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Domestic Incorporation of International Law: Comparative State Practice

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DOMESTIC INCORPORATION OF INTERNATIONAL LAW: COMPARATIVE STATE PRACTICE

Legal Memorandum

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Executive Summary

This memorandum examines the incorporation of international piracy laws into the domestic laws of states through a comparative state practice analysis of the Netherlands, South Korea, Tanzania, India, and Kenya. States such as the Netherlands and Kenya, are monist, meaning international law contained in treaties becomes part of the domestic law upon ratification by the state of a treaty without any further legislation passed by the legislature. In contrast, Tanzania and India follow a dualist model, which means that international law does not become automatically effective within those states without domestic legislation. The difference in the incorporation process of international law is often reflected in the constitutions of the states examined. The Constitutions of the Netherlands and Kenya, for instance, make reference to the role of international law in multiple provisions, while the Indian Constitution merely acknowledges the state's obligation to abide by such law.

In addition to the difference in the process of incorporating international law into their domestic law, the five states also differ how the states have undertaken to harmonize their domestic law with treaty provisions relating to piracy. Although all five of the states have ratified international agreements regarding piracy, such as United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), the states have applied international law relating to piracy in different ways. Some of the states have determined their existing penal law sufficiently incorporates their obligations under these treaties to allow for the prosecution of pirates, while others have recently amended their criminal law to come into compliance with these treaties. The Netherlands, South Korea, Tanzania, and Kenya all have domestic criminal provisions relating to piracy, though those the provisions differ in how closely they adhere to piracy provisions in the relevant international treaties. India is still in the process of drafting a piracy law, and has instead relied on criminal codes relating to trespass and attempted murder to prosecute pirates. Kenya has gone a step further than the other states and established a special piracy court and signed agreements with a number of states to undertake the prosecution of pirates captured by these states.

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Statement of Purpose

The purpose of this memorandum is to explore how different states incorporate international law into their domestic legal system, with particular emphasis on laws addressing piracy.

Introduction

As states have evinced a growing willingness to prosecuting acts of maritime piracy, the incorporation of international law has become particularly salient. A number of major international treaties provide the possible bases for prosecuting suspected pirates. However, if pirates are to be prosecuted in domestic courts using international law, that law needs to be incorporated into a state's domestic legal system.

Though states take a variety of approaches to incorporating international law, they tend to fall somewhere between two models. The first model, monism, refers to states which incorporate treaties and conventions directly and automatically into their domestic law. In other words, once ratified, the treaty has binding domestic effect. The second model, dualism, refers to states which require implementing legislation for a ratified treaty or convention to have domestic effect. States usually do not fit either pole perfectly, however: Even relatively monist states usually require implementing legislation for some treaty provisions, while dualist states are often willing to rely on ratified but unimplemented treaties as the basis for judicial rulings.

This memorandum will examine how the Netherlands, South Korea, Tanzania, India, and Kenya incorporate international law into domestic law. For each state, the domestic legal status of treaties, the mechanisms for ratification, and the process of implementation will be explored. Further, the memorandum will assess the state's current status with regard to the implementation of major international treaties and conventions that may be used to prosecute piracy. These include the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), the 1979 International Convention Against the Taking of Hostages (Hostage Taking Convention), and the 1999 International

Convention for the Suppression of the Financing of Terrorism (Terrorism Financing Convention).

The Netherlands

The Netherlands is a monist state, as treaties and conventions ratified by the automatically have domestic legal force. Although there are circumstances where implementing legislation is required to give effect to international law, generally treaties are treated as superior to Dutch domestic law. In regard to piracy law, the Netherlands has ratified both UNCLOS and SUA, and also has provisions relating to piracy within its domestic law.

Domestic Legal Status of International Law

The Constitution of the Netherlands has several provisions concerning the domestic legal status of international law. Articles 93 and 94 govern when ratified treaties become legally binding within the Netherlands, and how conflicts between treaty law and domestic law are to be resolved. Article 93 provides that treaties "which may be binding upon all persons by virtue of their contents" become legally binding once they have been ratified and published in the state gazette.[1] Thus, once published, treaties and the decisions of international organizations have legally binding effect on the citizens of the Netherlands. Furthermore, Article 94 provides that treaties "that are binding upon all persons" take precedence over the domestic law of the Netherlands – including the Dutch Constitution.[2] This means that in cases where provisions of a treaty conflict with Dutch law, the courts will hold the treaty provisions to prevail. For instance, in 1988 the Central Appeals Tribunal ruled that provisions of a Dutch law reducing women's social security benefits more than those of men in similar positions violated the International Covenant on Civil and Political Rights.[3] Thus, international law is generally the supreme law of the land in the Netherlands.

However, international law is supreme within the Netherlands only if it possesses "provisions . . . which may be binding upon all persons."[4] This requirement precludes customary international law, which by definition is neither ratified nor written, from being treated as superior to domestic Dutch law without

[1] NETHERLANDS CONST. art. 93 (1848), *available at* http://www.unhcr.org/refworld/docid/3ae6b5730.html.
[2] NETHERLANDS CONST. art. 94 (1848).
[3] Henry G. Schermers, *Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law*, 10 MICHIGAN JOURNAL OF INTERNATIONAL LAW 266, 273 (1989).
[4] NETHERLANDS CONST. art. 93 (1848).

implementing legislation. It similarly precludes treaty provisions that are not self-executing. Thus, both customary international law and non-self-executing treaties require implementing legislation in order to having binding domestic effect within the Netherlands.[5] Accordingly, the supremacy of international law in the Netherlands is not unlimited.

The domestic legal status of ratified treaties thus largely depends upon whether or not judges interpret its provisions as self-executing. Typically, for a court to deem a treaty self-executing, or having "direct effect," it needs to find that the treaty's provisions are so clear and specific that they do not require additional legislation.[6] If the court decides that specific rights and remedies are not provided by a treaty, it will be less likely to enforce them.[7]

Ratification of International Agreements

An international agreement is required to be ratified by the Netherlands before the issue of "direct effect" can be raised. The ratification process is governed by Article 91 of the Constitution, which requires that the States General (the bicameral Dutch legislature) approve all proposed treaties. Article 91 reads:

> 1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. Circumstances in which approval is not required shall be specified by Act of Parliament.
> 2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
> 3. Any provision of a treaty that deviates from the Constitution or which requires deviating from the Constitution may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.[8]

Under Article 91, the States General may prescribe the exact process for ratification by law. Accordingly, the States General passed the Kingdom Act on

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[5] Joseph Fleuren, *The Application of Public International Law by Dutch Courts*, 57 NETHERLANDS INTERNATIONAL LAW REVIEW 243, 250-51 (2010).
[6] Henry G. Schermers, *Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law*, 10 MICHIGAN JOURNAL OF INTERNATIONAL LAW 266, 269-271 (1989).
[7] Henry G. Schermers, *Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law*, 10 MICHIGAN JOURNAL OF INTERNATIONAL LAW 266, 269-271 (1989).
[8] NETHERLANDS CONST. art. 91 (1848).

the Approval and Publication of Treaties.[9] The Act provides that the States General are required to give either explicit or tacit approval in order to ratify a treaty. Explicit approval requires that the States General vote to ratify the bill as they would for any other legislative act.[10] The States General is allowed to amend the approval act if they wish to add any reservations.[11] Tacit approval, on the other hand, merely requires that the States General do nothing; if they do not signal that they want to explicitly approve a treaty for 30 days after its delivery to the legislative houses, it will be deemed tacitly approved.[12] Either mode of approval fulfills the constitutional requirements laid out in Article 91.

