The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia

D.J. Devine

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol26/iss2/3
The Relationship Between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia

D.J. Devine *

I. INTRODUCTION

On August 12, 1884, the German Empire proclaimed a protectorate over the area of South West Africa present day Namibia.1 This protectorate did not include the port and enclave of Walvis Bay2 or the so-called twelve Penguin Islands off the coast of South West Africa.3 The German protectorate continued until the First World War when South West Africa was invaded and occupied by South African forces in 1915.4

In 1920, after the conclusion of the war, The League of Nations granted to South Africa a Mandate to administer the territory.5 When the League of Nations was disbanded after the Second World War,6 the newly created United Nations endeavored to get South Africa to convert South West Africa into a U.N. trust territory so that the U.N. could

* Professor of Law, Director, Institute of Marine Law, University of Cape Town.

1 75 BRIT. & FOREIGN ST. PAPERS 528, 528-38 (1891); ALBERTUS J. HOFFMANN, DIE REGIME VAN EILANDE IN DIE INTERNASIONALE REG MET SPEISALE VERWYSING NA DIE SUID-AFRIKAANSE EILANDE AAN DIE KUS VAN SUIDWES-AFRIKA/NAMIBIE 124 (1987).


3 The Penguin Islands were recognized as part of the colony of the Cape of Good Hope in 1886 by the Protocol of Berlin concluded between the United Kingdom and the German Empire. A regime of joint control was instituted between Namibia and South Africa over Walvis Bay and the Penguin Islands in November, 1992. The regime was governed by the Joint Administrative Authority for Walvis Bay Act 93 of 1993. South Africa did not renounce it’s claim to sovereignty over the areas in question. On the 16th of August, 1993, a resolution was adopted at the South African multi-party negotiations accepting the incorporation of the areas into Namibia and requesting the government to report back within a month on progress on incorporation. Walvis Bay “To Go To Namibia”, CAPE TIMES, Aug. 17, 1993, at 1. The eventual incorporation of Walvis Bay into Namibia on March 1, 1994 was governed by the Transfer of Walvis Bay to Namibia Act 203 of 1993.


5 MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 249 (4th ed. 1982); THE SOUTH WEST AFRICA/NAMIBIA DISPUTE, supra note 4, at 69.

6 AKEHURST, supra note 5, at 249; THE SOUTH WEST AFRICA/NAMIBIA DISPUTE, supra note 4, at 96.
supervise its administration. Upon South Africa’s refusal, its relationship with the U.N. became marked by friction. The U.N. alleged that South Africa was not observing its Mandate of administration, and, after a series of appearances before the International Court of Justice, the U.N. General Assembly purported, in 1966, to revoke the Mandate and claimed the right to administer the territory itself. A United Nations Council for Namibia was created to administer the territory. The Security Council of the United Nations confirmed the revocation of the Mandate in 1970, as did the International Court of Justice in an Advisory Opinion in 1971.

In the years which followed, both South Africa and the U.N. had to seek new avenues for resolving the dispute. At first, South Africa tried to forge its own internal scheme for achieving the independence of Namibia, but this did not meet with international approval. Eventually, through the good offices and diplomacy of five Western nations, South Africa accepted a settlement plan to ensure Namibian independence. The plan was embodied in the famous Security Council Resolution 453 of 1978. Resolution 435 was not, however, to be implemented for more than a decade principally due to South Africa’s demand that Cuban troops be withdrawn from neighboring Angola to

7 AKEHURST, supra note 5, at 249; THE SOUTH WEST AFRICA/NAMIBIA DISPUTE, supra note 4, at 111.
8 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 676 (4th ed. 1990); THE SOUTH WEST AFRICA/NAMIBIA DISPUTE, supra note 4, at 211.
15 Id.
16 Canada, France, the Federal Republic of Germany, the United Kingdom, and the United States. See id. at 2.
17 Id.
ensure free and fair elections in Namibia under U.N. supervision.\textsuperscript{19}

During the 1980's, political and diplomatic negotiations continued.\textsuperscript{20} One of the main achievements of that decade was the 1982 Constitutional Principles.\textsuperscript{21} These principles were agreed to by the interested parties as those upon which a future Constitution for Namibia should be based.\textsuperscript{22} Elections under U.N. supervision were held in 1989, and a Constituent Assembly convened on November 21, of that year for purposes of adopting a Constitution.\textsuperscript{23} A Constitution which accorded with the 1982 Constitutional Principles was, in fact, adopted, and Namibia became independent under that Constitution on March 21, 1990.\textsuperscript{24}

The Constitution of Namibia contains provisions on what the law is in the new state of Namibia. In particular, articles 140(1) and 66(1) of this Constitution contain the relevant provisions. Article 140, entitled "The Law in Force at the Date of Independence" provides:

Subject to the provisions of the Constitution, all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.\textsuperscript{25}

The laws in force immediately before independence would include South African legislation applicable in Namibia, and the common and customary law then applicable.\textsuperscript{26} More specifically, on the question of common and customary law, article 66, entitled with "Customary and Common Law" provides:

Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.\textsuperscript{27}

\textsuperscript{19} Weichers, supra note 14, at 2.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id. at 1.

