

The Use of International Law in the Development of Human Rights Jurisprudence in Africa

John Mukum Mbaku*

During the early-to-mid-1990s, many African countries adopted new or amended constitutions which included provisions that recognized and adopted international law, particularly international human rights law, as a tool to interpret constitutional, statutory, and customary laws. Throughout the continent, domestic courts, even in countries where national constitutions do not require them to refer to international law, are seeking guidance from international and foreign comparative law when they interpret their bills of rights and other laws. Through this process, these courts are contributing to the development of jurisprudence on human rights in Africa. Thus, courts in African countries have emerged as important change agents, helping to improve the recognition and protection of human rights and fundamental freedoms. Examples of these courts' contributions to the development of human rights jurisprudence in Africa can be found in case law from South Africa, Uganda, Kenya, and Malawi. Using international and foreign comparative law as tools of interpretation, South Africa's Constitutional Court declared the country's death penalty law inconsistent with provisions of the Constitution, and hence, unconstitutional. In Uganda, the Supreme Court sought inspiration from international law in its determination of the constitutionality of provisions of the laws of Uganda, which prescribe the death penalty as a mandatory sentence for murder. The Supreme Court declared these provisions inconsistent with various provisions of the Constitution, and hence, unconstitutional. In Kenya, the Supreme Court ruled on four issues/questions, which included the applicability of international law in general, and international human rights law in particular. Using international and foreign comparative law, the Court affirmed the right to housing for all Kenyans and established the applicability of international law in the resolution of disputes in Kenya, including those involving the violation of socio-economic rights. In Malawi, the High Court sought insights from international and foreign comparative law to approve the adoption of an

* © 2026 John Mukum Mbaku. Mbaku is an attorney and counselor at law (licensed in the State of Utah) and Brady Presidential Distinguished Professor of Economics & John S. Hinckley Research Fellow at Weber State University (Ogden, Utah, U.S.). He is also a nonresident senior fellow at the Brookings Institution, Washington, D.C. He received a J.D. and graduate certificate in environmental and natural resources law from the S.J. Quinney College of Law, University of Utah, where he was managing editor of the *Utah Environmental Law Review*, and a Ph.D. (in economics) from the University of Georgia. This Article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

infant by a nonresident married couple. In its adjudication of this case, the High Court relied on the “best interests of the child” principle, which is enshrined in both the Convention on the Rights of the Child and the African Child Charter. These cases reveal that courts in African countries are playing a critical role in improving and advancing the recognition and protection of human rights and fundamental freedoms in Africa and their decisions are adding to the continent’s emerging human rights jurisprudence.

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I. INTRODUCTION

As late as the early 1980s, some observers within and outside Africa were still insisting that democracy was not the suitable form of government for African countries. For example, then-Paris mayor and later president of France Jacques Chirac proclaimed to African leaders that “[m]ulti-partyism is a political error, the type of luxury that developing countries cannot afford,”¹ and that “democracy is a luxury Africa can ill afford.”² However, it is said that in 1990, former French President François Mitterrand had changed France’s relationship with Africa when he “helped hasten the eviction of a number of dictators [in France’s former African colonies] by saying French aid would be linked to progress toward democracy.”³ Nevertheless, in the early 1990s, Chirac, who served as president of France from 1995 to 2007, declared that

1. See JOSHUA KURLANTZICK, *DEMOCRACY IN RETREAT: THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT* 36 (2013) (ebook).

2. See Howard W. French, *Chirac Tour Affirms Ties with Africa*, N.Y. TIMES, July 22, 1995, <https://www.nytimes.com/1995/07/22/world/chirac-tour-affirms-ties-with-africa.html> (on file with the Tulane Journal of International and Comparative Law).

3. *Id.*

“Africa was not ready for democracy,” a declaration that is said to have pleased many of Africa’s opportunistic politicians.⁴

Despite this pessimism, the pro-democracy movements that emerged in the late 1980s continued to gain support from the masses as they fought to transform their governance institutions and introduce democratic and competitive political systems.⁵ By the mid-1990s, especially after the official termination of South Africa’s racially based apartheid system and the successful adoption of a multiracial constitutional democracy, many Africans had begun to see “multiparty democracy and constitutionalism as the only legitimate way to change government, as well as to enhance and ensure peaceful coexistence and minimize sectarian conflict.”⁶

Many of the new African constitutions were expected to introduce regimes featuring a separation of powers with checks and balances, which included (1) an independent judiciary; (2) a bicameral legislature, with each chamber constitutionally empowered to exercise an absolute veto over legislation passed by the other; and (3) a guarantee of freedom of the press.⁷ Although most of the post-1990s institutional reforms introduced governing processes undergirded by a separation of powers, some of them also provided for imperial presidencies.⁸ For example, new constitutions adopted in Angola, Cameroon, and Congo (Brazzaville) in the 1990s, granted the president “unilateral authority over appointments to a broad range of key executive, judicial and other constitutional offices and empower[ed] the president to bypass the legislature and legislate or govern without the legislature’s participation even in non-emergency situations” and these constitutions virtually imposed or preordained “an imperial presidency.”⁹

One important innovation of these constitutional reforms was the recognition and adoption of international law, particularly international

4. *Id.*

5. See, e.g., JOHN MUKUM MBAKU & JULIUS O. IHONVBERE, *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) (ebook) (examining the transition to democracy in Africa that began in many African countries in the mid-1980s and early-1990s).

6. John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT’L COMPAR., POL’Y & ETHICS L. REV. 77, 90 (2018).

7. John Mukum Mbaku, *African Courts and International Human Rights Law*, 48 BROOK. J. INT’L L. 446, 495 (2023).

8. H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CONST. L. Q. 761, 775 (2008) (examining the persistence of the imperial presidency in Africa).

9. *Id.* at 815.

human rights law, as a tool to interpret domestic constitutional law, especially when the latter deals with or is related to fundamental rights or a given nation's bill of rights.¹⁰ One motivation for using international law in constitutional interpretation, especially in Africa, is to ensure that all domestic laws, including constitutional, customary, and statutory laws, conform to the provisions of international and regional human rights instruments.¹¹ Hence, domestic courts can use international human rights law to declare provisions of a statute or a customary law unconstitutional, and hence, null and void. For example, in *Ephrahim v. Pastory and Another*,¹² Judge Mwalusanya, writing for Tanzania's High Court, reviewed several international human rights instruments and declared that the "principles" enshrined in these international human rights instruments are "a standard below which any civilized nation should be ashamed to fall."¹³ Judge Mwalusanya then ruled that "the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories"¹⁴ and that Tanzanian courts "are not impotent to invalidate laws which are discriminatory and unconstitutional."¹⁵

Using international law as an interpretive tool in Africa can be viewed from two perspectives. First, some African constitutions specifically and expressly require that courts must consider international law.¹⁶ Second, in other African countries, although there are no constitutional provisions mandating the use of international law as a tool of interpretation, domestic courts have, nevertheless, used international law as a tool to interpret national laws and, "in a few instances, have indirectly acted in accordance with non-transformed treaties, constitutional constraints notwithstanding."¹⁷ South Africa's Constitution

10. Devika Hovell & George Williams, *A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa*, 29 MELB. UNIV. L. REV. 95 (2005) (examining the use of international law in constitutional interpretation in Australia and South Africa).

11. Mbaku, *supra* note 7, at 494. (noting that using international human rights instruments as a "tool to interpret the constitution and national laws" can "make certain that domestic laws, including custom and tradition, conform to the provisions of international human rights instruments").

12. *Ephrahim v. Pastory* (2001) AHRLR 236 (TzHC 1990) (Tanz.).

13. *Id.* at 239.

14. *Id.*

15. *Id.*

16. *See, e.g.*, THE CONSTITUTION OF SOUTH AFRICA, 1996 § 39(1)(b).

17. Julia Selman Ayetey & Bolanle T. Erinosh, *International Law in Ghana: A Study of the Attitudes, Knowledge and Use of International Law by Judges and Lawyers*, 31 AFR. J. INT'L

imposes an obligation on its courts to consider international law when they interpret the Bill of Rights. Section 39(1) states that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must* consider international law; and (c) *may* consider foreign law.”¹⁸ While South African courts *may* consider foreign law, they are obligated to—that is, they *must*—consider international law.¹⁹

According to Article 2(5) of Kenya’s Constitution, the “general rules of international law shall form part of Kenyan law,” which means that customary international law is deemed to be part of the laws of Kenya.²⁰ Article 2(6) provides that treaties and conventions which Kenya has ratified shall form part of the laws of Kenya, even if no enabling legislation has been enacted to domesticate these treaties and conventions.²¹ Nevertheless, Article 2(1) declares that the Constitution is the supreme law of the land and, according to Article 2(4), any law that is inconsistent with the Constitution is invalid to the extent of the inconsistency.²²

Kenyan legal scholars have noted that “although international law—and especially the more progressive international human rights regime—is of great significance in the interpretation of similar constitutional provisions, the Constitution prevails over inconsistent international law obligations.”²³ It is argued further that “[t]he Kenyan situation requires harmonization of the legal order in a manner that ensures that Kenyan citizens enjoy maximum benefits from the direct operation of international law in the country, while at the same time safeguarding the smooth and democratic operation of government organs.”²⁴ In addition, some Kenyan constitutional scholars argue that “international law may significantly promote the interpretation of rights established under the 2010 Constitution in a progressive manner.”²⁵

& COMP. L. 253, 259 (2023) (examining the use of international law as an interpretive tool in the Ghanaian courts).

18. S. AFR. CONST., 1996 § 39(1) (emphasis added).

19. *Id.*

20. CONSTITUTION OF KENYA, 2010 art. 2(5).

21. *Id.* art. 2(6).

22. CONSTITUTION, 2010 art. 2(1), 2(4) (Kenya).

23. Tom Kabau & Chege Njoroge, *The Application of International Law in Kenya Under the 2010 Constitution: Critical Issues in Harmonization of the Legal System*, 44 COMP. & INT’L L.J. OF S. AFR. 293, 294 (2011).

24. *Id.*

25. *Id.* at 300.

It is noted, however, that “[m]ost of the rights established under international treaties, especially the human rights regime, have equivalent provisions in the Constitution” and that the “question before the courts is not whether to apply an international human rights provision directly, but rather, how the court should interpret a constitutional right to ensure that it is also affirmed in the international human rights regime.”²⁶ Kenyan constitutional scholars Tom Kabau and Chege Njoroge argue that “[r]atified treaties, resolutions, international case law, and general comments by relevant international institutions, should inform the Kenyan courts when interpreting a constitutional provision with a treaty equivalent.”²⁷ Given that Kenya’s Constitution, unlike that of South Africa, does not require that courts must consider international law, among other requirements, an examination of case law from Kenya could provide insight into the nature of actual practice by domestic courts. However, some constitutional scholars have concluded that international law applies directly in Kenya and also serves as “an interpretative tool.”²⁸

Uganda’s Constitution has a Bill of Rights that incorporates virtually all the rights enshrined in the International Covenant on Civil and Political Rights (ICCPR).²⁹ Although the Constitution does not empower or impose an obligation on domestic courts to consider international or comparative foreign law when they interpret the Constitution, the country’s Supreme Court has “relied heavily on international human rights treaties and jurisprudence” and, in addition, has recommended that Uganda’s Constitution be amended to “empower or require courts to refer to international law and foreign case law in interpreting the country’s Constitution.”³⁰

Uganda’s Constitution mentions international law in various provisions.³¹ For example, in Objective XXVIII, which deals with foreign policy objectives, the Constitution provides that “(i) The foreign policy of

26. *Id.* at 300-01.

27. *Id.* at 301.

28. *Id.*

29. CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995 ch. 4 Protection and Promotion of Fundamental and Other Human Rights and Freedoms.

30. Jamil Ddamulira Mujuzi, *International Human Rights Law and Foreign Case Law in Interpreting Constitutional Rights: The Supreme Court of Uganda and the Death Penalty*, 9 AFR. HUMAN RTS. L.J. 576, 579 (2009).

31. CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995 National Objectives and Directive Principles of State Policy at Objective XXVIII. *See, especially* § XXVIII(b) (noting that “[t]he foreign policy of Uganda shall be based on the principles of—b. respect for international law and treaty obligations”). *See also* CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995 at art. 287, (International agreements, treaties and conventions).

Uganda shall be based on the principles of . . . (b) respect for international law and treaty obligations.”³² Additionally, the Constitution empowers the Uganda Human Rights Commission “to monitor the Government’s compliance with international treaty and convention obligations on human rights.”³³

Throughout Africa, even in situations where national constitutions do not mandate consultation, courts seek guidance from international law, particularly international human rights law, when they interpret domestic constitutional law.³⁴ Hence, international law has emerged as an important resource for constitutional interpretation for many courts in Africa. The main objective of this Article is to examine how African courts are using the provisions of international and regional human rights instruments to develop jurisprudence on human rights in the continent. This Article will examine case law from several African jurisdictions to illustrate the importance of and the role played by international law in the development of Africa’s human rights jurisprudence. However, before undertaking that analysis, it is necessary to provide an overview of the gradual evolution of international law as a resource for constitutional interpretation in Africa.

II. THE USES OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

Courts in the United States have made clear that international law remains relevant to constitutional interpretation by its domestic courts. For example, in *Atkins v. Virginia*,³⁵ the U.S. Supreme Court held that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”³⁶ In *Lawrence v. Texas*,³⁷ the U.S. Supreme Court reversed its earlier decision in *Bowers v. Hardwick*³⁸ and stated that “[t]o the extent that *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected

32. CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995 National Objectives and Directive Principles of State Policy, at Objective XXVIII(b).

33. *Id.* art. 52(1)(h).

34. *See, e.g.,* Attorney General v. Susan Kigula (Const. Appeal No. 03 of 2006) (Judgment of January 21, 2009) (Sup. Ct. Uganda) (illustrating the application of international human rights law to the interpretation of constitutional and statutory law in Uganda).

35. *Atkins v. Virginia*, 536 U.S. 304 (2002).

36. *Id.* at 316-17, n.21.

37. *Lawrence v. Texas*, 539 U.S. 558 (2003).

38. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

elsewhere.”³⁹ The Court then cited three decisions of the European Court of Human Rights (ECtHR) and noted that the ECtHR has not followed *Bowers* but rather its own decision in *Dudgeon v. U.K.*⁴⁰

In *Roper v. Simmons*,⁴¹ the U.S. Supreme Court determined whether the imposition of the death penalty on a seventeen-year-old who committed murder constituted “cruel and unusual” punishment and hence would be barred by the Eighth and Fourteenth Amendments of the U.S. Constitution. Justice Kennedy’s majority opinion noted that the Court’s “determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”⁴² Justice Kennedy then declared that “[t]his reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility.”⁴³ However, Justice Kennedy explained, “at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”⁴⁴

Justice Kennedy then concluded that “[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty” and that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁴⁵ Additionally, Justice Kennedy noted that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”⁴⁶

The “notion” that the United States does not “have a monopoly on wisdom and could learn from others might seem uncontroversial,” but “it has provoked a strong reaction in some quarters.”⁴⁷ For example, in his

39. *Lawrence*, 539 U.S. at 576.

40. *Lawrence*, 539 U.S. at 576-77; See also *Case of Dudgeon v. The United Kingdom*, [1981] 4 Eur. H.R. Rep. 149 (Eur. Ct. H.R.).

41. *Roper v. Simmons*, 543 U.S. 551 (2005).

42. *Id.* at 575.

43. *Id.*

44. *Id.*

45. *Id.* at 578.

46. *Id.*

47. Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMPAR. L. 421, 422 (2004).

dissenting opinion in *Lawrence*, Justice Scalia referred to “[t]he Court’s discussion of these foreign views” as “meaningless” and “[d]angerous dicta.”⁴⁸ Similarly, Justice Thomas, concurring in the denial of *certiorari* to *Foster v. Florida*, stated that “[w]hile Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”⁴⁹

Some U.S. Constitution scholars have argued that the debate in *Atkins* and *Lawrence* “was not about the use of international law per se in constitutional interpretation, but about the use of international sources more generally.”⁵⁰ International law expert Daniel Bodansky has presented four arguments why he believes international materials should be used to interpret the Constitution.⁵¹ First Bodansky argued that the founders of the American Republic “had a healthy respect for international law” and that Thomas Jefferson characterized what he referred to as “the law of nations”—as international law was called at the time—as “an integral part . . . of the laws of the land.”⁵² In addition, the first U.S. attorney general, Edmund Randolph, declared that “[t]he law of nations, though not specially adopted by the constitution, or any municipal act, is essentially a part of the law of the land.”⁵³ He concluded that the use of international law in interpreting the Constitution “has a long history, and reflects the Framers’ own interest in, and concern about, international law.”⁵⁴

Bodansky’s second argument is that “international sources are relevant to constitutional interpretation because American courts and foreign courts are part of a common legal enterprise.”⁵⁵ He argued that international sources can be useful to constitutional interpretation for two reasons. First, these non-domestic sources can provide “good ideas” for the judge.⁵⁶ He cited *Hurtado v. California*,⁵⁷ a case in which the Supreme Court held that:

48. *Lawrence*, 539 U.S. at 598.

49. *Foster v. Florida*, 537 U.S. 990, 470 (2002) (emphasis in original).

50. Bodansky, *supra* note 47, at 423.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 423-24.

55. *Id.* at 424.

56. *Id.* at 424.