The Netherlands federal system adds extra complexity to the process of treaty ratification. The Kingdom of the Netherlands actually consists of three different territories: the Netherlands in Europe, the Netherlands Antilles in the Caribbean, and Aruba.[13] Ratified treaties are generally binding on the entire Kingdom; however, it is sometimes a treaty is binding in one territory but not in others. The political relationship between the territories is governed by the Charter of the Kingdom of the Netherlands, which describes how international agreements interact with the Dutch federal system.[14] The Charter provides that Aruba and the Netherland Antilles have the power to determine independently whether or not a treaty applies in their territory. Thus, for instance, while the Netherlands is a member of NATO, Aruba and the Netherlands Antilles are not.[15]

Implementation of International Law

While treaties can have domestic legal effect without implementing legislation in the Netherlands, new legislation may nonetheless be required in order to fully comply with the treaty's obligations. For instance, the Netherlands found it necessary to pass implementing legislation after ratifying the Rome Statute of the

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[9] *Kingdom Act on the Approval and Publication of Treaties* (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 9 (January 2011), *available at* http://cil.nus.edu.sg/publications/working-papers/.

[10] *Kingdom Act on the Approval and Publication of Treaties,* art. 4 (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 9 (January 2011).

[11] *Kingdom Act on the Approval and Publication of Treaties,* art. 4 (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 9 (January 2011).

[12] *Kingdom Act on the Approval and Publication of Treaties,* art. 5 (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 9 (January 2011).

[13] Pieter van Dijk and Bahiyyih G. Tahzib, *Parliamentary Participation in the Treaty-making Process of the Netherlands,* 67 CHICAGO-KENT LAW REVIEW 413 (1991).

[14] *Charter of the Kingdom of the Netherlands,* art. 24-28 (Netherlands, 1954).

[15] Ramses A. Wessel, *The Netherlands and NATO, in* LEGAL IMPLICATIONS OF NATO MEMBERSHIP: FOCUS ON FINLAND AND FIVE ALLIED STATES 138 (Juha Rainne, ed., 2008), *available at* http://www.utwente.nl/mb/legs/research/wessel/wessel53.pdf.

International Criminal Court (ICC) in 2001. As the host state of the ICC, the Netherlands undertook special obligations. These required that the States General enact the ICC Implementation Act (ICC Act) in 2002. The ICC Act generally serves to facilitate the operations of the court, by providing for "cooperation with and the provision of assistance to the International Criminal Court and the enforcement of its decisions."[16] Section 7, for instance, gives the Dutch Minister of Justice the duty of responding to and trying to resolve any "obstacles or impediments to granting a request of the ICC for cooperation or enforcement."[17] The ICC Act also bestows new powers upon the Dutch judiciary, modifying rules of evidence and procedure in order to allow the prosecution of crimes in compliance with the ICC statute.[18] Thus, while self-executing treaties in the Netherlands may be automatically binding within the state, they may still require additional legislation for full compliance.

International and Domestic Law on Piracy

The Netherlands has ratified all of the major counter-piracy treaties and conventions, but has relied on its existing domestic law to implement the international instruments. The Netherlands ratified UNCLOS in 1996.[19] The Netherlands does not have any implementing legislation specific to UNCLOS; rather, the Netherlands relies on its existing domestic criminal law, which addresses piracy and was deemed sufficient to comply with UNCLOS obligations.[20] The Netherlands Criminal Code, which dates back to the early 19th century, defines the crime of piracy and gives Dutch courts universal jurisdiction to try suspected pirates.[21] Article 381 of the Code defines a pirate as any person:

> "1) who enters into service or is serving as a master on a vessel, knowing that it is intended for or using it for the commission of acts

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[16] *International Criminal Court Implementation Act* preamble (Netherlands 2002), *available at* http://www.asser.nl/wihl-webroot/finals/Netherlands/NL.%20L-IM%20ICC%20implementation%20act.pdf.
[17] *International Criminal Court Implementation Act* art. 7(1) (Netherlands 2002).
[18] *International Criminal Court Implementation Act* (Netherlands 2002).
[19] UN Division for Oceans and Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the related Agreements as at 03 June 2011*, *available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea; Center for Nonproliferation Studies, *SUA, SUA Protocol, Sua 2005, and Montreal Convention, available at* http://www.nti.org/e_research/official_docs/inventory/pdfs/apmsuamontreal.pdf.
[20] A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 16 (January 2011).
[21] *Netherlands Penal Code,* art. 381 (Netherlands), *discussed in* Harm M. Dotinga and Alfred H.A. Soons, *The Netherlands and the Law of the Sea, in* THE LAW OF THE SEA: THE EUROPEAN UNION AND ITS MEMBER STATES 365, 392 (Tullio Treves, ed., 1st edition, 1997).

> of violence against other vessels on the high seas or against persons or property on board these, without being so authorized by a Power engaged in warfare or without being part of the war navy of a recognized Power…" or
> "2) who, aware of such purpose or use, enters into service as a crew member on such a vessel, or voluntarily continues his employment after having become aware of such purpose or use…"[22]

Thus, under Dutch criminal law, any persons knowingly engaged in violent acts against ships, or persons and property on a ship, can be punished for piracy if they are not authorized to engage in such activities by a state at war.[23] The Code further provides that the punishment for acts of piracy are subject to punishment of up to 12 years in prison or a substantial fine.[24]

The Netherlands ratified the SUA Convention in 1992. As with UNCLOS, there is no specific legislation to implement the SUA. However, the Netherlands amended the provisions of the Criminal Code that relate to maritime crimes, in order to fully comply with SUA obligations.[25] The amended provisions incorporate the definitions of SUA crimes, such as seizing control of a sea vessel by an act of violence, or intentionally committing a violent act against someone on board a sea vessel.[26] The amendments likewise extend punishments for certain crimes, and criminalize conspiracy, attempt, and abetment of such crimes, in accordance with SUA. Notably, SUA was invoked as the basis for the Dutch prosecution of five Somali pirates in 2010.[27]

The Netherlands ratified the Hostage Taking Convention in 1988, and as in the case of UNCLOS and SUA, there is no specific implementing legislation to effectuate the Convention. However, as with both other treaties, the Netherlands legislature amended the criminal laws of the state to comply with the obligations created by the Convention. The amendments were made to clarify and explicitly

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[22] *Netherlands Penal Code,* art. 381 (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 16 (January 2011).
[23] *Netherlands Penal Code,* art. 381 (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 16 (January 2011).
[24] *Netherlands Penal Code,* art. 381 (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 16 (January 2011).
[25] A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 27 (January 2011).
[26] *Netherlands Penal Code* art. 385 (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 27 (January 2011).
[27] A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 33 (January 2011).

criminalize the act of hostage taking, according to the language of the Convention, and to address the issues of applicable penalties.[28] Despite these changes, Dutch courts have not conducted any prosecutions based on the Convention.[29]

South Korea

South Korea, like the Netherlands, is a relatively monist state. In South Korea, however, ratified treaties have the same legal status as domestic law, rather than superior status.[30] Nonetheless, South Korea has implemented international piracy law in a similar way to the Netherlands. Although South Korea has ratified the most important, applicable treaties,[31] it has chosen to rely on its own criminal code to implement them domestically.