\textsuperscript{25} NAMIB. CONST. ch. 20, art. 140(1).

\textsuperscript{26} The common law in force in Namibia at the date of independence was the Roman-Dutch common law — which also applies in South Africa. Roman-Dutch common law was introduced as the basic law of the former South West Africa after the First World War when South Africa received a mandate from the League of Nations: Administration of Justice Proclamation (No. 21) of 1919. See ROBERT W. LEE, AN INTRODUCTION TO ROMAN-DUTCH LAW 13 (5th ed. 1953). Indigenous African customary law was also part of the law and continues to be so in terms of article 66(1).

\textsuperscript{27} NAMIB. CONST. ch. 7, art. 66(1). Article 44 of the Constitution provides that "[t]he legis-
In addition, judicial supremacy is entrenched. The constitutionality of any statutory law can be tested by either the Supreme Court or the High Court. Also, both courts retain all powers of interpretation and application of other laws which the former High Court of South West Africa possessed.

INTERNATIONAL LAW IN THE FORMER SOUTH WEST AFRICA

The extent to which international law was a part of the law of Namibia at the date of independence, March 21, 1990, is governed by the common law. In describing this situation, reference will be made to court decisions which, as a matter of stare decisis, would have been binding law in the former South West Africa, up to the date of independence. International treaty law, in order to be part of South West African law, would have to have been translated into law by legislation. International customary law also formed part of the law of South West

Id. ch. 7, art. 44. Article 79(2) provides, in pertinent part, that "[t]he Supreme Court shall . . . hear and adjudicate upon appeals . . . including appeals which involve the interpretation, implementation and upholding of this Constitution . . . .” Id. ch. 9, art. 79(2). Article 80(2) provides, in pertinent part, that “[t]he High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution . . . .” Id. ch. 9, art. 80(2).

When the provisions of article 66(1) are considered with the above quoted provisions of articles 44, 79(2), and 80(2) of the Constitution, a clear hierarchy of law emerges in Namibia. The Roman-Dutch law and indigenous African customary law are the basic law of the land; but, in case of conflict between them and statutory law, or the Constitution, the latter will be preferred. Id. ch. 7, art. 66(1). Statutory Law would include both the primary legislation contained in Acts of Parliament and secondary legislation. The latter is legislation made under the authority of an act of Parliament. In the case of conflict between statutory law and the Constitution, the latter is preferred. See id. ch. 7, art. 44; id. ch. 9, art. 79(2); id. ch. 19, art. 80(2); id. ch. 19, arts. 131, 132. Thus, the Constitution is the supreme law of the land, to which statutory law, common law, and customary law must conform. Statutory law overrides common law and customary law. Id. ch. 8, art. 66(1).

Africa, subject, however, to recognized exceptions. For example, international customary law in conflict with statutory law would not be incorporated. The question of the relationship between international law and South African law — and therefore Namibian law — was reasonably clear as of March 21, 1990.

While in many cases it is left to national courts to settle the relationship between international law and the municipal law of their countries, it is preferable that this question should be settled in a systematic way by a legal instrument. In this circumstance a respective country’s constitution is unquestionably the best legal instrument for solving such questions. Thus, upon the establishment of the Federal Republic of Germany the drafters of the German Grundgesetz of 1949 defined the relationship between international law and German law in article 25 which provides that: “The general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.”

Whenever a new constitution comes into force, whether upon the independence of a country for the first time — as in the case of the

---


33 Nduli note 29; S. v. Tuhadeleni, 1 S. Afr. L.R. 153 (App. Div. 1969). See also Erasmus, supra note 30 at 89. See Devine, Permissive Rules, supra note 32, at 6-7 (examining other exceptions to the rule of incorporation of international customary law).

34 AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS 29 (2d ed., 1968) (translating GRUNDGESETZ [Constitution] [GG] art. 25 (F.R.G.)). See also id. at 280 (translating ITALY CONST. art. 10). Cf. IR. CONST. art. 29 (1937) (accepting the generally recognized principles of international law as its rule of conduct in relations with other states). Article 29 does not, however, expressly provide that international law is part of Irish municipal law. Id.
Federal Republic of Germany in 1949 — or by the introduction of a new constitution in an existing country, the opportunity is ideal for regulating the relationship between international law and municipal law in the country in question. Namibia, as mentioned earlier, gained independence on March 21, 1990.35 A new constitution became effective on that date, and the opportunity to define the relationship between international law and Namibian law was not missed.

