Article

A Chronicle of How Judges Have Internalised International Law in Namibia

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Abstract

Until recently, scholars had not detected the discrepancies in the international law jurisprudence in Namibia. Even the few jurists who spotted them did not reveal the precise extent of those inconsistencies. To demonstrate their sheer magnitude, this article chronicles the Namibian international law jurisprudence. In doing so, it offers the most detailed analysis of international law cases in Namibia. It presents that jurisprudence chronologically. This methodology ensures that readers understand how international law evolved in Namibia. And, to frame this inconsistency issue in a fashion that makes sense for developing countries, the article draws some insights from the Third World Approaches to International Law (TWAIL) movement. The article finds that judges zigzag between friendliness (ie, monism) and scepticism (ie, dualism) towards international law, and it uncovers four types of judges-interpreters, when considering the philosophies that motivate them. In addition to the monist and the dualist, the moralist and the constitutionalist have emerged. Nonetheless, this zigzagging and these inconsistencies undermine the rule of law—a foundational principle of the Namibian state. The article therefore discusses the four personae, hoping to inspire jurists and judges, in Namibia and other nations, to unify these different judicial personalities under one overarching rationale.

Keywords: Namibia; international law; domestication; court cases; Third World Approaches to International Law (TWAIL); monism; dualism; adjudication

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Introduction*

Three decades into independence, judges in Namibia have taken several routes in figuring out the place of international law in the domestic legal system. Most have applied international law directly[1] while a few have said that they cannot apply it because the Parliament must domesticate it beforehand.[2] The larger number of judgments effected international law by referring to article 144 of the Constitution[3] while a few seem to have applied it, but without clearly alluding to article 144.[4]

Given the different directions in which they have gone off, the question arises as to why judges and lawyers in Namibia differ in situating international law within the legal system. More importantly, the question arises about the reasons why judges, lawyers and other persons apply international law in the first place. Lawyers will spontaneously answer that article 144 grounds the application of international law in Namibia, but such answers fail to capture the manner in which judges have actually decided cases with an international dimension, including cases where judges adhered to the rules of international law without expressly referring to article 144.

So far, no judge had motivated the role of international law in domestic adjudication. As Dugard remarked, though domestic courts use international law more often, they rarely interrogate the theories that explain why they resort to international law.[5] While the questions about how international law relates to municipal law have circled around since Independence in 1990,[6] the *South African Poultry Association (SAPA)*[7] case brought these questions to a head. In that Supreme Court case, which dealt with

* I gratefully thank two anonymous reviewers for their constructive comments on a working draft of this article. I also extend my warm thanks to Bonolo R Dinokopila and Ian Mwiti Mathenge for making the time to review an earlier draft of the article and for sharing with me their thoughts and suggestions on the article. I hope that the changes I have made in light of their suggestions live up to their standards. At any rate, I am solely liable for any surviving errors.

1 See eg *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1992 NR 110 (HC); and *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 1999 NR 271 (SC).

2 See eg *S v Carracelas and Others (1)* 1992 NR 322 (HC).

3 See eg *S v Likanyi 2017 (3)* NR 771 (SC); *South African Poultry Association and Others v Minister of Trade and Others* 2018 (1) NR 1 (SC).

4 See *Ex Parte Attorney-General: in re Corporal Punishment by Organs of State* 1991 NR 178 (SC) (hereinafter referred to as '*Corporal Punishment*' case); *S v Curras* 1991 NR 208 (HC); *Pineiro and Others v Minister of Justice and Others* 1991 NR 283 (HC); *Namunjepo* (n 1) and *S v Gomaseb* 2014 (1) NR 269 (HC).

5 John Dugard, *International Law: A South African Perspective* (Juta 2011) 43.

6 Dunia Zongwe, 'Equality has no Mother but Sisters: The Preference for Comparative Law Over International Law in the Equality Jurisprudence in Namibia' in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (PULP 2010) 123.

7 *South African Poultry Association and Others v Minister of Trade and Others* 2018 (1) NR 1 (SC) (hereinafter the '*SAPA*' case).

measures imposed by the Trade Minister to protect the Namibian poultry industry against South African competitors, counsel for the Minister submitted that, under international law, municipal courts cannot enforce trade treaties.[8] In the unanimous judgment, Smuts JA correctly observed that the case raised an issue of 'considerable public importance' that concerns 'the interpretation to be given to art 144 of the Constitution.'[9] Thus, since *SAPA,* judges and lawyers can no longer pretend that this does not constitute a real issue or that it only matters for academics to brood over.

Traditionally, jurists have sought to justify using international law in domestic legal systems by canvassing two competing major theories: monism and dualism. Jurists in the West have long debated the monism-dualism dichotomy, but their counterparts in Africa have not turned it into a hobbyhorse. After the Second World War, some jurists have declared the debate obsolete,[10] while others have insisted that it remains relevant.[11] And, the scholars who have examined Namibian law with respect to international law have employed the monism-dualism binaries.[12]

8 See *SAPA* case (n 6) 12.

9 *SAPA* case (n 6) 18.

10 See eg Lando Kirchmair, 'The Theory of the Law Creators' Circle: Re-conceptualizing the Monism-dualism-pluralism Debate' (2016) 17 German Law Journal 179 (arguing that the monism-dualism debate can no longer comprehensively explain the relationship between international law and municipal law or the law of the European Union); Alexander Somek, 'Monism: A Tale of the Undead' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury 2012) 343; Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (2010) 10 Human Rights Law Review 1 (contending that the doctrinal distinctions between monism and dualism appear to have little effect on the way national human rights institutions work).

11 See eg Davor Jančić, 'Recasting Monism and Dualism in European Parliamentary Law: The Lisbon Treaty in Britain and France' in Marko Novakovic (ed), *Basic Concepts of Public International Law: Monism and Dualism* (University of Belgrade 2013) 806–807, stating that the concepts of monism and dualism have lost meaning in the multi-level legal system of the European Union, although they retain their 'fundamental importance' in international law; Somek (n 9) 343 contends that discourses addressing the final authority in the European Union have resuscitated the monism-dualism debate, though the proponents use a different vocabulary that may mask the true nature of the debate.

12 Ndjodi Ndeunyema, 'The Namibian Constitution, International Law and the Courts: A Critique' (2020) 9 Global Journal of Comparative Law 271; Onkemetse Tshosa, 'The Status of International Law in Namibian National Law: A Critical Appraisal of the Constitutional Strategy' (2010) 2 Namibia Law Journal 3; Yvonne Dausab, 'International Law vis-à-vis Municipal Law: An Appraisal of Article 144 of the Namibian Constitution from a Human Rights Perspective' in Anton Bösl, Nico Horn and André du Pisani (eds), *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (Macmillan 2010) 261; and François-Xavier Bangamwabo, 'The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework' in A. Bösl and N. Horn (eds)*, Human Rights and the Rule of Law in Namibia* (2nd edn, Macmillan Education Namibia 2009). Except for these publications on the relationship between international law and municipal law in Namibia, Dermott Devine, 'The Relationship Between International Law and

The existing scholarship, which uses the monism-dualism debate, accounts only partially for the ways in which judges and lawyers in Namibia have internalised international law in actual cases. I do believe that the monism-dualism debate retains some usefulness as a tool to analyse how lawyers apply international law in the domestic legal system and interpret international treaties. In the Namibian context, however, those theories have failed to faithfully portray the more complex nexus between international law and municipal law.

Until recently,[13] scholars had not discerned the discrepancies in the Namibian international law jurisprudence.[14] And, even when they did spot them, they did not reveal the precise extent of the inconsistencies. To expose the sheer magnitude of these discrepancies, this article primarily aims to chronicle the Namibian international law jurisprudence. In doing so, it offers the most detailed analysis of the court cases that tackled international law problems in Namibia.[15] I waded through that jurisprudence and I uncovered four types of interpreters, when considering the philosophies that motivate them. In addition to the monist and the dualist, the moralist and the constitutionalist have emerged from the Namibian jurisprudence on international law. I explain these four types of interpreters in the three sections of this article.

In the section immediately following this one, I trace the contours of the monism-dualism debate. To frame the debate in a fashion that makes the most sense for developing countries, I relate the dichotomy to the insights of the Third World Approaches to International Law (TWAIL) movement. Ferreira and Ferreira-Snyman point out that states balk at adopting monism because they wish to protect their sovereignty and because they perceive monism as subjecting them to an extra-territorial legislature.[16] On the other hand, the experience of Namibia as a mandated territory under South African administration shows that dualism can insulate the legal system from progressive international standards and to justify oppression and discrimination.[17]

Municipal Law in Light of the Constitution of the Republic of Namibia' (1994) 26 Case Western Reserve J of Intl L 295.

13 Dunia Zongwe, *International Law in Namibia* (Langaa RCPIG 2019) 85–102 and Ndeunyema (n 12).

14 See eg Dausab (n 12) and Tshosa (n 12).

15 Dausab (n 12) discussed seven cases (*Mwandinghi, Cultura, Kauesa, Müller, Namunjepo, Corporal Punishment,* and *Mwilima*); Ndeunyema (n 12) addressed six cases (*Mushwena, Kauesa, Mwilima, Müller, Likanyi,* and *SAPA*); and Tshosa weighed in on four cases (*Corporal Punishment, Cultura, Kauesa,* and *Mushwena*). The present article analyses at least 25 cases. See the chronicle section below.

16 Gerrit Ferreira and Anél Ferreira-Snyman, 'The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy Between Monism and Dualism' (2014) 17 Potchefstroom Electronic LJ 1490.

17 See eg *S v Tuhadeleni* 1969 (1) SA 153, where the court took advantage of dualism, in addition to a restrictive interpretation of international law, to deprive the accused persons of their rights, as

Next, this article chronicles the application of international law by judges from Independence up to 21 March 2020—the thirtieth anniversary of Namibia as an independent state. The chronicle presents the Namibian jurisprudence on international law chronologically. This research methodology ensures that readers gain a sense of how international law evolved in Namibia.

In the final substantive section, the article reveals the four types of international law interpreters: the monist, the dualist, the moralist, and the constitutionalist. Moreover, it considers the possibility of forging a fifth type: the law developer. In this role, the judge relies on international law to develop an entire field of law, such as human rights or anti-corruption law. The article ends with a discussion about the five judicial personae and the avenues for coordinating these different roles under a paramount and unifying rationale for incorporating international law in the Namibian system of laws.

International Law in Namibia: In Search for a General Justification

The Uncertain Status of International Law

The status of international law in the Namibian legal system has become uncertain—a situation that does not only undermine reliability and legal predictability, but the rule of law as well. The very first article of the Constitution proclaims Namibia a state founded upon the rule of law.[18] This uncertainty about where international law sits in the legal order shakes the foundations of Namibia as a state.