Domestic Legal Status of International Law

The South Korean Constitution has several provisions that govern the domestic effect of ratified treaties. Article 6(1) provides that "[t]reaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea."[32] Thus, implementing legislation is not needed in order for a treaty to have domestic effect.[33] South Korea does not have a constitutional limitation on the types of treaties that are automatically applicable, as the Netherlands does, but South Korean courts have imposed such a limitation, requiring a treaty to have "direct applicability" in order to be domestically enforceable.[34]

In determining whether a treaty has "direct applicability," South Korean courts often look to the specificity of its language with regard to rights and

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[28] *Netherlands Penal Code* art. 282(a)-(c) (Netherlands), *discussed in* A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 25 (January 2011).
[29] A.H.A. Soons and J.N.M. Schechinger, *The Netherlands Country Report*, CENTER FOR INTERNATIONAL LAW 22 (January 2011).
[30] SOUTH KOREA CONST., art. 6(1) (1948), *available at* http://www.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf.
[31] Treaties Office Database, *South Korea*, EUROPA (last visited Nov. 30, 2011), *available at* http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=2095&countryName=South%20Korea.
[32] SOUTH KOREA CONST., art. 6(1) (1948), *available at* http://www.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf.
[33] Young Sok Kim, *The Korean Implementing Legislation on the ICC Statute*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 161, 162 (2011).
[34] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 723-24 (1992).

obligations. For instance, language that imposes a vague duty of future action – such as, "the signing party shall endeavor to perform X" – is less likely to be deemed directly applicable. Language that lays out specific, immediate rights and obligations, on the other hand, is more likely to be so interpreted.[35]

Treaties that are determined to have direct applicability automatically possess the same legal status as South Korean domestic law. This differs significantly from the Netherlands, as treaties in South Korea are not the supreme law of the land and do not necessarily supersede subsequent legislation. For instance, South Korea ratified the International Covenant on Civil and Political Rights (ICCPR) in 1990.[36] The ICCPR was deemed directly applicable, and thus had the same effect as domestic law; it was effectively incorporated into South Korea's domestic legal system.[37] Where there is a conflict with domestic law, the general rule is that the law ratified most recently takes precedent.[38] Thus, treaties may be more susceptible to modification by later-enacted domestic law.[39]

Ratification of International Agreements

The process for ratifying treaties in South Korea is set forth in the Constitution. Under Article 61, treaties are first approved by the South Korean legislature, called the National Assembly.[40] The Constitution also requires that draft treaties be submitted to the "States Council," comprising the President and his top advisors, for assessment.[41] Article 73 then grants the power of final approval and ratification of treaties to the President.[42] South Korea has no additional legislation governing the ratification process.[43]

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[35] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 723-24 (1992).
[36] Office of the United Nations High Commissioner for Human Rights, *Status of Ratification: International Covenant on Civil and Political Rights* (Nov. 3, 2004), *available at* http://www2.ohchr.org/english/law/ccpr-ratify.htm.
[37] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 712-13 (1992).
[38] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 712-13 (1992).
[39] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 712-13 (1992).
[40] SOUTH KOREA CONST. art. 60 (1948).
[41] SOUTH KOREA CONST. art. 89 (1948).
[42] SOUTH KOREA CONST. art. 73 (1948).
[43] Suk-Kyoon Kim and Seokwoo Lee, *South Korea's Country Report*, CENTER FOR INTERNATIONAL LAW, 6 (2010), *available at* http://cil.nus.edu.sg/publications/working-papers/.

Implementation of International Law

The implementation of treaties in South Korea is generally straightforward; as in most cases, treaties have automatic domestic legal effect and do not require additional legislation.[44] Similar to the Netherlands, however, subsequent domestic laws and regulations may be required in order to implement certain treaty obligations. For instance, South Korea passed legislation to facilitate cooperation with the ICC and to incorporate the crimes under the jurisdiction of the ICC into domestic law.[45] After ratifying the Rome Statute in 2000, the National Assembly enacted the Korean ICC Act (Korea Act).[46] There was some initial debate as to whether such implementing legislation was necessary, but ultimately the National Assembly determined that new domestic law was needed to provide for such things as specific sentencing guidelines, which were not included in the Rome Statute.[47] It was also necessary to bring South Korea's domestic legislation on into line with the Rome Statute on matters such as extradition, and to incorporate ICC crimes into South Korea's domestic criminal law.[48] However, other aspects of the Rome Statute, such as the enforcement of sentences, were deemed sufficiently comprehensive and specific so as not to require implementing legislation.[49]

South Korea's implementation of the ICCPR and International Convention on Economic, Social, and Cultural Rights (ICESCR) provide further insights into its approach to the incorporation of international law. South Korea ratified both the ICCPR and ICESCR in 1990.[50] The ICCPR has been consistently treated as having direct applicability, and thus has been fully incorporated into South Korea's domestic law without the need for additional legislation. As a result, an individual can rely on the ICCPR as the basis to sue in domestic court – i.e. for the violation

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[44] Young Sok Kim, *The Korean Implementing Legislation on the ICC Statute*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 161, 162 (2011).
[45] *Law No. 8719*, (South Korea 2007), *discussed in* Young Sok Kim, *The Korean Implementing Legislation on the ICC Statute*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 161 (2011).
[46] *Law No. 8719*, (South Korea 2007), *discussed in* Young Sok Kim, *The Korean Implementing Legislation on the ICC Statute*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 161 (2011).
[47] Young Sok Kim, *The Korean Implementing Legislation on the ICC Statute*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 161, 162-163 (2011).
[48] Young Sok Kim, *The Korean Implementing Legislation on the ICC Statute*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 161, 162-163 (2011).
[49] Young Sok Kim, *The Korean Implementing Legislation on the ICC Statute*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 161, 163 (2011).
[50] Office of the United Nations High Commissioner for Human Rights, *Status of Ratification: International Covenant on Civil and Political Rights* (November 2004), *available at* http://www2.ohchr.org/english/law/ccpr-ratify.htm; Office of the United Nations High Commissioner for Human Rights, *Status of Ratification: International Covenant on Economic, Social and Cultural Rights* (November 2004), *available at* http://www2.ohchr.org/english/law/cescr-ratify.htm.