57. *Hurtado v. People of State of California*, 110 U.S. 516 (1884).

while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.⁵⁸

Bodansky also notes that “by looking to foreign sources, we can get empirical evidence about how a prospective legal rule operates in practice.”⁵⁹ In his dissenting opinion in *Printz v. United States*,⁶⁰ Justice Breyer noted as follows:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.⁶¹

Harold Hongju Koh, who served as amicus curiae in *Lawrence v. Texas* and in *Atkins v. Virginia*, and who at the time was dean of Yale Law School, stated that “constitutional concepts like ‘liberty,’ ‘equal protection,’ ‘due process of law,’ and privacy have never been exclusive U.S. property, but have long carried global meaning” and that “[t]o construe these terms in ignorance of these foreign and international precedents virtually ensures that our Supreme Court rulings will generate conflict and controversies with our closest global allies.”⁶² He argued further that the United States should “use the experience of other nations that share its common constitutional genealogy as laboratories to test workable social solutions to common constitutional problems.”⁶³

The third reason why U.S. courts should seek inspiration in international law to aid in their interpretation of the Constitution is “that the constitutional text itself is often open-ended and invites the use of community standards as a means of interpretation.”⁶⁴ However, in

58. *Id.* at 531.

59. Bodansky, *supra* note 47, at 425.

60. *Printz v. United States*, 521 U.S. 898 (1997).

61. *Id.* at 977.

62. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 47 (2004).

63. *Id.* at 47.

64. Bodansky, *supra* note 47, at 425.

Stanford v. Kentucky,⁶⁵ Justice Scalia argued that the community standards referred to are domestic U.S. standards.⁶⁶ He stated that “it is American conceptions of decency that are dispositive” and rejected “the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant.”⁶⁷ However, Koh has noted that the U.S. Supreme Court has “repeatedly recognized [that] the concept of ‘ordered liberty’ is not uniquely American but, rather, is ‘enshrined’ in the legal history of ‘English-speaking peoples,’ as well as other legal systems.”⁶⁸

Finally, argued Bodansky, using international materials to interpret the Constitution “is pragmatic” and “it helps avoid friction with the rest of the world.”⁶⁹ In 2001, when the U.S. Supreme Court was gearing up “to hear arguments on the constitutionality of the death penalty for defendants with an intellectual disability, a group of nine former diplomats took the extraordinary step of filing an amicus curiae brief in opposition to the practice.”⁷⁰ The diplomats argued that continuing to allow the execution of offenders with intellectual disabilities “will strain diplomatic relations with close American allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase U.S. diplomatic isolation, and impair other United States foreign interests.”⁷¹ Finally, argued the diplomats, “[t]he persistence of this practice has caused our allies and adversaries alike to challenge our claim of moral leadership in international human rights.”⁷²

Bodansky concluded that these are “not trivial problems at a time when the United States is actively seeking to enlist the assistance of other countries in the ongoing war against terrorism.”⁷³ He cited the *Charming Betsy* doctrine, which states that “wherever possible, statutes, and

65. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

66. *Id.* at 39, n.1.

67. *Id.*

68. Koh, *supra* note 62, at 45.

69. Bodansky, *supra* note 47, at 427.

70. Mark Warren, *Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 WM. & MARY BILL RTS. J. 309, 315 (2004); *See also* Brief for Diplomats as Amici Curiae Supporting Respondents at 9, *McCarver v. North Carolina*, 532 U.S. 941 (2001) (No. 00-8727).

71. Brief for Diplomats, *McCarver*, at 7.

72. *Id.* at 9.

73. Bodansky, *supra* note 47, at 427.

presumably the Constitution as well, should be construed so as to be consistent with international norms.”⁷⁴ The Court held that

an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country.⁷⁵

After World War II, the development of international human rights law “has widened the field for interaction between international law and constitutional interpretation, just as the spread of rights-based constitutionalism has increased the opportunity for comparative use of foreign constitutional law.”⁷⁶ This, of course, does not imply that “international human rights treaties *mandate* implementation through cooperative constitutional interpretation.”⁷⁷ While treaties “require legal implementation,” they nevertheless “leave the choice of the means of implementation to the different national legal systems.”⁷⁸ It is argued, however, that “the advent of the international human rights system has changed the conditions of constitutional adjudication, for the United States and for other countries.”⁷⁹

Some constitutional scholars have argued that in seeking to uncover the relationship between international human rights law and constitutional interpretation, “it is useful to distinguish three aspects of legal rights: their consensual, supra-positive, and institutional characteristics.”⁸⁰ While the “*consensual* aspect reflects the positive basis of the right in the consent of the relevant political actors,” the “*suprapositive* aspect reflects the claim of the right to normative recognition independent of its embodiment in positive law.”⁸¹ Finally, the “*institutional* aspect of the right reflects its articulation as a structured legal rule in a manner that facilitates compliance and enforcement within the relevant legal system.”⁸² These aspects of legal rights, it is argued, “exert competing influences on

74. Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMPAR. L. 421, 422 (2004); see also *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

75. *The Schooner Charming Betsy*, 6 U.S. at 118.

76. Gerald Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 84 (2004).

77. *Id.* at 84 (emphasis in original).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Neuman, *supra* note 76, at 84.

constitutional interpretation” in the United States, as well as within the “international human rights system.”⁸³

Placing the constitutional and international systems side by side and comparing them, particularly in regard to a right that they both protect (e.g., right to access to justice; right to a fair trial) significantly increases “the possibilities for competing influences on the interpretation of the right.”⁸⁴ For example, the “normatively based interpretation of the right in one system [e.g., national community] may contradict the consensually limited contours of the right in the other system [i.e., international community].”⁸⁵ Of course, such divergence could be due to the “normal variation” that “one might expect from parallel efforts in two legal systems to give positive legal force to the same normative principle.”⁸⁶ These divergences aside, what is important, especially with respect to the application of international law to the development of human rights jurisprudence in Africa, is that the “central purpose of *international human rights law* is to call into question positive legal practices that fail to respect universal values.”⁸⁷ It is important that all laws in each African country conform to the provisions of international and regional human rights instruments. It is noted that the “prominence of this suprapositive aspect distinguishes *human rights law* from other fields of *positive international law*.”⁸⁸

Some African countries have adopted constitutional provisions requiring that their bill of rights should be interpreted in accordance with either international treaties that they have ratified or in accordance with specifically mentioned international human rights treaties. For example, Article 26(2) of the Constitution of Angola states as follows: “Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the [Universal Declaration of Human Rights, or UDHR], the [Banjul Charter] and international treaties on the subject ratified by the Republic of Angola.”⁸⁹ In addition, Article 26(3) states that when Angolan courts have to resolve disputes concerning fundamental rights, the international human rights

83. *Id.* at 85.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (emphasis added).

88. Neuman, *supra* note 76, at 85 (emphasis added).

89. CONSTITUTION OF THE REPUBLIC OF ANGOLA, 2010 art. 26(2).

instruments mentioned in Section 2 of Article 26, “shall be applied, even if not invoked by the parties concerned.”⁹⁰

South Africa’s Constitution has provisions expressly mandating that its courts take into consideration international law when they interpret the Constitution.⁹¹ South Africa’s Constitutional Court (ZACC) has interpreted the direction provided by § 39(1) to include international human rights law that does not bind South Africa (e.g., unratified treaties and decisions of European and inter-American regional systems).⁹²

These types of constitutional arrangements, such as those made possible by South Africa’s Constitution, help countries “align constitutional interpretation with the international human rights system.”⁹³ There may be other reasons why African countries might want to anchor their “constitutional rights in the jurisprudence of more established systems” and these include benefiting from “a body of precedent and [decreasing] the likelihood of repressive interpretations” by domestic courts.⁹⁴ However, the main concern of international human rights treaties regarding national constitutions is to ensure that these constitutions do not “obstruct compliance with human rights obligations.”⁹⁵

Considering international human rights norms and their interpretations offers potential institutional benefits, not just to countries with highly developed legal systems, but also to African countries that have relatively underdeveloped constitutional systems. One primary institutional benefit is empirical, which is “the opportunity to observe how a proposed rule operates in other legal systems.”⁹⁶ Although it has been argued that “the most persuasive functional conclusion will be that a particular rule works well in another legal system precisely because of features that distinguish it from [for example,] the United States,” it is important to note that “the doctrines of regional human rights systems, and especially of the global human rights system, are less likely to depend on the individual characteristics of foreign legal systems.”⁹⁷

90. *Id.* art. 26(3).

91. Specifically, § 39(1) states that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . (b) must consider international law; and (c) may consider foreign law.” S. AFR. CONST., 1996 § 39(1)(b)-(c).

92. *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at paras. 26-29 (S. Afr.).

93. Neuman, *supra* note 76, at 85.

94. *Id.*

95. *Id.*

96. *Id.* at 87.

97. *Id.*

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The rights jurisprudence of the United States has been a significant and “prestigious” source of “individual rights doctrines and argumentation in the global community.”⁹⁸ However, that influence and prestige can be undermined if the Supreme Court insists “on the exceptional character of its rights conceptions, labeling them as idiosyncratic American values or limiting itself to literalist and eighteenth-century sources of interpretation.”⁹⁹ While isolationism in the United States can seriously weaken the human rights system, it can also “impair the promotion of U.S. constitutional values for U.S. citizens.”¹⁰⁰ Isolationism in African countries can significantly weaken the recognition and protection of human rights and prevent the harmonization of domestic laws with the provisions of international human rights instruments. In a globalized world, which is characterized by a significant volume of trade, travel, and communication, as well as cooperation in law enforcement, “the enjoyment of liberties often depends on the overlapping laws of several countries.”¹⁰¹

International human rights scholars have argued that the international human rights regime “challenges states to re-examine the justifiability of their practices” and that in countries such as the United States, “such reexamination may be especially beneficial where doctrinal structures preserve vestiges of long-vanished historical conditions.”¹⁰² In the Preamble to South Africa’s Constitution, South Africans made clear that in adopting the new Constitution, they “[r]ecognise the injustices of [their] past” and “[h]onour those who suffered for justice and freedom.”¹⁰³ In many cases brought before it, the ZACC, the country’s highest court, has frequently mentioned discriminatory practices of the apartheid era and how the new constitution, whose design was significantly impacted by international and regional human rights law, is expected to bring “together again in one country the parts that had been separated under apartheid.”¹⁰⁴

98. *Id.*

99. Neuman, *supra* note 76, at 87.

100. *Id.*

101. *Id.*

102. Neuman, *supra* note 76, at 87. One example is historical discrimination against African Americans, who have been subjected to lynchings, Black Codes, Jim Crow laws, and other forms of discrimination. See Equal Justice Initiative, *Segregation in America* (Dec. 2, 2024), [<https://segregationinamerica.eji.org/>] (on file with Tulane Journal of International & Comparative Law).

103. S. AFR. CONST., 1996 Preamble.

104. *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 31 (S. Afr.). This case was decided under the Interim Constitution of South Africa (1993).

South Africa's Interim Constitution (1993) was considered by South Africans as:

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.¹⁰⁵

In deciding *Makwanyane*, which was about the constitutionality of the death penalty, the ZACC sought inspiration from international and foreign comparative law.¹⁰⁶ The ZACC noted that international agreements and customary international law provide the Court with a framework "within which [the Bill of Rights] can be evaluated and understood."¹⁰⁷ Since *Makwanyane*, South African courts have sought inspiration from international and regional human rights instruments in interpreting the South African Bill of Rights.¹⁰⁸ Requiring that international law should be used in constitutional interpretation in South Africa "evokes fears that the application of the *Constitution* might be subject to the dictates of the international community and not to local conditions."¹⁰⁹ In their comparative analysis of the use of international law in constitutional interpretation in Australia and South Africa, Devika Hovell and George Williams state that such a view would be "a misreading of the injunction in the *Constitution*, which requires only that courts 'must consider international law'" and that after such consideration, a domestic court can reject international law as a "normative guide where it does not produce the outcome that is the correct one for the circumstances facing South Africa."¹¹⁰

The ZACC's decisions, note Hovell and Williams, "reveal a discerning acceptance, rather than a wholesale adoption, of international law."¹¹¹ In *Makwanyane*, Hovell and Williams noted, "after stating the need for 'due regard to our legal system, our history and circumstances, and the structure and language of our Constitution,'" Justice Chaskalson declared as follows: "We can derive assistance from public international

105. S. AFR. INTERIM CONST., 1993 Chapter 16.

106. *Makwanyane*, (3) SA 391 (CC) para. 35; Chapter 3 of the Interim Constitution.

107. *Makwanyane*, (3) SA 391 (CC) para. 35.

108. In South Africa's permanent constitution, the Bill of Rights is Chapter 2. S. AFR. CONST., 1996.

109. Hovell & Williams, *supra* note 10, at 120 (emphasis added).

110. *Id.*

111. *Id.*

law and foreign case law, but we are in no way bound to follow it.”¹¹² In *Coetzee v. Government of the Republic of South Africa, Matiso and Others v. Commanding Officer Port Elizabeth Prison and Others*,¹¹³ Justice Sachs provided a qualified approach to the constitutional injunction in § 35(1) of the Interim Constitution (1993), which is now § 39(1) of the Constitution of South Africa, 1996.¹¹⁴ Justice Sachs declared that this subsection “requires us to give due attention to such experience with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules.”¹¹⁵ He continued, stating that given “its importance and its relative novelty in South African jurisprudence,” he would “set out references to international instruments in some detail.”¹¹⁶

While justices of the ZACC, which was set up in 1994 by the Interim Constitution, regularly use international law as a tool to interpret the Bill of Rights, scholars of the ZACC’s jurisprudence have noted that its judgments “do not exhibit the ‘blithe adoption of alien concepts or inapposite precedents’ cautioned against by Justice Kriegler in *Bernstein v. Bester*.”¹¹⁷ In seeking inspiration from international law, the ZACC’s justices have consistently sought to strike a balance between benefiting from international law’s consideration of fundamental rights and dealing with the country’s unique domestic context.¹¹⁸ In *Brink v. Kitshoff*,¹¹⁹ Justice O’Regan in his concurring opinion, noted that the interpretation of Section 8 of Chapter 3 (Fundamental Rights) of the Interim Constitution

112. *Id.*

113. *Coetzee v. Government of the Republic of South Africa, Matiso v. Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC) (S. Afr.).

114. *Id.* para. 57.

115. *Id.*

116. *Id.* He then drew inspiration from the European Convention for the Protection of Human Rights and Fundamental Freedoms, European Court for Human Rights, and the ICCPR. *See id.* paras. 57-58.

117. Hovell & Williams, *supra* note 10, at 121. *See also* *Bernstein v. Bester* NO 1996 (2) SA 751 (CC) (S. Afr.). In *Bernstein*, Justice Krieger stated that “where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign cases.” However, it is “a far cry from blithe adoption of alien concepts or inapposite precedents. *See id.* para. 133. Krieger continued and stated that “[m]y colleague has been at pains to discern the principles applied by comparable courts in foreign jurisdictions, to establish whether they can be applied here, and, if so, to what extent and subject to what modifications.” *See id.*

118. Hovell & Williams, *supra* note 10, at 121.

119. *Brink v. Kitshoff* NO 1996 (4) SA 197 (CC) (S. Afr.).

“must be based on the specific language of section 8, as well as our own constitutional context.”¹²⁰ Justice O'Regan declared as follows:

Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as ‘white,’ which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. *It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.*¹²¹

In *Prinslo v. Van der Linde*,¹²² Justices Ackerman, O'Regan, and Sachs “recognised the need to strike a careful balance between obtaining value from international consideration of fundamental principles and attention to one’s own domestic context” when they stated that “[i]n relation to the text and context of the interim Constitution, it would therefore seem that a simplistic transplantation from other countries into our equality jurisprudence of formulae, modes of classification or degrees of scrutiny, might create more problems than it solved.”¹²³ Nevertheless, the three ZACC justices cautioned that “[a]t the same time, we must be mindful of section 35(1) which states” that “[i]n interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality.”¹²⁴ In addition, they acknowledged that “[a]t the same time, South Africa shares patterns of inequality found all over the globe, so that any development of doctrine relating to section 8 would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity.”¹²⁵

In *S v. Makwanyane*, a case that was decided under the Interim Constitution, the ZACC determined the constitutionality of the death penalty in South Africa.¹²⁶ Writing for the majority, Justice Chaskalson

120. *Id.* para. 40.

121. *Id.* (emphasis added).

122. *Prinslo v. Van der Linde* 1997 (3) SA 1012 (CC) (S. Afr.).

123. *Id.* para. 19.

124. *Id.*

125. *Id.* para. 20.

126. *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 31 (S. Afr.); see also International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

sought inspiration from the ICCPR and the U.N. Human Rights Committee¹²⁷ and noted that provisions of the ICCPR “specifically allow the imposition of the death sentence under strict controls ‘for the most serious crimes’ by those countries which have not abolished it.”¹²⁸ In her concurring opinion, Justice O’Regan noted that Article 6(6) of the ICCPR provides that “[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by the State Party to the present Covenant.”¹²⁹ Justice Chaskalson, who was president of the ZACC and wrote the opinion for the Court, declared that:

what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the [ICCPR] authorising the imposition of capital punishment by member States in certain circumstances, that the words had to be given a narrow meaning.¹³⁰

The ZACC then held that capital punishment in any part of the national territory of South Africa was inconsistent with the Constitution.¹³¹ This decision was reached after a careful and detailed analysis and “understanding of the textual and political limitations affecting the international legal position.”¹³²

In *S v. Williams*, which was the “consolidation of five different cases in which six juveniles were convicted by different magistrates and sentenced to receive a ‘moderate correction’ of a number of strokes with a light cane,” the issue to be decided by the ZACC was “whether the sentence of juvenile whipping, pursuant to the provisions of section 294 of the Criminal Procedure Act, is consistent with the provisions of the Constitution.”¹³³ In *Williams*, the Court undertook a similar analysis as it had done in *Makwanyane* into what it referred to as the “emerging consensus of values in the civilized international community” regarding the constitutionality of corporal punishment.¹³⁴ As it did in *Makwanyane*, the Court sought guidance and inspiration from international law and made specific references to international instruments and institutions, such as the ICCPR, the U.N. Human Rights Committee, Canadian

127. *Makwanyane*, (3) SA 391 (CC) para. 63.