Selznick once quipped that the legal order and 'the special contribution' of its scholars should aim to 'minimize the arbitrary element in legal norms and decisions.'[19] And yet many judges believe that international law applies automatically whereas a few of them maintain the opposite. Within government, some ministries and departments insist that parliament must incorporate a ratified international treaty by adopting an Act of Parliament domesticating it before that treaty can become part of Namibian law and before anyone can invoke or enforce it. In particular, the Directorate of Legislative

conferred by the League of Nations and as provided for by the Mandate for South West Africa (Namibia).

18 Namibian Constitution art 1(1). See also *Likanyi* case (n 3) 776, where Shivute CJ observed that the rule of law is a 'foundational principle of the Constitution'.

19 Philip Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation 1969) 13. See also John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 Australian Journal of Legal Philosophy 50 (linking certainty, consistency, and reliability).

Drafting within the Ministry of Justice has expressly adopted the dualist position.[20] Conversely, academia generally assumes the monist position.[21]

However, in *SAPA,* lawyers have for the first time challenged the monist position, which had obtained in the majority of cases since independence. Lawyers advanced several points against the direct application of international treaties in Namibia. First, one lawyer argued that domestic courts cannot enforce trade treaties.[22] Moreover, another maintained that, before a court can even hear any argument about an international treaty becoming domesticated, the principle of legality dictates that the state publish the provisions of that treaty.[23] The Supreme Court remitted the *SAPA* case to the High Court so that it can settle the question of the status of international law in municipal law, meaning that resolution of that question remains pending. Even so, this case forces judges to spell out the reasons why international law should (or should not) apply in the Namibian legal system.

So far, virtually all academics approached the meaning of article 144 *as a fact* out there for them to 'discover'[24] rather than *as a value* for them to justify. In the process, they may have missed the nub of the judgment in *Corporal Punishment,* in which the court recommended that readers of the Constitution search for its meaning in values, and not in facts. Mahomed AJ famously held that:[25]

20 I interacted with the Directorate in 2019. The draft manual it planned to use to guide legal drafters explicitly instructs them that international treaties need domestication.

21 Devine (n 12) 311–312, says that international treaties binding on Namibia form part of Namibian law and that international treaties do not need to be implemented by domestic legislation; Nico Horn, 'International Human Rights Norms and Standards: The Development of Namibian Case and Statutory Law' in Nico Horn and Anton Bösl (eds), *Human Rights and the Rule of Law in Namibia* (Konrad-Adenauer Stiftung 2008) 141–164, explains that, by virtue of article 144, people in Namibia may apply within domestic legal system all the ratified human rights treaties directly; Oliver Ruppel, 'The Protection of Children's Rights Under International Law from a Namibian Perspective' in Oliver Ruppel (ed), *Children's Rights in Namibia* (Macmillan 2009) 54, states that 'Article 144 of [the Namibian] Constitution explicitly incorporates international law and makes it part of the law of the land'; Magnus Killander and Horace Adjolohoun, 'International Law and Domestic Human Rights Litigation in Africa: An Introduction' in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (PULP 2010) 12; Sabine Katharina Witting and Markus Penda Angula, 'Leveraging International Law to Strengthen the National Legal Framework on Child Sexual Abuse Material in Namibia' (2020) 53 CILSA 12 (inferring that Namibia has embraced monism from the fact that article 144 does not require any domesticating legislation), Dausab (n 12) 266. (concluding that 'Namibia belongs to the species of monist states') and Thosa (n 12) 12 (stating that, in essence, that Namibian Constitution follows a monist approach).

22 *SAPA* case (n 6) 12, paraphrasing the arguments by J Gauntlett, counsel for the respondents.

23 *SAPA* case (n 6) 13, paraphrasing the arguments by S Namandje, counsel for the respondents.

24 See eg Tshosa (n 12); Devine (n 12); Dausab (n 12).

25 Corporal Punishment case (n 4) 188.

> [t]he question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court … It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share.

The confusion surrounding the exact contents of article 144 proves that the text of that article is not as clear as academics thought. Even if one could object that the value-laden interpretation of the Constitution only concerns the Bill of Rights in Chapter 3, judges could still counter that adjudication requires them to give meaning to the text, which may entail expanding, restricting, or modifying the meaning of legal texts, however clear.

The Monism-dualism Debate

Judges in Namibia do not employ the monism-dualism vocabulary. This suggests that, in this Southwestern African country, monist and dualist theories have not yet reached court benches, confining themselves to scholarly writing and the four corners of university lecture halls. The absence of that vocabulary in court judgments could partly explain the split-personality character and the zigzagging of the judiciary when it faces international law dilemmas.

In general, the debate pits those who push forth monism as developed mostly by Hans Kelsen against those who favour dualism as mainly developed by Heinrich Triepel.[26] In short, monism only requires ratification of or accession to a treaty for that treaty to apply domestically while dualism requires national parliaments to domesticate a treaty before the treaty can enter into force in the domestic legal system. Some monist countries also require that the state publishes a ratified treaty before it applies domestically. Whereas monism posits the primacy of international law and unifies that law and municipal law into one single legal system, dualism propounds the priority of municipal law over international law while separating them as two distinct universes.

Jurists have expanded on the monism-dualism polarity in much greater detail elsewhere. This article will therefore not duplicate those explanations. The following discussion does not aim to exhaust the monism-dualism debate. Still, the cases I scrutinise in the next section illustrate the debate.

26 Kirchmair (n 9) 179.

The monism-dualism debate took place in several contexts. It featured in discussions about the European Union,[27] individual countries,[28] and international commercial arbitration,[29] to mention but a few examples.

Monism

The Netherlands and the European Union (EU) exemplify monism. Most probably, the Netherlands remains the only country that adopts an almost pure form of monism. In the Dutch legal system, international law 'binds every one' and prevails over all national law, including the Constitution.[30] Article 93 of the Dutch Constitution ('Grondwet')[31] provides that international treaties and resolutions by international institutions become binding after publication and Article 94 stipulates that 'statutory regulations' shall not apply if they conflict with provisions of treaties or binding resolutions by international organisations.

Regionally, the EU exhibits a monist setup. The Treaty of Lisbon[32] structured the EU as a monist organisation, although it also provides for the principle of subsidiarity[33] and empowers the national parliaments of member states to contribute to the good functioning of the EU. The European Court of Justice (ECJ) largely shaped the unique monist structure of the EU.[34] The ECJ ruled that certain provisions of the Lisbon Treaty have 'direct effect' in that they apply directly in member states without any need to

27 Enzo Cannizzaro, 'The Neo-monism of the European Legal Order' in Enzo Cannizzaro, Paolo Palchetti and Ramses Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 35, noting that monist theories deeply influenced the approach initially adopted by the European Union and proposing to analyse how the European legal order proceeded from those monist theories to a new sort of monism, which he calls 'neo-monism'; Somek (n 9).

28 See eg Aparna Chandra, 'India and International Law: Formal Dualism, Functional Monism' (2017) 57 Indian Journal of International Law 57 (India); Gerhard Van der Schyff and Anne Meuwese, 'Dutch Constitutional Law in a Globalizing World' (2013) 9 Utrecht LR 1 (the Netherlands); Dunia Zongwe, 'Taking Leaves out of the International Criminal Court Statute: The Direct Application of International Criminal Law by Military Courts in the Democratic Republic of Congo' (2013) 46 Israel LR 249 (the Democratic Republic of the Congo).

29 SI Strong, 'Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law' in Novakovic (n 10) 547.

30 See also Van der Schyff and Meuwese (n 28) 1–2.

31 The Constitution for the Kingdom of the Netherlands, 1815, as amended. Official translation by the Dutch Ministry of the Interior and Kingdom Relations.

32 Signed on 13 December 2007 and effective since 1 December 2009, the Treaty of Lisbon amends the two treaties that form the constitutional basis of the European Union, the 1957 Treaty of Rome (which created the European Economic Community) and the 1992 Treaty of Maastricht, officially known as the Treaty on European Union (which created the European Union).

33 Treaty on European (1992) 31 ILM 253. Hereinafter the 'Treaty of Maastricht'. Article 5 of that treaty provides for the principle that the European Union (EU) should not take action (except in the areas that fall within the EU's exclusive competence), unless action by the EU would produce more or better results than action taken at national, regional or local level.

34 See Jančić (n 10) 803.

domesticate them.[35] The ECJ also acknowledged the supremacy of EU law over national law[36] and national constitutions.[37]

Dualism

Unlike monism, dualism restricts the space of international law not only in regional economic communities, but in the domestic legal systems as well. Ferreira and Ferreira-Snyman argue that dualism may prevent international law from taking its rightful place in the law of the African Union and the legal systems of its members.[38]

Friend or Critic: Namibia's Position and the TWAIL Movement

Namibia's Friendly Constitutional Attitude Towards International Law

Whether an interpreter concludes that the Namibian legal system qualifies as monist, dualist or pluralist, the Namibian Constitution views international law favourably. Scholars have described the constitutional perspective on international law as 'friendly' and positive.[39] Several provisions in the Constitution attest to this friendly disposition.

TWAIL

The friendliness of the Namibian Constitution vis-à-vis international law contrasts with the stance adopted by scholars from the Third World Approaches to International Law (TWAIL) movement. Far from embracing international law, they urge people and nations from the developing world to beware of international law. They contend that the West has brought into service international law to dominate and exploit other nations.[40]

For Mutua, the regime of international law is a 'predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.'[41] He adds that '[t]he construction and universalization of international law were

35 Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

36 Flaminio Costa v ENEL [1964] ECR 585.

37 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629.

38 Ferreira and Ferreira-Snyman (n 16) 1490.

39 Dermott Devine, 'The Relationship Between International Law and Municipal Law in Light of the Interim South African Constitution 1993' (1995) 44 International Law and Comparative Law Quarterly 17; Devine (n 12)313, describing the attitude of the Namibian Constitution towards international law as 'international law friendly'; Tiyanjana Maluwa, 'The Role of International Law in the Protection of Human Rights under the Malawian Constitution' (1996) 53 African Yearbook of Intl L 77; Tshosa (n 12) 28; and Zongwe (n 13) 36 and 73–75.

40 See eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004). See also James Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade Law and Development 26.