of a right protected by ICCPR.[51] On the other hand, as of 1992, courts in South Korea did not interpret ICESCR to have direct effect – and thus it was not directly applicable to cases in domestic court.[52] Scholars and judges distinguished the two treaties by noting the presence of more vague, future-oriented language in ICESCR provisions on states' obligations.[53] For instance, the ICESCR calls on states to "undertake to take steps… with a view to achieving progressively the full realization of the rights recognized in the present Covenant"; in contrast, the ICCPR calls on states to "undertake to respect and ensure" the enumerated rights.[54] Accordingly, South Korean courts have been inconsistent in their application of the ICESCR, and have not always allowed it to be directly applied for individual relief in domestic cases.[55]

International and Domestic Law on Piracy

South Korea has ratified the major counter-piracy treaties and conventions, but like Netherlands has not passed specific implementing legislation. South Korea ratified UNCLOS in 1996.[56] The South Korean criminal code, amended the year before, includes the crime of piracy, and defines it as the act of one who "through threat of collective force in the sea, forcibly seizes a ship or forcibly takes another's property after intruding upon a ship."[57] The definition, while fairly analogous to that of piracy in UNCLOS, diverges in several key ways. It does not require that the crime be committed for private ends, it does not require the involvement of more than one vessel, and it requires the "threat of collective force."[58] Perhaps most importantly, jurisdiction under the Act is limited to Korean nationals, and those who commit the crime on board a Korean vessel.[59]

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[51] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 723-24 (1992).
[52] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 724 (1992).
[53] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 724 (1992).
[54] *International Covenant on Economic, Social and Political Rights* art. 2(1) (1976), *available at* http://www2.ohchr.org/english/law/cescr.htm; *International Covenant on Civil and Political Rights* art. 2(1) (1976), *available at* http://www2.ohchr.org/english/law/ccpr.htm.
[55] Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants,* 14 MICHIGAN JOURNAL OF INTERNATIONAL LAW 706, 726 (1992).
[56] UN Division for Oceans and Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the related Agreements as at 03 June 2011*, *available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea; Center for Nonproliferation Studies, *SUA, SUA Protocol, Sua 2005, and Montreal Convention, available at* http://www.nti.org/e_research/official_docs/inventory/pdfs/apmsuamontreal.pdf.
[57] *Criminal Act,* art. 340 (South Korea), *available at* http://www.oecd.org/dataoecd/36/45/46816472.pdf.
[58] *Criminal Act,* art. 3 (South Korea), *available at* http://www.oecd.org/dataoecd/36/45/46816472.pdf.
[59] *Criminal Act,* art. 324 (South Korea), *available at* http://www.oecd.org/dataoecd/36/45/46816472.pdf.

South Korea ratified SUA in 2003.[60] As with UNCLOS, South Korea did not pass separate implementing legislation, but relied on its existing domestic criminal law.[61] In 1995, South Korea had amended its criminal code to include the crime of hostage taking. In addition, Korea has passed the Act on Punishment on Damaging Ships and Sea Structures, which provides sentencing guidelines for crimes related to the destruction of Korean property at sea and related crimes against persons.[62] These sentences include the death penalty and life imprisonment.[63]

Tanzania

In contrast with the Netherlands and South Korea, Tanzania is a relatively dualist state. International law in Tanzania therefore is required to be implemented via domestic legislation, even when the treaty or convention would be "directly applicable" in a monist state like the Netherlands or South Korea. The lack of direct applicability can lead to situations in which Tanzania ratifies a treaty but does little to implement it. Without domestic implementation, the treaty has little authority. Nonetheless, courts in Tanzania may still occasionally consider ratified but unimplemented treaties in their decisions. With regard to piracy law, however, Tanzania has taken an approach of domestic criminalization, similar to the Netherlands and South Korea.

Domestic Legal Status of International Law

Tanzania is a common law state that also possesses a Constitution. The Constitution is the supreme law of Tanzania, followed by received law from the colonial era and case law. In stark contrast with the Netherlands and South Korea, the Tanzanian Constitution does not contain any discussion of the domestic legal significance of international treaties or conventions.[64] The Constitution provides in one provision that the legislature may deliberate on and ratify treaties; in another, it provides that the legislature may enact laws "where implementation requires

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[60] International Maritime Organization, *Status of Conventions,* (last visited Nov. 30, 2011), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCIQFjAB&url=http%3A%2F%2Fwww.imo.org%2FAbout%2FConventions%2FStatusOfConventions%2FDocuments%2Fstatus-x.xls&ei=iJ_WTpvzDKTC0AGaxtSAAg&usg=AFQjCNFQXk3KVP6-ufR5sSI03ladu1lYOA.

[61] *Criminal Act,* art. 324 (South Korea), *available at* http://www.oecd.org/dataoecd/36/45/46816472.pdf.

[62] *Act on Punishment on Damaging Ships and Sea Structures,* (South Korea), *discussed in* Suk-Kyoon Kim and Seokwoo Lee, *South Korea's Country Report*, CENTER FOR INTERNATIONAL LAW, 11-12 (2010).

[63] *Act on Punishment on Damaging Ships and Sea Structures,* art. 6-11, 13 (South Korea), *discussed in* Suk-Kyoon Kim and Seokwoo Lee, *South Korea's Country Report*, CENTER FOR INTERNATIONAL LAW, 11-12 (2010).

[64] TANZANIA CONST. (1977), *available at* http://www.judiciary.go.tz/downloads/constitution.pdf.

legislation."[65] It does not specify, however, whether and when the implementation of treaties and other international agreements would require legislation.

In practice, however, Tanzania takes a dualist approach to the incorporation of international law.[66] As a result, in order to give full legal authority to ratified treaties and other international agreements, the legislature is required to either amend its existing domestic law or draft new law. Even treaties that are interpreted by other states as directly applicable require implementing legislation.[67] Without such legislation Tanzanian courts will not consider these treaties as binding.[68] For instance, Tanzania acceded to the ICCPR in 1976. As of 2008, however, the legislature had not taken explicit or concrete steps to incorporate the Convention into Tanzania's domestic law. Accordingly, the Covenant's provisions are not enforceable, and judges have only rarely invoked or interpreted them.[69] Thus, in practice terms Tanzania is a dualist state.

Ratification of International Agreements

In Tanzania, the unicameral legislature – called the National Assembly – is charged with ratifying treaties and other international agreements.[70] Article 63(3)(e) of the Constitution gives the National Assembly, which is the Tanzanian legislature, the power to "deliberate upon and ratify all treaties and agreements to which the United Republic is party and the provisions of which require ratification."[71] Thus, after being signed by the President, a Minister introduces the treaty or agreement to the National Assembly to be ratified.[72] It is first considered by the relevant standing committee, debated, and then submitted for a voice vote