128. *Id.* para. 66; *see also* ICCPR, *supra* note 126, at arts. 6(2)-6(5).

129. *Makwanyane*, (3) SA 391 (CC) para. 324 n.1.

130. *Id.* para. 67.

131. *Id.* para. 151(1).

132. Hovell & Williams, *supra* note 10, at 122.

133. *S v. Williams and Others* 1995 (3) SA 632 (CC) para. 1 (S. Afr.).

134. *Id.* para. 22.

Charter of Rights and Freedoms, the European Convention on Human Rights (ECHR), and the European Commission of Human Rights.¹³⁵

Writing for the ZACC, Justice Langa explained that

[w]hile our ultimate definition of the concepts must necessarily reflect our own experience and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law.¹³⁶

The right to adequate housing, which is enshrined in Section 26 of South Africa's Constitution, was the subject matter of *Government of the Republic of South Africa and Others v. Grootboom and Others*, decided by the ZACC.¹³⁷ In *Grootboom*, the ZACC also sought to use international law as a tool to interpret Section 26 of the Constitution.¹³⁸ Justice Yacoob, who wrote the lead judgment for the Court in *Grootboom* cited Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), general comments of the U.N. Committee on Economic, Social and Cultural Rights (CESCR),¹³⁹ but cautioned that while "[t]he relevant international law can be a guide to interpretation," "the weight to be attached to any particular principle or rule of international law will vary."¹⁴⁰ Nevertheless, noted Justice Yacoob, "where the relevant principle of international law binds South Africa, it may be directly applicable."¹⁴¹

Some legal scholars have argued that the use of international law as a tool of interpretation "might blur the separation of powers between the judiciary and the legislature" and that "the interpretation of the *Constitution* by reference to international values is undemocratic because it can lead to an effective amendment of the *Constitution* by the courts when this is the role of people or, in South Africa's case, the National Parliament."¹⁴² Although "[t]hese concerns are relevant not only in regard to international law but whenever judges interpret a constitution and especially when they make reference to non-textual materials," the ZACC's judgments "reveal how its judges have been careful to avoid

135. *Id.* para. 26-28.

136. *Id.* para. 23.

137. *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

138. *Id.* para. 25.

139. *Id.* paras. 25-33.

140. *Id.* para. 26.

141. *Id.*

142. Hovell & Williams, *supra* note 10, at 123 (emphasis in original).

overstepping the bounds of their judicial role . . . and indeed pay substantive regard to the separation of powers.”¹⁴³ In addition, as made clear by Justice Chaskalson in *Makwanyane*, unlike South Africa’s legislative branch, the Court is empowered and charged with protecting those individuals who are not able to secure their rights through the democratic process.¹⁴⁴ Thus, the Court is charged with a totally separate but valid role from that of the legislature’s. Justice Chaskalson explained this in *Makwanyane* when he stated as follows:

The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected. . . . This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.¹⁴⁵

This approach, Hovell and Williams explain, “informs [the ZACC’s] use of international law and its approach to constitutional interpretation more generally,” as the ZACC “also perceives a distinction between law reform and incremental development of the law.”¹⁴⁶ In *Carmichele v. Minister of Safety and Security*, Justices Ackermann and Goldstone, writing in the context of the common law, declared that:

In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.¹⁴⁷

In regard to the Constitution, Justice Ngcobo, writing for the Court in *S v. Jordan*, a case in which the ZACC was asked to determine the constitutionality of legislation criminalizing acts of prostitution, found the legislation to be valid and declared as follows:

143. *Id.* at 123-24.

144. *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 88 (S. Afr.).

145. *Id.* paras. 88-89.

146. Hovell & Williams, *supra* note 10, at 124.

147. *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) para. 36 (S. Afr.).

In a democracy those are decisions that must be taken by the legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.¹⁴⁸

In *Grootboom*, and two other cases,¹⁴⁹ the ZACC rejected adopting the concept of “minimum core” obligations, which had been developed by the CESC. ¹⁵⁰ As reasons for rejecting this international standard, the Court held that “it would involve the courts in decisions and balancing exercises most appropriately engaged in by the legislature.”¹⁵¹ In *Treatment Action Campaign*, the Court held as follows:

It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse . . . Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.¹⁵²

The ZACC sees its role as being bound “first, to enforce the terms and spirit of the *Constitution*, and second, to respect the freedom of the legislature to act within its constitutional limits.”¹⁵³ During the apartheid era in South Africa (1948-1994),¹⁵⁴ public international law was a completely neglected branch of law in the country.¹⁵⁵ Andre Stemmet, a former state law adviser (international law) in the South African Department of Foreign Affairs, explained that “South Africa’s international isolation effected a siege mentality among the ruling white minority, which in turn resulted in a lack of interest in and understanding

148. *S v Jordan* (Sex Workers Education and Advocacy Task Force as Amici Curiae) 2002 (6) SA 642 (CC) para. 30 (S. Afr.).

149. *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.); *Minister of Health v. Treatment Action Campaign* (No. 2) 2002 (5) SA 721 (CC) (S. Afr.).

150. *See, e.g., Treatment Action Campaign*, (5) SA 721, para. 26.

151. Hovell & Williams, *supra* note 10, at 124-25.

152. *Treatment Action Campaign*, (5) SA 721, para. 37-38.

153. Hovell & Williams, *supra* note 10, at 125 (emphasis in original).

154. NANCY L. CLARK & WILLIAM H. WORGER, *SOUTH AFRICA: THE RISE AND FALL OF APARTHEID*, (3d ed. 2016) (examining the evolution and eventual demise of the apartheid system in South Africa).

155. Hovell & Williams, *supra* note 10, at 125.

of international law.”¹⁵⁶ As a consequence, “public international law became a much-neglected branch of law in South Africa. It was rarely the subject of litigation and when it was, the judiciary often displayed a lack of comprehension of the principles of international law.”¹⁵⁷ In addition, the country’s apartheid courts, “under the influence of the prevailing doctrine of legal positivism, were also unwilling to apply international human rights principles in order to soften the impact of apartheid legislation.”¹⁵⁸

Stemmet then provided a positive note regarding the rise in international law, particularly, international human rights law in the post-apartheid democratic dispensation in South Africa. He stated as follows:

The unprecedented status that public international law has gained as a result of the constitutional changes in South Africa presents great challenges and opportunities to the legal fraternity. Judges, practitioners, and academicians will have to ground themselves in the principles of international law, especially international human rights law, and ensure that they keep up to date with developments in these fields in South Africa as well as in foreign jurisdictions.¹⁵⁹

In fact, noted Stemmet, “interest in international law, and especially international human rights law, has markedly increased in South Africa in recent years.”¹⁶⁰ In addition to the fact that several human rights institutes have been founded at many of the country’s law schools to spearhead research into various aspects of international law and its relationship to domestic law in South Africa, several law journals have emerged to memorialize research in this important field.¹⁶¹ Many law schools in the country now offer graduate degrees in law with an emphasis on international law, constitutional law, and/or human rights. Additionally international law is a compulsory subject for postgraduate programs at these schools.¹⁶² Finally, the International Law Association,

156. Andre Stemmet, *The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law*, 33 INT’L LAW. 47, 72 (1999).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 73.

161. These include the *South African Journal on Human Rights*, *Southern African Public Law*, *South African Yearbook of International Law*, and *Comparative and International Law of South Africa*. See Stemmet, *supra* note 156, at 72.

162. Stemmet, *supra* note 156, at 74.

which spearheads the study, clarification, and development of international law, now has a branch in South Africa.¹⁶³

In *Kaunda and Others v. President of the Republic of South Africa*, Justice O'Regan noted that "[t]he leitmotif of [South Africa's post-apartheid] Constitution is . . . the promotion and recognition of human rights" and that "[a]gain and again, [the] Constitution restates the foundational importance of human rights to our constitutional vision."¹⁶⁴ Justice O'Regan then cites the Preamble of the Constitution, which emphasizes the need to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."¹⁶⁵ While South Africa's Constitution "asserts as a foundational value the need to protect and promote human rights," adds Justice O'Regan,

[t]he importance of that foundational value is to be understood in the context of a growing international consensus that the promotion and protection of human rights is part of the responsibility of both the global community and individual states, and that there is need to take steps to ensure that those fundamental human rights recognized in international law are not infringed or impaired.¹⁶⁶

Justice O'Regan concluded that taking into consideration "this constitutional acknowledgement of the importance of both international law and international human rights, South Africa has, since 1994, signed and ratified a range of international human rights conventions."¹⁶⁷ When South Africa's government signed and ratified these international and

163. *Id.*

164. *Kaunda v. President of the Republic of South Africa* 2005 (4) SA 235 (CC) para. 220 (S. Afr.).

165. S. AFR. CONST., 1996 Preamble.

166. *Kaunda*, (4) SA 235 (CC) para. 222.

167. *Id.* para. 223. The international human rights instruments signed and ratified by South Africa include, the ICCPR; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the African Charter on Human and Peoples' Rights. *See id.* para. 222. It was in 1994 that the apartheid system was officially terminated and replaced by a non-racial democratic dispensation. Its foundation was the Constitution of the Republic of South Africa Act 118 of 1996. *See, e.g.*, JOHN C. EBY & FRED MORTON, *THE COLLAPSE OF APARTHEID AND THE DAWN OF DEMOCRACY IN SOUTH AFRICA*, 1993 (2017) (examining the demise of apartheid and the introduction of a non-racial democratic system); *see also* ANTON D. LOWENBERG & WILLIAM H. KAEMPFER, *THE ORIGINS AND DEMISE OF SOUTH AFRICAN APARTHEID: A PUBLIC CHOICE ANALYSIS* (1998) (applying public choice theory to analyze the evolution and eventual collapse of apartheid in South Africa).

regional agreements and conventions, as Justice O'Regan, it was "promoting the protection of human rights in the international arena."¹⁶⁸

To better understand the contributions of international law to the development of human rights jurisprudence in Africa, it is necessary to examine case law from the continent in which judges use international law, particularly international human rights law, as a tool to interpret constitutional rights. In the following section, this Article examines cases from Kenya, South Africa, Uganda, and Malawi, which deal with human rights issues such as the death penalty and in which the judges seek inspiration and guidance from international and regional human rights instruments to determine the constitutionality of various statutory provisions.

III. THE USE OF INTERNATIONAL LAW IN THE DEVELOPMENT OF HUMAN RIGHTS JURISPRUDENCE IN AFRICA

A. *Introduction*

Many African constitutions adopted in the 1990s made references to the relevance of international law to their domestic legal systems. For example, according to Uganda's 1995 Constitution, "[t]he foreign policy of Uganda shall be based on the principles of . . . respect for international law and treaty obligations"¹⁶⁹ Kenya's Constitution makes declarations regarding international law. For example, Article 2(5) states that "[t]he rules of international law shall form part of the law of Kenya" and Article 2(6) states that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."¹⁷⁰

Unlike that of South Africa, the constitutions of Kenya and Uganda do not impose an obligation on domestic courts to consider international law when interpreting their bills of rights or other constitutional provisions.¹⁷¹ However, despite the absence of constitutional provisions specifically directing courts to consider international law when they interpret the constitution, courts in Kenya and Uganda have used the provisions of international and regional human rights instruments as interpretive tools in cases dealing with human rights. Thus, to determine the extent to which international law is contributing to the development of human rights jurisprudence in Africa, it is necessary to examine cases involving issues of constitutional interpretation that have been

168. *Kaunda* (4) SA 235 (CC) para. 222.

169. CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995 at Objective XXVIII(i).

170. CONSTITUTION, 2010 art. 2(5)-(6) (Kenya).

171. S. AFR. CONST., 1996 § 39(1)(b).

adjudicated in selected African countries. In the following subsection, this Article will examine a case from the ZACC dealing with the constitutionality of the death penalty.¹⁷²

B. S v. Makwanyane and Another (ZACC)

This case, *S v. Makwanyane and Another*, was adjudicated by the ZACC under South Africa's Interim Constitution.¹⁷³ In *Makwanyane*, two individuals were convicted in the Witwatersrand Local Division of the Supreme Court "on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances."¹⁷⁴ They were subsequently sentenced to death on each of the four counts of murder and to long terms of imprisonment on the other counts.¹⁷⁵ The convicted individuals then appealed their convictions and sentences to the Supreme Court's Appellate Division. However, their appeals were dismissed, with the Appellate Division concluding that the "circumstances of the murders were such that the accused should receive the heaviest sentence permissible according to law."¹⁷⁶

Writing for the ZACC, Justice Chaskalson noted that Section 277(1)(a) of the Criminal Procedure Act "prescribes that the death penalty is a competent sentence for murder."¹⁷⁷ Counsel for the accused had argued before the Appellate Division that the impugned provision of the Criminal Procedure Act was not consistent with the Interim Constitution (1993), which had entered into force "subsequent to the conviction and sentence by the trial court."¹⁷⁸ The counsel for the accused had also argued that Section 277(1)(a) was "in conflict with the provisions of sections 9 and 11(2) of the Constitution."¹⁷⁹ Justice Chaskalson noted that in dismissing the appeal against the sentences on the counts of murder and

172. *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 31 (S. Afr.).

173. S. AFR. INTERIM CONST., 1993 Act 200.

174. *Makwanyane*, (3) SA 391 (CC) para. 1.

175. *Id.*

176. *Id.*

177. *Id.* para. 2. See also Criminal Procedure Act No. 51 of 1977 § 277(1)(a) (S. Afr.). Arthur Chaskalson was the first president of the new South African Constitutional Court in 1994. The Constitution of the Republic of South Africa (Amendment Act No. 34 of 2001) changed the title of the president of the Constitutional Court to that of chief justice of the Constitutional Court. See S. AFR. CONST., Amendment Act No. 34 of 2001 § 11. Section 277(1)(a) of the Criminal Procedure Act, 1977 states as follows: "Sentence of death may be passed by a superior court only and—(a) shall, subject to the provisions of subsection (2), be passed upon a person convicted of murder." Criminal Procedure Act No. 51 of 1977 § 277(1)(a) (S. Afr.).

178. *Makwanyane*, (3) SA 391 (CC) para. 1

179. *Id.*

robbery, the Appellate Division had postponed “the further hearing of the appeals against the death sentence until the constitutional issues [had been decided by the ZACC].”¹⁸⁰ Justice Chaskalson explained that the case was decided by the Witwatersrand Division of the Supreme Court before the Interim Constitution came into force and, as a consequence, “the question of the constitutionality of the death sentence did not arise at the trial.”¹⁸¹

Justice Chaskalson explained that two issues were raised, “the constitutionality of *section 277(1)(a)* of the Criminal Procedure Act, and the implications of *section 241(8)* of the Constitution,” and that although “there was no formal reference of these issues to this Court in terms of *section 102(6)* of the Constitution, that was implicit in the judgment of the Appellate Division, and was treated as such by the parties.”¹⁸² He noted further that, since the framers of the Constitution had not expressly stated “either that the death penalty is not a competent penalty, or that it is permissible in circumstances sanctioned by law,” it was now left to the ZACC to determine whether the death penalty is consistent with the provisions of the Constitution.¹⁸³ This, explained Justice Chaskalson, is “the extent and limit of the [ZACC’s] power in this case.”¹⁸⁴

Justice Chaskalson began his analysis of the case by referencing the relevant provisions of the Constitution and noting that although the Interim Constitution was a transitional constitution, it had established “a new order,” one that entrenched human rights and fundamental freedoms and democracy in South Africa.¹⁸⁵ That Constitution would be the supreme law of the Republic and “any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.”¹⁸⁶ Justice Chaskalson explained that although chapter three of the Interim Constitution sets out “the fundamental rights to which every person is entitled under the Constitution and also contains provisions dealing with the way in which the Chapter is to be interpreted

180. *Id.* para. 3.

181. *Id.* para. 4.

182. *Id.* at para. 3. Section 241 of the Interim Constitution deals with transitional arrangements affecting the judiciary, while Section 102(6) states that “[i]f it is necessary for the purpose of disposing of the said appeal for the constitutional issue to be decided, the Appellate Division shall refer such issue to the Constitutional Court for its decision.” S. AFR. INTERIM CONST., 1993 §§ 241(8), 102(6).

183. *Makwanyane*, (3) SA 391 (CC) para. 5.

184. *Id.*

185. *Id.* para. 7.

186. *Id.*

by the Courts,” it does not “deal specifically with the death penalty.”¹⁸⁷ However, Section 11(2) of the Constitution prohibits “cruel, inhuman or degrading treatment or punishment.”¹⁸⁸ Since the Constitution did not provide a definition for “cruel, inhuman or degrading,” Justice Chaskalson explained that the ZACC would “have to give meaning to these words.”¹⁸⁹

Justice Chaskalson then explained the approach adopted by the ZACC for interpreting the fundamental rights enshrined in the South African Bill of Rights.¹⁹⁰ He declared that in *S v. Zuma and Two Others*, the ZACC approved an approach to the interpretation of the Bill of Rights, which, “whilst paying due regard to the language that has been used, is ‘generous’ and ‘purposive’ and gives expression to the underlying values of the Constitution.”¹⁹¹ Justice Chaskalson noted that Kendridge AJ, who had delivered the judgment of the Court in *S v. Zuma*, referenced the following passage from the Canadian case of *R v. Big M Drug Mart Ltd.*:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.¹⁹²

Stating that there was no need to elaborate on the ruling in *Zuma*, Justice Chaskalson explained that Section 11(2) of the Constitution “must

187. *Id.* para. 8.

188. *Id.* para. 8; *See also* S. AFR. CONST., 1993 § 11(2). Section 11(2) states as follows: “No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.” S. AFR. CONST., 1993 § 11(2).

189. *Makwanyane*, (3) SA 391 (CC) para. 8.

190. *See* S. AFR. CONST., 1993 Chapter Three.

191. *Makwanyane*, (3) SA 391 (CC) para. 9; *See also* *S v. Zuma* 1995 (2) SA 642 (CC) (S. Afr.).

192. *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344 (Can. Alta. S.C.C.) (emphasis in original).

not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of chapter three of which it is part.”¹⁹³ In addition, remarked Justice Chaskalson, Section 11(2) must be construed in a way “which secures for ‘individuals the full measure’ of its protection.”¹⁹⁴ Thus, he concluded, “[p]unishment must meet the requirements of *sections* 8, 9 and 10; and this is so, whether these sections are treated as giving meaning to Section 11(2) or as prescribing separate and independent standards with which all punishment must comply.”¹⁹⁵

Justice Chaskalson then explained that during the hearing of the matter, the South African government had informed the Court that it “accepts that the death penalty is a cruel, inhuman and degrading punishment and that it should be declared unconstitutional.”¹⁹⁶ Noting that South African courts have “held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question,” Justice Chaskalson provided a review of the impugned provision of Section 277(1)(a) of the Criminal Procedure Act prescribing the death penalty as a competent sentence for murder.¹⁹⁷

Justice Chaskalson then stated that during the constitutional negotiations, the issue of the death penalty was not resolved.¹⁹⁸ However, the Parliamentary negotiators adopted the “Solomonic solution”; “[t]he death sentence was, in terms, neither sanctioned nor excluded, and it was left to the [ZACC] to decide whether the provisions of the pre-constitutional law making the death penalty a competent sentence for murder and other crimes are consistent with Chapter Three of the Constitution.”¹⁹⁹

Death, Justice Chaskalson noted, “is the most extreme form of punishment to which a convicted criminal can be subjected” as the execution of the death penalty is “final and irrevocable.”²⁰⁰ The Court then proceeded to determine whether the death penalty is a “cruel, inhuman or degrading punishment.”²⁰¹ First, the Court provided an overview of the

193. *Makwanyane*, (3) SA 391 (CC) para. 10.

194. *Id.*

195. *Id.* (emphasis in original).

196. *Id.* para. 11.

197. *Id.* paras. 12-25.

198. *Id.* para. 25.

199. *Id.* para. 10. Chapter 3 enshrines fundamental rights (sections 7-35). *See* S. AFR. CONST., 1993 Chapter Three (§§ 7-35).

200. *Makwanyane*, (3) SA 391 (CC) para. 26.

201. *Id.* at para. 27.

death penalty in what was referred to as the “old Republic of South Africa.”²⁰² Second, the Court sought inspiration from international and foreign comparative law.²⁰³ Justice Chaskalson then explained that Section 231 of the Constitution sets out the requirements for how customary international law and treaties and agreements signed and ratified by South Africa become law binding within South Africa.²⁰⁴ Justice Chaskalson explained that in Section 35(1) of the Constitution, which deals with the interpretation of the Bill of Rights, public international law includes “non-binding as well as binding law.”²⁰⁵ Thus, he concluded, “[i]nternational agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood.”²⁰⁶

Justice Chaskalson begins his analysis of the use of international law as a tool to interpret Section 11(2) of the Constitution by noting that “[c]apital punishment is not prohibited by public international law” and that this is a factor that “has to be taken into account in deciding whether [capital punishment] is cruel, inhuman or degrading punishment within the meaning of section 11(2).”²⁰⁷ Justice Chaskalson then notes that international human rights agreements, such as the ICCPR, the American Convention on Human Rights, the ECHR, and the Banjul Charter, differ from South Africa’s Constitution: “[W]here the right to life is expressed in unqualified terms they either deal specifically with the death sentence, or authorize exceptions to be made to the right to life by law.”²⁰⁸ This, he explained, “has influenced the way international tribunals have dealt with issues relating to capital punishment, and is relevant to a proper understanding of such decisions.”²⁰⁹

Justice Chaskalson then explained that when the death sentence has been challenged in international or foreign courts and tribunals and these challenges have failed, “the constitution or the international instrument concerned has either directly sanctioned capital punishment or has

202. The old South Africa did not include the former Transkei, Bophuthatswana, Venda, and Ciskei, which were treated by the apartheid government as independent states and hence had their own legislation on crime and criminal procedures. *See id.* para. 29.

203. *Id.* paras. 33-95.

204. *Id.* para. 35; *See also* S. AFR. CONST., 1993 § 231.

205. *Makwanyane*, (3) SA 391 (CC) para. 35.

206. *Id.* Chapter 3 is the Bill of Rights.

207. *Id.* at para. 36. Section 11(2) states that “[n]o person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.” S. AFR. CONST., 1993 § 11(2).

208. *Makwanyane*, (3) SA 391 (CC) para. 36.

209. *Id.*

specifically provided that the right to life is subject to exceptions sanctioned by law.”²¹⁰ In gaining inspiration from comparative law, noted Justice Chaskalson, the Court must

bear in mind that [it is] required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution

and that while South African courts can “derive assistance from public international law and foreign case law,” they are “in no way bound to follow it.”²¹¹

Justice Chaskalson began his analysis of whether the death penalty offends Section 11(2) of the Constitution, specifically whether its application is arbitrary and unequal, by examining death penalty jurisprudence from the U.S. Supreme Court.²¹² After examining U.S. Supreme court cases, such as *Furman v. Georgia*,²¹³ Justice Chaskalson concluded that U.S. jurisprudence “has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishment, but also permits, and contemplates, that there will be capital punishment.”²¹⁴ Justice Chaskalson noted further that “[t]he acceptance by a majority of the [U.S.] Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation” and that the difficulties that have befallen American courts have persuaded him that the ZACC “should not follow” the route chosen by U.S. courts.²¹⁵

Next, Justice Chaskalson examined the right to dignity and noted that the U.S. Constitution does not have provisions that provide a “specific guarantee of human dignity” and that the country’s Supreme Court has agreed that “the concept of human dignity is at the core of the prohibition of ‘cruel and unusual punishment’ by the Eighth and Fourteenth Amendments.”²¹⁶ Justice Chaskalson cited *Gregg v.*

210. *Id.* para. 38.

211. *Id.* para. 39.

212. *Id.* para. 40.

213. *Furman v. Georgia*, 408 U.S. 238 (1972).

214. *Makwanyane*, (3) SA 391 (CC) para. 56.

215. *Id.*

216. *Id.* para. 57.

Georgia,²¹⁷ where Justice Brennan speaks to the issue of human dignity.²¹⁸ Justice Chaskalson then explained that South Africa's new post-apartheid constitutional order specifically guarantees the right to dignity and that "it can only be limited by legislation which passes the stringent test of being 'necessary'" and that "[t]he weight given to human dignity by Justice Brennan is wholly consistent with the values of [South Africa's] Constitution and the new order established by it."²¹⁹

Justice Chaskalson then noted that the Federal Constitutional Court of Germany (GCC) has stressed respect for human dignity, specifically holding that "[r]espect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishment."²²⁰ The Canadian Supreme Court, noted Justice Chaskalson, has also recognized that capital punishment "constitutes a serious impairment of human dignity."²²¹ In *Kindler v. Canada*, Justice Chaskalson explained, three of the seven judges who had heard the case declared that the death penalty was "cruel and unusual."²²² Three other *Kindler* judges expressed that "[t]here is strong ground for believing that having regard to the limited extent to which the death penalty advances any valid penological objectives and the serious invasion of human dignity it engenders that the death penalty cannot, except in exceptional circumstances, be justified in this country."²²³

The issue to be decided in *Kindler* was whether "the action of the [Canadian] Minister of Justice, who had authorised the extradition without any assurance that the death penalty would not be imposed, was constitutional."²²⁴ The Canadian Supreme Court sought to balance the country's international obligations in respect of extradition and the need to prevent Canada from becoming a haven for criminals against the likelihood that the fugitives would be executed if they returned to the United States.²²⁵ The majority in *Kindler* held that returning the fugitives

217. *Gregg v. Georgia*, 428 U.S. 153 (1976).

218. *Makwanyane*, (3) SA 391 (CC) para. 59.

219. *Id.* para. 58.

220. Quoted in *id.* para. 59.

221. *Id.* para. 60.

222. *Id.*; See also *Kindler v. Canada* (Minister of Justice), [1991] 2 S.C.R. 779, 818 (Can. S.C.C.).

223. *Kindler*, 2 S.C.R. at 833.

224. *Makwanyane*, (3) SA 391 (CC) para. 62. *Kindler* concerned the extradition from Canada of two fugitives, Kindler, who had been convicted of murder and sentenced to death in the United States, and Ng, who faced a murder charge in the United States and the possibility of a death sentence. See *Kindler*, 2 S.C.R. para. 60.

225. *Makwanyane*, (3) SA 391 (CC) para. 62.

to the United States “could not be said to be contrary to the fundamental principles of justice.”²²⁶

The fugitives in *Kindler*—Ng and Kindler—subsequently took their case to the U.N. Human Rights Committee (HRC) where they argued that Canada had breached its obligations under the ICCPR.²²⁷ Justice Chaskalson noted that although there was a division of opinion within the HRC, there was no dissent from the statement that “[t]he Committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the [ICCPR].”²²⁸ Justice Chaskalson noted that although “articles 6(2) to (5) of the [ICCPR] specifically allow the imposition of the death penalty under strict controls ‘for the most serious crimes’ by those countries which have not yet abolished it,” the ICCPR also provides in “article 6(6) that ‘[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.’”²²⁹

In conclusion, noted Justice Chaskalson,

[d]espite these differences of opinion, what is clear from the decisions of the [HRC] of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the International Covenant authorising the imposition of capital punishment by member States in certain circumstances, that the words had to be given a narrow meaning.²³⁰

Next, Justice Chaskalson noted that issues similar to those before the ZACC were examined by the ECtHR in *Soering v. United Kingdom*.²³¹ *Soering* was also concerned with the extradition of a fugitive, Soering, to the United States to face “murder charges for which capital punishment was a competent sentence.”²³² Counsel for Soering argued before the ECtHR that extradition to the United States would expose the fugitive to “inhuman and degrading treatment and punishment contrary Article 3 (art. 3) of the [ECHR].”²³³ Although Article 2 of the ECHR protects the

226. *Id.*

227. *Id.* para. 63.

228. *Id.* paras. 63-64.

229. *Id.* para. 66 (emphasis in original).

230. *Id.* para. 67.

231. *Soering v. United Kingdom*, App. No.14038/88, Eur. Ct. H. R. Rep. ¶¶ 103, 111 (1989), <https://hudoc.echr.coe.int/?i=001-57619>

232. *Makwanyane*, (3) SA 391 (CC) para. 68; *Soering*, App. No.14038/88 ¶ 105.

233. *Makwanyane*, (3) SA 391 (CC) para. 68; *Soering*, App. No.14038/88 ¶ 76.

right to life, it grants an exception in the case of “the execution of a sentence of a court following [the] conviction of a crime for which this penalty is provided by law.”²³⁴ The ECtHR held that extraditing Soering to the United States to face trial in Virginia would “expose him to a real risk of treatment going beyond the threshold of Article 3.”²³⁵

Noting that in *Makwanyane*, the ZACC was in a comparable position as the ECtHR in *Soering*, Justice Chaskalson then explained that if the ZACC were to hold that the death penalty is unconstitutional, that would not involve a choice between freedom and death but such a holding would involve “a choice between death in the very few cases which would otherwise attract that penalty under section 277(1)(a), and the severe penalty of life imprisonment.”²³⁶

After explaining that in its *amicus brief* in *Makwanyane* the South African police relied on decisions of the Indian Supreme Court, Justice Chaskalson concluded that it was necessary for the ZACC to make reference to the way the law on capital punishment has developed in India.²³⁷ Justice Chaskalson cited Section 302 of the Indian Penal Code which provides for the imposition of the death sentence as a penalty for murder and that in *Bachan Singh v. State of Punjab*, the Supreme Court determined the constitutionality of this section.²³⁸ Justice Chaskalson noted that in *Bachan Singh*, there was also “a challenge to the constitutionality of the legislation on the grounds of arbitrariness” and that the majority of the Indian Supreme Court had “rejected the argument that a discretion exercised judicially by persons of experience and standing, in accordance with principles crystallized by judicial decisions, is not an arbitrary discretion.”²³⁹ However, noted Justice Chaskalson, “long delays in carrying out the death sentence in particular cases have apparently been held in India to be unjust and unfair to the prisoner, and in such circumstances the death sentence is liable to be set aside.”²⁴⁰

Next, Justice Chaskalson considered the “unqualified right to life vested in every person by section 9 of [the Interim Constitution].”²⁴¹ He explained that the provision of this section of the Constitution “is another factor crucially relevant to the question whether the death sentence is

234. *Makwanyane*, (3) SA 391 (CC) para. 68; *Soering*, App. No.14038/88 ¶ 101.

235. *Makwanyane*, (3) SA 391 (CC) para. 69; *Soering*, App. No.14038/88 ¶ 105.

236. *Makwanyane*, (3) SA 391 (CC) para. 69.

237. *Id.* para. 70.

238. *Id.* para. 71, 79; *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 ¶ 208; Indian Penal Code, § 302.

239. *Makwanyane*, (3) SA 391 (CC) para. 79.

240. *Id.*

241. *Id.* para. 80; *See also* S. AFR. INTERIM CONST., 1993 § 9.

cruel, inhuman or degrading punishment within the meaning of *section 11(2)* of [the] Constitution [of South Africa].”²⁴² Justice Chaskalson explained further that South Africa’s Constitution “differs materially from the Constitutions of the United States and India,” as well as from the ECHR and the ICCPR.²⁴³

However, some judges dissented in cases decided under “these constitutions and treaties” and “held that notwithstanding the specific language of the constitution or instrument concerned, capital punishment should not be permitted.”²⁴⁴ Some of the dissents, such as that in *Soering*, focused on the right to life.²⁴⁵ In a concurring opinion in *Soering*, Judge de Meyer declared that capital punishment is “not consistent with the present state of European civilization” and that if the fugitive were extradited to the United States, that action would violate his right to life.²⁴⁶ Additionally, noted Justice Chaskalson, in a dissent in the HRC’s decision in the *Kindler* case, HRC member B. Wennergren stressed the importance of the right to life.²⁴⁷ Finally, Justice Chaskalson examined the Hungarian Constitutional Court’s consideration of the right to life in a case in which it declared capital punishment to be unconstitutional.²⁴⁸ Noting that the Hungarian Court had held “capital punishment to be unconstitutional on the grounds that it is inconsistent with the right to life and the right to dignity,” Justice Chaskalson explained that South Africa’s Constitution does not include “the qualification found in *section 54(1)* of the Hungarian Constitution, which prohibits only the *arbitrary* deprivation of life” and that to that extent, the right to life in South Africa’s Constitution “is given greater protection than it is by the Hungarian Constitution.”²⁴⁹

Justice Chaskalson explained that in both the United States and India, where capital punishment is legally sanctioned, the fact that these countries’ highest courts

have intervened on constitutional grounds in particular cases to prevent the carrying out of death sentences, because in the particular circumstances of such cases, it would have been cruel to do so, evidences the importance attached to the protection of life and the

242. *Makwanyane*, (3) SA 391 (CC) para. 80.

243. *Id.*

244. *Id.*

245. *Id.* para. 81.

246. *Id.*

247. *Id.* para. 82.

248. *Id.* para. 83.

249. *Id.* para. 83, 85.

strict scrutiny to which the imposition and carrying out of death sentences are subjected when a constitutional challenge is raised.²⁵⁰

A similar concern, noted Justice Chaskalson, was apparent in the decisions of the ECtHR and the HRC.²⁵¹

The next issue examined by Justice Chaskalson is how South African public opinion views the death penalty.²⁵² He noted that while public opinion may be relevant to the inquiry on the constitutionality of the death penalty, it in itself cannot substitute “for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour” and that if public opinion were to be decisive, there will be no need for courts to engage in constitutional adjudication.²⁵³ Under such a legal system in which public opinion is determinative, the protection of human and fundamental rights would fall within the exclusive purview of Parliament, “which has a mandate from the public, and is answerable to the public for the way its mandate is exercised.”²⁵⁴ However, such an approach would return South Africa to parliamentary sovereignty and effectively remove the country from the “new legal order established by the 1993 Constitution.”²⁵⁵

Justice Chaskalson explained that the determination of the constitutionality of capital punishment cannot be submitted to a popular referendum, “in which a majority view would prevail over the wishes of any minority.”²⁵⁶ Justice Chaskalson explained further that “the very reason” that South Africans established a new legal order through the 1993 Constitution and vested “the power of judicial review of all legislation in the courts[] was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process” and that “[t]hose who are entitled to claim this protection include the social outcasts and marginalised people of our society.”²⁵⁷

The ZACC, Justice Chaskalson clarified, must not stray from its duty to serve as “an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.”²⁵⁸ He then

250. *Id.* para. 86.