41 Makau wa Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law Proceedings 31.

essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination.'[42]

Article 144 of the Namibian Constitution

Article 144 of the Constitution mandates judges and people in Namibia to apply international law. Given its importance, it bears quoting word for word. Entitled 'International Law', article 144 lays down that

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

This thirty-four-word sentence forms the basis for people and lawyers to apply international law in the Namibian legal system. Subject to the Constitution and Acts of Parliament, the rules of international law and international agreements shall form part of the law of Namibia. Ndeunyema,[43] Killander and Adjolohoun[44] deduce that this clause embodies 'weak monism'. Nevertheless, the jurisprudence that I analyse in the next section demonstrates that a lawyer could read the same clause, especially the proviso that subordinates international law to statutes and the Constitution, to plead the opposite, i.e., that Namibia endorsed 'weak dualism'. Contrary to the existing scholarship, who affirms that Namibia is monist, my analysis underscores the indeterminacy of the text of article 144. In interviews conducted by Hakweenda with lawyers, they all agreed that the manner in which the Constitution is drafted proves that the Namibian court approach vis-à-vis international law is neither monist nor dualist, but a mixture of the two.[45]

42 ibid.

43 Ndeunyema (n 12) 285. However, he (ibid 285–286) cautions that casting the interaction between international law and municipal law in monist/dualist categories oversimplifies the complexity of implementing doctrines.

44 Magnus Killander and Horace Adjolohoun, 'International Law and Domestic Human Rights Litigation in Africa: An Introduction' in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (PULP 2010) 12.

45 See Lydia Hakweenda, 'Invocation of International Trade Agreements by Private Parties Before Domestic Courts: A Namibian Perspective' (MCom dissertation, University of Cape Town 2015) 46 and 49. However, apart from noting in her methodology section that she sent out interviews and questionnaires to 'selected, qualified and experienced' (see page 9 of her dissertation), she does not specify how many lawyers or respondents she included in her interviews and questionnaires.

Meaning of the Provisions in Article 144

At a minimum, the phrase 'general rules of public international law' refers to the rules of customary international law.[46] These rules bind states, irrespective of whether they have expressly consented to them. In Namibia as well, the rules of customary international law 'form part of the law of Namibia' and apply directly. Before and after Independence in 1990, a long line of cases confirms the position that customary international law applies directly in Namibia.[47]

However, unlike the rules of international custom, (the general rules of) 'international agreements binding upon Namibia' pose a bigger problem as far as it concerns their application in the Namibian legal system.[48] A consensus exists that the expression 'international agreements binding upon Namibia' relates to (international) treaties ratified by Namibia.[49]

The Hierarchy of Laws in Article 144

In terms of article 144, where does international law stand in the hierarchy of laws? By relying on the express words used by article 144, one could say safely that the Constitution perches at the top of the hierarchy. This inference is reinforced by article 1(6) of the Constitution, which declares the supremacy of the Constitution. Then, in second place, come Acts of Parliament.

Article 144 places international law underneath Acts of Parliament. However, it does not stipulate whether international law ranks third. In the overall scheme of article 144, common law, case law, or customary law could rank third. Indeed, prior to Independence and before this Constitution entered into force, the Appellate Division rated international law lower than common law.[50]

46 Tshosa (n 12) 12–13. See, however, Ndeunyema (n 12) 280–281 who argues that the phrase 'general rules of public international law' encompasses both customary international law and the general principles of law.

47 See eg *In re Willem Kok and Nathaniel Balie* (1879) 9 Buch 45 (war); *Acutt, Blaine and Co v Colonial Marine Assurance Co* (1882) 1 SC 402 (state jurisdiction); *In re De Beer* Greg 1883-1885 part I 25 (extradition); *Cameron v Gouvernement OVS* Greg 1883-1885 part I 35 (state succession); *Queen v Jizwa* (1894) 11 SC 387 (nationality); *Maynard et Alii v The Field-Cornet of Pretoria* (1894) 1 SAR 214 (aliens); *Randjeslaagte Syndicate v The Government* 1908 TS 404 (annexation); *Setecki v Setecki* 1917 TPD 165 (conquest, aliens); *De Howorth v The SS India* 1921 CPD 451 (sovereign immunity); *Rex v Christian* 1924 AD 101 (sovereignty); *S v Penrose* 1966 (1) SA 5 (N) (immunity of consuls); and *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 1 SA 234 (C) (fishing zone).

48 See the cases analysed in the chronicle section presented later in this article.

49 Tshosa (n 12) 12–13; Zongwe (n 13) 82–83.

50 See *Nduli v Minister of Justice* 1978 (1) SA 906 (A).

Chronicle of Namibian Courts' Application of International Law

I now turn to the way Namibian judges—and lawyers—applied international law in the domestic legal system. I start with the jurisprudence that Namibia inherited when South Africa administrated the mandated territory of South West Africa.

Before Independence

Although this period preceded Namibia's independence from South Africa in 1990, articles 140 and 66 of the Namibian Constitution carry over the South African case law on international law—a heritage that still fuels the dualist tendencies in Namibia. During this time, judges linked international law to the classic Roman-Dutch writers (*Lionda* and *Nduli*), relegated it to a second-class role (*Nduli, ISRDS, Kaffraria Property,* and *Binga*), and laid the groundwork for dualism (*Pan American World Airways*). Peculiarly, judges deployed dualism to stop international law from realising the Namibian people's self-determination (*Tuhadeleni*) while labelling freedom fighters 'terrorists' (*Tuhadeleni* and *Nduli*). In short, this period witnessed the birth of the dualist judge in South Africa and South West Africa/Namibia.

Rex v Lionda 1944

Lionda represents primal efforts to locate international law within the domestic legal system. Handed down in 1944, before the then Union of South Africa attained full independence from the United Kingdom (UK), this judgment associated international law with the common law, as rendered by Roman-Dutch writers. Importantly, Davis AJA stated that:[51]

> the [war] regulation must not be read standing alone: it must be read against the background of International Law, more especially that law as expounded by Roman-Dutch writers.

The general position: Pan American World Airways 1965

A few years after South Africa became an independent republic in 1961, Chief Justice Steyn got the occasion to lay down the general principle with respect to the domestic application of international law. In 1965, Steyn CJ formulated the standard principle in *Pan American World Airways v SA Fire and Accident Insurance* as follows:[52]

> It is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by

51 *Rex v Lionda* 1944 AD 352.

52 *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 161 (A).

> legislative process ... In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject.

The *Pan American World Airways* judgment consecrated dualism in South Africa and South West Africa/Namibia.

S v Tuhadeleni 1969

This case typifies how the South African administration construed international law and its own municipal law to thwart the Namibian people's quest for self-determination. The state charged and the court below convicted the thirty appellants under the provisions of the Terrorism Act 83 of 1967 for participating in terrorism. Three members of the group had been convicted under the Suppression of Communism Act 44 of 1950. The appellants had pleaded that the court had no jurisdiction to try them for the offences levelled against them because the Terrorism Act, in so far as it purported to apply to South West Africa, was invalid and of no effect. Specifically, they argued that the legislature of South Africa had no competence to pass the Act because the UN revoked South Africa's mandate over South West Africa/Namibia:[53]

> (a) Its competence to legislate for the territory of South-West Africa was derived from a mandate issued by the Council of the League of Nations and given effect to by the Government of the Union of South Africa in terms of the Treaty of Peace and South-West Africa Mandate Act, 49 of 1919, the Treaties of Peace Act, 32 of 1921, and the South-West Africa Constitution Act, 42 of 1925, as amended.
>
> (b) The said mandate was on 27th October, 1966 (and before the said Terrorism Act was enacted), terminated by the General Assembly of the United Nations, the successor of the said Council of the League of Nations.

The Attorney-General countered that, by virtue of section 59(2) of the South African Constitution Act of 1961, courts had no jurisdiction to enquire or pronounce on the validity of legislation.[54] The court below upheld this contention. Section 59(2) read:

> No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to repeal or amend the provisions of section one hundred [declaring English and Afrikaans as official languages of the Republic] and eight or one hundred and eighteen [empowering Parliament to repeal or alter any provisions of this Constitution, except section 108].

53 *S v Tuhadeleni* 1969 (1) SA 167.
54 ibid 168.

On appeal, the counsel for the accused reserved two questions of law for the Appellate Division to settle, namely:

1. whether, having regard to section 59(2) of the Constitution, the court had jurisdiction to pronounce on the validity of the Terrorism Act and the General Law Amendment Act to the extent that they purport to apply to the mandated territory of South-West Africa; and

2. if section 59(2) of the Constitution purports to deprive courts of jurisdiction to pronounce on the validity of those Acts to that extent, whether the provisions of section 59(2) were valid and binding.[55]

Chief Justice Steyn noted that section 5 of the General Law Amendment Act 62 of 1966 made the Suppression of Communism Act applicable to the mandated territory of South West Africa, including the Caprivi Zipfel and the Rehoboth Gebiet.[56]

Steyn CJ understood the appellants as contending that the Constitution Act, read as a whole, intended to apply to South Africa alone, and not to the mandated territory of South West Africa.[57] The judge examined other provisions, the history and context of the Constitution Act; eventually he rejected that contention, remarking that, clearly, the Constitution Act intended to apply not only internally, but to the mandated territory as well.[58]

With specific reference to the Mandate over South West Africa, the appellants maintained that the Mandate entrench the rights that it conferred on the inhabitants of South West Africa against any violation by an Act of Parliament and that Parliament has recognised those limits on its powers.[59] They further insisted that the courts serve as guardian of those entrenched rights, that the Mandate vests the courts with jurisdiction to declare invalid any Act of Parliament that offends the Mandate, and that Parliament could not have intended to oust this jurisdiction when it enacted section 59(2) of the Constitution Act.[60]

Steyn CJ analysed Article 22(8) of the League of Nations Covenant, Article 8 of the Mandate for South West Africa, the provisions of the Treaty of Peace and South-West Africa Mandate Act 49 of 1919, and the preamble to the South-West African Constitution of 1925, among others. He did not see in those provisions any suggestion that the Covenant expressly intended to restrain or limit the powers of the South African

55 ibid (Steyn CJ quoting the two questions of law reserved for consideration by the court).
56 ibid 167. The judge also cited *S v Bock* 1968 (2) SA 658 (AD) to support that interpretation.
57 *Tuhadeleni* case (n 53) 169.
58 ibid 169–171.
59 ibid 171.
60 ibid.

Parliament.[61] Steyn CJ answered the first reserved question in the negative and the second question in the affirmative. Though he upheld the appeal made by some appellants against their sentence, Steyn CJ generally ruled in favour of the state and against the appellants.[62]

This case shows how dualism, coupled with legislative supremacy, sheltered South Africa's oppressive policies and practices in Namibia from international law. Ironically, it also opens the possibility that judges or states could relay and hijack the arguments of TWAIL to resist progressive norms of international law and advance a retrograde agenda.