[65] TANZANIA CONST. art. 63(d)-(e) (1977).
[66] See, e.g. Baraka Luvanda, Statement, *The Rule of Law at the National and International Levels* (Oct. 12, 2010).
[67] Center for Civil and Political Rights, *NGO Report on the Implementation of the ICCPR,* LEGAL AND HUMAN RIGHTS CENTER, 11 (January 2009), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/ngos/T_NGO_Coalition_HRC95_Tanzania.pdf.
[68] Center for Civil and Political Rights, *NGO Report on the Implementation of the ICCPR,* LEGAL AND HUMAN RIGHTS CENTER, 11 (January 2009).
[69] Center for Civil and Political Rights, *NGO Report on the Implementation of the ICCPR,* LEGAL AND HUMAN RIGHTS CENTER, 11 (January 2009).
[70] Government of Tanzania, *Public Administration* (2011), *available at* http://www.tanzania.go.tz/administration.html.
[71] TANZANIA CONST. art. 63(3)(e), (1977).
[72] National Assembly of Tanzania, *Chapter Three: The Functions of Law – Making and Passing Resolutions*, *available at* http://www.parliament.go.tz/bunge/Docs/CHAPTER%20THREE.pdf.

by the entire Assembly.[73] The Speaker determines which group of voices appeared to be the majority and declares the result.[74]

Implementation of International Law

Treaty implementation is of special importance in Tanzania, as implementation is the only method of given international agreements binding legal status. However, in a number of cases, Tanzania has ratified a treaty but failed to pass implementing legislation – thus rendering the treaty unenforceable. For instance, Tanzania ratified the Rome Statute of the ICC in 2002.[75] However, Tanzania has not implemented the ICC statute using domestic legislation. Tanzania has prior domestic law on issues like extradition and mutual legal assistance, but these laws do not appear to have been modified after the ratification of the ICC statute. Thus the enforceability of the ICC statute, and the relationship between Tanzania and the ICC, is unclear.[76]

The same is true with several major human rights treaties that Tanzania has ratified, including the ICCPR and CEDAW.[77] This may be the result of a lack of official enthusiasm, a lack of capacity for the drafting of new bills, the high costs of implementing new legislation, or misunderstandings about the domestic implications of a treaty.[78] For instance, there is worry in Tanzania that implementing the ICC statute will require prison reforms because the International Criminal Tribunal for Rwanda, which is based in Tanzania, had such requirements.[79]

Although Tanzania is a dualist state, its courts will at times refer in their opinions to treaties that have been ratified but not implemented. Typically, this

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[73] National Assembly of Tanzania, *Chapter Three: The Functions of Law – Making and Passing Resolutions*, *available at* http://www.parliament.go.tz/bunge/Docs/CHAPTER%20THREE.pdf.
[74] National Assembly of Tanzania, *Chapter Three: The Functions of Law – Making and Passing Resolutions*, *available at* http://www.parliament.go.tz/bunge/Docs/CHAPTER%20THREE.pdf.
[75] Jolyon Ford, *Country Study IV: Tanzania,* INSTITUTE FOR SECURITY STUDIES (March 2008), *available at* http://www.iss.co.za/pgcontent.php?UID=2135.
[76] Jolyon Ford, *Country Study IV: Tanzania,* INSTITUTE FOR SECURITY STUDIES (March 2008), *available at* http://www.iss.co.za/pgcontent.php?UID=2135.
[77] *NGO Report on the Implementation of the ICCPR,* LEGAL AND HUMAN RIGHTS CENTER, 4 (January 2009), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/ngos/T_NGO_Coalition_HRC95_Tanzania.pdf; *CEDAW Concluding Observations*, NETHERLANDS INSTITUTE OF HUMAN RIGHTS, (2008), *available at* http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/8c342dd3b2bc4fe6c12574aa0049eff9?OpenDocument.
[78] Jolyon Ford, *Country Study IV: Tanzania,* INSTITUTE FOR SECURITY STUDIES (March 2008), *available at* http://www.iss.co.za/pgcontent.php?UID=2135.
[79] Jolyon Ford, *Country Study IV: Tanzania,* INSTITUTE FOR SECURITY STUDIES (March 2008).

reference to treaties is performed in conjunction with analysis of the Tanzanian Constitution or other domestic law. For instance, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has been ratified but not implemented in Tanzania.[80] However, Tanzanian courts have referenced CEDAW in several cases regarding the rights of women, arguing that constitutional provisions protecting "human dignity" ought to be interpreted in light as incorporating human rights instruments such as CEDAW that forbid discrimination against women.[81]

International and Domestic Law on Piracy

While Tanzania's approach to the incorporation of international law differs strikingly from that of approach of the Netherlands and South Korea, all three states employ the same approach to anti-piracy law: Using existing or updated domestic criminal codes as the primary source of law.

Tanzania ratified UNCLOS in 1985.[82] In 2010, at the urging of the international community, Tanzania updated its Penal Code in order to more effectively cope with piracy.[83] Under the amended law, the definition of piracy mirrors that under UNCLOS, and give Tanzanian courts near-universal jurisdiction over acts of piracy on the "high seas."[84] At least eleven pirates have been tried and convicted since the passage of the amended law.[85] The law may be used to prosecute individuals who may not have taken part in the piracy attack, so long as the ship on which they were traveling can be proven to have been intended for pirate acts.[86] However, the ability of Tanzania to prosecute suspected pirates has a particular limitation. Tanzania cannot prosecute if the vessel is not registered in Tanzania, unless there is a special agreement between Tanzania and the arresting

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[80] *CEDAW Concluding Observations*, NETHERLANDS INSTITUTE OF HUMAN RIGHTS, (2008), *available at* http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/804bb175b68baaf7c125667f004cb333/8c342dd3b2bc4fe6c12574aa0049eff9?OpenDocument.

[81] *Jurisprudence of Equality Program Decisions,* INTERNATIONAL ASSOCIATION OF WOMEN JUDGES, *available at* http://www.iawj.org/jep/jep.asp.

[82] United Nations Treaty Collection, *United Nations Convention on the Law of the Sea*, UNITED NATIONS (Nov. 30. 2011), *available at* http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

[83] *UK Lauds Tanzania for Enacting Anti-Piracy Law,* THE CITIZEN, (May 11, 2010), *available at* http://www.thecitizen.co.tz/news/4-national-news/1861-uk-lauds-tanzania-for-enacting-anti-piracy-law.html.

[84] *Written Laws Act, 2010,* art. 18 (Tanzania 2010), *available at* http://www.parliament.go.tz/Polis/PAMS/Docs/11-2010.pdf.

[85] Roger L. Phillips, *Tanzania – a Case Study,* COMMUNIS HOSTIS OMNIUM (MAR. 3, 2011), *available at* http://piracy-law.com/2011/03/03/tanzania-%E2%80%93-a-case-study/.

[86] Roger L. Phillips, *Tanzania – a Case Study,* COMMUNIS HOSTIS OMNIUM (MAR. 3, 2011), *available at* http://piracy-law.com/2011/03/03/tanzania-%E2%80%93-a-case-study/.

state.[87] Tanzania might therefore be unable to hear cases that involve piracy committed against non-Tanzanian nationals in another state's territorial waters, which could foreseeably raise problems if Tanzania were to be used as the site of an international piracy court.

India

Like Tanzania, India follows the dualism model of incorporating international law into domestic law. As such, international law does not automatically become domestic law, but rather is incorporated into domestic law through a separate legislation enacted by parliament.[88] Although India has ratified the UNCLOS and SUA, and engaged in numerous anti-piracy efforts, India differs from the Netherlands, South Korea, and Tanzania in that it does not yet have domestic legislation to combat piracy and is still in the process of drafting the law.