The Constitution of Namibia now deals specifically with the relationship between international law and Namibian law in article 144.36 Since article 66 provides that the existing common law — i.e., the common law in force in present day Namibia on March 21, 1990 — remains in force only to the extent it is not in conflict with the Constitution,37 it follows, therefore, that article 14438 now overrides the law which has been described above39 in the case of conflict. The provisions of article 144 would appear to be quite a substantial deviation from the previously applicable law. It is the purpose of this article to analyze the provisions of article 144 and to point out the changes in the law which have occurred.

TREATIES AND NAMIBIAN LAW

Article 144 provides that "international agreements binding upon Namibia under this Constitution, shall form part of the law of Namibia."40 In respect to international agreements, article 143 provides that "[a]ll existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides."41

Article 63(2)(d) is, in fact, the provision which deals with Namibian state succession to international agreements. It delegates to the National Assembly the power to decide whether or not to succeed to such agreements. It should be pointed out that the National Assembly is not to be equated with Parliament. Parliament is the National Assembly

35 See supra note 24 and accompanying text.
36 NAMIB. CONST. ch. 21, art. 144.
37 Id.
38 Article 144 provides: "Unless 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." Id.
39 See supra note 26 and accompanying text.
40 NAMIB. CONST. ch. 21, art. 144 (emphasis added).
41 Id. ch. 20, art. 143. See generally Paul C. Szasz, Succession to Treaties Under the Namibian Constitution, 15 S. Afr. Y.B. INT'L L. 65, 80 (1989) (discussing succession).
and the National Council. Hence, the Assembly is simply one "house" of Parliament.

From the above, it would appear that treaties are, in principle, part of the law of Namibia. They do not have to be incorporated into Namibian law by legislation. The incorporation theory is adopted rather than the translation theory. This represents a fundamental change in the law. Under the law as it existed before independence and as laid down in the Pan-American case, the translation theory applied. Therefore, under current constitutional provisions, treaties — which include oral agreements and executive agreements — need only be incorporated, not translated into law.

A Namibian court faced with an issue concerning treaty incorporation into Namibian law would have to first resolve the threshold question of whether the treaty was "binding on Namibia" in international law. With respect to pre-independence treaties, this would involve establishing whether the treaty had been concluded for Namibia by South Africa, or possibly by the United Nations Council for Namibia. In deciding this question, a Namibian court should examine and apply the general international legal rules relating to the formation and binding character of treaties. If the court found that the treaty in question was duly concluded and binding on Namibia as such, the treaty would then be prima facie part of the Namibian law. At this stage the court would then have to apply two further tests before finally accepting the treaty as part of Namibian law.

First, the court would have to be satisfied that the National Assembly had decided to succeed to the treaty under article 63(2)(d). The power to decide to succeed or not to succeed would not seem to require a legislative act. Article 63(1) provides that, in addition to its legislative powers, the National Assembly "shall further have the power and function . . . [to decide] whether or not to succeed to international agree-

42 NAMIB. CONST. ch. 21, art. 146(2)(a).
43 See Erasmus, supra note 30, at 94.
44 Namibian courts will take judicial notice of international law under both the Constitution and at common law. Id. at 95.
ments. Therefore, the power in question is not legislative. The power may probably be exercised by a simple majority, and appears to be one residing solely in the National Assembly, not in the full Parliament.

Second, the court would have to be satisfied that the treaty was not in conflict with the Constitution or with an Act of Parliament. In this respect, the conflict envisaged here would be with an Act of Parliament passed after independence. Hence, if a treaty should conflict with the provision of a South African Act of Parliament, which is still in force in Namibia by virtue of articles 25(1)(b) and 140(1), it is submitted that the treaty provisions will prevail. Nowhere in the Constitution is there any indication that the term "Act of Parliament" is to include Acts of the South African Parliament. Article 140(4) provides that references to then existing officials and institutions in South African laws in force at independence are to be interpreted to refer to the corresponding Namibian officials and institutions. There is, however, no similar provision in the Namibian Constitution that references to Namibian officials and institutions in the Constitution or legislation enacted thereunder are intended to refer to corresponding South African officials and institutions. Hence, "Parliament" in the Namibian Constitution cannot include the South African Parliament, even though many Acts of the latter remain in force in Namibia.

Furthermore, a treaty will prevail over subordinate legislation which is in conflict with it. In this respect, one need only note that article 144 mentions only the Constitution and Acts of Parliament as overriding international law.