South Atlantic Islands Development Corporation v Buchan 1971

Buchan dealt with fishing rights around the Tristan da Cunha island, located off the coast of Cape Town. Before *Buchan,* no courts in South Africa had ever expressly stated that international law formed part of South African law. Yet, though the judge in this case expressed disbelief at the fact that no court had ever ruled that international law belonged to South African law, he himself fell short of making that ruling expressly:[63]

> Although I am surprised that there is no decision in which a South African Court has expressly asserted that international law forms part of our law, I would be even more surprised if there were a decision asserting the contrary. It appears to have been accepted in both the English and the American Courts that international law forms part of their own law … And there are also one or two indications in decisions in our Courts that judicial notice will be taken of international law.[64]

A senior lecturer at the University of Cape Town, Dermott J Devine, filed an affidavit for the appellant in the case to prove the rules of international law on the fishery limits of the Tristan da Cunha's island.[65] Devine also told the court that those rules bound South Africa.[66] Counsel for the respondent asked the court to strike out Devine's affidavit on the ground that, although parties may lead evidence to prove foreign law, international law formed part of South African law and that the court did not therefore need any affidavit for that purpose.[67] The applicant replied that, since he could not find any precedent in South African courts, he deemed it wise to file the affidavit *ex*

61 ibid 172–177.
62 ibid 182.
63 South Atlantic Islands Development Corporation v Buchan 1971 (1) SA 238(C). Hereinafter 'Buchan' case.
64 The judge cited the following examples: '*De Howorth v The s.s. India*, 1921 CPD 451 at p. 457, and *Ex parte Sulman*, 1942 CPD 407, and other cases referred to in the *South African Law Journal* 1966, (part 11) at p. 131.'
65 See *Buchan* case (n 63) 237–238.
66 ibid.
67 ibid 238.

abundante cautela (out of an abundance of caution).[68] The court accepted the respondent's argument and struck out Devine's affidavit:[69]

> In my view it is the duty of this Court to ascertain and administer the appropriate rule of international law in this case. It follows that Mr. Devine's affidavit is neither necessary nor admissible and must be struck out.

Nonetheless, the judge did not clarify whether the appropriate rule of international law he hinted at originated in international treaties or custom. Chief Justice Rumpff shed some light on this puzzle in the next case, *Nduli.*

Nduli v Minister of Justice 1978

The facts of this case closely resemble those of *Likanyi,* which I discuss later in this section. This case involved two people allegedly abducted from the territory of Swaziland and formally arrested under terrorism and anti-communism laws in South Africa. The two accused appealed to the Appellate Division arguing that courts in South Africa do not have jurisdiction to try them because the South African police brought them in the country by forcibly taking them from the Swazi territory, which violates international law.

Chief Justice Rumpff cited Hahlo and Kahn to support the proposition that the courts normally applied international law unless it conflicted with South African legislation or common law.[70] The judge held that:[71]

> [w]hile it is obvious that international law is to be regarded as part of our law, it has to be stressed that the *fons et origo* of this proposition must be found in Roman-Dutch law.

Rumpff CJ added that '[o]ur own concept of public international law is based on the acceptance of territorial sovereignty of independent States.'[72] He qualified the application of international law in South Africa by saying that:[73]

> It was conceded by counsel for appellants that according to our law only such rules of customary international law are to be regarded as part of our law as are either universally recognised or have received the assent of this country, … I think that this concession was rightly made.

68 ibid.
69 *Buchan* (n 63) 238.
70 Nduli (n 50) 906. See also *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 712 (E).
71 *Nduli* case (n 50) 906.
72 ibid.
73 ibid.

In the end, however, the court dismissed the appellants' case, observing that, even though the two policemen had forcibly taken them from Swazi territory, the police (and thus the South African state) did not authorise the two policemen to abduct the two appellants.[74] For that reason, Rumpff CJ continued, the appellants cannot argue that the jurisdiction of municipal courts was ousted according to international law and that the court below erred in ruling that municipal courts had jurisdiction in the matter.[75]

Like *Lionda*, *Nduli* connected international law to Roman-Dutch law. Unlike *Lionda*, however, the judge in *Nduli* described Roman-Dutch law as the source, the fountain (*fons*), and the origin of international law within the domestic legal system. All the same, both judgments classified international law as inferior to Acts of Parliament. In fact, for Rumpff CJ in *Nduli* and for Hahlo and Kahn*,* even common law outranks international law.[76]

Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique 1980

In the wake of the *Nduli* decision, several judgments emulated its stance on the rules of international custom. In one such judgment, *Inter-Science Research and Development Services v Republica Popular de Mocambique* (*ISRDS*), the court looked to state practice to determine whether a doctrine (ie, absolute immunity) remained part of customary international law. The applicant, in that case, applied for the court to order the attachment of vehicles and moneys in a bank account held in Johannesburg. Specifically, the applicant alleged that Mozambique was liable for moneys owed under certain contracts that Portugal entered into in 1973 and 1974, when Portugal still controlled Mozambique as a colony. (Mozambique achieved independence from Portugal in 1974.) Mozambique put up the defence of sovereign immunity.

The court had to answer the question whether Mozambique had succeeded to the obligations of Portugal under the contracts. Early in the judgment, Margo J ruled, based on the Lusaka Agreement that provided for Mozambique's independence from Portugal, that '[i]t may be safely assumed' that Mozambique had succeeded to the obligations of Portugal.

Then moving on to the plea of sovereign immunity, the court noted that so many states had departed from the doctrine of absolute immunity such that courts in South Africa should no longer consider it a rule of international law.[77] It further noted that those states

74 ibid 911–912.

75 ibid.

76 See ibid 906, holding that the courts will 'normally apply [international law](taking judicial cognizance of its rules) … unless it conflicts with South African legislation or common law.'

77 *Inter-Service Research and Development Services v Republica Popular de Mocambique* 1980 2 SA 122 and 124–125 (T). Hereinafter 'ISRDS' case.

replaced absolute immunity with restrictive immunity,[78] in terms of which foreign states will not enjoy immunity for commercial transactions.[79] The court therefore ordered that the sheriff attach the interests of Mozambique in certain moneys and certain immovable properties, and it granted the applicant leave to sue Mozambique to recover the moneys it alleged that Mozambique owed it.[80]

Kaffraria Property v Government of the Republic of Zambia 1980

Just like *ISRDS,* this case involved sovereign immunity and the question whether South African law accepts sovereign immunity as absolute or restrictive. The United States donated a certain quantity of mixed fertilisers to Zambia. Then Zambia awarded the contract for the shipment of the fertilisers to Westfield Shipping Company (hereinafter 'Westfield Co'). On 8 May 1979, Zambia entered into an ordinary commercial charter party with Westfield Co. The ship sailed for East London in South Africa.

Upon arrival, however, the ship was detained for four days because Zambia could not produce the necessary letters of credit for the freight charges, as provided for in the charter party. Consequently, the ship incurred damages of USD 63 315, 28. The ship owners ceded their right to claim payment to Kaffraria Property, which then approached the court for an order to attach 1 000 tons of the fertilizers donated to Zambia and being discharged in East London.

Eksteen J considered the immunity defence that Zambia could raise. The lawyer for Kaffraria Property, the applicant, argued that Zambia could not raise the defence of sovereign immunity because the dispute involved a purely commercial transaction.[81] By virtue of the restrictive doctrine of sovereign immunity, Zambia could not claim such immunity.

Alluding to how states changed their practice of granting absolute immunity to the restrictive doctrine of immunity, Eksteen J ruled that:[82]

> Customary international law, depending as it does on 'universal' recognition by civilized States, is bound to and does change from time to time as a result of changing circumstances, international agreements or treaties, or even by virtue of the force of public opinion; and when it does so change, as it has done on the principle of sovereign immunity, it is the duty of our Courts to ascertain the nature and extent of such change and to apply it in appropriate circumstances.

78 ibid 122.
79 ibid 124.
80 ibid 126–127.
81 *Kaffraria Property v Government of the Republic of Zambia* 1980 2 SA 709 (E).
82 ibid 715.

By highlighting the adjective 'universal', the judge was referring to Rumpff CJ's dictum in *Nduli* that 'only such rules of customary international law are to be regarded as part of our law as are either *universally recognised* or have received the assent of this country.'[83]

Adopting the restrictive doctrine of immunity, the judge accepted the applicant's contention that the dispute concerned a transaction of a purely commercial nature.[84] Hence, Eksteen J concluded that Zambia could not brandish the defence of sovereign immunity.[85] He ordered the deputy sheriff to attach the 1 000 tons of fertilisers, the property of Zambia, stored in East London.[86]

Binga v Administrator-General, South West Africa 1984

Tuhadeleni and this case depict the oppressive manner in which judges dispensed dualism. The applicant challenged the validity of a notice requiring him to report for military services in terms of the Defence Act 44 of 1957. He contended that the Act conflicted with the mandate written by the League of Nations for the administration of Namibia. Also, he argued that since, by virtue of Proclamation 222 of 1981, the court (ie, the South West Africa Supreme Court) no longer worked as a division of the South African Supreme Court, the court had no longer the obligation to follow the decision of the Appellate Division in *Tuhadeleni*,[87] which prevented courts from testing legislation against the terms of the mandate. Alternatively, he submitted that the General Assembly of the United Nations had revoked the mandate which empowered South Africa to administer and legislate for Namibia.

Relying on *Nduli* and a few doctrinal writers, Strydom J wrote:[88]

> If we, sitting as a municipal Court, are satisfied that the control by the South African Government over the territory is effective and exclusive, we are, in my opinion, obliged to give effect to the Government's will as *inter alia* expressed in its legislation, irrespective of what the position may be as far as the international community is concerned. This, in my opinion, stems from the fact that in South Africa, as in British and other Commonwealth Courts, municipal Courts are obliged, in cases of conflict between municipal law and international law, and for that matter international opinion, to give effect to the former.

83 *Nduli* case (n 50) 906.
84 *Kaffraria* case (n 70) 715.
85 ibid.
86 ibid 716–717.
87 *Tuhadeleni* case 153.
88 *Binga v Administrator-General, South West Africa* 1984 (3) SA 967 (SWA).

Strydom J, the future Chief Justice of Namibia, added that:[89]

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

Even if *Buchan* expressly affirmed that international law formed part of the laws of South Africa (and South West Africa/Namibia), no court case could say whether it applied directly or automatically. With respect to customary international law, *Nduli* pointed out that it enters municipal law when it becomes 'universally recognized' or 'assented to' by South Africa. At least two cases, *Nduli* and *ISRDS*, invoked customary international law, but none specified whether international treaties integrated municipal law directly upon ratification or indirectly after domestication. To this day, no judge in Namibia has been able to straighten out this conundrum.

The Formative Years After Independence

The pre-Independence era birthed the dualist judge. By contrast, Independence carried along with it the moralist and the monist judge. Therefore, since 21 March 1990, three judicial personae have cohabited in Namibian courtrooms, namely the dualist, the moralist, and the monist. The moralist judge, epitomised by Ismail Mahomed, draws on core values to interpreting the Constitution and enlists international law for the purposes of interpreting the Constitution. For his part, the monist judge leans on article 144 of the Constitution to apply international law directly.