Domestic Legal Status of International Law

International treaties ratified by the Executive do not automatically become part of domestic law in India.[89] Rather, international law requires domestic implementing legislation in order to take effect within India's legal framework.[90] Although the Constitution does not directly address incorporation of international law into domestic law, it specifically mentions a willingness to uphold international law and the state's treaty obligations. Article 51 of the Constitution governs the applicability of international law, articulating India's dedication to enhancing international peace and security, and "foster[ing] respect for International Law and Treaty obligations."[91] The Constitution therefore suggests that the state's domestic legal structure aspires to adhere to international law and treaty standards.

In India, the Executive has authority to enter into international agreements[92] and Parliament is responsible for creating legislation that incorporates international law.[93] However, the Judiciary also has a role, as its court decisions interpret

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[87] Roger L. Phillips, *Tanzania – a Case Study,* COMMUNIS HOSTIS OMNIUM (MAR. 3, 2011), *available at* http://piracy-law.com/2011/03/03/tanzania-%E2%80%93-a-case-study/.
[88] Sunil Kumar Agarwal, *Implementation of International Law in India: Role of Judiciary*, MCGILL UNIVERSITY, *available* at http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf.
[89] Legal India, *The Status of International Law Under the Constitution* (2010)**,** *available at* http://www.legalindia.in/the-status-of-international-law-under-the-constitution-of-india.
[90] Legal India, *The Status of International Law Under the Constitution* (2010)**.**
[91] INDIA CONST. art. 51 (amendment of 1996), *available at* http://www.constitution.org/cons/india/const.html.
[92] INDIA CONST. art. 73 (amendment of 1996).
[93] INDIA CONST. art. 253 (amendment of 1996).

domestic law consistently with India's international treaty obligations and with international law.[94] For instance, the Indian Constitutional Court has imposed a duty on domestic courts to consider international conventions for interpreting domestic law,[95] particularly when there is no inconsistency between domestic law and the international norm, and when there is a void in domestic law.[96] Since future courts are bound by past precedent, the Judiciary effectively plays a large part in incorporating international law into domestic law. Moreover, because international law may be relied upon only when not inconsistent with domestic statutes, international law is effectively subordinate to domestic law in India.

Ratification of International Agreements

Similar to the Netherlands, India's legal system grants legislative power to both the federal and federal unit governments. The Constitution enumerates the scope of these powers, and grants authority to enter into international agreements and treaties only to the Executive branch at the federal level.[97] However, unlike the Netherlands and South Korea, the Indian Constitution does not enumerate the process for ratifying these treaties. Recently introduced legislation called the Consultation and Ratification of Treaties Bill of 2011, which was introduced in Parliament earlier this year, indicates that the Executive needs Parliament to ratify such treaties; otherwise they are not binding.[98]

Implementation of International Law

As stated above, India requires implementing legislation to effectuate international law and treaty obligations,[99] unlike the Netherlands and South Korea. Article 253 of the Indian Constitution grant Parliament the power to make any law, for a particular federal unit or the whole of India, to implement any treaty signed by the Executive. Article 253 provides that "[n]ot withstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the

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[94] *See e.g.* Jolly George Verghese & Anr vs. the Bank of Cochin, (1980) AIR 470

[95] Michael Kerby, *International Law – The Impact on National Constitutions,* AMERICAN UNIV. INTERNATIONAL LAW REVIEW 21, NO. 3 (2006), 327, 330, *available at* http://auilr.org/pdf/21/21-3-1.pdf/

[96] Martha I. Morgan, *International Human Rights norms in Comparative Constitutional Jurisprudence: CEDAW-Based Examples,* UNIVERSITY OF ALABAMA SCHOOL OF LAW, *available at* http://www.ialsnet.org/meetings/constit/papers/MorganMartha(USA).pdf.

[97] Legal India, *The Status of International Law Under the Constitution* (2010)**,** *available at* http://www.legalindia.in/the-status-of-international-law-under-the-constitution-of-india.

[98] *The Consultation and Ratification of Treaties Bill* art. 6 (India 2011), *available at* http://164.100.24.219/BillsTexts/RSBillTexts/asintroduced/conslt.pdf;; *see also* INDIA CONST. art. 253 (amendment of 1996), *available at* http://www.servat.unibe.ch/icl/in00000_.html.

[99] Sunil Kumar Agarwal, *Implementation of International Law in India: Role of Judiciary*, MCGILL UNIVERSITY.

whole or any part of the Territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any International Conference, Association or Other body."[100] As such, India's approach of implementing international law is similar to that of South Korea. Further, the Parliament's obligation to enact legislation outlined in Article 253 in conjuncture with Article 51's language that binds the state to take steps to comply with international law. This authority is consistent with the Constitution's Seventh Schedule, which articulates which level of government has authority to legislate on which matters, since legislative authority is divided between the central government and federal units pursuant to Article 246 of the Constitution.[101]

The Judiciary also plays a vital role in implementing international law through their interpretation and application of existing law. Indian courts are encouraged to look to international conventions in deciding cases when there is no inconsistency with state law, or where state law is silent on an issue. For instance, in *Visakha v. State of Rajasthan*, the Supreme Court looked to international conventions in construing the guarantee of gender equality and the right to work in the Constitution.[102]

International and Domestic Law and Piracy

Although India has ratified UNCLOS, it has not adopted domestic implementing piracy laws pursuant to sections 101 and 107 of the UNCLOS.[103] Similar to the Netherlands and South Korea, India also prosecutes pirates in accordance with its domestic criminal code. Unlike the Netherlands and South Korean criminal code, however, the Indian Penal Code ("IPC") neither identifies piracy as a crime nor defines maritime crimes.[104] Nevertheless, India has been relying on IPC and admiralty law to prosecute pirates.[105]

Under UNCLOS, piracy was defined as "an illegal act involving violence, detention, or depredation committed for private on the high seas involving at least two ships."[106] In contrast, Indian courts prosecute captured pirates under Section

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[100] INDIA CONST. art. 253 (amendment of 1996).
[101] INDIA CONST. Seventh Schedule (amendment of 1996).
[102] Visakha v. State of Rajasthan (1997) AIR SC 3011.
[103] Roger Phillips, *India: A Case Study,* COMMUNIS HOSTIS OMNIUM (Sep. 24, 2011).
[104] The Times of India, *India Readies Anti-Piracy Law with More Teeth,* June 29, 2011, *available* http://articles.timesofindia.indiatimes.com/2011-06-29/india/29717029_1_anti-piracy-law-somali-pirates-aden
[105]The Times of India, *India Readies Anti-Piracy Law with More Teeth,* June 29, 2011.
[106]*United Nations Convention on the Law of the Sea,* art. 101 (1982), *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/part7.htm.

441 and 443 of the IPC for trespass.[107] Section 441 defines criminal trespass as "[w]hoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence."[108] In addition to using laws prohibiting trespass, India also uses Section 121 of the IPC, which is a criminal charge against individuals waging war,[109] as well as Sections 397 and 398 (armed robbery) and Section 307 (attempted murder).[110] India has also signed and ratified SUA, but has also not passed specific legislation to directly address its obligation under SUA.[111] India has also passed the United Nations Security Council's Anti-piracy resolution[112] and has engaged in numerous conferences to combat piracy,[113] but does not yet have domestic legislation criminalizing piracy.