If the court is satisfied that a pre-independence treaty binding on Namibia has been the subject of a National Assembly decision to accede to it, and conflicts with neither the Constitution nor an Act of Parlia-

---

48 NAMIB. CONST. ch. 7, art. 63(2)(d).
49 Id. ch. 7, art. 63(2)(d).
50 See id. ch. 7, art. 67. See also supra note 34, and accompanying text, on the distinction between the National Assembly and the Parliament.
51 See id. ch. 21, art. 144.
52 See id. ch. 21, art. 146(a) (defining Parliament). See also id. ch. 8, art. 65; id. ch. 20, arts. 140(1), 140(3).
53 Professor Erasmus points out that compatibility with "inherited legislation" is not required. He does, however, adduce an argument to the effect that compatibility could be required if arts. 25(1)(b) and 140(1) are interpreted as giving pre-independence Acts the same status as those of the post-independence era. See Erasmus, supra note 30, at 100.
54 See id. at 100. Subordinate — or secondary — legislation is that which is passed under the authority of an Act of Parliament.
55 NAMIB. CONST. ch. 21, art. 144.
ment, the treaty will be held to be part of Namibian law. There are and should be no further conditions for incorporation.

As far as post-independence treaties are concerned, the National Assembly is required by article 63(2)(e) to agree to their ratification or accession.\(^5\) In order to incorporate such treaties into Namibian law, a court would, therefore, have to be satisfied that the treaty was binding on Namibia as a matter of international law, that the National Assembly had agreed to ratification, and that the treaty conflicted with neither the Constitution nor an Act of Parliament.\(^7\) A dispute has arisen in this context. On the one hand, the theory has been advanced that an agreement concluded by the executive, which is binding in international law, automatically becomes a part of Namibian law by virtue of article 144 — provided of course it does not conflict with either the Constitution or an Act of Parliament.\(^8\) On the other hand, it is argued that while the executive may conclude international agreements and these may be valid in international law, they are not a part of Namibian law until the National Assembly agrees to ratification or accession.\(^9\) The proponents of this view go so far as asserting that if the executive were to enter into an agreement which, by its terms, was to become effective on signature — rather than upon ratification by the National Assembly — then the National Assembly's ratification of the executive is unnecessary and ineffective.\(^6\) In this event, the agreement can become part of Namibian law only by virtue of legislation. The legislation might be previously existing legislation which authorized the agreement, or subsequent legislation which translated it.\(^6\) This view, however, perhaps goes too far. Article 63(2)(e) requires that the National Assembly “agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of article 32(3)(1) hereof.”\(^6\) While article 32(3)(e) empowers the President to “negotiate and sign international agreements, and to delegate such power[.].”\(^6\) the National Assembly must still ratify any international agreement signed by the President or his delegate. Only then will it become a part of Namibian law. If the terms of the agreement state it is to enter into force upon executive

\(^{56}\) Id. ch. 7, art. 63(2).


\(^{58}\) Erasmus, supra note 30, at 101, 108.

\(^{59}\) Mtopa, supra note 57, at 111.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) NAMIB. CONST. ch. 7, art. 63(2)(e).

\(^{63}\) Id. ch. 5, art. 32(2)(c).
signature, then the National Assembly's ratification following signature would have the effect of translating the agreement into municipal law.

The above questions have recently come before the courts. In the *Carracelas Case* the court held that the mere fact that an international treaty has been entered into does not *ipso facto* make the provisions of such a treaty part of the municipal law of Namibia. Legislative ratification of the treaty is first required before it will be considered a part of municipal law. This, in fact, amounts to a third approach and is more restrictive than either of the two previous approaches. The Erasmus approach is the most liberal and compatible with international law. Under it, treaties binding on Namibia in international law are incorporated as municipal law. The Mtopa approach is more restrictive and would require the agreement of the National Assembly for incorporation in certain cases and legislation in other cases. The approach of the court is the most restrictive, requiring legislation for incorporation in all cases. The court apparently overlooked the fact that article 63(2)(e) of the Constitution of Namibia does not require a legislative act for the incorporation of a treaty. It requires only the agreement of one house of Parliament, which does not constitute a legislative act. Since the Constitution does not require a legislative act for incorporation, the South African case law requiring treaties to be translated into municipal law by legislation, must be deemed overruled by article 63(2)(1) of the Constitution. In other words, the Pan American case is no longer authoritative in Namibia, therefore the court's reliance on it to support its approach was unjustified.

In summary, it is apparent that the correct approach, at least in principle, is that of Mtopa under which international agreements become part of Namibian law on agreement of the National Assembly, not upon legislative action.

The view has also been expressed that an agreement, if it is to be part of Namibian law, must be an international agreement. Hence, an

---

64 State v. Carracelas, High Court of Namibia (Nov. 10, 16, 20, 1992) (on file with *Case W. Res. J. Int'l L.*).  
65 *Id.* at 4.  
66 See generally Erasmus, *supra* note 30.  
67 *Id.* at 91.  
68 Mtopa, *supra* note 57.  
69 *Id.* at 111.  
70 See *NAMIB. CONST.* ch. 7, art. 63(2)(e).  
71 *Id.*  
72 See *supra* note 30.  
73 Mtopa, *supra* note 57, at 108-09 and accompanying text.
agreement between the government and a non-governmental organization (NGO) would not be covered by article 144 of the Constitution. This surely is correct and, even if the National Assembly agreed to ratification of such an agreement, this would have no effect. However, such an agreement could become part of Namibian law on ordinary legal principles. It could operate as a binding contract, under municipal law between the government and the NGO. It would be presumed — unless the contrary was stated in the agreement — that the contract was governed by the law of the state which was a party to the contract, in casu Namibian law. Of course, provisions in the contract which conflict with the Constitution, with legislation, with common law, or even with incorporated international law would be void.

The Law of the Sea Convention (LOS) would appear to be in a unique position in relation to the Namibian Constitution. It could be considered a pre-independence treaty since it was adopted in 1982, prior to the Namibian independence in 1990. The United Nation’s Council for Namibia ratified the LOSC on behalf of Namibia on April 18, 1983. On the other hand, it could be considered a post-independence treaty since it was not in force on March 20, 1990 and only came into force on November 16, 1994. This poses difficult problems in relation to state succession. In the Carracelas case, the court held that Namibia was not a party to LOSC as it had not acceded to it. However, the court did not consider the possibility that Namibia might be a party by succession — presumably, because LOSC itself was not yet in force.

In cases where there are two possible interpretations of the Constitution or of an Act of Parliament, one of which would lead to conflict with a treaty while the other would not, it is apparent that the courts should adopt the interpretation of the municipal law in question which would avoid conflict with the treaty and with international obligations. This is simply an application of an existing common law rule of statutory interpretation.

---

74 Id. at 109 n. 19.
75 DANIEL P. O'CONNELL, 2 INTERNATIONAL LAW 979 (2d ed. 1970).
76 In fact, the agreements cited by Mtota, though theoretically part of municipal law, would be void under that municipal law because they would be in conflict with statute. See Mtota, supra note 57, at 109.
78 See supra note 46.
80 Id. at 4.
Namibian Constitution which requires the State to ensure that in its international relations it fosters respect for treaty obligations. One the mechanisms by which respect for treaty obligations could be fostered is for Namibian courts to faithfully apply this presumptive rule of statutory interpretation. Erasmus goes so far as to say that the intention of Parliament to disregard international law must be established beyond doubt and, even in the case of the Constitution, every attempt should be made to harmonize its provisions with international law.

INTERNATIONAL CUSTOMARY LAW AND NAMIBIAN LAW

According to article 144, the "general rules of public international law" form part of the law of Namibia. At first glance it would appear that general rules of public international law could be either customary or conventional in character. However, this leads to the conclusion that a rule of international law contained in a treaty which was general in character could form part of the law of Namibia, even if Namibia was not a party to the treaty in question. Therefore, it is apparent that the phrase "general rules of public international law" as used in article 144 should receive a more restrictive interpretation to mean "general rules of customary public international law." The restrictive construction can be deduced from the context in which the phrases "general rules of public international law" and "international agreements binding on Namibia" are placed in juxtaposition. The latter phrase is obviously intended to deal with the status of treaty law as part of the law of Namibia. The former phrase must, therefore, be interpreted as dealing with the status of international customary law as part of Namibian law. With this interpretation, there is no overlap or confusion between the phrases.

The principle that international customary law forms part of Namibian law is, therefore, confirmed by the Constitution. It is necessary, however, to examine the precise ambit of the principle established in article 144. A number of observations are appropriate.

First, article 144 only incorporates general rules of public international law. It would therefore seem that neither regional customary international law, nor particular customary international law will form part of the law of Namibia. This would appear to be the case even if Namibia is bound by such customary rules as a matter of international

82 Namib. Const. ch. 11, art. 96(d).
83 Erasmus, supra note 30, at 94.
84 Namib. Const. ch. 21, art. 144.
85 Id.
86 For discussion of this concept, see Devine, supra note 31, at 124-25.
87 Id. at 125-26.
law. The incorporation theory is confined to rules of general international customary law. In this respect, the legal position under article 144 is different from the law which applied immediately before independence. In accordance with the principles established in the pre-independence case of Nduli, it was possible to incorporate rules of regional and particular international customary law into municipal law. Article 144 now excludes this possibility.

Second, it would appear to be clear that a rule of universal international customary law will ipso facto also be a rule of general international customary law. It, therefore, follows that universal international customary law would also form part of the law of Namibia. In this respect the position does not differ materially to that which existed prior to independence.

Third, it would also appear to be clear that rules of international customary law, whether universal or general in character, will not form part of Namibian law if they conflict with the Constitution or an Act of the Namibian Parliament. In this respect, exceptions to incorporation are clearly established. In addition, such exceptions existed, in principle, under pre-independence law.

As previously described, conflict with an Act passed by the South African Parliament and which was in operation at the date of independence, would not exclude the incorporation of the customary rule in question. In fact, such an incorporated customary rule would override conflicting provisions in such a South African Act. It may be noted here that the court, in the Banco Exterior case, did not appreciate the fact that, in terms of articles 25(1)(b) and 140(1) of the Constitution, rules of international customary law prevail over conflicting South African statutes which Namibia inherited on independence. Compatibility

---

8 See generally id. at 120.

9 Supra note 29.

90 See generally Devine, supra note 31, at 124-27.

91 Professor Erasmus, while admitting that a literal interpretation of article 144 would exclude the incorporation of regional and particular — i.e., local — international customary law, he nevertheless prefers the thesis that all international customary law is incorporated because all such law is based on the principle of pacta sunt servanda. See Erasmus, supra note 30, at 98-99.

92 Id. at 99.

93 NAMIB. CONST. ch. 21, art. 144.

94 See supra notes 32-34 and accompanying text.

95 See supra notes 25-27 and accompanying text.

96 See supra note 53.

with "inherited legislation" is not required. In casu the court gave effect to the provisions of an — arguably — South African statute authorizing the forfeiture of a vessel which had been used in committing a fishing offence. The court, however, went further by holding that innocent third parties who had mortgage bonds in the vessels also lost their rights. This, in effect, amounted to a confiscation of the property of innocent, third-party foreigners without prompt, fair, and effective compensation. As such, it was contrary to the minimum standard of treatment which international customary law gives to foreigners. It is clear that on a proper interpretation of the Namibian Constitution, the court should have at least tried to reconcile the punitive provisions of the Sea Fisheries Act of 1973 with international customary law, insofar as each made provision for the confiscation of the assets of innocent foreigners. It is interesting to note that the law as declared by the court has now been rectified by legislation. It is no longer possible to confiscate the assets of innocent foreigners which have been used in committing fisheries offenses.

Fourth, the text of article 144 presents a problem of interpretation when it incorporates into Namibian law "the general rules of public international law and international agreements binding upon Namibia." It is quite clear that if international agreements are to be part of the Namibian law, they must be "binding on Namibia." The question arises, however, whether general international customary law, if it is to be part of Namibian law, must also be "binding on Namibia." Does the latter phrases in article 144 qualify both custom and treaties, or the latter only? Both possible interpretations will now be considered.

A. Customary law is not required to be "binding on Namibia"

The consequences of this interpretation are that any general rule of international customary law would be part of Namibian law. It would be immaterial that Namibia might not be bound by that rule as a matter of international law. For example, the Namibian state might have had the

---

98 Erasmus, supra note 30, at 100.
100 O'Connell, supra note 75, at 762, 777, 780.
102 Namib. Const. ch. 3, art. 25(1)(b); id. ch. 20, art. 140(1).
103 Act 58 (1973).
105 See id. § 35(3).
106 Namib. Const. ch. 21, art. 144.
status of a persistent objector to the rule in international law and thus not be bound by it, yet Namibian courts would be obliged to give effect to the rule in municipal law simply because it is a general rule. This would be an anomalous situation.

B. Customary law, in order to be law in Namibia, must be “binding on Namibia”

It is submitted that this would be a more appropriate interpretation of article 144. The words “binding on Namibia” would be seen as qualifying not only treaties, but also international customary law. Such an interpretation would prevent the anomalous situation where the Namibian authorities could, in effect, speak with two different voices on a particular rule of international customary law. The government might deny that the rule was binding on the state because of its status of a persistent objector. At the same time, the courts would have to apply the non-binding rule as part of the law of Namibia simply because it was of a “general” character. In accordance with the suggested interpretation, the approach of a Namibian court could be as follows. First, the court would inquire as to whether the rule in question was a rule of general — or universal — international customary law. If the answer to this question is in the negative, that should be the end of the inquiry. The rule in question should not be part of Namibian law by virtue of article 144. If the answer is in the affirmative, the court could embark on the second inquiry of whether the rule was binding on Namibia. If the answer to this particular question is in the negative — because, for example, Namibia has the status of persistent objector in relation to the rule, — the rule, though it is general in nature, should not be incorporated into Namibian law. If the answers to both the questions are positive, the rule should be held to be part of Namibian law.

In carrying out the above twofold inquiry, the court should be at liberty to introduce an additional element if it so desired. It could give effect to the international law presumption that a rule of general international customary law binds all states — i.e., that it is universal. In effect, this would mean that once the court has established that a rule of international customary law is general in nature, it would be presumed to be universal and thus binding on Namibia. The presumption would,

---

107 Brownlie, supra note 8, at 10; Schwarzenberger & Brown, supra note 101, at 27-29; Georg Schwarzenberger, International Law II 45-46 (1968); Devine, supra note 31, at 120.

108 Devine, supra note 31, at 121-22.

109 Id. at 120.
of course, be rebuttable. It could be rebutted by establishing that Namibia is not bound by the general rule because it has the status of persistent objector in relation to the rule in question.\textsuperscript{110}

Consistency is another reason to interpret article 144 to require that general customary law be "binding on Namibia" if it is to form part of the law of Namibia. The previous law on incorporation of general international customary law — established by the decision in the \textit{Nduli} case\textsuperscript{111} — was the same in principle. The earlier approach also involved a dual enquiry: first as to the generality of the rule, and second as to whether it had received the "assent of the country."\textsuperscript{112} Assent of the country would, of course, have meant that the rule was "binding" on the country. Continuity with the past is therefore preserved by the suggested interpretation of article 144. Furthermore, one can fall back on the interpretative rule that legislation — and perhaps also a constitutional provision — should be interpreted in a manner which brings about as little change in the existing law as possible.\textsuperscript{113}

The incorporation of universal international customary law into Namibian law presents no problems regardless of which interpretation of article 144 is adopted. A rule of universal international law will also be a rule of general international law for the purposes of this Article. In addition, by definition, it will be binding on Namibia simply because it is binding on \textit{all} states.\textsuperscript{114} Hence, universal international customary law will always be part of Namibian law. A Namibian court faced with a question of incorporation merely has to establish the universality of the rule in question.\textsuperscript{115}

Finally, it would appear to be clear from article 144 that a rule of international customary law may not be incorporated into Namibian law if it conflicts with the Constitution or an Act of the Namibia Parliament. However, for reasons which were given when discussing the legal status of incorporated treaties,\textsuperscript{116} it is submitted that incorporated rules of international customary law will similarly prevail over other forms of conflicting legislation, including Acts of the South African Parliament which

\textsuperscript{110} \textit{Id.}; Erasmus, \textit{supra} note 30, at 99 (According to Professor Erasmus, no additional acts of acceptance by Namibia would be required for incorporation.).

\textsuperscript{111} \textit{Supra} note 29.

\textsuperscript{112} \textit{Id.} See also Devine, \textit{supra} note 31, at 120-24. Nor was positive acceptance by the South African state demanded for incorporation. \textit{See} Erasmus, \textit{supra} note 30, at 88.

\textsuperscript{113} COCKRAM, \textit{supra} note 81, 139-40; LUCAS C. STEYN, DIE UITLEG VAN WETTE 99, 153 (5th ed. 1981).

\textsuperscript{114} Devine, \textit{supra} note 31, at 120.

\textsuperscript{115} \textit{Id.} at 126.

\textsuperscript{116} See \textit{supra} notes 40-83 and accompanying text.
were in force on the date of independence.\textsuperscript{117}

**CONCLUSIONS**

In light of the foregoing, the following conclusions are submitted on the question of what international law forms part of Namibian law by virtue of article 144 of the Constitution.

(1) Treaties

(a) Treaties which are binding on Namibia form part of the domestic law, and the incorporation theory applies rather than the translation theory. This represents a change in approach from that of the previously applicable law. In the former South West Africa a treaty which affected rights had to be implemented by legislation to form a part of the domestic law.

(b) There are a number of exceptions where provisions of treaties will not form part of Namibian law. They are as follows:

(i) A treaty not binding on Namibia will not be incorporated. This follows directly from the wording of article 144 of the Constitution.

(ii) If the National Assembly does not give its agreement to ratification, the treaty will not be incorporated. It should be noted here that the agreement is that of one house of Parliament,\textsuperscript{118} and, thus, does not constitute a legislative act.\textsuperscript{119} The power to agree to ratification of treaties is specifically given to the National Assembly by article 63(2)(e).

(iii) If the treaty is in conflict with the Constitution, it directly follows from the provisions of article 144 that it will not be incorporated.

(iv) If the treaty conflicts with an Act of the Namibian Parliament, incorporation will not occur. This also flows directly from the provisions of article 144. In cases of doubt, however, an Act of Parliament should, if possible, be interpreted in such a manner as to avoid conflict.

(v) The National Assembly may override a pre-independence treaty by a decision not to succeed to it. Such a treaty will then

\textsuperscript{117} See Erasmus, supra note 30, at 100.

\textsuperscript{118} For the distinction between the National Assembly and Parliament, see supra note 42 and accompanying text.

\textsuperscript{119} According to the court in State v. Carracelas, High Court of Namibia (Nov. 10, 16, 20, 1992) (on file with Case W. Res. J. Int'l L.), legislation is necessary for incorporation. Thus, the translation theory would apply.
not be incorporated into present domestic law. This power is
given to the Assembly by article 63(2)(d). Again, it is a power
given to one house of the legislature, not to the whole Parlia-
ment. This power, and the power to agree to ratification of
treaties under article 63(2)(e), is reminiscent of the power of
“advise and consent” given to the Senate of the United States in
relation to treaties.120

(c) A binding treaty incorporated into Namibian law will override
all conflicting legislation, except the Constitution and Acts of the
Namibian Parliament. This flows from article 144. Acts of the
South African Parliament applicable to Namibia on the date of
independence will also be overridden, insofar as their provisions
conflict with an incorporated treaty. This situation results from the
definition of “Parliament” in article 146(2)(a).121 “Parliament” is
defined as the Namibian Parliament only.122 Hence, only Acts of
the Namibian Parliament will override conflicting treaty provisions.

(2) International Customary Law

(a) In principle, general international customary law binding on
Namibia is incorporated into Namibian law. This, again, flows from
the provisions of article 144.

(b) It follows that universal customary law is similarly incorporated.
“Universal” international customary law will, by definition, also be
“general.”

(c) Neither regional, nor particular international customary law can
form part of Namibian law since they cannot be described as “gen-
eral” rules of public international law. This represents a change in
approach from the past. The principle of incorporation established
in the Nduli case123 was wide enough to incorporate regional or
local international customary law where these could be said to have
received the assent of the country — South Africa.124

(d) Under article 144, international customary law cannot be incor-
porated if it conflicts with either the Constitution or an Act of the

120 Namib. Const. ch. 7, art. 63(2)(e).
121 Id. ch. 20, art. 146(2)(a).
122 Id.
123 Supra note 29.
124 The court in Nkondo v. Minister of Police, 2 S. Afr. L.R. 894, 908-09 (Orange Free State
Provincial Div. 1980), considered the possible incorporation of a local international custom
alleged to exist in relations between South Africa and Lesotho. In the final analysis, however, the
court held that the “custom” had not been established. Id.
Namibian Parliament.

(e) An incorporated rule of international customary law will over-
ride other conflicting legislation including Acts of the South Afri-
can Parliament which were in force at the date of indepen-
dence.\textsuperscript{125} As pointed out, in terms of article 146(2)(a), “Parlia-
ment” includes only the Namibian Parliament\textsuperscript{126} and, therefore,
only Acts of the Namibian Parliament prevail over conflicting inter-
national customary law.\textsuperscript{127}

(3) General Attitude of the Namibian Constitution to International Law

The approach of the Namibian Constitution to the incorporation of inter-
national law has been described as “international law friendly.”\textsuperscript{128} Public international law is clearly incorporated — rather than translated —
by article 144, there are also other provisions which indicate “interna-
tional law friendliness.” Article 96(d) promises respect for international
law and treaty obligations.\textsuperscript{129} Article 199(2) provides that international
disputes should be settled by peaceful means.\textsuperscript{130} Article 95(d) provides
that membership of international organizations is a principle of state
policy.\textsuperscript{131} This “international law friendliness” creates a juridical atmo-
sphere which should influence courts in their general approach to incor-
poration. It indicates the following guidelines should be followed by
courts seized of incorporation questions.

(a) The Namibian approach is a radical departure from the past. It
is, therefore, best to approach all questions in relation to incorpo-
ration from a fresh starting point—namely, article 143 on the specific
question of state succession to treaties\textsuperscript{132} and article 144 for the
general question of the incorporation of international law into
Namibian law.\textsuperscript{133}

(b) As a direct result of this, it is best to ignore all of the excep-
tions to the incorporation of international customary law contained

\textsuperscript{125} The court in Banco Exterior de Espana S.A. v. Republic of Namibia, 2 S. Afr. L.R. 432
(Namib. High Ct. 1991), did not seem to be aware that this was the situation.
\textsuperscript{126} NAMIB. CONST. ch. 20, art. 146(2)(a).
\textsuperscript{127} Id.
\textsuperscript{128} Erasmus, \textit{supra} note 30, at 93.
\textsuperscript{129} NAMIB. CONST. ch. 11, art. 96(d).
\textsuperscript{130} Id. ch. 19, art. 132.
\textsuperscript{131} Id. ch. 11, art. 95(d). \textit{See also} Erasmus, \textit{supra} note 30, at 93.
\textsuperscript{132} NAMIB. CONST. ch. 20, art. 143.
\textsuperscript{133} Id. ch. 21, art. 144. \textit{See also} Erasmus, \textit{supra} note 30, at 100-01. In cases of doubt in
interpreting article 144, it is possible that, in the interests of consistency, support could be can-
vassed from previously applicable rules.
in the previously applicable domestic law. Presently the only exceptions are now contained in articles 143 and 144.\textsuperscript{134}

(c) In the case of doubt as to whether incorporation should take place or not, a court should, if possible, lean in favor of incorporation. The general atmosphere of “international law friendliness” displayed in the Constitution would indicate such an approach as the correct one. This might, for example, be a factor which could influence a court in deciding whether or not to incorporate regional or particular international customary law also into Namibian law.\textsuperscript{135}

\textsuperscript{134} Erasmus, supra note 30, at 99-100.

\textsuperscript{135} See id. at 98-99.