251. *Id.*

252. *Id.* para. 87.

253. *Id.* para. 88.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* para. 89.

cited *Furman v. Georgia*, the U.S. Supreme Court case in which Justice Powell stated as follows:

[T]he weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function.²⁵⁹

Justice Chaskalson concluded the discussion on public opinion and its relevance to constitutional interpretation by citing *West Virginia State Board of Education v. Barnette*, another U.S. Supreme Court case in which Justice Jackson stated as follows:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²⁶⁰

Justice Chaskalson then reiterated that the U.N. Committee on Human Rights, the Hungarian Constitutional Court, and three judges of the Canadian Supreme Court, have all held that “the death penalty by definition is cruel and degrading punishment.”²⁶¹ He added that the death sentence has “also been held to be cruel or unusual punishment and thus unconstitutional under the state constitutions of Massachusetts and California.”²⁶² Justice Chaskalson then concluded that the death sentence “destroys life, which is protected without reservation under *section 9* of [South Africa's] Constitution,” noting that “it annihilates human dignity which is protected under *section 10*, elements of arbitrariness are present in its enforcement and it is irremediable.”²⁶³ Justice Chaskalson then declared:

Taking these factors into account, as well as the assumption that I have made in regard to public opinion in South Africa, and giving the words of

259. *Furman v. Georgia*, 408 U.S. 238, 443 (1972).

260. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

261. *Makwanyane*, (3) SA 391 (CC) para. 90.

262. *Id.*

263. *Id.* para. 95.

section 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.²⁶⁴

The next issue that Justice Chaskalson examined was whether capital punishment is justifiable as a penalty for murder in the circumstances contemplated by *sections 277(1)(a), 316A and 322(2A)* of the Criminal Procedure Act.²⁶⁵ Justice Chaskalson began the analysis by noting that while it is “difficult to conceive of any circumstances in which torture, which is specifically prohibited under *section 11(2)*, could ever be justified,” this does not necessarily apply to capital punishment, which, unlike torture, has not been “absolutely prohibited by public international law.”²⁶⁶ Hence, noted Justice Chaskalson, it is not “inappropriate” for South African courts to “consider whether the death penalty is justifiable under our Constitution as a penalty for murder.”²⁶⁷ The way forward, notes Justice Chaskalson, is for the ZACC to undertake an inquiry similar to that undertaken in *Furman* where Justice Brennan seeks to address the contention that “death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment.”²⁶⁸

Justice Chaskalson then reviews case law from various jurisdictions in the United States, including the Supreme Court of California, as well as the U.S. Supreme Court.²⁶⁹ He notes that South Africa’s Constitution “deals with the limitation of rights through a general limitation clause” and that this was interpreted by Acting Justice Kentridge in *S v. Zuma and Two Others* to mean a “two-stage” approach.²⁷⁰ Through the two-stage approach, “a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three” and, in addition, limitations on rights “have to be justified through the application of *section 33*.”²⁷¹ This, Justice Chaskalson explained, is different from the U.S. Constitution, which does not have a limitation clause, and as a result,

264. *Id.* (emphasis in original).

265. *Id.* para. 96; *see* Criminal Procedure Act No. 51 of 1977 § 277(1)(a) (S. Afr.).

266. *Makwanyane*, (3) SA 391 (CC) para. 97.

267. *Id.*

268. *Id.*; *See* S. AFR. INTERIM CONST., 1993 § 36; *see also* *Furman v. Georgia*, 408 U.S. 238, 300-01 (1972).

269. *Makwanyane*, (3) SA 391 (CC) paras. 97-98.

270. *Id.* para. 100; *S v. Zuma and Two Others* 1995 (2) SA 642 para. 21 (CC) (S. Afr.); S. AFR. INTERIM CONST., 1993 § 33.

271. *Makwanyane*, (3) SA 391 (CC) para. 100.

U.S. courts are “obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves.”²⁷² He then cited the plurality’s judgment in *Gregg*:

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification, and thus is not unconstitutionally severe.²⁷³

Under South Africa’s Constitution, noted Justice Chaskalson, “the position is different” from that in the United States” and this is so because “[i]t is not whether the decision of the State has been shown to be clearly wrong; it is whether the decision of the State is justifiable according to the criteria prescribed by *section 33*.”²⁷⁴ That is, “it is whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary, and to be consistent with the other requirements of *section 33*.”²⁷⁵ Finally, noted Justice Chaskalson, “[i]t is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified.”²⁷⁶

Justice Chaskalson then provides an overview of *Section 33(1)*, which prescribes criteria for the limitation of any right enshrined in *Section 11(2)*: (i) that the limitation must be justifiable in an open and democratic society based on freedom and equality, (ii) that it must be both reasonable and necessary, and (iii) that it must not negate the essential content of the right.²⁷⁷ After noting that the limitation of constitutional rights “for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality,” Justice Chaskalson explained that when undertaking the process, “regard must be had to the provisions of *section 33(1)*, and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, ‘the role of the Court is not to second-guess the wisdom of policy choices made by legislators.’”²⁷⁸

272. *Id.*

273. *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976).

274. *Makwanyane*, (3) SA 391 (CC) para. 102.

275. *Id.*

276. *Id.*

277. *Id.* at para. 103 (e.g. § 33 of the Constitution).

278. *Makwanyane*, (3) SA 391 (CC) para. 104.

Justice Chaskalson began the analysis by examining case law on rights limitation in Canada, noting that the Canadian Charter of Rights, like South Africa's Constitution, makes provision for the limitation of rights through a general clause.²⁷⁹ Section 1 of the Canadian Charter, Justice Chaskalson explained, provides for "such reasonable limitations of Charter rights 'as can be demonstrably justified in a free and democratic society.'"²⁸⁰ After citing Chief Justice Dickson in the Canadian Supreme Court case, *R v. Oakes*, Justice Chaskalson concluded that

[a]lthough there is a rational connection between capital punishment and the purpose for which it is prescribed, the elements of arbitrariness, unfairness and irrationality in the imposition of the penalty, are factors that would have to be taken into account in the application of the first component of the test.²⁸¹

With respect to the second component of the test, Justice Chaskalson noted that since there exists an alternative and severe punishment in the form of life imprisonment, that alternative would be relevant "to the question whether the death sentence impairs the right as little as possible."²⁸²

Justice Chaskalson then returned to the Canadian Supreme Court case *R v. Oakes* and noted that the second requirement in the *Oakes* test is that the limitation on the right should impair the right "as little as possible" and that this raises "a fundamental problem of judicial review."²⁸³ Justice Chaskalson explained that the Canadian Supreme Court was quite aware of and sensitive to the issue of separation of powers, which is "particularly acute where choices have to be made in respect of matters of policy."²⁸⁴ Justice Chaskalson cited the Canadian case *Reference re ss. 193 and 195(1)(c) of the Criminal Code (Manitoba)* where it was stated that "it is not the role of this Court to second-guess the wisdom of policy choices made by . . . legislators."²⁸⁵ In *R v. Chaulk*, another Canadian case, it was held that this means that the right must be

279. *Id.* para. 105.

280. *Id.*

281. *Id.* para. 106; *R v. Oakes*, [1986] 1 S.C.R. 103, 106 (Can. Ont. C.A.).

282. *Makwanyane*, (3) SA 391 (CC) para. 106.

283. *Id.* para. 107; *Oakes*, 1 S.C.R. at 106.

284. *Makwanyane*, (3) SA 391 (CC) para. 107.

285. *Id.*; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 1199 (Can.).

impaired “as little as is reasonably possible.”²⁸⁶ The Canadian Supreme Court also held that “the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual’s *Charter* rights” and that “[w]here the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down.”²⁸⁷

Next, Justice Chaskalson examined the limitation of constitutional rights in Germany and noted that although the German Constitution does not contain a general limitation clause, it provides for “certain basic rights to be limited by law.”²⁸⁸ Justice Chaskalson notes that proportionality is central “to the process followed by the [GCC] in its adjudication upon the limitation of rights” and that the German Constitution has a “a provision similar to section 33(1)(b) of [the South African] Constitution.”²⁸⁹ However, noted Justice Chaskalson, the GCC “avoids making use of this provision, preferring to deal with extreme limitations of rights through the proportionality test.”²⁹⁰

With respect to the limitation of rights under the ECHR, Justice Chaskalson notes that the ECHR does not have a general limitations clause but that it makes certain rights “subject to limitation according to specified criteria.”²⁹¹ The ECtHR has a proportionality test that calls for “a balancing of ends and means.”²⁹² Specifically, the “end” must be a “pressing social need” and the “means” must be “proportionate to the attainment of such an end.”²⁹³ With respect to certain rights, their limitation is “conditioned upon the limitation being ‘necessary in a democratic society’ for purposes defined in the relevant provisions of the [ECHR].”²⁹⁴ While the ECtHR’s jurisprudence “provides some guidance as to what may be considered necessary in a democratic society,” notes Justice Chaskalson, “the margin of appreciation allowed to national authorities by the [ECtHR] must be understood as finding its place in an

286. *Makwanyane*, (3) SA 391 (CC) para. 107; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, 1305 (Can.).

287. *Makwanyane*, (3) SA 391 (CC) para. 107; *Tétreault-Gadoury v. Canada*, [1991] 2 S.C.R. 22, 44 (Can. Fed. C.A.).

288. *Makwanyane*, (3) SA 391 (CC) para. 108.

289. *Id.*

290. *Id.*

291. *Id.* para. 109.

292. *Id.*

293. *Id.*

294. *Id.*

international agreement which has to accommodate the sovereignty of member states” and that this is not necessarily “a safe guide as to what would be appropriate under section 33 of [South Africa’s] Constitution.”²⁹⁵

Regarding the issue whether capital punishment for murder is justifiable under South Africa’s Constitution, Justice Chaskalson noted Acting Justice Kentridge’s point in *Zuma* that

the criteria developed by the Canadian Courts for the interpretation of *section 1* of the Canadian Charter of Rights may be of assistance to [South African] Courts, but that there are differences between [South Africa’s] Constitution and the Canadian Charter which have a bearing on the way in which section 33 should be dealt with.²⁹⁶

Justice Chaskalson concluded that, like Justice Kentridge, he did not see any reason to try to fit the ZACC’s analysis in the case at bar into “the Canadian pattern” or, for that matter, into “the pattern followed by any of the other courts to which reference has been made.”²⁹⁷ He then noted that *section 33* of South Africa’s Constitution “prescribes in specific terms the criteria to be applied for the limitation of different categories of rights” and that it was “in the light of these criteria that the death sentence for murder has to be justified.”²⁹⁸

South Africa’s Constitution, Justice Chaskalson explains, mandates that each person is entitled to claim the protection of the rights contained or enshrined in the Bill of Rights and that no person shall be denied the protection provided or offered by these rights.²⁹⁹ In addition, respect for life and dignity, “which are at the heart of *section 11(2)* are values of the highest order under [South Africa’s] Constitution,” and the “carrying out of the death penalty would destroy these and all other rights that the convicted person has, and a clear and convincing case must be made out to justify such action.”³⁰⁰ Before the ZACC, noted Justice Chaskalson, South Africa’s attorney general (ZAGG) had argued that the death penalty for murder “meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do,” that “[i]t has a greater deterrence effect than life imprisonment,” and finally, that it “ensures that the worst murderers will not endanger the lives of prisoners

295. *Id.*

296. *Id.* para. 110.

297. *Id.*

298. *Id.*

299. *Id.* para. 111.

300. *Id.*

and warders who would be at risk if the ‘worst of the murderers’ were to be imprisoned and not executed.”³⁰¹

The attorney general had also argued that his justifications for the imposition of the death penalty had been recognized by the Appellate Division.³⁰² However, Justice Chaskalson explained that the decisions of the Appellate Division, were “only of limited relevance to the questions that have to be decided in the [case before the Court].”³⁰³ Justice Chaskalson explained that the criteria set by the Appellate Division “for the passing of a death sentence for murder are relevant to the argument on arbitrariness” and that they also “provide a basis for testing the justifiability of such a penalty,” but that they “do not, however, do more than that.”³⁰⁴

Justice Chaskalson then noted that there was support for the attorney general’s argument in the judgment of the Tanzanian Court of Appeal (TCA) in *Mbushuu and Another v. The Republic*.³⁰⁵ While the *Mbushuu* Court had held that the death sentence is a cruel and degrading form of punishment, which is prohibited under the Constitution of Tanzania, the TCA, nevertheless, declared that the death sentence was not unconstitutional.³⁰⁶ The TCA had explained that Tanzania’s Constitution provided for derogations to be made from “basic rights for legitimate purposes” and that a derogation is lawful “if it was not arbitrary, and reasonably necessary for such purpose.”³⁰⁷ The TCA, noted Justice Chaskalson, had explained that the death sentence was a mandatory sentence for murder that it did not consider to be arbitrary “because decisions as to guilt or innocence are taken by judges.”³⁰⁸

However, while the TCA agreed that “[t]here was no proof one way or the other that the death sentence was necessarily a more effective punishment than a long period of imprisonment,” the Tanzanian Court stated that “it was for society and not the courts to decide whether the death sentence was a necessary punishment.”³⁰⁹ Satisfied that Tanzanian society favored the death penalty and that “in the circumstances ‘the reasonable and necessary’ standard had been met,” the TCA held that the

301. *Id.* para. 112.

302. *Id.* para. 113.

303. *Id.*

304. *Id.*

305. *Mbushuu alias Dominic Mnyaroje v. Republic of Tanz.*, [1995] TZCA 106, 98 (Tanzania).

306. *Makwanyane*, (3) SA 391 (CC) para. 114; *Mbushuu*, TZCA 106 at 117.

307. *Makwanyane*, (3) SA 391 (CC) para. 114; *Mbushuu*, TZCA 106 at 112-13.

308. *Makwanyane*, (3) SA 391 (CC) para. 114; *Mbushuu*, TZCA 106 at 115.

309. *Makwanyane*, (3) SA 391 (CC) para. 114; *Mbushuu*, TZCA 106 at 116-17.

death sentence was “a lawful derogation from the prohibition of cruel and degrading punishment, and thus valid.”³¹⁰

After examining *Mbushuu*, Justice Chaskalson remarked that the approach taken by the TCA “to issues concerning the limitation of basic rights seems to have been influenced by the language of the Tanzanian Constitution,” as well as, “rules of interpretation developed by the Courts to deal with that language.”³¹¹ Justice Chaskalson then explained that the relevant provisions in South Africa’s Constitution are quite different from those in Tanzania’s Constitution and that the correct approach to the interpretation of the limitations clause of the Constitution is to be found in “the language of *section 33* construed in the context of the Constitution as a whole.”³¹² He noted that while the ZACC was expected to “have regard to societal attitudes in evaluating whether legislation is reasonable and necessary,” ultimately, the decision must be the Court’s.³¹³

In his presentation to the Court in *Makwanyane*, the ZAAG attached “considerable weight to the need for a deterrent to violent crime” and argued that countries that had abolished the death penalty “were on the whole developed and peaceful countries in which other penalties might be sufficient deterrents.”³¹⁴ He argued further that South Africa had not reached that stage of development and that when the country eventually achieved that level of development, the death penalty could be abolished.³¹⁵ Justice Chaskalson then explained that while the need for a strong deterrent to crime is important and is not in dispute and that it is of fundamental importance to the future of South Africa that “respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly,” the relevant question is “whether the death sentence for murder can legitimately be made part of that law.”³¹⁶ The answer to that question, Justice Chaskalson explained, must meet the criteria prescribed by section 33(1) of the Constitution.³¹⁷

Justice Chaskalson explained that the surge in crime in South Africa cannot simply be attributed to the failure to carry out the death penalty that was imposed by the courts.³¹⁸ The country’s upsurge in crime came at a time of significant social change in South Africa that was “associated

310. *Makwanyane*, (3) SA 391 (CC) para. 114; *Mbushuu*, TZCA 106 at 117.

311. *Makwanyane*, (3) SA 391 (CC) para. 115.

312. *Id.* (e.g. § 33 of the Constitution).

313. *Makwanyane*, (3) SA 391 (CC) para. 115.

314. *Id.* para. 116.

315. *Id.*

316. *Id.* para. 117.

317. *Id.*

318. *Id.* para. 119.

with political turmoil and conflict, particularly during the period 1990 to 1994.”³¹⁹ Progress toward significant levels of crime in South Africa started long before the courts placed a moratorium on executions.³²⁰ In addition, factors such as homelessness, unemployment, poverty, “the frustration subsequent upon such conditions,” as well as the failure of the police to effectively maintain law and order, “are other causes of the crime wave.”³²¹ Justice Chaskalson then concluded that “[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished” and that this, unfortunately, is what is lacking in South Africa’s criminal justice system.³²²

While the death penalty ensures that the criminal will never again commit murder, noted Justice Chaskalson, it is not the only way to achieve that objective.³²³ The sentence of life imprisonment can serve the same purpose.³²⁴ With respect to retribution, Justice Chaskalson noted that capital punishment is “not the only way that society has of expressing its moral outrage at the crime that has been committed” and that “[a] very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal.”³²⁵ Justice Chaskalson then cited a provision from the National Unity and Reconciliation which states as follows:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and *revenge*.

These can now be addressed on the basis that there is a need for understanding but *not for vengeance*, a need for reparation but *not for retaliation*, a need for *ubuntu* but *not for victimisation*.³²⁶

Justice Chaskalson noted that although the commitment found in the National Unity and Reconciliation document “has its primary application in the field of political reconciliation,” it is, however, “not without relevance to the enquiry we are called to undertake in the present case”

319. *Id.*

320. *Id.*

321. *Id.* para. 120.

322. *Id.* para. 122.

323. *Id.* para. 128.

324. *Id.*

325. *Id.* para. 129.

326. *Id.* para. 130 (emphasis added by Justice Chaskalson.).

and that “[t]o be consistent with the value of ubuntu,” South Africa’s “should be a society that ‘wishes to prevent crime . . . [not] to kill criminals simply to get even with them.’”³²⁷ Section 33(1)(b) of the Constitution of South Africa, Justice Chaskalson noted, provides that a limitation “shall not negate the essential content of the right” and that the difficulty in interpreting this provision “arises from the uncertainty as to what the ‘essential content’ of a right is, and how it is to be determined.”³²⁸ Justice Chaskalson concluded, however, that it is not necessary for the ZACC to “solve this problem in the present case” and then proceeded to examine what he terms “the balancing process.”³²⁹

Justice Chaskalson explained that

[i]n the balancing process, deterrence, prevention and retribution must be weighed against the alternative punishments available to the state, and the factors which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty.³³⁰

After stating that the ZAAG’s argument that the right to life and the right to human dignity are not absolute concepts was fallacious, Justice Chaskalson then explained that although the rights vested in every person by the Bill of Rights are subject to limitation under Section 33, “the rights vest in every person, including criminals convicted of vile crimes” and that such criminals “do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment.”³³¹

In conclusion, Justice Chaskalson stated that the rights to life and dignity are the most important of all of human rights as well as “the source of all other personal rights in Chapter Three” and that “[b]y committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”³³² He added that these objectives cannot be achieved in South Africa by “objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.”³³³

327. *Id.* para. 131.

328. *Id.* para. 132.

329. *Id.* para. 134.

330. *Id.* para. 135.

331. *Id.* para. 136-37.

332. *Id.* para. 144.

333. *Id.*

With respect to the balancing process, Justice Chaskalson explained that the principal factors that the Court must weigh are, on the one hand, the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment, and the existence of a severe alternative punishment (life imprisonment) and, on the other, the claim that the death sentence is a greater deterrent to murder, and will more effectively prevent its commission, than would a sentence of life imprisonment, and that there is a public demand for retributive justice to be imposed on murderers, which only the death sentence can meet.³³⁴

With respect to retribution, Justice Chaskalson explained that it cannot be granted the same “weight under [the] Constitution [of South Africa] as the rights to life and dignity, which are the most important of all the rights in Chapter Three.”³³⁵ In addition, noted Justice Chaskalson, “[i]t has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be.”³³⁶ Chaskalson P then concluded that if all these factors are taken into account, “as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out.”³³⁷ Hence, Justice Chaskalson held, “[t]he requirements of section 33(1) have accordingly not been satisfied, and it follows that the provisions of *section 277(1)(a)* of the Criminal Procedure Act, 1977 must be held to be inconsistent with *section 11(2)* of the Constitution.”³³⁸

Justice Chaskalson then made the following order:

(1) In terms of *section 98(5)* of the Constitution, and with effect from the date of this order, the provisions of paragraphs (a), (c), (d), (e), and (f) of *section 277(1)* of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which are in force in any part of the national territory in terms of *section 229*, are declared to be inconsistent with the Constitution and, accordingly, to be invalid.

334. *Id.* para. 145.

335. *Id.* para. 146.

336. *Id.*

337. *Id.*

338. *Id.*

(2) In terms of section 98(7) of the Constitution, and with effect from the date of this order:

(a) the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and

(b) all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments.³³⁹

Using international and foreign comparative law as a tool of constitutional interpretation, Justice Chaskalson declared the death sentence inconsistent with the Constitution of South Africa.³⁴⁰ He then declared that with effect from the date of the Court's order, all laws that sanction capital punishment in any part of the territory of South Africa are declared inconsistent with the Constitution and, hence, null and invalid.³⁴¹ *Makwanyane*, which was adjudicated at the time when South Africa was beginning its transition from the racially based apartheid system to a non-racial democratic order, represents an important addition to the human rights jurisprudence in South Africa.

Although the Constitution of Uganda does not have provisions that specifically impose an obligation on its courts to consider international law when they interpret the Bill of Rights, the country's courts have, nevertheless, made use of international and foreign comparative law in their adjudication of cases involving human rights and fundamental freedoms.³⁴² One such case is *Attorney General v. Susan Kigula & 417 Others*, which was brought before the Uganda Supreme Court.³⁴³ In the subsection that follows, this Article will examine this case to show how courts in Uganda are using international law as interpretive tools to contribute to Africa's jurisprudence on human rights.

C. *Attorney General v. Susan Kigula & 417 Others (Supreme Court of Uganda)*

The appellant in *Attorney General v. Susan Kigula & 417 Others (Kigula 2009)* was Uganda's attorney general (UGAG), and the

339. *Id.* para. 151.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Attorney General v. Susan Kigula* (Const. Appeal No. 03 of 2006) (Judgment of January 21, 2009) (Uganda).

respondents were Susan Kigula and several other individuals who, at different times, had been convicted of “diverse capital offences under the Penal Code Act and had been sentenced to death as provided for under the laws of Uganda.”³⁴⁴ The case before the Ugandan Supreme Court (UGSC) arose from an appeal against the judgment of Uganda’s Constitutional Court (UGCC) in *Susan Kigula & 416 Others v. The Attorney General (Kigula 2005)*.³⁴⁵ In *Kigula 2005*, the petitioners had argued before the UGCC at Kampala that the imposition of the mandatory death sentence on them was inconsistent with Articles 24 and 44 of the Constitution of Uganda.³⁴⁶ They also made several other allegations.³⁴⁷

The UGAG, who had been the respondent in *Kigula 2005* but who was now the appellant in *Kigula 2009*, opposed the petition presented to the Court by the petitioners, arguing that Uganda’s Constitution provides for the death penalty and that its imposition “whether as a mandatory sentence or as a maximum sentence was Constitutional.”³⁴⁸ After it had heard the petition, the UGCC held as follows: (1) The imposition of the death penalty “does not constitute cruel, inhuman or degrading punishment in terms of articles 24 and 44 of the Constitution, and therefore the various provisions of the laws of Uganda prescribing the death sentence are not inconsistent with or in contravention of Articles 24 and 44 or any provisions of the Constitution”; (2) the various laws of Uganda which prescribe the mandatory sentence are inconsistent with various provisions of the Constitution, and hence, are unconstitutional; (3) hanging as a way to implement the death sentence is constitutional

344. *Id.* at 1.

345. *Susan Kigula v. Attorney General*, (Const. Pet. No. 6 of 2003) [UGCC 8] (June 5, 2005) (Uganda), at 80.

346. *See Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 1-2 (*e.g.* articles 24 & 44 of the Ugandan Constitution).

347. In *Kigula 2005*, Susan Kigula and the 416 other petitioners had further petitioned in the alternative. *See Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 2 (quoting *Susan Kigula v. Attorney General*, (Const. Pet. No. 6 of 2003) [UGCC 8] (June 5, 2005), at 2-3, 46, 50 “[First,] that the various provisions of the laws of Uganda which provide for a mandatory death sentence are unconstitutional because they are inconsistent with Articles 20, 21, 22, 24, 28 and 44(a) of the Constitution. They contended that the provisions contravene the Constitution because they deny the convicted person the right to appeal against sentence, thereby denying them the right of equality before the law and the right to fair hearing as provided for in the Constitution. [Second,] that the long delay between the pronouncement by Court of the death sentence and the actual execution, allows for the death row syndrome to set in. Therefore[,] the carrying out of the death sentence after such a long delay constitutes cruel, inhuman and degrading treatment contrary to Articles 24 and 44(a) of the Constitution. (c) that Section 99(1) of the Trial on Indictments Act which provides for hanging as the legal mode of carrying out the death sentence, is cruel, inhuman and degrading contrary to Articles 24 and 44 of the Constitution.”).

348. *See Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 2.

since it operationalizes Article 22(1) of the Constitution; and (4) failure to carry out the death sentence beyond three years after it had been confirmed by the country's highest appellate court is "an inordinate delay," and therefore, it would be unconstitutional to execute any condemned prisoners who had been on death row for three or more years after their sentences had been confirmed by the country's highest appellate court, as this would be inconsistent with Articles 24 and 44(a) of the Constitution.³⁴⁹

Since the UGAG was not "wholly" satisfied with the UGCC's ruling in *Kigula 2005*, he appealed to the UGSC and listed eight grounds of appeal.³⁵⁰ The respondents were also dissatisfied with parts of the UGCC's decision and cross-appealed to the UGSC.³⁵¹ Before the UGSC, the attorney general, representing the government of Uganda, argued that the UGCC had erred in law when it held that "various provisions of the law that prescribe mandatory death sentences are inconsistent with" the Constitution of Uganda.³⁵² The appellant (the UGAG) prayed the UGSC to allow the appeal and overrule the judgment of the UGCC.³⁵³ Susan Kigula and the other death row inmates cross-appealed against the UGCC's ruling on three grounds, namely, that the UGCC had erred in law (i) when it ruled that the death penalty is not inconsistent with the Constitution; (ii) when it found, "as a question of fact and law," that hanging was a permissible form of punishment because the death penalty was permitted by the Constitution of Uganda; and (iii) when it held that Articles 24 and 44(a) of the Constitution, which prohibit any form of torture, cruel, inhuman, and degrading treatment or punishment were not meant to apply to Article 22(i) of the Constitution.³⁵⁴

On January 21, 2009, the UGSC delivered its ruling in *Kigula 2009*.³⁵⁵ By unanimous decision, the UGSC dismissed the appeal, and by majority decision, it dismissed the cross appeal.³⁵⁶ Then, it confirmed the declarations of the UGCC in *Kigula 2005* but it modified the orders made by the UGCC.³⁵⁷ The UGSC ordered that for all the condemned prisoners

349. *Id.* at 3.

350. *Id.* at 4-6 (listing the eight grounds of appeal adduced by the appellant, UGAG)

351. *Id.* at 6-7 (The respondents in the case before the Supreme Court (i.e., *Kigula 2009*) were Susan Kigula and 417 other condemned prisoners who had been convicted of murder and were sentenced to death and who, at the time, were on death row).

352. *Id.* at 4.

353. *Id.* at 6.

354. *Id.* at 6-7.

355. *Id.* at 64.

356. *Id.* at 63.

357. *Id.*

whose sentences had already been confirmed by the country's highest court, "their petitions of mercy under article 121 of the Constitution must be processed and determined within three years from the date of confirmation of the sentence."³⁵⁸ However, if after three years, a decision had not been made by "the Executive, the death sentence shall be deemed commuted to imprisonment for life without remission."³⁵⁹ For those condemned prisoners whose sentences had arisen from the mandatory sentence provisions and which are still pending a decision by the Appellate Court, "their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law."³⁶⁰

In making its decision, the UGSC considered the views and concerns of the framers of the 1995 Constitution of Uganda concerning the mandatory death penalty for the crime of murder at the time that the provisions on the death penalty were enacted.³⁶¹ Specifically, the UGSC referenced the country's history of gross violations of human rights, which included "extra-judicial killings" and situations in which "people simply disappeared" or were "missing, presumed dead."³⁶² The UGSC noted that a commission of inquiry, headed by Justice Oder, into human rights violations in Uganda, had uncovered "numerous instances of torture, where people were burned with molten plastic materials, shocked with electricity, buried alive, hacked to death, put in boots of cars[,] etc."³⁶³ The UGSC explained that the decision of the framers to include a bill of rights in the 1995 Constitution was informed by their awareness of the country's history of gross human rights violations.³⁶⁴ However, noted the UGSC, the framers also included "clear exceptions where those were found necessary" and modelled them on provisions of international human rights instruments.³⁶⁵

The UGSC remarked that Article 22(1) of the Constitution "is clearly meant to deal with and do away with extra judicial killings by the state."³⁶⁶ This provision of the Constitution, noted the UGSC, "recognises

358. *Id.*

359. *Id.*

360. *Id.* at 64.

361. *Id.* at 31.

362. *Id.* at 32.

363. *Id.*

364. *Id.*

365. *Id.* at 33.

366. Article 22(1) states as follows: "No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been

the sanctity of human life,” but also recognizes that “under certain circumstances acceptable in the country, that right might be taken away.”³⁶⁷ The framers, the UGSC explained further, “were aware that the Constitutional Commission had specifically sought and analysed views from the public in Uganda about the retention of the death penalty.”³⁶⁸ Aware of Uganda’s history of torture and other “cruel punishments,” the framers included provisions in Uganda’s Constitution that provided that “life is sacrosanct and may only be taken away after due process up to the highest court, and after the President has had opportunity to exercise prerogative of mercy.”³⁶⁹ However, noted the UGSC, the framers declared that “there must not be torture or cruel, inhuman or degrading punishment under any circumstances.”³⁷⁰

Specifically, the UGSC held that there is no conflict between Article 22(1) and Article 44(a) of the Constitution.³⁷¹ The Court explained that Article 44(a) “was not meant to apply to article 22(1) as long as the sentence of death was passed by a competent court after a fair trial” and the sentence “had been confirmed by the highest appellate Court” in Uganda.³⁷² Such a sentence, the UGSC concluded, “could not be torture, cruel or degrading punishment in the context of Article 24,” and if the framers had intended “to provide for the non-derogable right to life, they would have so provided expressly.”³⁷³

The Court explained further that given the circumstances faced by the framers at the time when the Constitution was designed and adopted, especially the country’s history of gross human rights violations, which included extra-judicial killings, they designed the two provisions “to treat the right to life with qualification but with necessary safeguards, while totally outlawing all other forms of torture, cruel and degrading punishments as had been found to have taken place in Uganda.”³⁷⁴ The UGSC declared that it agreed with the UGCC (in *Kigula 2005*) that “the imposition of the death penalty in article 22(1) is not inconsistent with [the Constitution].”³⁷⁵

confirmed by the highest appellate court.” See *Uganda Const.*, art. 22(1) (1995); *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 33.

367. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 33.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 34.

375. *Id.*

The UGSC then noted that many countries have abolished the death penalty, either through amending their constitutions to include provisions that specifically prohibit the death penalty or they have “acceded to the [Second] Optional Protocol [to the ICCPR, aiming at] the Abolition of the Death Penalty.”³⁷⁶ The Court cited Justice Chaskalson’s ruling in *Makwanyane*, which was “so well and ably reasoned,” that it “is a good authority on the abolition of the death penalty in its entirety, where the Constitution itself has not dealt with it.”³⁷⁷

The UGSC noted that in *Makwanyane*, Justice Chaskalson had reviewed case law from many jurisdictions and had found that some judges had argued for “the unconstitutionality of the death penalty notwithstanding provisions permitting it.”³⁷⁸ However, Justice Chaskalson concluded in the context of the Constitution of South Africa as follows: “I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.”³⁷⁹ The UGSC also noted that Justice Sachs, in his concurring opinion in *Makwanyane*, had agreed with Justice Chaskalson that Section 9 of the Constitution of South Africa guarantees an unqualified right to life.³⁸⁰

The UGSC then explained that the “situation and Constitution of South Africa are materially different from those obtaining in Uganda” and Uganda’s Constitution does not include the right to life under the general provision dealing with derogation under article[s] 43 and 44 of the Constitution.”³⁸¹ The Court noted that in Tanzania, the Court of Appeal in *Mbushuu* “saved the death penalty under the general provisions on derogation from fundamental Human Rights,” but that in Uganda, “the Constitution specifically provides for [the death penalty] under a substantive article of the Constitution.”³⁸² Unlike the case in South Africa, noted the UGSC, the framers of the Uganda’s Constitution did not leave the subject of the death penalty for the courts “to fill in the gaps” and, as a consequence, Uganda’s courts could not then take on the role of the “Legislature to abrogate a substantive provision of the Constitution by a

376. *Id.*; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty art. 1, Dec. 15, 1989, 1642 U.N.T.S. 414 [hereinafter Abolition Protocol]; *id.* at art. 2.

377. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 34.

378. *Id.* at 36.

379. *S v. Makwanyane*, 1995 (3) SA 391 (CC) para. 95 (S. Afr.).

380. *Id.* para. 350 (emphasis added by the UGSC).

381. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 36.

382. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 36-37 (*e.g.* article 22(1) of the Ugandan Constitution).

process of interpreting one provision against another.”³⁸³ In Uganda, the UGSC concluded, “this is the work of the Legislature who should indeed further study the issue of the death penalty with a view to introducing appropriate amendments to the Constitution.”³⁸⁴

The next issue for determination by the UGSC concerned provisions in the various laws of Uganda that provide for the imposition of the mandatory death sentence for certain offenses defined by those laws.³⁸⁵ Before the UGSC, the Commissioner for Civil Litigation (CCL), who represented the UGAG, argued that the various laws of Uganda that prescribe the mandatory death sentence are not inconsistent with, nor do they contradict, various provisions of the Constitution.³⁸⁶ The CCL argued further that the court has the discretion to determine “the appropriateness of the sentence even before conviction,” and as such, “the mandatory sentence does not deprive the court of its discretion.”³⁸⁷ The Court then noted that Sempebwa, who had argued the case before the UGSC on behalf of the respondents, had argued that the provisions of the penal code, which provide for the mandatory death sentence for murder and aggravated robbery, “were inconsistent with the Constitution notwithstanding that there may have been a fair trial before conviction.”³⁸⁸ In his view, (1) a fair trial as “envisaged in article 22(1) included conviction and sentencing,” (2) “[p]leading mitigation was part of [a] fair trial in all other non-mandatory sentences,”³⁸⁹ and (3) “[t]he fact that mitigation was not expressly mentioned as a right in the Constitution does not deprive it of its essence as a right because the rights in the Constitution are not exhaustive.”³⁹⁰

Counsel for the respondents argued further that a sentence that has been fixed by law to be imposed upon conviction effectively deprives the court of its sentencing discretion.³⁹¹ As a consequence, “the mandatory

383. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 37.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 38.

388. *Id.*

389. *Id.* at 38-39.

390. *Id.* at 39 (the Judge sought inspiration from *Mithu v. Punjab*, a case of the Supreme Court of India, which declared Section 303 of the Indian Penal Code unconstitutional and invalidated mandatory death penalties in India. See *Mithu v. Punjab*, (1983) 2 SCC 277 18. Professor Sempebwa also cited *Reyes v. The Queen*, a case of the Privy Council in which the appellant challenged the constitutionality of the mandatory death penalty in Belize as provided by Section 102 of the Criminal Code. *Reyes v. R.* [2002] UKPC 11 (Belize) ¶ 1).

391. *Id.*

sentence becomes inconsistent with the Constitution and therefore unconstitutional,” and in jurisdictions such as the United States, “which prescribe for various degrees of murder, for example, the mandatory sentences have been adjudged to be unconstitutional.”³⁹² He cited *Woodson v. North Carolina*, a case in which the U.S. Supreme Court held that the mandatory death penalty for first-degree murder violated the Eighth and Fourteenth Amendments.³⁹³ Finally, Sempebwa argued that mandatory death sentences “are cruel and inhuman because they do not differentiate between offenders, thereby offending Article 24.”³⁹⁴ He then cited the High Court of Malawi’s decision in *Kafantanyeni & Others v. Attorney General* to support his arguments on behalf of the respondents (Susan Kigula and 417 others).³⁹⁵ In *Kafantanyeni*, the High Court declared the mandatory death penalty unconstitutional and held that all prisoners who had been given mandatory death sentences were legally entitled to a new sentence hearing.³⁹⁶ The *Kafantanyeni* Court had struck down the mandatory death sentence on the grounds that it violated the right of the accused person to a fair trial and the right of access to justice.³⁹⁷ Finally, the counsel for the respondents submitted that “sentencing is a matter of law and part of the administration of justice which under article 126 is a preserve of the Judiciary” and that “Parliament should only prescribe the maximum sentence and leave the courts to administer justice by sentencing offenders according to the gravity and circumstances of the case.”³⁹⁸ He then prayed the UGSC to confirm the judgment of the UGCC on “this issue.”³⁹⁹

With respect to the constitutionality of the mandatory death sentence, UGSC declared that it was important to consider certain provisions of the Constitution.⁴⁰⁰ The Court referenced Article 20 of the Constitution, which provides that “[f]undamental rights and freedoms of the individual are inherent and not granted by the State” and that “[t]he rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.”⁴⁰¹ The Court next referenced Article

392. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 39.

393. *Id.* at 39; see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

394. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 39.

395. *Id.*; *Kafantanyeni v. Attorney General*, [2007] MWHC 1 (Malawi).

396. *Kafantanyeni*, MWHC 1 at 14.

397. *Id.* at 11-12.

398. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 39-40.

399. *Id.* at 40.

400. *Id.*

401. *Id.*

28(1) which states that “[i]n the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”⁴⁰² The Court also referred to Article 28(3)(e), which states that “[e]very person who is charged with a criminal offence shall . . . (e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State.”⁴⁰³

The UGSC then explained that these constitutional provisions bring out a number of important factors: (i) that the rights of each individual are inherent; (ii) that all persons are equal before and under the law; (iii) that a person is entitled to a fair, speedy, and public hearing before an independent and impartial tribunal; and (iv) that in cases carrying the death sentence, the state must provide legal representation to the accused person.⁴⁰⁴ The Court then noted that a trial does not terminate at conviction of the accused.⁴⁰⁵ Instead, the trial includes the process of sentencing, because the Court will “take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence.”⁴⁰⁶ The UGSC explained that a court cannot perform its function as “an impartial tribunal in trying and sentencing a person” if “the sentence has already been pre-ordained by the Legislature, as in capital cases.”⁴⁰⁷

The Court mentioned that there are two other aspects of the right to equality that must be considered in respect of the mandatory death sentence.⁴⁰⁸ First, is the issue of mitigation.⁴⁰⁹ According to Section 95 of the Trial on Indictments Act,

[i]f an accused person is found guilty or pleads guilty, the judge shall ask him or her whether he or she has anything to say why sentence should not be passed upon him or her according to law, but the omission so to ask him or her shall have no effect on the validity of the proceedings.⁴¹⁰

402. *Id.*

403. *Id.*

404. *Id.* at 41.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.* at 42.

409. *Id.*

410. *Id.* at 41-42; Trial on Indictments Act, ch. 25, § 95 (originally enacted as Decree 10/1971) (amended by Law Revision (Misc. Amendments) Act, 2023) (Uganda).

The Court then explained that the reason why the Constitution grants the accused this right is to ensure that he or she can present “mitigation factors,” which “may affect the sentence to be passed on him or her,” even if the information is provided to the court at this late stage in the trial.⁴¹¹

The other aspect of the right to equality relevant to the determination of the constitutionality of the mandatory death sentence, explained the UGSC, is provided in Section [99] of The Trial on Indictments, which provides that a court “may make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed.”⁴¹²

The UGSC declared that it found this section quite troubling, because a person who is “accused of stealing a chicken may not only be heard in mitigation, but may actually request the court to inquire into his character and antecedents for purposes of assessing the appropriate sentence for him, while on the other hand, a person accused of murder and whose very life is at stake, may not do likewise.”⁴¹³ The Court concluded that this is inconsistent with the principle of equality before and under law.⁴¹⁴ Noting that not all murders “are committed in the same circumstances” and that “all murderers are not necessarily of the same character,” the Court concluded that there is no reason why “these factors should not be put before the court before it passes the ultimate sentence.”⁴¹⁵

The Court then referenced Article 121(5) of the Constitution, which states that

[w]here a person is sentenced to death for an offence, written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy.⁴¹⁶

The Court then asked the following question: “If the judge is prevented by Section [99] of the [Trial on Indictments Act] from carrying out an inquiry while the accused person is still before him, on what basis will he write the report required of him under Article 121(5) of the Constitution?”⁴¹⁷

411. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 42.

412. *Id.*; Trial on Indictments Act, ch. 25, § 99 (originally enacted as Decree 10/1971) (amended by Law Revision (Misc. Amendments) Act, 2023) (Uganda).

413. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 43.

414. *Id.*

415. *Id.*

416. *Uganda Const.*, art. 121(5) (1995).

417. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 43-44.

The Court then explained that “if there [was] one situation where the framers of the Constitution expected an enquiry, it is the one involving a death penalty,” and the report of the judge is viewed as so important “that it forms a basis for advising the President on the exercise of the prerogative of mercy.”⁴¹⁸ In addition, noted the UGSC, the administration of justice in Uganda is a function of the judiciary as provided in Article 126 of the Constitution, and the entire process from the arraignment of an accused person to his or her sentencing “constitutes the administration of justice.”⁴¹⁹ By imposing a mandatory death sentence on those convicted of certain crimes, the Court concluded, Uganda’s Parliament effectively removed the power to determine an appropriate sentence from the courts, which “is inconsistent with article 126 of the Constitution.”⁴²⁰

The UGSC explained that Uganda’s Constitution provides for a separation of powers between the executive, the judiciary, and the legislature and that any law enacted by Parliament, which prevents the judiciary from effectively performing its function to administer justice is inconsistent with the Constitution.⁴²¹ After stating that the UGCC had “properly addressed this matter” and had come to the right conclusion, the UGSC declared that it agreed with the UGCC that “all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency.”⁴²²

The UGSC then determined the issue of delays in execution of the death sentence.⁴²³ The Court noted that counsel for the appellant (i.e., the UGAG) had contended that Article 121 of the Constitution grants the president of the republic the prerogative of mercy but does not set out the time frame within which such a prerogative must be exercised.⁴²⁴ Hence, concluded counsel for the appellant, “any delay in the execution of the sentence of death is not unconstitutional.”⁴²⁵ To support that position, counsel for the appellant cited *Michael de Freitas v. George Ramoutar Benny & Others*.⁴²⁶ She argued that any delay in carrying out the death

418. *Id.* at 44.

419. *Id.*

420. *Id.*

421. *Id.* at 44-45.

422. *Id.* at 45.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Michael de Freitas v. George Ramoutar Benny & others* [1976] AC 239 (PC) 10 (appeal taken from Trinidad and Tobago).

sentence actually allows the convicted person to live longer “in hope of a reprieve, and that executions should not be rushed.”⁴²⁷

The counsel for the respondents (the death row inmates) argued that making individuals stay on death row for a long time causes significant suffering and subjects them to the “death row syndrome,” which “itself amounts to a cruel and inhuman or degrading treatment or punishment.”⁴²⁸ He noted that all the respondents had been on death row for a long time and that in Uganda, “the average length of stay on death row is 10 years.”⁴²⁹ He also argued that the case *Michael de Freitas*, which had been relied on by the counsel for the appellants, had been overruled by *Neville Lewis v. Attorney General of Jamaica and Another*, where the court had held that “to execute a person who had been on death row for over six years after conviction would amount to inhuman treatment.”⁴³⁰ Counsel for the respondents, the Court concluded, “supported the findings and decision of the [UGCC] on these issues and prayed for the dismissal of these grounds of appeal.”⁴³¹

The Court began its analysis of the issue of delay by explaining that an individual who has been sentenced to death and whose sentence has been confirmed by the country’s highest court does not lose all his other rights as a human being.⁴³² Instead, noted the Court, a condemned person is still “entitled to his dignity within the confines of the law until his sentence is carried out strictly in accordance with the law.”⁴³³ The Court then examined the death row syndrome, referring to the psychological effects caused by the delay in execution and the nature of prison conditions that the prisoner is subjected to while he or she awaits execution of the sentence.⁴³⁴ The Court cited *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General, Zimbabwe, and Others*, a case in which the Supreme Court of Zimbabwe (ZIMSC) set aside the death sentences because the appellants had been on death row for “5 years, in demeaning conditions.”⁴³⁵ The ZIMSC held that “the prolonged delay in those condition[s] caused prolonged mental suffering

427. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 46.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 47.

432. *Id.*

433. *Id.*

434. *Id.* at 47-48.

435. *Id.* at 48 (citing *Cath. Comm’n for Just. & Peace v. Attorney General of Zimbabwe*, 1993 (4) SA 243 (Zim.)).

which amounted to cruel and inhuman treatment, and that a period of more than 2 years tended to be inordinate delay.”⁴³⁶

The UGCC, the UGSC stated, had “correctly addressed the issue and correctly analysed the evidence.”⁴³⁷ The UGSC cautioned, however, that it is important to “remember the concerns of the condemned persons that they do not seek a quick execution when they argue against inordinate delay.”⁴³⁸ The UGSC explained that, based on the international instruments that it had already cited in the judgment, “a person who has been sentenced to death must be given as much latitude as possible to exhaust not only the court appellate process but even all appeals for clemency before the sentence of death is carried out.”⁴³⁹ The Court then referenced the U.N. Economic and Social Council’s *Safeguards guaranteeing the protection of the rights of those facing the death penalty*, which states as follows:

1. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.
2. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.⁴⁴⁰

The UGSC then explained that the *Safeguards* “are part of the evolving standards of common decency, namely that society should not wish to put a person to death expeditiously.”⁴⁴¹ The rationale for this must be because the death sentence is final.⁴⁴² It extinguishes life.⁴⁴³ It should therefore not be carried out in a hurry.”⁴⁴⁴ The Court noted that it was aware of instances in which individuals have spent many years on death row but it was finally determined that they had been wrongly convicted and were then released and set free or had their sentences commuted.⁴⁴⁵ The Court then explained that, had such individuals been hurriedly executed in order to avoid the “death row syndrome,” this would have

436. *Id.*

437. *Id.*

438. *Id.* at 49.

439. *Id.*

440. *Economic and Social Council Res.* 1984/50, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ¶¶ 7-8 (May 25, 1984).

441. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 50.

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

resulted in a “gross miscarriage of justice, far worse than the death row syndrome.”⁴⁴⁶

The Court then called for “a balance,” so that while a person exercises his rights to fully exhaust all legal avenues before he is executed, “he at the same time is not unduly kept in prison serving a sentence that he was not sentenced to.”⁴⁴⁷ In addition, noted the Court, individuals sentenced to death “need not be held in demeaning conditions as has been testified to,” and the government and “all those who inspect prisons must ensure that the conditions under which all prisoners are kept strictly conform[] to the law and to international standards.”⁴⁴⁸

With respect to the prerogative of mercy, which is provided to the president of Uganda by Article 121 of the Constitution, the Court noted that many countries have adopted a similar system and these include the United States, whose Supreme Court has developed jurisprudence on the issue of executive clemency.⁴⁴⁹ The Court cited *Herrera v. Collins*,⁴⁵⁰ where Justice Rehnquist held as follows: “Our Constitution adopts the British model and gives to the President the ‘Power to grant Reprieves and Pardons for Offences against the United States.’”⁴⁵¹ The Court also cited *U.S. v. Wilson*, a case of the U.S. Supreme Court in which Justice Marshall also elaborated on the president’s pardon power.⁴⁵² The UGSC then noted that Uganda’s Constitution provides for “more or less the same position as the American one on the matter of Prerogative of mercy.”⁴⁵³

Although counsel for UGAG had argued that “since the Constitution itself does not provide for a time limit within which to exercise the prerogative of mercy, it is not up to the courts to impose such time limits as this would amount to interference with the executive privilege,” the Court explained that, in interpreting the provision on the prerogative of mercy, a court must look at the constitution as a whole in order to determine the “purpose and effect of the various provisions.”⁴⁵⁴ The Court then mentioned the right to liberty (Article 23) and the right to a fair trial (Article 28) and explained that “these provisions mean that a person who has had a speedy trial should only have his liberty compromised in execution of a sentence of court *without delay*” and that such a person

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.* at 50-51.

450. *Herrera v. Collins*, 506 U.S. 390 (1993).

451. *Id.* at 412-13.

452. *U.S. v. Wilson*, 32 U.S. 150, 160 (1833).

453. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 52.

454. *Id.* at 53.

would serve his sentence and then regain his liberty.⁴⁵⁵ However, in the case of an individual who has been sentenced to death, it is necessary that “the processes provided for under Article 121 should be put in motion as quickly as possible so that the person knows his fate, i.e., whether he is pardoned, given a respite or remission or whether the sentence is to be carried out.”⁴⁵⁶

The Court also recalled that although the Constitution does not provide for a time limit on the exercise of the prerogative of mercy, Section 34(2) of the Interpretation Act provides that “[w]here no time is prescribed or allowed within which anything shall be done, that thing *shall be done without unreasonable delay* and as often as due occasion arises.”⁴⁵⁷ The Court concluded that the law “envisages that even the president will act without unreasonable delay” and that “[t]o hold otherwise, would mean that the President could withhold his decision indefinitely or for many years, and the person would remain on death row at the pleasure of the President.”⁴⁵⁸ This, concluded the Court, would be contrary to the spirit of the Constitution.⁴⁵⁹

The UGCC had held that a period of more than three years from the time that the death sentence was confirmed by the country’s highest court would be considered to constitute inordinate delay.⁴⁶⁰ While agreeing with the UGCC, the UGSC explained that as soon as the country’s highest court has confirmed the sentence, the Advisory Committee on the Prerogative of Mercy and prisons authorities should immediately proceed with the processing of the applications of condemned persons so that they can provide the president with the advice that he or she needs to exercise the prerogative of mercy without unreasonable delay.⁴⁶¹ The UGSC then concluded that “to hold a person beyond three years after the confirmation of sentence [by the highest court in the country] is unreasonable.”⁴⁶² The Court declared that at the end of three years after the country’s highest appellate court has confirmed the sentence, if the president has not yet exercised his prerogative “one way or the other, the death sentence shall be deemed to be commuted to life imprisonment without remission.”⁴⁶³

455. *Id.* (emphasis in original).

456. *Id.*

457. *Id.* at 53-54; Interpretation Act, 2023 (Act. No. 17/2023) (Uganda).

458. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 54.

459. *Id.*

460. *Id.*

461. *Id.* at 54-55.

462. *Id.* at 55.

463. *Id.* at 57.