In Spring 2011 the Indian legislature began drafting a piracy law; it has progressed through the law ministry, but at present has yet to be presented to Parliament.[114] The draft legislation sets out what actions constitute piracy and who would be considered a pirate under the law.[115] The draft law also authorizes punishment for different acts of piracy.[116] Thus, India is moving towards creating a uniform piracy law that will fully implement the terms of UNCLOS.[117]

Kenya

With the adoption of a new Constitution in August 2010, Kenya moved from a dualist system towards a more monist approach to international treaties. Additionally, Kenya has been at the forefront of prosecuting pirates under its domestic criminal law since 2009, when it signed agreements with a number of

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[107] Roger Phillips, *India: A Case Study,* COMMUNIS HOSTIS OMNIUM, (Sep. 24, 2011) *see also Indian Penal Code* art. 441, 443 *available at* http://www.vakilno1.com/bareacts/indianpenalcode/indianpenalcode2.htm.
[108] *Indian Penal Code* art. 441.
[109] Roger Phillips, *India: A Case Study,* COMMUNIS HOSTIS OMNIUM, (Sep. 24, 2011).
[110] Roger Phillips, *India: A Case Study,* COMMUNIS HOSTIS OMNIUM, (Sep. 24, 2011).
[111] Roger Phillips, *India: A Case Study,* COMMUNIS HOSTIS OMNIUM, (Sep. 24, 2011).
[112] Rediff News, *India's Anti-Piracy Laws are Medieval: Experts,* Apr 18, 2011, *available at* http://www.rediff.com/news/report/indias-anti-piracy-laws-are-medieval-say-experts/20110418.htm
[113] *See e.g. Global Maritime Security and Anti-Piracy Conference 2011,* Nov. 26, 2011*, available at* http://www.gmsac2011.com/docs/provisional_program.pdf.
[114] Thaindian News, *New Anti-Piracy Law Ready for Parliament,* June 28, 2011, *available at* http://www.thaindian.com/newsportal/uncategorized/new-anti-piracy-law-ready-for-13%20parliament_100546085.html#ixzz1SZj7CfOs .
[115] Thaindian News, *New Anti-Piracy Law Ready for Parliament,* June 28, 2011.
[116] Thaindian News, *New Anti-Piracy Law Ready for Parliament,* June 28, 2011.
[117] Sandeep Dikshit, *Government to Frame Law to Tackle Piracy on the Seas,* THE HINDU, Mar. 13, 2011, *available at* http://www.thehindu.com/news/national/article1532398.ece

states to prosecute alleged pirates captured by other states. Kenya has recently updated its domestic provisions relating to piracy to harmonize its law with piracy provisions in UNCLOS and related treaties to which it has acceded.

Domestic Legal Status of International Law

The status of international law in Kenya has shifted with the recent adoption of a new Constitution. Prior to the new Constitution, international law was given no formal place in the hierarchy of laws within Kenya in either the Constitution or other legislation. The Judicature Act lists the hierarchy of laws as the Constitution, statutes, common law, and African customary law for civil cases.[118] Additionally, the power to ratify treaties lay with the Executive.[119] Therefore, in order for treaty provisions to have legal force within Kenya, the legislature had to pass legislation to bring those provisions within the domestic system.[120]

Kenya's new Constitution, however, has adopted a monist approach towards international law. The Constitution indicates that "[t]he general rules of international law shall form part of the law of Kenya," and "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"[121] Further, "[t]he State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms."[122] Thus, the language in the Kenyan Constitution closely mirrors the provision in the Indian Constitution as both acknowledge the states objective to abide by international law and treaties. However, in section 132 the Kenyan Constitution goes a step further and provides that the President especially has responsibility to "ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries."[123]

Although the Judicature Act does not list international law as a source of law for Kenya domestically, judges in Kenya have recognized some role for customary international law, even prior to the adoption of the new Constitution.[124] In a 2002

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[118] *Judicature Act* sec. 3 (Kenya, 1967), *available at* www.kenyalaw.org.
[119] UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, *Development and Harmonization of Environmental Laws* 26 (1999), *available at* http://www.unep.org/padelia/publications/Dev._&_harm._Vol.6.pdf.
[120] James Thuo Ganthii, *Kenya's Piracy Prosecutions*, 104 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 416, 418 (2010).
[121] KENYA CONST. art 2(5), 2(6) (2010), *available at* http://kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf.
[122] KENYA CONST. art 21 (2010).
[123] KENYA CONST. art 132 (2010).
[124] James Thuo Ganthii, *Kenya's Piracy Prosecutions*, 104 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 416, 419-21 (2010).

case, the Court of Appeal wrote in its decision that "as a member of the international community, Kenya subscribes to international customary law" and "current thinking on the common law theory is that both international customary and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation."[125] Judges, then, have some ability to employ both forms of international law when deciding cases, as long as it is not counter to state law.

Ratification of International Agreements

Although the Kenyan Constitution does not illustrate the ratification process for international agreements, Article 2(6) says that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[126] As such, Article 2(6) reflects the monism system in Kenya. Moreover, pursuant to section 51 of the Constitution, "parliament shall enact legislation that--takes into account the relevant international human rights instruments."[127] There is a Bill dealing with the process of ratification of treaties under the new Constitution, but it has yet to be enacted into law. Under the previous Constitution, the Executive had control of the ratification process.[128]

Implementation of International Agreements

Kenya has recently moved to become a monist system, allowing for treaty provisions to automatically become effective upon ratification without necessitating implementing legislation.[129] Due to this shift, a new Bill has been introduced to provide for a legislative ratification process for treaties, which ensures that the law-making entity of the state controls the process in which new law, under the guise of treaties, is incorporated into the domestic legal system of the state.[130] The current language of the Bill restricts which treaties or treaty provisions may be ratified by Parliament, noting that

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[125] *Rono v. Rono*, Civ. App. No. 66 of 2002, 10-11, 1 KLR (G&F) 803.
[126] KENYA CONST. art 2(6) (2010).
[127] KENYA CONST. art 51 (2010).
[128] UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, *Development and Harmonization of Environmental Laws* 26 (1999).
[129] Makumi Mwagiru, *From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice* 3 JOURNAL OF LANGUAGE, TECHNOLOGY & ENTREPRENEURSHIP IN AFRICA 144, 150*, available at* http://www.ajol.info/index.php/jolte/article/viewFile/66714/54979.
[130] *The Ratification of Treaties Bill, 2011* (Kenya, 2011), *available at* http://www.kenyalaw.org/klr/index.php?id=98.

> (5) Parliament shall not approve the ratification of a treaty or part of it if its provisions are contrary to Constitution, nor shall the House approve a reservation to a treaty or part of it if that reservation negates any of the provisions of the Constitution even if the reservation is permitted under the relevant treaty.[131]

If the Bill becomes law, this language would arguably place international treaty law in a position subordinate to the Constitution, as no treaty provision could be adopted that is inconsistent with the Constitution.