In the Aftermath of Apartheid

By the time Namibia attained political independence from South Africa in 1990, the existing jurisprudence had established the following principles:[90]

1. International law was part of South Africa (and Namibia), except when it conflicts with Acts of Parliament or the common law;[91] and

2. courts will take judicial notice of international law, and they have a duty in any given case to ascertain and apply the appropriate rule of international law.[92]

89 ibid 967–968.

90 Other relevant pre-Independence cases include *Bock* (n 56).

91 *Nduli* case (n 50) 893.

92 *Buchan* case (n 63) 234.

In the wake of Independence, the judiciary confronted the Herculean task of building on that jurisprudence while erasing the deep scars of apartheid.

Corporal Punishment 1991

The Attorney-General called upon the Supreme Court of Namibia to settle the question whether corporal punishment by organs of state and by public schools violated the right to human dignity, as protected in article 8 of the Constitution.[93] This case offered the courts one of their earliest opportunities to test the Constitution and use international law.

Mahomed AJ first framed the interpretation of the Constitution as involving the identification of a value judgment, ascertained objectively and extracted from the norms, values, aspirations, expectations and sensitivities of the Namibian people.[94] Interestingly, the judge said that, in relying on the norms and values of the Namibian people, the interpreter must take into account 'the emerging consensus of values in the civilised international community' to which Namibia is a part and which Namibians share.[95] Through this dictum, the judge made very clear Namibia's commitment to international human rights standards and international law.

More noteworthy, the judge did not expressly refer to article 144 of the Namibian Constitution when he applied international law. Possibly, the judge omitted to mention article 144 because, with a Constitution newly minted, judges had yet to acquaint themselves with the provisions of the Constitution, including article 144.[96] Or they simply resorted to international law as a way of interpreting the right to human dignity as protected in article 8 of the Namibian Constitution.[97] Through this method, Mahomed AJ embodies the moralist judge.

S v Curras 1991

Early cases often involved European ships engaged in illegal or predatory fishing in Namibian waters without the proper licence or authorisation. They frequently featured the international law of the sea. In *Curras,* the state had successfully prosecuted a thirty-nine-year-old Spanish national for fishing in Namibia's exclusive economic zone (EEZ) without a permit or a licence.[98] The accused appealed against the sentence. Defence counsel argued that the Namibian legislature abolished imprisonment by amending section 22 of the Sea Fisheries Act to bring the penalty in line with the 1982 United

93 *Corporal Punishment* (n 4) 178.
94 ibid 188.
95 ibid.
96 Zongwe (n 13) 90–91.
97 ibid 30–31, affirming that the Supreme Court of Namibia used international law to interpret the right to human dignity enshrined in article 8 of the Namibian Constitution.
98 *Curras* (n 4) 208.

Nations Convention on the Law of the Sea (UNCLOS).[99] He further argued this amendment should guide the court accordingly.[100] Article 73.3 of the UNCLOS lays down that 'penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment.'

Levy J held that, even if Article 73.3 of the UNCLOS reflected customary international law, courts cannot enforce the rules of international custom when they contradict local law.[101] In so holding, Levy J[102] relied on *Nduli* (above) and *Petane*.[103] Strangely, the judge based his holding on (dualist) case law rather than article 144 of the Constitution, despite the fact that article 144 subjects the application of international law to the Constitution and Acts of Parliament exclusively, and not to 'local law' generally. Given that the Constitution sits on top of the legal system as the supreme law, the dualist judge misapplied international law.

Minister of Defence, Namibia v Mwandinghi SC 1992

The monism in *Mwandinghi* intrigues. On the one hand, the court mentions article 144, but puts it in parentheses.[104] On the other hand, it rests its interpretation of the Bill of Rights on its 'international character'[105] and origins,[106] rather than article 144.

On 9 July 1987, in Namibia, South African soldiers shot and seriously injured Mwandinghi. The wounded man sued for damages the Interim Government of South West Africa and the South African Minister of Defence. The Minister admitted that South African soldiers shot Mwandinghi and that they were acting within the scope of their employment.

In the meantime, Namibia gained independence and South Africa no longer administered Namibia. The South African Defence Minister argued that, because of Namibia's independence, liability for Mwandinghi's injuries passed to the Namibian Minister of Defence. The court of Namibia took it for granted that article 140 attributes to Namibia's new government the delicts committed by the South African administration before Namibia's independence.[107]

99 ibid 216.
100 ibid.
101 *Curras* (n 4) 217.
102 *Curras* case (n 4) 217.
103 *S v Petane* 1988 (3) SA 55 (C).
104 *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 365 (NmS). Hereinafter '*Mwandinghi*' case.
105 ibid 362.
106 ibid 364.
107 ibid 359.

In construing article 140 in light of international law, the Supreme Court noticed that the Bill of Rights in Chapter 3, framed in a broad and ample style, is 'international in character'.[108] It added that the interpretation of the Bill of Rights in Chapter 3 calls for the application of international human rights norms,[109] and for a 'generous, broad and purposive interpretation that avoids "the austerity of tabulated legalism".' [110] Nevertheless, the court did not clarify whether this generosity, breadth, and purposiveness should guide the construction of constitutional provisions outside the Bill of Rights, for instance, article 140.

Cultura v Government of the Republic of Namibia 1992

In *Cultura*,[111] the judge wore a moralist hat and professed Namibia's adherence to the values of the international community, especially the United Nations (UN), when construing the Constitution. Like Mahomed in *Corporal Punishment,* Levy AJP in *Cultura* leveraged international law without expressly citing article 144.[112]

The South African administration (ie, the government) had caused to transfer huge amounts of money to Cultura 2000, a non-governmental cultural association established in 1989.[113] Incorporated as a non-profit organisation, it served as an umbrella association for cultural organisations that aimed to preserve and further 'West European cultural activities' in Namibia.[114]

After Independence, the newly elected government, mainly composed of the Black majority, passed legislation, the State Repudiation (Cultura 2000) Act 32 of 1991, that repudiated or cancelled any sale or donation of property under any laws in force prior to the date of Independence. The Act purported to realise article 140(3) of the Constitution which deemed the post-Independence government responsible for the acts done by the government that existed before Independence, unless such acts are 'subsequently repudiated by an Act of Parliament.'

The applicants asked the High Court for an order declaring the State Repudiation Act null and void for violating the applicants' right to practice, maintain and promote the culture, language or traditions of certain persons or groups—a right protected by article 19 of the Namibian Constitution.[115] The applicants also alleged that the Act violated

108 ibid 362.
109 ibid 362.
110 ibid 364.
111 *Cultura 2000 and Another v Government of the Republic of Namibia and Others* 1992 NR 110 (HC). Hereinafter '*Cultura* HC' case.
112 Except *Cultura* HC 115–116 where Levy AJP mentions article 144 of the Constitution once to paraphrase the allegations in which the applicants, and not him, expressly cited this provision.
113 *Cultura* HC case (n 111) 110.
114 ibid 117.
115 ibid 115

their right to culture as protected by international law and 'as incorporated in Namibian law under art 144 of the Constitution.'[116]

Levy AJP cited *Mwandinghi* to avail himself of international law in interpreting article 140(3) of the Constitution.[117] He went on to say that:

> the fundamental human rights as expressed in the United Nations Charter and all expositions of human rights emanating from the United Nations will have a bearing on the interpretation of the Constitution of Namibia. Namibia was spawned by the United Nations and is a member thereof.[118]

Finally, the court agreed with the applicants that the Act went against the Constitution and it declared the Act *ultra vires* and invalid.[119]

S v Carracelas (1) 1992

This trilogy of reported cases[120] also involved accusations by the Namibian state that the accused engaged in fishing within Namibia's EEZ without a permit or a licence, thereby violating section 22A(4)(b) of the Sea Fisheries Act.

Most lawyers will not notice that this trilogy of *Carracelas* judgments pertains to international law. Yet, this case represents a perfectly dualist recourse to international law in that the rules that the court had to handle prioritised the Constitution and Acts of Parliament over international law, and that the rules resulted from the legislature domesticating international law norms through Acts of Parliament. The Act in question was the Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990 ('EEZ Act'), which implements the UNCLOS, and which utilises that Convention to demarcate Namibia's maritime zones,[121] including its territorial sea[122] and EEZ.[123]

The state and the accused differed on the exact place where the boundary of Namibia EEZ was located. The prosecution adduced evidence that Namibia's Cabinet demarcated the northern boundary of the country's EEZ whereas the accused objected that Cabinet did not have the legal power to draw boundaries.

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116 ibid 115–116.

117 ibid 120, holding that '[t]his Court is assisted in the interpretation of art 140(3) by the learned judgment of the Supreme Court in *Minister of Defence, Namibia v Mwandinghi*.'

118 ibid.

119 ibid 126.

120 *S v Carracelas (1)* 1992 NR 322 (HC); *S v Carracelas and Others (2)* 1992 NR 329 (HC); and *S v Carracelas and Others (3)* 1992 NR 336 (HC).

121 Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990 (EEZ Act) s 6(1) (the continental shelf) and s 3A(2) (the contiguous zone).

122 ibid s 2(2)(a).

123 ibid ss 4(2).

Frank J held that the Namibian Constitution does not empower the Cabinet to determine the country's EEZ. He said that, by virtue of section 5 of the EEZ Act 3 of 1990, Namibia could determine its boundaries primarily by signing treaties with its neighbours.[124]

Kauesa v Minister of Home Affairs 1994

The court in *Kauesa* sketched a monist outlook on international law that faintly echoes Mahomed's moralism. Elvis Kauesa, a police officer, faced criminal charges in an internal hearing for publicly speaking unfavourably against the administration of the Namibian Police, thereby flouting Regulation 58(32)—a regulation promulgated under the Police Act of 1990. During the hearing, the police officer decided to challenge the constitutionality of Regulation 58(32) in court, arguing that the regulation violated his right to freedom of speech and expression.

Before it found that Regulation 58(32) did not infringe his freedom of speech, the High Court tackled Kauesa's lawsuit in an ostensibly monist style. O'Linn J recalled article 144 of the Constitution and remarked that, by virtue of that clause, the African Charter on Human and Peoples Rights integrated Namibian law because the Namibian Government formally recognised it.[125] He then proceeded to display exalted monism when he asserted that provisions of the Constitution override international agreements that have become Namibian law only when those provisions are 'specific and unequivocal'.[126] Otherwise,

> [i]n cases where the provisions of the Namibian Constitution are equivocal or uncertain as to the scope of their application, such provisions of the international agreements must at least be given considerable weight in interpreting and defining the scope of the provisions contained in the Namibian Constitution.[127]

O'Linn J also fulfilled monism when he maintained that, though they may question whether the Universal Declaration of Human Rights and the 1982 Constitutional Principles[128] have penetrated Namibian law, people should nonetheless attach weight to

124 *S v Carracelas (1)* 1992 NR 327. Hereinafer '*Carracelas (1)*' case.

125 *Kauesa v Minister of Home Affairs* 1994 NR 140 (HC). Hereinafter '*Kauesa* HC' case.

126 ibid 102.

127 ibid.

128 The Principles Concerning the Constituent Assembly and the Constitution for an Independent Namibia, famously known as the '1982 Constitutional Principles', contain the bare bones of the Namibian Constitution. They were drafted in the early 1980s by a group of Western countries, consisting of Canada, France, the UK, the United States of America (US), and West Germany. Liberal in orientation, these principles prescribe multiparty democracy, an independent judiciary, and a bill of rights that include freedom of expression. In 1982, the UN Security Council annexed these principles to one of its resolutions, thereby officially granting the principles the status of international law. See also Marinus Wiechers, 'Namibia: The 1982 Constitutional Principles and their Legal Significance' (1989/1990) 15 South African Yearbook of International Law 1ff.

these two international law instruments when interpreting the Constitution. O'Linn treaded in Mahomed's moralist footsteps by deriving values from international law, not as a source of law, but as a source of meaning. Whereas Mahomed AJ immediately jumped into international law in *Corporal Punishment,* O'Linn J explicitly quoted article 144 in his reasoning in *Kauesa*.

In the end, however, it is difficult to confirm that the monist perspective in *Kauesa* has retained its force as precedent. In October 1995, the Supreme Court quashed O'Linn J's *Kauesa* judgment,[129] such that this judgment may no longer reflect settled law.[130] Nevertheless, O'Linn AJA later managed to salvage one aspect of the *Kauesa's* perspective when he reiterated in *Frank* that the 1982 Constitutional Principles qualified as 'background material' for the interpretation of the Constitution.[131]

Namunjepo v Commanding Officer, Windhoek Prison 1999

A prison had chained inmates with iron to reduce their mobility. Some inmates sued the prison and prayed the court for an order declaring the practice of chaining prisoners a violation of article 8 of the Constitution on the right to human dignity.[132]

The Supreme Court looked to international law when assessing the parties' arguments and concluded that the practice offended the inmates' right to human dignity, as those chains hobbled inmates like animals. Chief Justice Strydom quoted with approval Mahomed AJ's celebrated dictum in *Corporal Punishment* on the necessity to come up with a value judgment when construing the Constitution.[133] Strydom CJ stressed that the Namibian Parliament acceded to both the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR) on 28 November 1994.[134] He then observed that these two international instruments contain provisions that resemble article 8 of the Namibian Constitution.[135] Moreover, Strydom CJ noted that the UN Standard Minimum Rules for the Treatment of Prisoners prohibit the practice of chaining prisoners to decrease their mobility.[136]

129 *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC).

130 However, Ndeunyema (n 12) 288, suggests that O'Linn's two 'central principles' (mentioned above in the text) still guide the enforcement of international law domestically and the interpretation of the Namibian Constitution. Given that the Supreme Court later set aside O'Linn's judgment in *Kauesa,* I submit that this suggestion does not accurately state the positive law.

131 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 135 (SC). Hereinafter '*Frank*' case.

132 *Namunjepo* (n 1).

133 ibid 277–278.

134 *Namunjepo* (n 1) 284.

135 ibid 284.

136 ibid.

Both the *Corporal Punishment* and the *Namunjepo* judgments are moralists. They glean the substance of rights enshrined in the Constitution from Namibian values and international law; they do not reference article 144; and they do not condition the application of ratified treaties on their domestication through statutes.

The Second Decade

Initiatives and judgments to undo the legacies of apartheid and 'moralise' the law characterised much of the formative years of the Namibian jurisprudence on international law. As the cases decided in that first decade post-Independence show,[137] judges applied international law inconsistently. The 1990s began with Mahomed AJ striving to steer the jurisprudence towards better ethics. Running parallel with the moralists,[138] some judges drove that jurisprudence in monist[139] and dualist[140] directions.

In sum, during that transition, judges did not demonstrate a clear understanding of how to apply international law municipally. More importantly, they did not formulate a clear rationale of the place of international law in municipal law.

By the end of the decade, a group of armed men attempted to break the Caprivi region (now Zambezi region) from the rest of Namibia. But the Namibian army succeeded in quelling the botched secession. From this major event in Namibia's history arose the longest and probably the most expensive litigation, the Caprivi high treason trial.[141] Several cases emanated from this trial, for instance, *Mwilima, Mushwena,*[142] and *Likanyi.* And Caprivi high treason litigation kept Namibian courts busy from the dawn of the second decade to date. From an international law perspective, the high treason trial touched on issues of extradition and state responsibility.

In this period, while the monists and dualists carried on, the moralist judicial persona faded. This time heralded bolder monism (*Mwilima*) and dualism (*Frank*). The judge in *Mwilima* preferred international law standards over an Act of Parliament, flying in the face of the hierarchy set in article 144 of the Constitution, whereas the judge in *Frank* chose to resolve the case by emphasising local values and downplaying international law.

137 *Other relevant cases from that period include* Pineiro v Minister of Justice *1991 NR 283 (HC);* Minister of Defence v Mwandinghi *1993 NR 63 (HC);* Government of the Republic of Namibia v Cultura 2000 *1993 NR 328 (SC)*; Freiremar SA v The Prosecutor-General of Namibia and Another *1996 NR 18 (HC);* Müller v President of the Republic of Namibia and Another *1999 NR 190 (SC)*.

138 For example, *Cultura HC* case (n 111) and *Namunjepo* case (n 1).

139 For example, *Kauesa HC* case (n 125).

140 For example, *Carracelas (1)* (n 124) case.

141 *S v Malumo and Others* (CC 32-2001) [2015] NAHCMD 213 (7-14 September 2015). Hereinafter '*Malumo'* case.

142 *S v Mushwena and Others* 2004 NR 276 (SC).

Chairperson of the Immigration Selection Board v Frank 2001

Frank joins a series of court decisions—chiefly *Müller*,[143] and *Hamwaama*—that pushed back against efforts by litigants to mount an argumentation based on international law. With *Frank,* this resistance against international law, mostly centring on equality rights claimed by some unpopular minorities,[144] ripened into a feisty dualism. Judges in those cases avoided international law by emphasising local norms and strategically chosen foreign law.

Falling under the rubric of immigration law, *Frank* focused on the travail of two women engaged in a lesbian relationship. Elizabeth Frank was a German national while her partner, a Namibian citizen. The couple confronted the Chairperson of the Immigration Selection Board who had appealed against the decision of the High Court to grant Frank permanent residence.

In the High Court, Frank and her partner had submitted that the denial by the Immigration Selection Board to grant Frank's permanent residence in Namibia discriminated against Frank because she indicated in her application for permanent residence that she had begun a lesbian relationship with her partner.[145] The High Court agreed with Frank and her partner that the Immigration Selection Board should have granted permanent residence to Frank and ordered the Board to issue Frank with a permanent residence.[146]

The Immigration Selection Board appealed against the High Court decision. On appeal, the Supreme Court had to address the question whether the Board violated Frank's rights to dignity, privacy, family, and equality.[147] In determining this question, the court considered both comparative law and international law. Eventually, though the Supreme Court ordered that the Board reconsider Frank's permanent residence application;[148] it nonetheless ruled that the state did not discriminate against Frank.[149]

143 *Müller v President of the Republic of Namibia and Another* 1999 NR 190 (SC).

144 See Dunia Zongwe, 'Equality has no Mother but Sisters: The Preference for Comparative Law Over International Law in the Equality Jurisprudence in Namibia' in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (PULP 2010) 123.

145 *Frank and Another v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

146 ibid 268–269 and 271.

147 *Frank* case (n 131) 107.

148 ibid 129.

149 ibid 156–157.

In arriving at this ruling, the court relied heavily on comparative law, especially the legal position in Zimbabwe, rather than international law.[150] Writing for the majority, O'Linn AJA also leaned on Namibian values:[151]

> The Namibian Constitution corresponds to that of Zimbabwe in regard to the provision for equality and non-discrimination. The 'social norms and values' in regard to sexual behaviour of Namibians appear to correspond more to that of Zimbabweans than to that in South Africa…

Contrary to Mahomed AJ in *Corporal Punishment*, O'Linn AJA employed local 'norms and values' to avoid international law or unfavourable comparative law. He did not even mention article 144; and, though he paraphrased the respondents' international law submissions, he embarked on a textualist reading of the Constitution. O'Linn AJA did not bother to broach the application of international law in Namibia despite the respondents' internationalist submissions.

O'Linn's dualism diametrically opposes Mahomed's moralism. O'Linn AJA did not 'moralise' the interpretation of the Constitution; he relativised it. On the way, he accomplished a conservative social policy, one that refused to 'strengthen the perception that the Courts are imposing foreign values on the Namibian people.'[152] In reality, O'Linn AJA watered down the liberal aspects of Mahomed's natural-law paradigm by relativising the values of Namibians and the value judgment that the reader of the Constitution must articulate:[153]

> The Namibian reality is that these traditions/usages, norms, values and ideals are not always 'liberal' and may be 'conservative' or a mixture of the two. But whether or not they are 'liberal', 'conservative' or a mixture of the two, does not detract from the need to bring this reality into the equation when interpreting and applying the Namibian Constitution.

To sidestep international law and unfavourable comparative law (from South Africa), O'Linn AJA also waved the sovereignty of the people and Parliament, 'one of the most important institutions to express the present day values of the Namibian people.'[154]

Overall, *Frank* does not count as dualist because it requires domestication, which it actually does not; but it is dualist in its impulses and effects because it subjects

150 For a full examination of the *Frank* case, see Zongwe (n 13) 123.
151 *Frank* case (n 131) 150–151.
152 ibid.
153 ibid 135.
154 ibid 140–141.

international law to the sovereignty and Acts of Parliament. Contrarily, *Mwilima* went to the opposite extreme.

Government of the Republic of Namibia v Mwilima 2002

Mwilima and his co-accused started an armed group that sought to forcibly break the former Caprivi province away from the rest of Namibia. They argued that the right to a fair trial, given the nature of the case and the charges against them, required that the Namibian state provide them with free legal aid.[155] The Supreme Court agreed with the arguments made by Mwilima and his co-accused. Interestingly, the court preferred to apply the standard in the ICCPR rather than the standard set in the Legal Aid Act. The Act differs from the ICCPR in the sense that the Act subjected the granting of free legal aid to the state's economic resources whereas the ICCPR allows the granting of legal aid if it satisfies the "interests of justice". By choosing the standard in the ICCPR, the judge in *Mwilima* pursued an unusual variety of monism that defied the text of article 144.

Attorney-General v Hamwaama 2008

On 13 August 2007, the applicants requested the court to declare certain provisions of the Criminal Procedure Act of 1977 unconstitutional because they contradicted Article 14(5) of the ICCPR.[156] This provision of the ICCPR guarantees the right of the accused to have his conviction and sentence reviewed by a higher tribunal according to law.

Although the applicants expressly raised the provisions of the ICCPR and claimed that Namibia is a party to that treaty,[157] Parker J did not entertain those claims. Instead, he dismissed the application on a different ground, namely that the impugned provisions of the Criminal Procedure Act did not violate the applicants' right to equality in article 10 of the Constitution.[158]

This case illustrates that dualism may manifest through a disregard of international law, regardless of whether a judge intended to endorse dualism. To produce dualist outcomes, he or she simply needs to disregard the text of article 144 or, as in *Hamwaama,* the entreaties of the international lawyer. At the very least, this attitude reinforces the uncertainty about the pertinence of article 144 or international law.

155 *Government of the Republic of Namibia v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC). Hereinafter '*Mwilima*' case.

156 *Attorney-General v Hamwaama and Others* (A 176/2007) [2008] NAHC 80 (31 July 2008).

157 ibid para 8.

158 ibid para 26.

The Build-up to the Critique of International Law

In the second decade, O'Linn AJA in *Frank* may have succeeded in silencing moralist judges when he warned that 'the guideline that a constitution must be interpreted "broadly, liberally and purposively", is no licence for constitutional flights of fancy.'[159] He then circumscribed Mahomed's liberal vision of Namibian values.[160] The second decade heard, not so much the muted moralist, but the louder voices of dualists (eg *Frank*) and monists (eg *Mwilima*).

In the run-up to the present, the dualists and monists continued to adjudicate. The jurisprudence comprised dualist decisions (ie, *Alexander* and *Clear Enterprises*) and monist ones (ie, *Mazila* and *Swart*). In that run-up, a fourth judge-identity surfaced: the constitutionalist. In *Matador,* this persona led the judge to internalise international law norms indirectly by measuring the fairness or reasonableness of administrative acts against them.

Alexander v Minister of Justice 2010

The accused faced extradition because of crimes he allegedly committed in the US. In the High Court, counsel for the accused invoked international law, including notably the ICCPR.[161] Strydom AJA reasoned that, since Namibia ratified the ICCPR, the court must give effect to it.[162]

Mazila v the Government of the Islamic Republic of Iran 2015

This case featured a judge who behaved like the dualist judge in *Curras* by obeying international law through a municipal law domesticating it. The case concerned a man and his wife who were residing in properties owned by the Embassy of Iran in Namibia.[163] When the Embassy asked them to vacate the premises, they sued the Embassy. Before the High Court, the Embassy argued that it had immunity and that the dispute was not a commercial transaction since the Embassy never entered into any lease or contractual agreement with the man and his wife.

The High Court relied on the Diplomatic Privileges Act 71 of 1951 and international law to decide in favour of the Iranian government.

159 *Frank* case (n 131) 135.
160 ibid 135–136.
161 See *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC).
162 ibid 354.
163 *Mazila v the Government of the Islamic Republic of Iran* (A 13/2015) [2015] NAHCMD 24 (13 February 2015).

Matador Enterprises v Minister of Trade and Industry 2015

This case marks the first episode of the constitutionalist judge, who checks the powers of an administrative body or official by dint of international law. Two importers of dairy products sued the Minister of Trade in the High Court, seeking an order declaring the minister's import restrictions null and void.[164] The Namibian government had relied on the infant-industry protection (IIP) of the 2002 Southern African Customs Union (SACU) Agreement to restrict imports of dairy products, including imports from South Africa.[165] The applicants, on the other hand, countered that the Minister's IIP measure did, in fact, go against the SACU Agreement.[166]

Smuts J thought it unnecessary to say whether the minister breached the SACU Agreement,[167] but the applicants nonetheless succeeded in using Namibia's international treaty obligations under the SACU Agreement to convince the judge that the minister failed in his administrative law duties.

Swart v Tube-O-Flex Namibia 2016

This case presents a unique instance of monism. In a labour dispute, Damaseb DCJ accepted that an international soft law (ie, the International Labour Organisation (ILO) Recommendation 198) framed Namibia's Labour Act of 2007.[168] Accordingly, he read the Act in light of the soft law.[169] He never alluded to article 144 of the Constitution. This case stands out from the rest because, without asserting the primacy of international law, it still subscribes to non-binding international norms to construe a local statute.

S v Likanyi 2017

The Supreme Court in *Likanyi* misapplied international law in spectacular fashion. The precedent embodies some of the major defects that bedevil Namibia's jurisprudence on the status of international law in municipal law, for example, the lack of theoretical understanding, systematic analysis, and ordering of norms within the scheme devised by the constitution-maker through article 144.[170]

Likanyi is a spin-off of the main Caprivi high treason trial. It closely resembles the *Mununa* case,[171] except that in *Likanyi* the accused were forcibly taken from Botswana soil, and not Zambian territory as in *Mununa.*

164 *Matador Enterprises v Minister of Trade and Industry and Others* 2015 (2) NR 477 (HC).
165 ibid 481–482.
166 ibid 493–494.
167 ibid 509.
168 *Swart v Tube-O-Flex Namibia* 2016 (3) NR 859 (SC).
169 ibid 859–860.
170 For an extended discussion of *Likanyi*, see Zongwe (n 13) 100–102.
171 *S v Mununa and Others* 2016 (4) NR 954 (SC).

Here, too, the judge concluded that courts in Namibia lacked the jurisdiction to try the accused because the state brought them in Namibia in violation of the rules of international law. But the court wrongly decided this case because a state cannot breach international law when it performs an allegedly wrongful act against another state that consents to the act. Botswana did sanction the arrest of Likanyi by Namibian Police on its territory and worked with the Namibian Police for that purpose.[172]

In holding that violations of international law deprive courts of jurisdiction, the Supreme Court's assertion hinged on Roman-Dutch law, as set out in *S v Ebrahim*,[173] and as opposed to international custom or treaties. This reasoning poses a problem because it suggests that common law (or case law, for that matter) prevails over international law. To this day, Namibian judges have not yet settled this question.

South African Poultry Association v Minister of Trade 2018

Similar to *Matador,* the *South African Poultry Association (SAPA)* case involved parties using the rules of administrative law to enforce international treaties obliquely. The SAPA and poultry importers complained that import restrictions by the Trade Minister violated the SACU Agreement, which restricts measures aimed at protecting infant industries. However, the High Court threw out their case because they delayed in commencing action.

Displeased by the High Court's decision, SAPA and the poultry importers appealed against it to the Supreme Court.[174] The appellants relied on the IIP provisions of the SACU Agreement to contend that the minister failed to apply his mind to the matter and that, as a consequence, he violated article 18 of the Constitution.[175] The Supreme Court concluded that the High Court should have condoned the appellant's delay because their lawsuit brings up a matter, namely article 144 and the domestic application of international treaties, that serves the public interest:

> [T]he public interest would be served by the ventilation and determination of the application of Article 144 of the Constitution and the extent, if any, to which international treaties can be enforced in domestic courts.

172 *Likanyi* (n 3) 806. Frank AJA dissented from the majority judgment and stressed that the most basic tenet of international law consent by a state to activities in its territory does not breach international law, nor does it breach the consenting state's sovereignty.

173 1991 (2) SA 553 (AD). Note that this South African case can only enjoy persuasive authority in Namibian law because it happened after 1990, when Namibia attained political independence from South Africa. The case has therefore no binding force.

174 *SAPA* case (n 6) 1.

175 ibid 4.

For that reason, the Supreme Court remitted the matter to the High Court for adjudication.[176] Even though the appellants invited Smuts JA to wear the constitutionalist mantle, he wisely sent their case back to the High Court so that the latter could act as a court of first instance. For now, therefore, *Matador* gives judges a stronger mandate than *SAPA* to assume a constitutionalist role.

Clear Enterprises (Pty) Ltd v Minister of Finance 2019

Lastly, another dualist case along the lines of *Curras.* Clear Enterprises, a company registered in Botswana, sued SACU, which is headquartered in Windhoek, Namibia. However, Masuku J set aside the complaint on the basis that SACU enjoyed immunity by virtue of the Headquarters Agreement that SACU entered into with Namibia. The judge noted that the term 'diplomat' encompasses international organisations[177] and that, as a result, Namibia validly granted immunity to SACU by virtue of the Diplomatic Privileges Act.[178]

Four Interpreters of International Law

Surveying the jurisprudence on the place of international law within Namibia's legal system has revealed four judge-identities: the dualist, the moralist, the monist, and the constitutionalist. I now explain each of these personae.

The Monist

The Standard Principle

Inasmuch as they applied the rules of international law without requiring domestication or inquiring into whether parliament had so incorporated the rules, the courts have in the overwhelming majority of international law cases displayed a monist mindset. Cases that displayed such attitude include *Mwandinghi*, *Kauesa*, *Mwilima*, and *Swart*.

This perspective on the relationship between international law and municipal law has thus ripened into the standard principle. It also mirrors the wording of article 144 most closely.

Mwilima: The Most Monist

What makes *Mwilima* stand apart from the other cases is the fact that, in *Mwilima*, the position under international law differed from or conflicted with the position under domestic legislation. Except for *Mwilima,* all the other cases that dealt with article 144

176 ibid 20.
177 *Clear Enterprises (Pty) Ltd v Minister of Finance* 2019 (2) NR 580 (HC).
178 ibid 593.

in a monist fashion did not involve any glaring tension between international law and municipal law.

And, of all international law cases in Namibia, *Mwilima* appears to have gone the farthest in the monist direction. The Supreme Court in that case seems to have ignored the hierarchy set in article 144 of the Constitution, which places international law below Acts of Parliament and the Constitution. Instead, in *Mwilima,* the court ranked the provisions of the ICCPR (ie, international law) above the provisions of the Legal Aid Act. In doing so, the court inched Namibian jurisprudence toward the pure form of monism that the Netherlands has embraced and that lifts international law higher than the constitution itself.

The Dualist

Curras best stands for the dualist tradition that obtained in South West Africa/Namibia before it attained political independence from South Africa. *Pan American World Airways, Tuhadeleni, Nduli, ISRDS, Kaffraria, Binga, Carracelas (1), Frank, Hamwaama, Alexander, Mazila,* and *Clear Enterprises* are other specimens of that tradition.

South Africa in turn acquired that tradition from the UK. Today, the weight of authorities favours a monist perspective on the relationship between international law and municipal law, but the outcome of the *SAPA* matter can still revive certain elements of the dualist tradition, notably the requirement that Parliament domesticates international treaties before they can enter into force municipally.

The Moralist

The constitution-makers located article 144 in the Constitution; and the Supreme Court requires that people interpret the Constitution by making a value judgment.[179] This implies that the Constitution requires that they interpret article 144 by drawing on moral or political values. This requirement entails that interpreters move beyond legalist or textualist perspectives on article 144 to explain why they apply international law and that they dig further to find the deeper foundations of international law in municipal law. The judgments that heeded this requirement comprise *Corporal Punishment, Cultura,* and *Namunjepo*.

International Law as an Aid to the Interpretation of Municipal Law

Both monist and moralist judges have turned to international law to enlighten the clauses of the Constitution. The court in *Mwilima* fell short of the ideal monism as it did not

179 This statement extrapolates the assertion in the *Corporal Punishment* case 188: that the question as to whether a particular form of punishment authorised by the law can properly be said to violate the right to human dignity involves the exercise of a value judgment by the court.

elevate international law above the Constitution. Nonetheless, judges and lawyers could take the approach in *Mwilima* even farther along the monist path. In particular, monist judges could achieve their goals by moralist means by inserting values, local and international, into their interpretation of the Constitution. If judges had espoused this strategy in *Mwilima,* they would have said that the state must provide Mwilima and all the other accused with legal aid, not because the ICCPR provided better protection to the accused than the Legal Act did, but because the right to a fair trial enshrined in article 12 of the Constitution, read together with the ICCPR provisions, demands it. This strategy pre-empts any objection that the interpreter violates article 144, and the principle of constitutional supremacy declared in article 1(6) of the Constitution. It maintains that, by resorting to the rules of international law, the interpreter is merely interpreting—and not contravening—the supreme Constitution. These creative or innovative uses of international law through interpretation seem to be supported by the way the Supreme Court approached the interpretation of the Legal Aid Act in *Mwilima.*

In a handful of cases, courts have not applied international law directly. Instead, they have resorted to it while making sense of the law. *Rex v Lionda*[180] teaches an early lesson —that courts or judges can use international law to interpret the law. At 352, Davis AJA remarked:[181]

> It was strongly contended on behalf of the appellant that the regulation did not cover the entering into a business transaction, but only the carrying on of the transaction when once it had been entered into: this: [sic] indeed was the main argument advanced on his behalf. In my opinion, reading the words 'carry on any business transaction' only in the light of their dictionary definitions and the context, and without the background of International Law, even then, for the reasons which I have given, that limited meaning is not their correct one.

As this case shows, judges in South African courts relied on the way Roman-Dutch writers expounded on international law.[182] By interpreting the law like that, they actually interpreted the law through common law, and not directly through international law.

The Leading Case: Corporal Punishment

The *Corporal Punishment* case epitomises what I call the 'moralist' view. Mahomed AJ held that the interpretation of the Constitution involves a value judgment, determined objectively. The objective determination the judge alludes to draws on the values, norms, aspirations, sensitivities, and expectations of the Namibian people. Crucially, it draws on the values of the international community of which Namibia belongs to. This

180 *Lionda* (n 51) 348.
181 ibid 348, 352.
182 See *Lionda* (n 51) 348, 352–354.

determination implies that readers of article 144 of the Constitution must read it by taking those values, Namibian and international, into account.

With this view, lawyers, judges and government agents do not apply international law merely because article 144 says so. Rather, the moralist view commands interpreters of the Constitution to apply international law, regardless of article 144, because applying it satisfies the moral values of the Namibian people and the international community to which they belong. Like Mahomed AJ did in *Corporal Punishment,* such moralist perspective would enable a judge or a lawyer to enforce ratified international treaties without relying on article 144 at all.

In fact, through interpretation, judges can implement the rules of international law to clarify even the terms of the Namibian Constitution itself though article 144 expressly subjects the application of international law to the Constitution. They can privilege positions adopted in customary or conventional international law without giving the impression that they are offending the Constitution.

The Constitutionalist

In the last semi-decade, judges used international law at least once to check the powers of the administrative state. I designate this growing practice as 'constitutionalist' because it fulfils the purposes of constitutionalism, as traditionally understood. Throughout all its successive phases, true constitutionalism remains what it has been almost from the beginning, the limitation of government by law.[183]

When a judge treats international law with constitutionalism in mind, he or she does not implement the rules of treaties or custom directly, but indirectly to determine whether a government body or official has acted reasonably and fairly in terms of article 18 of the Constitution. To put it simply, a constitutionalist judge employs international law as a tool to determine whether a government body or official has violated administrative law. The constitutionalist role, thus, emanates from the court's power to review administrative action. Article 18 enables any person aggrieved by the acts or decisions of government bodies or officials to 'seek redress before a competent Court or Tribunal'. Crucially, if the constitutionalist finds that a decision of a body or official violates administrative law by ignoring international law, he or she will set aside the decision.

Matador illustrates how constitutionalist judges can rely on international law to check the decision-making process of the government. In that dispute, Smuts J did not call on article 144 to rule that the SACU Agreement applies in the Namibian legal system. Though he considered article 144 and the SACU Agreement, he did not pronounce himself on the applicability of that Agreement.[184] Instead, he used the SACU Agreement

183 Charles McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press 1940) 24.
184 *Matador* case (n 164) 509.

as one of the factors to conclude that the Namibian Minister of Trade breached the rules of administrative law.[185] Specifically, the judge held that, by failing to uphold the provisions of the SACU Agreement, among others, the Trade Minister failed to 'properly apply his mind to relevant matters'.[186] Accordingly, the judge set aside the minister's decision.[187]

The applicants in *SAPA* pursued a strategy similar to the one the applicants used in *Matador.* They challenged the import restrictions on slaughtered chicken ordered by the Namibian Trade Minister based on international law and administrative law. The applicants argued that the order contravened several treaties. They argued that the order violated Namibia's obligations under the 1947 General Agreement on Tariffs and Trade (GATT), the 1995 World Trade Organisation (WTO), the SACU Agreement, the 1992 Treaty Establishing the Southern African Development Community, and its 1996 Protocol on Trade.[188] In addition, the applicants alleged that the minister's order infringed article 18 of the Constitution on administrative justice in that the order did not follow fair procedures.[189]

The Law Developer

Judges could also use international law to develop the law in specific fields, such as human rights, regional trade, and anti-corruption law. Take the case of anti-corruption in Namibia. In *Lameck,* the court leaned on international law, among other factors, to declare the statutory definition of the term 'corruptly' unconstitutional.[190] Before Parliament enacted the Anti-Corruption Act 8 of 2003, common law defined the crime of corruption. The Anti-Corruption Act aimed at modernising the common-law definition, but in *Lameck* the accused, who stood accused of crimes under the Act, claimed that the definition of 'corruptly' under the Act did not adhere to the principle of legality entrenched in the Constitution as it swept too widely.[191] Smuts J held that, in interpreting the term 'corruptly', courts would need to have regard for its meaning in court decisions, dictionaries, and international instruments.[192]

Smuts J ruled the term 'corruptly' unconstitutional for being over-broad, but he did not specify a proper definition of the adverb 'corruptly', nor did he elaborate on the definition of that term in international instruments. Chief Justice Shivute in *Goabab* went farther than Smuts J in *Lameck.* In *Goabab,* another corruption prosecution,

185 See Zongwe (n 13) 382–383.
186 *Matador* case (n 164) 508.
187 ibid 509.
188 *SAPA* HC case (n 6) 265–266.
189 ibid 266.
190 *Lameck and Another v President of the Republic of Namibia and Others* 2012 (1) NR 255 (HC).
191 ibid 277–278.
192 ibid 280–281.

Shivute CJ remarked that the Anti-Corruption Act clearly did away with the common-law elements of the crime of corruption.[193] He further remarked that the new definition had become broad in its reach and that such broader scope reflected the necessity to capture a crime (ie, corruption) that manifests itself in different shapes and forms, and that the state found difficult to prove.[194] Of greater significance, Shivute CJ observed that the wide ambit of the crime appears 'international in nature' and that it demonstrates the international community's resolve that, if left unchecked, corruption can erode a country's gains in all spheres.[195] To support his observation, the Chief Justice then quoted the preamble and the provisions of the African Union Convention on Preventing and Combating Corruption, which he said that 'Namibia has ratified'.[196] Based on these instruments, Shivute CJ outlined the proper definition of the term 'corruption' as denoting, at its lowest threshold when used in the context of the public service, 'the abuse of a public office or position (including the powers and resources associated with it) for personal gain.'[197]

Both *Lameck* and *Goabab* exemplify the law-developing judge. In the specific context of anti-corruption law, this type of interpreters can play a vital role as most of the rules that the state enacted come from international law.[198] O'Linn would have objected that, given the constitutionally guaranteed principle of popular sovereignty, Namibian courts stand in a weaker position than their South African counterparts in regard to 'developing the common law or customary law or legislation.'[199] But if, in the future, any court concludes that article 144 of the Constitution means that Parliament must domesticate treaties, the law-developing judge would become the last resort in developing entire fields through international law without having to wait for the protracted legislative process to complete its course and without violating the Constitution.

Conclusion

In this article, I have thus chronicled how the courts in Namibia have struggled to apply international law, generally, and article 144, in particular. It portrays a strong judiciary, open and friendly to norms from the international community. It portrays, however, a judiciary without a clear theory or understanding of how it should apply international law. Consequently, the approach of the courts to the application of international law has

193 *S v Goabab and Another* 2013 (3) NR 611.
194 ibid 611.
195 ibid.
196 ibid 611–612.
197 ibid 612.
198 See Graham Hopwood, *Namibia and the UN Convention Against Corruption (UNCAC): A Gap Analysis on Namibia's Compliance With UNCAC Completed by the IPRR and Published by the ACC and the UNDP* (UNDP 2011) 25–26, showing that, in legislating against corruption, Namibia complied with most of the provisions in Chapter III of the United Nations Convention Against Corruption.
199 *Frank* case (n 131) 141.

been inconsistent and varies from one judgment to the other. An inconsistency that culminated in *Likanyi* in a spectacular debacle.

The jurisprudence developed in Namibia on international law unveils four types of adjudicators: The monist, the dualist, the moralist, and the constitutionalist. The moralist deploys international law as a legal-reasoning tool to elucidate the meaning of domestic statutes.

For lawyers and jurists in other developing-countries, the Namibian experience puts forward strategies that they can utilise to approach the execution of international law domestically and urge them to see beyond the monism-dualism binary to endorse one of the five judge-identities outlined in this article.

They could also learn from the manner in which judges have realised the necessity to settle the application of international law in Namibia, if what the judges said in the *SAPA* appeal is anything to go by. With this sort of realisation, lawyers in Namibia have every reason to hope that the near future will bring clarity and overarching guidance as to why and how they should argue, apply, read and understand international law.

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