenya: 29th November 1963 Accession

Treaty Banning Nuclear Weapons Tests in the Atmosphere, in the Outer Space and Under Water

Adopted: Moscow 5th August 1963
Entry into force: 10th October 1963
Kenya: 10th June 1965 Accession

Treaty on Principles Governing the Activities of States in Exploration and use of the Outer Space Including the Moon and Other Celestial Bodies

Adopted: London, Moscow, Washington 27th
January 1967
Entry into force: 10th October 1967

Kenya: 19th January 1984 Accession

African Convention on the Conservation of Nature and Natural Resources

Adopted: Algiers 15th September 1968
Entry into force: 9th October 1969
Kenya: 9th October 1969 Accession
Domestication: Environmental Management and
Coordination Act 1999

**Convention on the Prohibition of the Development, Production and
Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their
Destruction**

Adopted: London, Moscow, Washington 10th April
1972
Entry into force: 26th March 1975
Kenya: 7th January 1976 Accession

**Convention Concerning the Protection of the World Cultural and Natural
Heritage**

Adopted: Paris 23rd November 1972
Entry into force: 17th December 1975
Kenya: 5th June 1991 Acceptance

**Convention on the Prevention of Marine Pollution by Dumping of Wastes and
other Matter**

Adopted: London, Mexico City, Moscow,
Washington 29th December 1972
Entry into force: 30th August 1975
Kenya: 7th January 1976 Accession
Domestication: Environmental Management and
Coordination Act 1999

**Convention on International Trade in Endangered Species of Wild Fauna and
Flora**

Adopted: Washington 3rd March 1973
Entry into force: 1st July 1975
Kenya: 13th December 1978

**Convention for the Protection, Management and Development of the Marine
and Coastal Environment of the Eastern African Region**

Adopted: Nairobi 21st June 1985
Entry into force: 30th May 1996
Kenya: 11th September 1990 Accession

Protocol Concerning Cooperation in Combating marine Pollution in Cases of Emergency in the Eastern African Region

Adopted: Nairobi 21st June 1985
Entry into force: Not yet
Kenya: 11th September 1990 Accession

International Convention for the Prevention of Pollution from Ships

Adopted: London 2nd November 1973
Entry into force: 2nd October 1983
Kenya: 12th September 1975 Deposit of Instrument

Convention on Wetlands of International Importance Especially as Waterfowl

Adopted: Ransar, Iran 2nd February 1971
Entry into force: 21st December 1975
Kenya: 5th June 1990 Accession

International Convention for the Prevention of Pollution of the Sea by Oil (Amended on 11th April 1962 and 21st October 1969)

Adopted: London 12th May 1954
Entry into force: 26th July 1958
Kenya: 12th December 1975

International Plant Protection Convention

Adopted: Rome 6th December 1951
Entry into force: 3rd April 1952
Kenya: 7th May 1974 Accession

MARITIME

International Convention for the Safety of life at Sea

Adopted: 1st November 1974
Entry into force: 25th May 1980
Kenya: 21st October 1999 Accession

International Convention on Load Lines

Adopted: 5th April 1966
Entry into force: 21st July 1968
Kenya: 12th December 1975 Accession

International Convention on Tonnage Measurement of Ships

Adopted: 23rd June 1969
Entry into force: 18th July 1982
Kenya: 15th March 1993 Accession

Convention on the International Regulations for Preventing Collisions at Sea

Adopted: 20th October 1972
Entry into force: 15th July 1977
Kenya: 12th December 1992 Accession

International Convention for Safe Containers

Adopted: 2nd December 1972
Entry into force: 6th September 1977
Kenya: 2nd February 2001 Accession

International Convention on Standards of Training, Certification and Watch-Keeping for Seafarers

Adopted: 7th July 1978
Entry into force: 28th April 1984
Kenya: 15th March 1993 Accession

International Convention on Maritime Search and Rescue

Adopted: 27th April 1979
Entry into force: 22nd June 1985
Kenya: 14th January 1993 Accession

Convention on the International Maritime Satellite Organization

Adopted: 3rd September 1976
Entry into force: 16th July 1979
Kenya: 21st July 1998 Accession