Under the previous Constitution the treaty ratification process was under the control of the Executive and treaty provisions had no force in the domestic law unless the Kenyan parliament adopted domestic implementing legislation.[132] For instance, the Kenyan parliament has enacted the International Crimes Bill that incorporates the ICC into domestic law after Kenya ratified the Rome statute.[133] Other legislation enacted by Parliament under the previous Constitution to give force to treaty provisions include the Geneva Conventions Act, the Bretton Woods Agreement Act, and the Privileges and Immunities Act.[134]

International and Domestic Law on Piracy

Kenya became a leader in prosecuting pirates following the recent increase in piracy in the Gulf of Aden. The state has established, with international assistance, a special court to try alleged pirates.[135] It has also entered into a number of agreements with other states to try alleged pirates captured by those states.[136]

The legal system employed by the court has used international and domestic law to take jurisdiction over the cases, and has applied Kenyan domestic law on piracy to try the accused. In an appeal to the first piracy trial conducted in the newly established court, the High Court found that jurisdiction to try the case came from both the domestic criminal code and in international law as expressed in the

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[131] *The Ratification of Treaties Bill, 2011* art. 5(5) (Kenya, 2011).
[132] UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, *Development and Harmonization of Environmental Laws* 26 (1999).
[133] *International Crimes Act, 2008* (Kenya, 2009), *available at* http://www.kenyalaw.org/kenyalaw/klr_home/.
[134] UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa, *Development and Harmonization of Environmental Laws* 26 (1999).
[135] Jeffrey Gettleman, *The West Turns to Kenya as Piracy Criminal Court*, THE NEW YORK TIMES (Apr. 23, 2009), *available at* http://www.nytimes.com/2009/04/24/world/africa/24kenya.html.
[136] James Thuo Ganthii, *Kenya's Piracy Prosecutions*, 104 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 416, 416-17 (2010).

United Nations Conventions on the Law of the Sea (UNCLOS), to which Kenya has acceded.[137] The domestic law made piracy illegal both in the territorial waters and on the high seas, while the UNCLOS provision mentions only the high seas and waters outside the jurisdiction of any state.[138] The Appeals Court noted that even if there was no mention of piracy in the domestic law, the lower court could have relied solely on the UNCLOS provision, as the judge was "bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations."[139]

In 2009, Parliament passed the Merchant Shipping Act, which was designed to bring Kenyan law into compliance with portions of UNCLOS and other similar treaties.[140] This act at least partially superseded the prior criminal code on piracy, and in fact led to a judge ordering the freedom of several suspected pirates, declaring that the new law gave Kenya jurisdiction only over piracy cases in its territorial waters.[141] That decision has been appealed, and a UN report noted that amendments would be made to the Act to correct these deficiencies.[142] Some commentators have argued that the judge's decision was incorrect as the new Constitution makes international law part of the law of Kenya and the state may retain universal jurisdiction for piracy under the cover of customary international law.[143]

Conclusion

States incorporate international law into their domestic legal frameworks in different ways. Some are monist, meaning international law contained in treaties automatically becomes part of the domestic law upon ratification by the state

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[137] Hassan M. Ahmed v. Kenya Crim. App. 6-8 (2010), *available at* http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=46020005977717698652240.
[138] James Thuo Ganthii, *Kenya's Piracy Prosecutions*, 104 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 416, 421-22 (2010).
[139] Hassan M. Ahmed v. Kenya Crim. App. 8 (2010).
[140] Dino Kritsiotis, *The Contingencies of Piracy*, 41 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 305, 342 (2010-2011).
[141] Eunice Machuhi, *AG Files Appeal Against Ruling on Piracy Cases*, DAILY NATION (Apr. 11, 2011), available at http://www.nation.co.ke/News/AG+files+appeal+against++ruling+on+piracy+cases+/-/1056/1142950/-/14jw7p2/-/index.html; Special Advisor to the Secretary-General, *Legal Issues Related to Piracy Off the Coast of Somalia*, para. 50 *delivered to the Secretary General* U.N. Doc S/2011/30 (Jan. 25, 2011), *available at* http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Lang_report_S-2011-301.pdf.
[142] Special Advisor to the Secretary-General, *Legal Issues Related to Piracy Off the Coast of Somalia*, para. 50 *delivered to the Secretary General* U.N. Doc S/2011/30 (Jan. 25, 2011).
[143] Kathurima M'Inoti, *Why Ruling that Kenya Cannot Try Pirates Left More Queries Than Answers*, DAILY NATION (Nov. 15, 2010), *available at* http://www.nation.co.ke/oped/Letters/-/440806/1054088/-/9auqhj/-/index.html.

without any further legislation passed by parliament. In contrast, dualist model states require domestic legislation enacted by the legislature for international law in treaties signed by the state to become effective. With the sharp increase in piracy off the coast of Somalia, as well as other oceans near the region, states have prosecuted pirates by using either international law as incorporated into their legal systems, such as the Netherlands, or relying on existing or updated laws that relate to acts of piracy. Some states have criminalized piracy within their domestic legal framework, such as South Korea, Kenya, and Tanzania. Others, such as India, have relied on other penal codes relating to murder and trespass in order to prosecute pirates. The growing engagement in counter-piracy measures has revealed the disparate approaches to international and domestic counter-piracy law taken by various states.

About the Public International Law & Policy Group

The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, is a non-profit organization, which operates as a global pro bono law firm providing free legal assistance to states and governments involved in peace negotiations, drafting post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

PILPG's four primary practice areas are:

- **Peacebuilding**
- **War Crimes**
- **Post-Conflict Political Development**
- **Public International Law**

To provide pro bono legal advice and policy formulation expertise, PILPG draws on the volunteer services of over sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on pro bono assistance from major international law firms including Baker & McKenzie; Covington & Burling; Curtis, Mallet-Prevost, Colt and Mosle; DLA Piper; Sullivan & Cromwell; Steptoe & Johnson; Milbank, Tweed, Hadley & McCloy; WilmerHale; Vinson & Elkins; and graduate international affairs and law students at American University and Case Western Reserve Schools of Law. Annually, PILPG is able to provide over $10 million worth of pro bono international legal services.

Frequently, PILPG sends members in-country to facilitate the provision of legal assistance and its members often serve on the delegations of its clients during peace negotiations. To facilitate this assistance, PILPG is based in Washington, D.C. and has points of contact in New York City, Boston, Seattle, Cleveland, London, Paris, Rome, The Hague, Stockholm, Belfast, Krakow, Budapest, Zurich, Tbilisi, Kabul, and Nairobi.

PILPG was founded in London in 1995 and moved to Washington, D.C. in 1996, where it operated under the auspices of the Carnegie Endowment for International Peace for two years. PILPG currently maintains an association with American University in Washington, D.C., and Case Western Reserve University in Cleveland, Ohio. In July 1999, the United Nations granted official Non-Governmental Organizations status to PILPG.

In January 2005, a half dozen of PILPG's pro bono clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial pro bono legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice."