Legal reception in the AU against the backdrop of the monist/dualist dichotomy

Michelle Barnard [*]

Abstract

The relationship between international and domestic law is traditionally viewed through the lens of the monist/dualist dichotomy. While monists view international and domestic law as two sides of the same coin and therefore see no need for the reception of international law into national law, dualists hold the opposite viewpoint. The monist and dualist schools rely on their construction of the relationship between international and domestic law to prescribe how/how not reception should take place. Interestingly, neither of the two schools pays much attention to the role the nature of the international law to be received should play in how the reception of such law takes place. It is the main aim of this article to investigate whether the nature of international law should influence how it is received into domestic legal systems at the African Union level.

Introduction

Contemporary legal developments in the African Union (AU) relate to a large extent to the reception of international law into national legal systems in Africa. According to Oppong, Africa is becoming more 'international law-friendly' which is characterised by a trend in Africa towards making international law supreme over, and directly or automatically applicable within, the domestic legal system.[1] The trend of accepting the supremacy and direct application of international law has been complemented by judicial reliance on unincorporated treaties and decisions of international

[*] LLB, LLM, LLD (North-West University, Potchefstroom), Lecturer at the Faculty of Law, North-West University, Potchefstroom Campus.

[1] Oppong 'Re-imagining international law: an examination of recent trends in the reception of international law into national legal systems in Africa' 2006 *Fordham International Law Journal* 296–297; and Maluwa 'The incorporation of international law and its interpretational role in municipal legal systems in Africa: an exploratory survey' 1998 *SAYIL* 45 48–51

tribunals in reaching their decisions.[2] It must be borne in mind that international law cannot be directly incorporated into a regional legal framework of a regional entity such as the AU. African Union organs and institutions do not have the authority to accede to international legal instruments on behalf of member states. This is because the relationship between the AU and its member states is based on voluntary accession to the regional body and can therefore not be compared to the relationship between the state and individuals at the national level. Furthermore, the Constitutive Act of the AU, 2000, does not contain provisions which grant AU institutions sovereignty which would elevate AU law above national laws.[3] How international law – be it hard or soft in nature – is to be received into the legal frameworks of AU member states relates to the reception of international law into national law. Let us consider the foregoing statement against the backdrop of a practical example.

The Treaty Establishing the African Economic Community, 1992, (Abuja Treaty) mandates the inclusion of nuclear energy into the energy systems of AU member states[4] and instructs member states to harmonise their national energy plans and articulate a common energy policy.[5] While the Abuja Treaty is silent on the legal norms and standards in terms of which member states should harmonise their national energy plans, other regional instruments clearly state that the legal norms and standards of the International Atomic Energy Agency (IAEA)[6] should inform AU law and

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2 Maluwa n 1 above at 61–63.

3 It is interesting to note that the *EAC Treaty*, 1999 indeed includes such provisions. Article 8(4) of the Treaty provides that Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty. The Treaty also establishes the East African Court of Justice in terms of article 8(4). The decisions of the court have precedence over decisions of national courts on a similar matter. In pursuance of this provision, art 8(5) enjoins member states to make the necessary legal instruments to confer precedence of Community institutions and laws over similar national ones.

4 Article 55 of the Abuja Treaty.

5 *Id* at art 54(2)(e).

6 The establishment of the IAEA in 1957 and subsequent drafting of its Statute undoubtedly initiated the movement towards a global nuclear security regime. The accident at the Chernobyl nuclear power plant in 1986 underlined some significant deficiencies and gaps in the international legal and regulatory norms established to govern the safe and peaceful use of nuclear energy. This proved to be the impetus for increased international co-operation on establishing a global nuclear safety regime. Rautenbach, Tonhauser & Wetherall 'Joint Report by the OECD Nuclear Energy Agency and the International Atomic Energy Agency 'An overview of the international legal framework governing the safe and peaceful uses of nuclear energy – some practical steps' in *International Nuclear Law in the Post-Chernobyl Period* 2006 NEA No 6146 7.

policy makers in this regard.[7] The IAEA legal framework consists of binding international legal instruments,[8] which predominantly take the form of treaties and conventions (hard law) as well as non-binding international legal instruments,[9] most notably codes of conduct (soft law).[10] If the member states of the AU, acting upon the provisions of these regional instruments, decide to incorporate the IAEA legal instruments into their national legal systems, the following question arises. Should the nature of the international law to be received into African national legal systems influence the way in which the reception takes place? This question will be analysed against the backdrop of the monist/dualist dichotomy. The difference in nature between hard law and soft law will provide the theoretical basis from which to hypothesise that the monist approach best serves the reception of hard law, while the dualist approach best serves the reception of soft law. In addressing this hypothesis the following aspects will be discussed.

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7 These include but are not restricted to the African Regional Cooperative Agreement for Research, Development and Training Related to Nuclear Science and Technology, 1990 (AFRA), the The Africa – European Union Energy Partnership of 2008 (AEEP) and the African Nuclear-Weapon-Free Zone, 2009 (Pelindaba Treaty). These initiatives share the common agenda of increasing further regional integration and cooperation focused on the establishment and practical implementation of a coordinated regional nuclear energy legal framework regulating the expansion of nuclear energy in the AU.

8 These include: The Convention on the Physical Protection of Nuclear Material and the 2005 Amendment thereto; Safeguards Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons; Model Protocol Additional to Agreement(s) between State(s) and the Agency for the Application of Safeguards; Convention on Early Notification of a Nuclear Accident; Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency; Convention on Nuclear Safety; Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management. Available at: http://www-ns.iaea.org/security/legal_instruments_list.asp?s=4&l=28.

9 These include: Code of Conduct on the Safety and Security of Radioactive Sources (INFCIRC/663); Guidance on the Import and Export of Radioactive Sources (INFCIRC/663); The Physical Protection of Nuclear Material and Nuclear Facilities (INFCIRC/225/Rev.4); Physical Protection Objectives and Fundamental Principles (GC(45)/INF/14); Code of Conduct on the Safety of Research Reactors(GOV/2003/7); International Basic Safety Standards for Protection against Ionizing Radiation and for the Safety of Radiation Sources (Safety Series No 115); Regulations for the Safe Transport of Radioactive Material – 2005 Edition (Safety Series No TS-R-1); Legal and Governmental Infrastructure for Nuclear, Radiation, Radioactive Waste and Transport Safety Requirements (Safety Standards Series (No GS-R-1); Safety Requirements on Preparedness and Response to a Nuclear or Radiological Emergency (Safety Standards Series No GS-R-2; Emergency Notification and Assistance Technical Operations Manual (ENATOM); Joint Radiation Emergency Management Plan of the International Organizations (JPLAN); Emergency Response Network Manual (ERNET 2002). *Ibid.*

10 The implementation of the provisions contained in either the binding or non-binding instruments comprising the IAEA legal framework into the legal framework of any member state depends on the adoption of the instrument and subscription thereto. See Rautenbach *et al* n 6 above at 8.

In the first instance, the concepts of hard law and soft law as manifestations of international law will be discussed after which the focus will shift to the question of legal reception. This discussion will take place against the backdrop of the different approaches to legal reception as prescribed by monism and dualism. Monism and dualism in African jurisprudence and judicial practice will then be analysed with reference to specific African constitutions and case law, and in the final instance, recommendations regarding the primary research question will be offered.

Hard law and soft law: finding the difference or striking a balance?

The nature of the distinction between hard law and soft law is traditionally a binary one in which hard law is seen as binding and soft law as non-binding.[11] In terms of this conception of hard and soft law, the differentiation lies in the legal form in which the law appears with the result that law contained in treaty form is always hard in nature and therefore always binding. If the form is that of a non-binding agreement, it is not a treaty and therefore qualifies as a soft agreement.

This should, however, not be taken to mean that all forms of soft law are non-binding, as some agreements between states may be binding even if not in treaty form.[12] Conversely, not all provisions contained in treaties (hard law instruments) are indeed hard in nature. Two cumulative elements give birth to classifying the nature of an obligation, namely: its source (*soft instrumentum*); and its content (*soft negotium*).[13] Furthermore, international agreements are generally considered legally binding only if the parties thereto intend to create legal rights and obligations. In the absence of the

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[11] This is the viewpoint of positivist legal scholars such as Jan Klabbers. He argues that law cannot be 'more or less binding' and in essence denies the very concept of soft law since law by definition (for positivists) is binding. Weil notes that hard law and soft law norms vary considerably in terms of their relative normativity and that the trend towards the increased use of soft law may 'destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose'. See Klabbers 'The redundancy of soft law' 1996 *Nordic Journal of International Law* 65 181; and Weil 'Towards relative normativity in international law 1983 *American Journal of International Law* 413 423.

[12] The difficulty in assessing whether or not an agreement is indeed a binding treaty, and therefore hard law was highlighted in the decision of the *Qatar-Bahrain Maritime Delimitation Case* (1994) ICJ Rep 112. See also *Anglo-Iranian Oil Case* (1952) ICJ Rep 93.

[13] D'Aspremont 'Softness in international law: a self-serving quest for new legal materials' (2008) 19 *European Journal of International Law* 1081.

intention to be bound, the instrument is deemed soft in nature.[14] The intention of parties to be bound (or not) is, however, not always equally easy to ascertain. This could be attributed to the fact that governments tend to be reluctant to include explicit provisions in an international agreement stating that it is non-binding or lacks legal force.[15] This in turn leads to a situation where inferences as to such intent have to be drawn from the language of the instrument (text) and the circumstances of its conclusion and adoption (context). Statements of general aims and broad declarations of principle are considered too indefinite to create enforceable obligations culminating in the agreement being classified as non-binding or soft.[16] However, sources such as treaties, binding unilateral acts, customary law, or judicial decisions, which clearly seem to be hard law, may also contain soft law norms in those cases when the norms are imprecise.[17] The nature of the provisions contained in legal instruments rather than the instrument as a whole should inform the classification of the provisions as either hard or soft law. In this regard, the late Judge Baxter notably stated that some treaties are soft in the sense that they impose no real obligations on the parties.[18] Though formally binding, the vague, indeterminate, or general nature of their provisions deprives these treaties of their hard-law character. The United Nations Framework Convention on Climate Change, 1992, provides a good example. While the treaty imposes some commitments on the parties, core articles dealing with policies and measures to tackle greenhouse gas emissions, are so cautiously and obscurely worded that it is uncertain whether any real obligations are created.[19] These provisions, although contained in a hard-law instrument, embody 'soft' undertakings that are not normative and cannot be described as creating 'hard rules' in any meaningful sense.[20]

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14 Schachter 'The twilight existence of non-binding international agreements' (1997) 71 *American Journal of International Law* 296–297.

15 Munch 'Non-binding agreements' 1969 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 291 3.

16 O'Connell *International law* (2ed 1970) 199–200.

17 Terpan 'Soft law in the European Union: the changing nature of EU law' *Sciences Po Grenoble Working Paper 7*, November 2013 available at: http://halshs.archives-ouvertes.fr/docs/00/91/14/60/PDF/SPGWP_N7.pdf (last accessed 9 October 2014).

18 Baxter 'International Law in "her infinite variety"' (1980) 29 *International and Comparative Law Quarterly* 549.

19 This prompted an American policy advisor to opine that 'there is nothing in anyone of the languages which constitutes a commitment to any specific level of emissions at any time'. Bodansky 'The United Nations Framework Convention on Climate Change: a commentary' 1993 *Yale Journal of International Law* 516–517 and Jamieson 'Climate change, consequentialism, and the road ahead' 2013 *Chicago Journal of International Law* 13/2 449.

20 This is probably true of very many, if not most treaties, a point recognised by the International Court in the North Sea Continental Shelf Case (1969) ICJ Rep 3 when it

What I have said above should not be taken to infer that the non-binding nature of soft negates the role it has to play in international law-making. Boyle views soft and hard law as complementary and not competing sources of international law. He observes that soft law instruments serve as mechanisms for the authoritative interpretation of treaties; provide the detailed rules and technical standards for the implementation of a treaty; are sometimes given binding force by being implicitly incorporated into treaties; and may operate in conjunction with a treaty to provide evidence of *opinio juris* for the possible emergence of a rule of customary international law.[21] In this sense non-binding soft law instruments are not fundamentally different from multilateral treaties, which serve much the same law-making purposes, making them both an alternative to, and part of, the process of multilateral treaty-making.[22] The reasons for the statements above are varied. First, it may be easier to reach agreement if the form is non-binding.[23] Secondly, it may be easier for some states to adhere to non-binding instruments because they can avoid the domestic treaty ratification process and perhaps escape democratic accountability for both the domestic treaty ratification process and the policy to which they have agreed. While this may be viewed as a reason for promoting the use of soft law in law-making, it may also make it comparably more difficult to implement the policies if funding, legislation, or public support is necessary.[24] Both treaties and soft law instruments can serve to focus consensus on rules and principles and mobilise consistent response on the part of states. While treaties may be more effective than soft law instruments for this purpose because they carry greater weight due to their legally binding nature, the assumption that hard law is more authoritative than soft law is misplaced.[25] Referring to the Rio Declaration, which both codifies existing international law and aims to develop new law,[26] it is not obvious that a treaty with the same provisions would carry greater weight or achieve its objectives any more successfully.

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specified that one of the conditions to be met before a treaty could be regarded as law-making is that it should be so drafted as to be 'potentially normative' in character.

21 Boyle 'Reflections on treaties and soft law' 1999 *International and Comparative Law Quarterly* 905–906.

22 *Id* at 902.

23 The use of soft law instruments enables states to agree to more detailed and precise provisions because their legal commitments, and the consequences of any non-compliance, are more limited. *Id* at 903.

24 *Id* at 903.

25 *Id* at 904.

26 Boyle & Freestone *International law and sustainable development: past achievements and future prospects* (1ed 1999); and Sands *Greening International* (1ed 1993).

Apart from the binary approach to differentiating between hard and soft law, other viewpoints on the nature of the distinction relate to the level of commitment either form of law creates,[27] and the effectiveness of law at the implementation stage.[28] An argument raised by Abbott and Snidal considers the issue of legalisation in international relations. They define legalisation in international relations as varying across three dimensions: precision of rules; obligation; and delegation which give law either a hard or a soft character.[29] The extent to which any given international agreement fulfils these three dimensions will characterise it as either hard or soft law. According to these writers, hard law refers to 'legally binding obligations that are precise (or can be made precise) and that delegate authority for interpreting and implementing the law.'[30] On the other hand, soft law begins 'once legal arrangements are weakened along one or more of three dimensions of obligation, precision and delegation.'[31] Therefore, if an agreement is not binding or it is *formally* binding but its content is so vague that it leaves almost complete discretion to the parties as regards its implementation, the agreement will be soft along the dimensions of obligation and precision.[32] So, too, if an agreement does not delegate authority to a third party to monitor its implementation, interpret it, or enforce it, the agreement is soft in the third dimension of delegation.[33] The key difference between interpreting hard and soft law in terms of a binary

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27 Rational institutionalist scholars view the term 'binding international agreement' as a 'misleading hyperbole' but nonetheless acknowledge the usefulness of the term as it signals the seriousness of states' commitments in that non-compliance entails greater reputational costs. These scholars are furthermore of the opinion that law is soft when it is not contained in a formal treaty. See Lipson 'Why are some international agreements informal' (1991) *International Organization* 45 495, 508; Guzman *How international law works: a rational choice theory* (1ed 2008) 71–111; Guzman 'The design of international agreements' 2005 *European Journal of International Law* 16 579, 582; and Raustiala 'Form and substance in international agreements' 2005 *American Journal of International Law* 99 581–582.

28 Constructivist scholars focus less on the binding nature of law at the enactment stage and more on the effectiveness of law at the implementation stage. They focus more on the law-in-action than on the law-in-books and note that even domestic law varies in terms of its impact on behaviour. In short, these scholars view the binary distinctions between binding hard law and non-binding soft law as 'illusionary'. See Trubek, Cottrell & Nance 'Soft law, hard law and EU integration' in De Burca & Scott (eds.) *Law and new governance in the EU and the US* (1ed 2006) 65, 67.

29 Abbott & Snidal 'Hard and soft law in international governance' 2000 *International Organization* 54/3 421–456.

30 *Id* at 421.

31 *Id* at 422.

32 Shaffer & Pollack 'Hard vs soft law: alternatives, complements and antagonists in international governance' 2010 *Minnesota Law Review* 715.

33 *Id* at 715.

binding/non-binding conceptualisation, and evaluating it in terms of specific characteristics is whether international law is addressed *ex post* implementation or *ex ante* negotiation.[34] If viewed from an *ex post* enforcement perspective, legal positivists are correct in stating that a specific legal instrument is either legally binding or non-binding, to a judge interpreting the instrument during the process of adjudication. However, if viewed from an *ex ante*-negotiation position the negotiating parties exert choices that, in practice, may render an agreement relatively binding or non-binding in the way that Abbott and Snidal note.[35] The typology used by these writers goes far in characterising different instruments as hard or soft law in terms of precision, binding legal obligation, and delegation without prejudging the legal value of the instruments. Hard law is not seen to be more important than soft law, but rather the two co-exist within the international legal system and contribute in different ways to the development of international law – a viewpoint which I support. Regardless of how the distinction between hard and soft law is drawn, a wide range of international law instruments – either relatively harder or softer in nature – exist in the international legal realm. These instruments offer different but distinct advantages in different contexts, and these advantages direct the use of any particular instrument by the parties involved. This should be taken to mean that if the advantages of using a hard law instrument outweigh those of a soft law instrument, parties will choose the hard law route and vice versa, of course. For the sake of brevity, the most notable advantages of hard and soft law will be provided in the form of a table.[36] This list is, however, not intended to be exhaustive.

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34 *Ibid*.

35 Abbott & Snidal n 29 above at 421–422.

36 The information included in the table has been obtained from a number of different sources which have all been integrated into a single document. For a general overview see Shaffer & Pollack n 32 above at 717–719.

Table 1: *Advantages of soft and law and hard law instruments*

Soft law instruments[37]	**Hard law instruments**
Soft law instruments are easier and more inexpensive to negotiate.	Hard law instruments allow states to commit themselves more credibly to international agreements as reneging implies a greater cost – albeit in the form of legal sanctions or impact on the state's reputation.[38]
Soft law instruments impose lower sovereignty costs on states on sensitive matters.	Hard law instruments are considered more credible because they can have either direct legal effect in national jurisdictions (self-executing) or effect through domestic legal enactment.[39]
Soft law instruments provide greater flexibility for states in coping with uncertainty.	Hard law instruments solve problems of incomplete contracting by creating mechanisms for the interpretation and elaboration of legal commitments over time.[40]
Soft law instruments allow states to be more ambitious and engage in more intense cooperation than is the case with hard law which would imply enforcement.	Hard law instruments make it easier for states to monitor and enforce their international commitments.
Soft law instruments cope better with diversity.	
Soft law instruments are directly available to non-state actors.	

37 For an extensive overview of the purported strengths of soft law see Kirton & Trebilcock *Hard choices, soft law: voluntary standards in global trade, environment, and social governance* (1ed 2004) 3, 9; Abbott & Snidal n 29 above at 434–454; Trubek n 28 above at 73–74; and Sindico 'Soft law and elusive quest for sustainable global governance' 2006 *Leiden Journal of International Law* 829, 836.

38 Guzman is of the opinion that the reputation cost of non-compliance with hard law instruments is indeed the primary factor for explaining compliance with international law. He adds that states 'rationally choose soft law because they wish to reduce the cost to their reputation of potentially violating the soft law in light uncertainty'. See Guzman n 27 above at 16 597.

39 Abbott & Snidal argue that where hard law obligations are implemented via the national legislation, new legal tools are created which mobilise domestic actors thereby increasing the audience cost of a violation. This in turn renders the instrument and the commitment it imposes more credible. See Abbott & Snidal n 29 above at 428.

40 Shaffer & Pollack n 32 above at 718; and Abbott & Snidal n 29 above at 433.

From this one can see that the form which international law takes may impact considerably on how the legal instruments embodying them are brought into the domestic legal domain. The reception of international law into national legal systems is most often viewed against the backdrop of two very distinct schools of reasoning: monism and dualism. As mentioned earlier, I support the hypothesis that the dualist approach is better suited to the reception of soft law instruments, while the monistic approach better suits hard law reception. In proving this hypothesis a discussion of the monist-dualist dichotomy with regard to legal reception is warranted.

Legal reception and the monist/dualist dichotomy

Traditionally, international law is seen as a set of legal rules and institutions governing relationships between sovereign states which exists independently from national law.[41] This classic model of international law reflects the principles of Westphalian sovereignty and defines the state as physical territory 'within which domestic political authorities are the sole arbiters of legitimate behaviour'.[42] Traditionally, the relationship between national and international law has been characterised by the import of national legal principles into the international legal arena.[43] A case in point is the national principle of democracy which was exported and transformed into the international law principle of self-determination.[44] In recent years international law has infiltrated the once exclusive national legal domain, and has come to be seen to regulate specific aspects of the relationship between national governments and their citizens – most notably with reference to international human rights law and international criminal law.[45] As stated above, the origins of many of these international standards being incorporated into national constitutional law are domestic in nature. This results in a situation where a modified (sometimes diluted) product is 're-imported' into the domestic legal sphere.[46] The importation of international

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41 Slaughter & Burke-White 'The future of international law is domestic (or, the European way of law)' 2006 *Harvard International Law Journal* 47/2 327.

42 Krasner *Sovereignty: organized hypocrisy* (1ed 1999) 20.

43 Peters 'Supremacy lost: international law meets domestic constitutional law' (2009) 3/3 *International Constitutional Law Journal* 173.

44 The link between these two legal principle is evident from paragraph 135 of the Resolution of the UN-General Assembly on the 2005 World Summit Outcome (UN-Doc A/RES/60/1) which states " … democracy is a universal value based on the freely expressed will of the people to determine their own political, social and cultural systems …'. *Id* at 173.

45 Slaughter & Burke-White n 42 above at 1

46 Human rights once again provide a topical example. After WWII the once national conception of human rights as national legal entitlements was transferred to the international level by means of a variety of international legal instruments. In recent years

law into national legal systems relates directly to the question of legal reception. Legal reception relates to the relationship between international and domestic law in that it prescribes how international law should apply within a national legal system. The vertical convergence of international and constitutional law resulting from international legal reception has been aptly described as the 'globalisation of state constitutions and a constitutionalisation of international law'.[47] The natural result of these two processes should, in theory, prove the undoing of the monist-dualist debate in its entirety as the relationship between the two spheres of law (international and constitutional) becomes tautologous. If international and constitutional law, through either of the two processes mentioned earlier, become so intertwined or uniform, legal reception is indeed unnecessary.[48]

Traditionally, two approaches to the reception of international law into the national legal system characterise countries as either monist or dualist.[49] Monists view international and national law as part of a single legal order and therefore international law is directly applicable in the national legal order. There is no need to transform international law in the form of legislation at the domestic level as international law is immediately applicable.[50] In terms of a monistic conception of the international-national law relationship, international law is superior to national law and national law should therefore always conform to the requirements of international law.[51] While this is the general monist conception, it is not the conception of all monists. For instance, though Hans Kelsen was an advocate of

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however, the idea of legal protection of human rights flows back to the constitutional legal orders of non-complying states. See Peters n 44 above at 174.

47 Bryde 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts' 2003 *Der Staat* 61–75 (translation obtained from Peters n 44 above at 174).

48 Ferreira 'Legal comparison, municipal law and public international law: terminological confusion?' 2013 *CILSA* 339; Rosas 'The death of international law?' 2009 *Finnish Yearbook of International Law* 223; and Ferreira & Ferreira-Snyman 'The constitutionalisation of public international law and the creation of an international rule of law: taking stock' (2008) 33 *SAYIL* 147–167.

49 Dugard *International law: a South African perspective* (4ed 2011) 42–43; Starke 'Monism and dualism in the theory of international law 1936 *British Yearbook of International Law* 66–67; Brownlie *Principles of public international law* (8ed 2008) 31–33*;* and Shaw *International law (*6ed 2008*)* 121–124.

50 Schaefer 'Are private remedies in domestic courts essential for international trade agreements to perform constitutional functions with respect to sub-federal governments*?'* 1997 *Northwestern Journal of International Law and Business* 609, 628.

51 Cassese *International law* (1ed 2005) 213–214; and Ginsburg, Chernykh & Elkins 'Commitment and diffusion: how and why national constitutions incorporate international law' 2008 *University of Illinois Law Review* 204.

monism, he did not argue that international law was superior to national law. In his view, international law may be subjected to particular norms within the national legal system. In other words, for Kelsen, monism required that legal norms be part of a single system of law, but failed to address the relationship between the norms.[52] The incorporation approach to legal receptions applies under monism. This approach has two variants: automatically adopting the international instrument as part of the national legal framework; or drafting *ad hoc* legislation encompassing the provisions of the international instrument.[53]

Dualists, on the other hand, view international and national law as distinct legal orders. For international law to be applicable in the national legal order it must be received through domestic legislative measures, thereby transforming the international rule into a national one.[54] The transformation approach involves adopting, through national legal instruments, specific rules to implement the provisions of an international instrument.[55] In other words, the rules in the international instrument are, in effect, transformed into regulatory measures to be applied at the national level. The main tenants of the dualist conception of the relationship between national and international law are briefly highlighted. According to dualists the national democratic process is the ultimate legitimate source of coercive legal norms, and international norms are only enforceable at the domestic level to the extent to which they have been incorporated into statutory legislation by the national sovereign.[56] To allow international law automatic effect in the domestic legal arena would result in a 'free-wheeling and self-programming judiciary ... [usurping] domestic legal and political prerogatives'.[57] Considering this, it seems that dualist concerns relate primarily to the loss or demarcation of domestic legal certainty at the hands of international law. Another characteristic of the dualistic school of thought is its essentially sceptical view of the status of moral principle and reasoning in international

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52 See Kelsen *The pure theory of law* (1ed 1967) 328–347.

53 Fassbender & Peters *Oxford handbook of the history of international law* (1ed 2012) 782; McDougal 'The impact of international law upon national law: a policy-oriented perspective' (1959) *Faculty Scholarship Series* Paper 2614 71; Shaw n 50 above at 129; and Dixon *Textbook on international law* (6ed 2007) 95.

54 Cassese n 52 above at 214

55 Fassbender & Peters n 54 above at 95

56 De Burca & Gerstenberg 'The Denationalization of Constitutional Law' (2006) 47/1 *Harvard International Law Journal* 245.

57 *Id* at 245.

affairs outside of the 'bounded community' of the sovereign nation state.[58] In terms of this view constitutional law is characterised by on-going legal interpretation in a seamless system of constitutional meaning based on a political contract among citizens as both authors and subjects of binding (domestic) law. International law, by contrast, is seen as a set of background-less voluntary agreements between contracting sovereign states with primary normative reference being made to states, peoples, and societies rather than individuals.[59] The dualist propensity to separate national law from international law, therefore, appears to find its justification in a need to ensure that domestic law and its adjudicative application are subject to the national interpretation of domestic legal norm exclusively.

From the perspective of the relationship between international and national law, significant developments are taking place within certain regional economic arrangements and national legal systems in Africa. While some have accepted the direct and automatic application of international law within their national legal systems – in other words, the monist approach – others clearly define areas of national law which remain subject to international law.[60]

Monism/dualism and legal reception in the AU

At the AU level it is widely accepted that civil law countries are traditionally seen as monist while common- law countries follow a primarily dualist approach to classifying the relationship between international and domestic law.[61] With reference to the monist approach, I shall offer a brief discussion of Francophone African countries,[62] Portuguese-speaking African countries,[63] and other civil-law based African countries.[64] Attention will then be shifted to the dualist approach followed by the approach among common-law African countries. The monistic nature of the constitutional provisions of Francophone countries is clear and for the most part mirror article 55 of the French Constitution which provides: 'Treaties or agreements duly

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58 Benhabib 'On the Alleged Conflict Between Democracy and International Law' (2005) *Ethics and International Affairs* 85, 90.

59 De Burca & Gerstenberg n 57 above at 246.

60 Oppong n 1 above at 300.

61 Killander & Adjolohoun 'Introduction' in Killander (ed) *International law and domestic human rights litigation in Africa* (1ed 2010) 4.

62 Francophone African countries are countries with a French or Belgian colonial heritage and include: Burundi, Rwanda and the Democratic Republic of the Congo (DRC). Killander and Adjolohoun n 61 above at 5.

63 Mozambique and Angola.

64 Eritrea, Libya, Somalia, Ethiopia and Egypt.

ratified or approved shall, upon publication, prevail over Acts of Parliament.'[65]

It is evident that on ratification international law not only immediately becomes part of these countries' domestic legal frameworks, but trumps municipal law in cases of conflict.[66] While many Francophone African countries' constitutions contain overtly international law-friendly provisions, their judicial practices fail to reflect this. In many instances domestic courts avoid the direct application of international law, and in the rare instances where it is applied it is usually done for the sake of reinforcing domestic constitutional provisions.[67] This is because self-executing and directly applicable treaty provisions are narrowly interpreted by domestic courts.[68] Portuguese-speaking Mozambique and Angola are also international-law friendly when viewing their respective constitutional provisions. Article 18 of the Mozambican Constitution states that norms of international law 'have the same force in the Mozambican legal order as have infra-constitutional legislative acts'. So, too, the Angolan Constitution provides in article 21(1) that 'the fundamental rights provided for in the present (Angolan) Law shall not exclude others stemming from the laws and applicable rules of international law'. Once again, as in Francophone countries, Portuguese-speaking African countries' judicial practice does not reflect its monistic constitutional provisions. Other civil law-based countries such Eritrea, Libya, Somalia, Ethiopia, and Egypt have pluralistic legal systems which reflect some form of customary law. Nevertheless, these countries interpret

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65 Examples of Francophone countries' constitutions containing the above-mentioned provision include Benin (art 147), Burkina Faso (art 151), Burundi (art 292), Cameroon (art 45), Central African Republic (art 69), Chad (art 222), Congo- Brazzaville (art 185), Côte d'Ivoire (art 87), DRC (art 215), Guinea (art 79), Mali (art 116), Mauritania (art 80), Niger (art 132), Rwanda (art 190), Senegal (art 91) and Togo (art 140).

66 The nature of the relationship between international law and constitutional provisions is made clear by the French *Conseil d'État* (Council of State) stating that 'supremacy conferred on international law does not apply, within the domestic order, to provisions of constitutional nature'. Furthermore, most Francophone countries examine the conformity of international treaties with their domestic Constitution before ratification. Examples are: Algeria (art 165), Benin (art 146), Burkina Faso (art 150), Cameroon (art 44), Central African Republic (art 68), Madagascar (art 118), Mali (art 90).

67 Killander & Adjolohoun n 62 above at 10.

68 A telling example of this can be found in the *Habré* case (ECW/CCJ/JUD/06/10*)* where it was decided by the Senegalese Court of Cessation that the relevant provisions of the Convention on Torture were not self-executing and therefore not applicable. Mr Habré could therefore only be prosecuted once the Senegalese government had enacted legislation to give the local courts jurisdiction.

the relationship between national and international law as monistic in nature.[69]

On the other end of the spectrum we find common-law African countries[70] which are generally associated with dualism. While international law and national law is seen as separate legal systems, most common-law countries have constitutional provisions governing the extent to which international law may be applied by domestic courts. How international law is used by the courts in many African common-law countries is aptly described by Higgins She opines that courts use whatever is needed from unincorporated treaties, including international case law arising under them, so long as the court does not purport to enforce the treaty obligation.[71] It is, however, interesting to note that some common-law countries have adopted monism with regard to treaties in their national legal frameworks. In this regard, article 144 of the Namibian Constitution provides that international law is directly applicable unless otherwise provided by the Constitution or an Act of Parliament. This is in line with section 231(4) of the South African Constitution which states that courts can apply a self-executing provision of a treaty even if the treaty has not been enacted into law. Section 231(4) of the Constitution reads:

> 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.

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69 For a general overview of monism within these countries' legal systems see Kumenit 'An overview of the most important features of the Ethiopian legal system' available at: www.ialsnet.org/meetings/enriching/kumenit.pdf (last accessed 24 September 2014); Aberra 'Ethiopia' in Heyns (ed) *Human rights law in Africa* (1ed 2004) 1080; *Tsedale Demisse v Kifle Demisse*, Appeal decision, Cassation file no 23632; ILDC 1032 (ET 2007); Abdel Wahab 'An overview of the Egyptian legal system and legal research' available at: http://www.nyulawglobal.org/globalex/Egypt.htm (last accessed 24 September 2014) and Bernard-Maugiron 'Egypt' in Heyns (ed) *Human rights law in Africa* (1ed, 2004) 1040.

70 With common law countries we here include those with a Roman Dutch common law heritage (South Africa, Namibia, Botswana, Lesotho, Swaziland and Zimbabwe). It should also be noted that Mauritius and the Seychelles have mixed legal systems based on French civil law and English common law. Other common law countries in Africa are Malawi, Nigeria, Uganda, and Ghana. See Killander & Adjolohoun n 62 above at 4, 12–14.

71 Higgins 'The role of domestic courts in the enforcement of international human rights: The United Kingdom' in Conforti & Francioni (eds) *Enforcing international human rights in domestic courts* (1997) 40.

The *Glenister v President of the Republic of South Africa*[72] case saw the minority and majority judgments paying considerable attention to the role, place, and authority of international law in South African domestic law.[73] In the majority judgment, the court, however, failed to deal with interpreting the concept of self-execution and its inclusion in the Constitution. While the court acknowledges that clarifying this uncertainty depends largely upon judicial interpretation of section 231(4) of the Constitution, it neglects to do so. The opinion of Ferreira and Scholtz is that the only way in which a South African court can decide whether a provision is self-executing in terms of section 231(4), is to establish, first and foremost, the extent to which the domestic law allows for the application of the provision.[74] This question relates directly to the manner in which the relationship between international and domestic law is viewed in any particular national legal system – dualism in the case of South Africa.[75] The inclusion of the concept self-executing in the text of section 231 is confusing to say the least. In a dualistic system it is impossible for a treaty to determine its own self-executing status as this depends on whether (or not) it is incorporated into national law. The unwillingness of South African courts to provide concrete jurisprudence on the inclusion of the concept of self-execution in the Constitution, leaves a distinct legal lacuna.

The Malawi Constitution provides that treaties which entered into force before the commencement of the Constitution in 1994, are part of the law of the land, but that subsequent treaties require incorporation.[76] Judicial precedent indicates that the same is true of human rights treaties ratified in Zimbabwe before the constitutional amendment in 1993.[77] The Constitutions

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72 2011 3 SA 347 (CC).

73 The court had to take into account, *inter alia*, the United Nations Convention against Corruption in order to come to the conclusion that the controversial legislation that had turned the highly successful elite crime unit, the Scorpions, into the Hawks was unconstitutional and invalid. Swanepoel 'Die plek en gesag van internasionale reg in die Suid-Afrikaanse plaaslike reg, met verwysing na die *Glenister*-uitspraak' 2013 *Litnet Akademies* 65.

74 Ferreira & Scholtz 'Has the Constitutional Court found the lost ball in the high weeds? The interpretation of section 231 of the South African Constitution' (2009) 2 *CILSA* 269.

75 In his interpretation of articles 231(4), 232 and 233 of the Constitution, Ferreira highlights that South African law allows a multi-faceted approach to the relationship between international and municipal law. With regard to customary international law it follows a monist approach while a dualistic approach is followed with reference to treaty law. Ferreira n 49 above at 357.

76 Trier Hansen 'Implementation of international human rights standards through the national courts in Malawi' (2002) 46 *Journal of African Law* 31-42.

77 In *Kachingwe and others v Minister of Home Affairs and Commissioner of Police*, Final appeal judgment, No SC 145/04; ILDC 722 (ZW 2005) the Supreme Court of Zimbabwe

of Nigeria, Ghana, and Uganda contain no explicit provisions on the relationship between international and domestic law, but there have been several judicial decisions on the topic. The Supreme Court of Nigeria held that the African Charter (which only Nigeria has domesticated) has a status higher than ordinary laws, but lower than the Constitution.[78] Article 54 of the Ugandan Constitution – which merely states that the rights contained in its Bill of Rights are not exhaustive – leads to an interpretation that rights not explicitly mentioned may be read in (from international treaties).[79] This is similar to article 33(5) of the Ghanaian Constitution which provides that no rights not specifically mentioned in the Constitution which are 'inherent in a democracy and intended to secure the freedom and dignity of man shall be excluded'. With reference to the role of international law in the interpretation of constitutional provisions, only the Constitutions of South Africa, Malawi, and Botswana contain provisions explicitly mandating the application of international law.[80] It is apparent that direct application of international law is relevant in a relatively small number of cases in common-law countries. It is widely held that this is the case as all African countries have constitutional bills of right which indirectly domesticate international human rights and consequently the treaties containing them.[81] Directly incorporating these treaties into the domestic legal systems of the countries in question, is therefore technically not necessary as domestic bills of rights already reflect international treaty provisions. I feel that this 'implicit' incorporation of international law into the domestic legal systems of dualist countries, rather reflects a monist approach.

Recommendations and conclusions

From this discussion it is clear that how African countries interpret the relationship between international and domestic law is strongly linked to whether they are classified as monist or dualist. While the constitutional provisions of African countries are in the main unambiguous as to the nature of the relationship between international law and their domestic legal

held (at paragraph 64) that 'in all probability' the contention was right, 'but determination of that point of law is not necessary for the determination of this case'.

78 *Abacha v Fawehinmi* SC 45/1997; ILDC 21 (NG 2000); (2001) AHRLR 172 (NgSC 2000).

79 In *Uganda Law Society & Anor v The Attorney General* Constitutional Petitions No 2 & 8 of 2002 [2009] UGCC 1 this approach was confirmed. In this case, the right to appeal (which is not included in the Ugandan Bill of Rights) was read in.

80 Section 39(b) of the South African Constitution; section 11(2)(c) of the Constitution of Malawi and the *Interpretation Act of Botswana* 20 of 1984.

81 Heyns & Kaguongo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673–714.

systems, none differentiates between hard international law and soft international law. Some constitutions – most notably that of South Africa – do, however, allow room for a multi-faceted approach in which monism is applied to customary international law and dualism to treaty law. No African constitution or existing judicial practice differentiates between hard and soft law, or that the different nature of these forms of international law may necessitate a re-thinking of the monist/dualist dichotomy. In my view, legal reception in terms of the monist/dualist dichotomy should be interpreted against the background of the nature of the international law in question. The focus on the source in which the law appears is, in my view, less important. The object and purpose of international law provisions rather than the source in which they are embodied, direct the classification of international law as either hard or soft.[82] Therefore, the application of either the monist or dualist approach to legal reception should be based on the nature of the international law to be received into the domestic legal sphere. Referring back to the advantages of hard law as listed in the table in paragraph 2 above, together with the arguments of Snidal and Abbott, the monistic approach should be applied to hard law. In other words, if a country has signed or ratified an international agreement, this agreement will automatically form part of the domestic legal framework through incorporation. This being the case because monism does not differentiate between international law and national law. On the other hand, the nature of soft law as elaborated in paragraph 2 above, provides the theoretical basis from which to argue that the dualist approach best serves the reception of soft law into domestic law.

Let us now return to the practical example of the IAEA legal instruments in the introduction above. In order to address the issue as to how the international legal instruments contained in the IAEA legal framework are to be incorporated into an AU regional nuclear legal framework, I would suggest the following. AU member states (acting on the mandate contained in the regional instruments listed) that have ratified the hard-law IAEA instruments will, in terms of the monist approach, automatically include these instruments in their domestic legal systems. The soft-law instruments, following the dualist approach, will need to be transformed into AU member states' domestic legal systems by means of the transformation approach.

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[82] See nn 17 and 18 above.