Operating Agreement for the International Maritime Satellite Organization

Adopted: 3rd September 1976

Entry into force: 16th July 1979
Kenya: 21st July 1998

International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978

Adopted: MARPOL Convention 1973
Adopted: MARPOL Convention 1978

Annex I Prevention of Pollution by Oil

Entry into force: 2nd October 1983
Kenya: 15th March 1993 Accession

Annex II Control of Pollution by Noxious Liquid Substances

Entry into force: 2nd October 1983
Kenya: 15th March 1993 Accession

Optional Protocols

Annex III- Prevention of Pollution by Harmful Substances in Packaged Form

Entry into force: 1st July 1992
Kenya: 15th March 1993 Accession

Annex IV Prevention of Pollution by Sewage from Ships

Entry into force: 21st September 2003
Kenya: 15th December 1992 Accession

Annex V Prevention of Pollution by Garbage from Ships

Entry into force: 31st December 1988
Kenya: 15th March 1993 Accession

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters

Adopted: 13th November 1972
Entry into force: 30th August 1975
Kenya: 6th February 1976 Accession

Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage 1969

Adopted: 27th November 1992
Entry into force: 30th May 1996
Kenya: 2nd February 2001 Accession

Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage 1971

Adopted: 27th November 1992
Entry into force: 30th May 1996
Kenya: 2nd February 2001 Accession

Convention for the Suppression of Unlawful Acts against the Safety of fixed Platforms Located on the Continental Shelf

Adopted: 10th March 1988
Entry into force: 1st March 1992
Kenya: 2002

International Convention on Salvage

Adopted: 24th April 1989
Entry into force: 14th July 1996
Kenya: 21st July 2000 Accession

International Convention on Oil Pollution Preparedness, Response and Cooperation

Adopted: 30th November 1990
Entry into force: 13th May 1995
Kenya: 21st October 1999 Accession

FISCAL MATTERS

International Convention for the Suppression of Counterfeiting Currency

Adopted: Geneva 20th April, 1929
Entry into force: 22nd February, 1931
Kenya: 10th November, 1977 Accession
Depositary: League of Nations, now United Nations

AFRICAN UNION TREATIES, CONVENTIONS, PROTOCOLS AND CHARTERS

CONSTITUTIVE

Constitutive Act of the African Union

Adopted: Lome 11th July, 2000
Entry into Force: 26th May, 2001
Kenya: 2nd March, 2001 Signature
4th July, 2001 Ratification
10th July, 2001 Deposition of Instrument

Protocol on the Amendment to the Constitutive Act of the African Union

Adopted: Maputo 11th July, 2003
Entry into Force:
Kenya: 17th December, 2003 Signature
22nd May, 2007 Ratification
8th June, 2007 Deposition of Instrument

Protocol to the Court of Justice of the African Union

Adopted: Maputo 11th July, 2003
Entry into Force:
Kenya: 17th December, 2003 Signature

Protocol Relating to the Establishment of the Peace and Security Council of the African Union

Adopted: Durban 9th October, 2002
Entry into Force: 13th December, 2006
Kenya: 17th December, 2003 Signature
29th December, 2006 Ratification
17th January, 2007 Deposition of
Instrument

Treaty Establishing the African Economic Community

Adopted: Abuja 3rd June, 1991
Entry into Force: 12th May, 1994
Kenya: 3rd June, 1991 Signature
18th June, 1993 Ratification
22nd June, 1993 Deposition of Instrument

Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African parliament

Adopted: Sirte 2nd March 2001
Entry into Force: 14th December 2003

Kenya: 7th July, 2003 Signature
19th December, 2003 Ratification
22nd December, 2003 Deposition of Instrument

SOCIO-CULTURAL

Cultural Charter for Africa

Adopted: Port Louis 5th July 1976
Entry into Force: 19th September 1990
Kenya: 28th October 1981 Accession
5th November, 1981 Deposition of Instrument

Agreement for the Establishment of the African Rehabilitation Institute

Adopted: Addis Ababa 17th July 1985
Entry into Force: 2nd December 1991
Kenya: 17th December, 2003 Signature
9th May, 2006 Ratification
23rd May, 2006 Deposition of Instrument

HUMAN RIGHTS

Convention Governing the Specific Aspects of Refugee Problems in Africa

Adopted: Addis Ababa 10th September, 1969
Entry into Force: 20th June, 1974
Kenya: 10th September, 1969 Signature
23rd June, 1992 Ratification
4th February, 1993 Deposition of Instrument
Domestication: The Refugees Act 2006

African Charter on Human and People's Rights

Adopted: Nairobi June 1981
Entry into Force: 21st October, 1986
Kenya: 23rd October, 1992 Accession
10th February, 1992 Deposition of Instrument

Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights

Adopted: Ougadougou 10th June, 1998
Entry into Force: 25th January, 2004
Kenya: 7th July, 2003 Signature
4th February, 2004 Ratification

18th February, 2005 Deposition of

Instrument

Protocol to the African Charter on Human and People's Rights on the Rights of women in Africa

Adopted: Maputo 11th July, 2003
Entry into Force:
Kenya: 17th December, 2003 Signature

African Charter on the Rights and Welfare of the Child

Adopted: Addis Ababa July 1990
Entry into Force: 29th November 1999
Kenya: 25th July 2000 Accession
10th August, 2000 Deposition of Instrument
Domestication: Children Act 2001

DIPLOMATIC RELATIONS

General Convention on the Privileges and Immunities of Organization of African Unity

Adopted: Accra 25th October, 1965
Entry into Force: 25th October, 1965
Kenya: 25th October, 1965 Signature
12th January, 1967 Ratification
17th January, 1969 Deposition of Instrument

ENVIRONMENT

African Convention on the Conservation of Nature and Natural Resources

Adopted: Algiers 15th September, 1968
Entry into Force: 16th June, 1969
Kenya: 15th September, 1968 Signature
12th May, 1969 Ratification
12th may, 1969 Deposition of Instrument
Domestication: Environmental Management and coordination
Act
1999

Revised African Convention on the Conservation of Nature and Natural Resources

Adopted: Maputo 11th July, 2003
Entry into Force:

Kenya:

17th December, 2003 Signature

Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa

Adopted: Bamako 30th January, 1991

Entry into Force:

Kenya: 17th December, 2003 Signature

PEACE AND DISARMAMENT

African Nuclear-Weapon-Free Zone Treaty (The Treaty of Pelindaba)

Adopted: Addis Ababa July 1995

Entry into Force:

Kenya: 11th April, 1996 Signature
15th November, 2000 Ratification
9th January, 2001 Deposition of Instrument

CIVIL AVIATION

African Civil Aviation Commission

Adopted: Addis Ababa 17th January 1969

Entry into Force: 15th March 1972

Kenya: 12th May 1969 Accession
16th May, 1969 Deposition of Instrument

INTERNATIONAL TRADE AND DEVELOPMENT

Constitution of the Association of African Trade Promotion Organizations

Adopted: Addis Ababa 18th January 1974

Entry into Force:

Kenya: 18th January, 1974 Signature

ENERGY

Convention of the African Energy Commission

Adopted: Lusaka 11th July, 2001

Entry into Force: 13th December, 2006

Kenya: 17th December, 2003 Signature
29th December, 2006 Ratification

17th January, 2007 Deposition of Instrument

TRANSPORT AND COMMUNICATION

Convention on African Maritime Transport Charter

Adopted: Tunis 11th June, 1994
Entry into Force:
Kenya: 17th December, 2003 Signature

TERRORISM

Convention on the Prevention and Combating of Terrorism

Adopted: Algiers July 1999
Entry into Force: 6th December, 2002
Kenya: 10th December, 2001 Signature
28th November, 2001 Ratification
10th December, 2001 Deposition of Instrument

MISCELLANEOUS PENAL MATTERS

African Convention on Preventing and Combating Corruption

Adopted: Maputo 11th July 2003
Entry into Force: 5th August 2006
Kenya: 17th December, 2003 Signature
3rd February, 2007 Ratification
7th March, 2007 Deposition of Instruments

Convention for the Elimination of Mercenarism in Africa

Adopted: Libreville 3rd July 1977
Entry into Force: 22nd April 1985
Kenya: 17th December, 2003 Signature

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