The UGSC then examined the constitutionality of hanging as a method of carrying out the death sentence.⁴⁶⁴ The Court noted that Mr. Sim Katende, who had argued this issue on behalf of the respondents, had criticized the UGCC for ruling that hanging was constitutional because the death penalty was provided for in Article 22 of the Constitution.⁴⁶⁵ He argued further that since hanging as a way to carry out the death penalty is provided in the Trial on Indictments Act, which is a legislative enactment and not the Constitution, it can be challenged “if it is inconsistent with or in contravention of any provision of the Constitution.”⁴⁶⁶ Counsel for the death row inmates noted that hanging had been identified in *Mbushuu* (TCA) and *Makwanyane* (ZACC) as cruel, inhuman, and degrading “in the manner it was carried out, the way it affected other prisoners and the way it affected even the executioners themselves.”⁴⁶⁷ He concluded that hanging is “inconsistent with and in contravention of article[s] 24 and 44(a) of the Constitution.”⁴⁶⁸

Counsel for the death row inmates, Mr. Katende, relied on *Attorney General v. Salvatory Abuki* “for the proposition that in interpreting the Constitution purpose and effect must be looked at, and that there can be no derogation whatsoever from the freedom from torture, cruel, inhuman or degrading punishment.”⁴⁶⁹ Mr. Katende also cited *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General and Others*, a case of the Supreme Court of Zimbabwe in which Justice Gubbay observed as follows:

It cannot be doubted that prison walls do not keep out fundamental rights and protections. Prisoners are not, by mere reason of a conviction, denuded of all the rights they otherwise possess. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inevitably removed from them by law, expressly or by implication. Thus, a prisoner who has been sentenced to death does not forfeit the protection afforded by s 15(1) of the Constitution in respect of his treatment while under confinement.⁴⁷⁰

While conceding that “every punishment involves pain,” counsel for the death row inmates submitted that “the degree of pain in hanging [is]

464. *Id.* at 58.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*; see *Att’y Gen. v. Salvatori Abuki*, [1999] UGSC 7 (Uganda) at 20-21.

470. *Cath. Comm’n for Just. and Peace in Zim v. Att’y Gen., Zim., and Others*, [1993] (4) SA 239 (Zim.).

excessive.”⁴⁷¹ Furthermore, Katende relied on *Abuki* for “the proposition that rights and freedoms guaranteed by the constitution are to be interpreted having regard to evolving standards of common decency” and that hanging violates those standards and therefore, must be held to be or declared unconstitutional.⁴⁷² The Court distinguished *Abuki*, where the offense was practicing witchcraft and part of the punishment was banishment of the convicted person from his home, a punishment that was found to be cruel, inhuman, and degrading, and therefore unconstitutional.⁴⁷³ The Court then noted that in the case before the UGSC, the punishment prescribed by the laws of Uganda for capital offenses is death.⁴⁷⁴ The Court then explained that in the case under consideration, it had declared that “provided the conditions stated in article 22(1) of the Constitution are fulfilled, the death penalty is constitutional.”⁴⁷⁵ The Court then concluded that what remained for it to determine was “the *manner* of carrying out the constitutionally permitted punishment.”⁴⁷⁶

The UGSC then referenced the U.N. Economic and Social Council’s *Safeguards guaranteeing protection of the rights of those facing the death penalty*, where it is stated as follows: “Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.”⁴⁷⁷ The Court noted that while suffering is necessarily part of the process of carrying out the death sentence, such suffering must be minimized.⁴⁷⁸ The Court then dismissed the appeal by unanimous decision and the cross appeal by majority decision and then modified the orders made by the UGCC, as follows:

For those respondents whose sentences were already confirmed by the highest Court, their petitions for mercy under article 121 of the Constitution must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the Executive, the death sentence shall be deemed commuted to imprisonment for life without remission.

471. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 59.

472. *Id.*

473. *Id.* at 60.

474. *Id.*

475. *Id.*

476. *Id.* (emphasis in original).

477. Economic and Social Council Res. 1984/50 (May 25, 1984).

478. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 61.

For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law.⁴⁷⁹

When the UGSC delivered its judgment in *Attorney General v. Susan Kigula & 417 Others* in 2009, it ended a ten-year challenge to the constitutionality of the mandatory death penalty in Uganda.⁴⁸⁰ In reaching its decision, the Supreme Court relied on international human rights and comparative foreign case law. The Court noted that as a result of the crimes and atrocities committed during World War II, especially by Germany's Nazi regime, the international community through the United Nations General Assembly adopted the UDHR, which set the minimum international standards regarding human rights to be followed by all nations.⁴⁸¹ In addition to the UDHR, the UGSC also drew inspiration from the ICCPR, the decision of the U.N. Committee on Human Rights in *Ng v. Canada*, the Banjul Charter, and many others.⁴⁸²

An important issue that the UGSC was called upon to determine was the constitutionality of the mandatory death sentence.⁴⁸³ The Court delivered a two-part decision.⁴⁸⁴ First, the Court declared that the mandatory death sentence compromises the principle of a fair trial, which is guaranteed by Uganda's Constitution.⁴⁸⁵ The mandatory death sentence, the UGSC held, is inconsistent with the principle of equality before the law and made clear that a trial does not stop at the conviction of the accused, but it includes the sentencing process, which provides the trial court the opportunity to consider evidence, the nature of the offense, and the circumstances of the case in order to arrive at an appropriate

479. *Id.* at 63.

480. *Id.* at 63-64; see also: Barrie Sander, *Capital Punishment Jurisdiction: A Critical Assessment of the Supreme Court of Uganda's Judgment in "Attorney General V. Susan Kigula & 417 Others"*, 55 J. OF AFR. LAW 261 (2011) (examining the impact of the Uganda Supreme Court's judgment in *Kigula & 417 Others* on the development of jurisprudence on capital punishment in Uganda).

481. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009) at 12-13.

482. *Id.* at 14-19.

483. See *id.* at 40 (noting that the UGSC was considering the "constitutionality of the mandatory death sentence").

484. *Id.* at 3-4.

485. See *id.* at 41 (declaring that the mandatory death sentence denies the Court the exercise of its function as "an impartial tribunal in trying and sentencing a person" and in the view of the Court, "this compromises the principle of a fair trial.")

sentence.⁴⁸⁶ The mandatory death sentence, the Court concluded, denies the trial court of the right to exercise its constitutional functions.⁴⁸⁷ The UGSC's decision in *Kigula 2009* represents an important addition to the application of international human rights law to the development of human rights jurisprudence in Africa.

The applicability of international law, which includes international human rights law, is governed by Article 2, paragraphs 5 and 6 of the Constitution of the Republic of Kenya 2010.⁴⁸⁸ In *Mitu-Bell Welfare Society v. The Kenya Airports Authority and Others*,⁴⁸⁹ the Kenya Supreme Court (KESC) determined the applicability of international law in general and international human rights law in particular in Kenya, as well as the right to housing under the Constitution of Kenya. In the subsection that follows, this Article will examine *Mitu-Bell Welfare Society*.

D. Mitu-Bell Welfare Society v. The Kenya Airports Authority and Others (Supreme Court of Kenya)

This case was an appeal to the KESC from the judgment and orders of the Kenya Court of Appeal (KECAP).⁴⁹⁰ The KESC noted that the appeal concerned “a matter of general public importance under articles 163(4)(b) and 163(5) of the Constitution” and that the appellants were “challenging the entire Judgment and Orders of the [KECAP].”⁴⁹¹

The KESC began its analysis of the appeal by providing a historical overview of the case's litigation history, beginning with the adjudication of the case in the High Court and then moving on to the determination of the appeal of the High Court's judgment by the KECAP.⁴⁹² The Mitu-Bell Welfare Society, whose membership was made up of residents of Mitumba Village, filed a petition before the High Court on September 21, 2011 on behalf of its members and other residents of Mitumba Village

486. *Id.* at 41-43.

487. *Id.* at 40-44.

488. CONSTITUTION, 2010 art. 2(5), 2(6) (Kenya).

489. *Mitu-Bell Welfare Soc'y v. The Kenya Airports Auth. and Others* (2021) K.E.S.C. 34 (K.L.R.) (Kenya).

490. *Id.* ¶ 1.

491. *Id.* ¶ 1. Article 163(4)(b) of the Constitution of Kenya states as follows: “Appeals shall lie from the Court of Appeal to the Supreme Court . . . (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general importance is involved, subject to clause (5).” Article 163(5) states that “[a] certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, carried, or overturned.” See CONSTITUTION art. 163(4)(b), 163(5) (2010) (Kenya).

492. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 2.

(collectively referred to as the “appellants” before the KESC).⁴⁹³ At the time the case was brought before the High Court, the appellants were all residents of Mitumba Village, which was located on Plot Number 209/12908, near Wilson Airport, Nairobi.⁴⁹⁴ The children of the appellants, the KESC noted, attended Mitumba Primary School, which was located on Plot Number 209/12921, also near the Wilson Airport.⁴⁹⁵

The appellants had filed the petition before the High Court in response to a notice that had been published in local newspapers on September 15, 2011 by the attorney general of Kenya (KEAG), who was the second respondent in the appeal before the KESC.⁴⁹⁶ The KEAG’s notice had given the appellants seven days to vacate the land that they had occupied.⁴⁹⁷ In addition to the petition filed before the High Court, the appellants had also “filed a chamber Summons application seeking among others, conservatory orders against the 1st respondent [the Kenya Airports Authority].”⁴⁹⁸ On September 22, 2011, Justice Gacheche “granted an Order restraining the respondents from demolishing the village pending the hearing *inter partes* and determination of the application for conservatory orders.”⁴⁹⁹

However, despite the conservatory order, the respondents still demolished the homes of the appellants in Mitumba Village on November 19, 2011.⁵⁰⁰ On December 1, 2011, following the demolition of the appellants’ homes and their subsequent eviction, the petition was amended by leave of the High Court.⁵⁰¹ The amended petition prayed the Court for several orders, which included “a declaration that the demolition was illegal, irregular, unprocedural and contrary to various provisions of the Constitution of Kenya.”⁵⁰²

In opposing the petition, the respondents argued that they had not violated the fundamental rights of the appellants and advanced four arguments to support their position⁵⁰³: first, that the land under question

493. *Id.*

494. *Id.* ¶ 3.

495. *Id.*

496. *Id.* ¶ 4.

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.* ¶ 5.

502. These provisions were articles 26, 27(2)(4) and (6), 28, 29, 39, 40, 43, 47, and 56 of the Constitution of the Republic of Kenya 2010. *See* CONSTITUTION, 2010 (Kenya); *see Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 5.

503. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 6.

belonged to the first respondent, the Kenya Airports Authority, and not to the appellants; second, that the first respondent was simply performing its statutory duty pursuant to the Civil Aviation Act and was under an obligation to ensure air safety at the Wilson Airport by getting rid of any informal settlement “which was on a flight path”; third, that the demolition of the homes of the appellants was not undertaken by the first respondent but by the State of Kenya in order “to remove the threat posed by the village given the ongoing war in Somalia”; and fourth, that the applicants were “claiming social economic rights which were progressive and could not be granted at once.”⁵⁰⁴

The KESC then noted that in its judgment dated September 11, 2013, the High Court (under Justice Mumbi Ngugi) allowed the petition.⁵⁰⁵ The Court declared that the demolition, which was carried out while an order of the Court restraining the demolition was in force, had violated the constitutional rights of the appellants.⁵⁰⁶ The KESC then provided a summary of the High Court’s detailed findings.⁵⁰⁷ With respect to the issue of the rights, if any, of the appellants over the subject property, the High Court declared that “the appellants had no legitimate claim to the land, and could not therefore maintain a claim for violation of their right over the property (land) under Article 40.”⁵⁰⁸

On the issue of whether the eviction of the appellants from the land designated as Plot Number 209/12908 constituted a violation of their constitutional rights, the High Court initially determined the reasonableness of the notice to vacate.⁵⁰⁹ The Court ruled that the notice, which gave the appellants just seven days to vacate, was unreasonable.⁵¹⁰ The Court also noted that although it was headed as a “Reminder Notice,” there was no evidence that the first respondent had issued any other notices to the appellants.⁵¹¹ After declaring that the notice was “unreasonable, unconscionable, and unconstitutional,” the Court “opined that Kenya was yet to develop legislation and guidelines, for eviction of persons occupying land they are not legally entitled to occupy.”⁵¹² The High Court explained, however, that despite the absence of legislation and guidelines governing evictions, Kenya is a member of the international

504. *Id.*

505. *Id.* ¶ 8.

506. *Id.*

507. *Id.* ¶ 9.

508. *Id.*

509. *Id.* ¶ 10.

510. *Id.*

511. *Id.*

512. *Id.*

community as well as a signatory to international treaties and conventions and hence is bound by provisions of these international instruments and guidelines.⁵¹³

The High Court then invoked Article 2(5) and (6) of the Constitution of Kenya and held that the State of Kenya, its organs, and all persons, when they carry out evictions, should do so in accordance with the CESCR's General Comment No. 7: The right to adequate housing (Art. 11:1): forced evictions.⁵¹⁴ With respect to whether the demolition had violated the appellants' constitutional rights, the Court determined that the appellants had made clear the case of the violation of their constitutional rights by the first and second respondents (the Kenya Airports Authority and the KEAG).⁵¹⁵ On the violation of the right to property, the Court held that the constitutional right to property under Article 40, as read with Article 260 of the Constitution of Kenya, "extends to, and must include the protection of, goods and personal property."⁵¹⁶ The Court added that even though the appellants had not provided specific particulars of the goods that had been destroyed during the eviction, "it must inevitably follow that such goods as the appellants had in their dwellings, and the materials the houses were made of, were destroyed during the demolition."⁵¹⁷

On the violation of the appellants' right to housing and other socio-economic rights, the Court held that these rights are enshrined in and protected under articles 43 and 21 of the Constitution.⁵¹⁸ The Court also held that when the State demolishes the homes of poor citizens, such as the appellants, following a seven-day notice and without providing the evictees with alternative accommodations, "it violates not only the rights of the appellants under articles 21 and 43 of the Constitution, but also the national values and principles of governance set out in Article 10 of the

513. *Id.* ¶ 11. The KESC relied on several international and regional instruments, including: the African Charter on Human and Peoples' Rights; Canadian Charter of Rights and Freedoms, 1998; European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953; U.N. Declaration of Rights and Duties of States, 1949; International Covenant on Civil and Political Rights; International Covenant on Economic, Social, and Cultural Rights; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights; Statute of the International Court of Justice, 1945; Universal Declaration of Human Rights; and Vienna Convention on the Law of Treaties, 1980.

514. U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4 (1991), U.N. Doc E/1992/23, 6th Sess.

515. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 12.

516. *Id.*

517. *Id.*

518. *Id.* ¶ 13.

Constitution.”⁵¹⁹ Article 43 of the Constitution, the Court explained, “imposes on the state a positive obligation to ensure access by its citizens to social economic rights, whose realization is progressive and dependent upon, the availability of resources.”⁵²⁰

The Court relied on *Irene Grootboom and Others v. The Government of the Republic of South Africa and Others* and held that under Article 21(1) of the Constitution, “the state and private individuals have a negative obligation to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms,” and that the State of Kenya “had an obligation to protect the appellants’ existing homes, rudimentary as they were, while doing what it could, to the extent of its available resources, to ensure their progressive access to adequate housing.”⁵²¹

On the issue of the violation of civil and political rights under articles 26-29 and 47 of the Constitution, the Court held that “the enjoyment of these rights[] was not possible without the social economic rights which the Constitution guarantees under Article 43,” and the failure of the State to ensure that its citizens “have access to the rights guaranteed by Article 43 directly impacts on the ability of citizens to enjoy all the other rights set out in the Constitution.”⁵²²

On the issue of the constitutional requirement for consultation with and participation of those evicted, the Court noted that “there may be instances when eviction of people may be necessary” but that even in such instances, “there is a need to follow due process” and give reasonable notice to those affected, consult with them, and provide them with the opportunity to participate.⁵²³ The Court also noted that the principle of consultation and participation is enshrined in the Constitution of Kenya and the human rights guidelines of the Office of the U.N. High Commissioner for Human Rights.⁵²⁴ The Court then concluded that the State had effectively abdicated its constitutional responsibilities and its obligations under international law.⁵²⁵

With respect to the violation of the right to nondiscrimination and equal protection under the law, the Court held that “the selective demolition of the appellants’ temporary shacks for allegedly being on the airport’s flight path or posing a security threat,” while at the same time,

519. *Id.*

520. *Id.* ¶ 14.

521. *Id.*

522. *Id.*

523. *Id.* ¶ 16.

524. *Id.*

525. *Id.*

“sparing multi-storied buildings which surrounded it, wreaked of discrimination” and that such action on the part of the State, “amounted to a violation of the right to non-discrimination and equal protection of the law guaranteed under Article 27(1), (2) and (4) of the Constitution.”⁵²⁶

On the violation of the rights of children, the Court explained that the State has an obligation to protect children, persons with disabilities, and other marginalized groups, pursuant to various provisions of the Constitution.⁵²⁷ The Court added that based on the evidence presented to it, there was a primary school, although an informal one, within the Mitumba Village and that children attended that school.⁵²⁸ The Court concluded that

with no averment by any of the respondents that they took any action to provide for the needs of vulnerable groups particularly children, in the period leading up to and during the demolition, it was uncontested that the actions of the respondents resulted in a violation of the rights of the appellants’ children.⁵²⁹

With respect to appropriate relief, the Court opined that it has power under Article 23 of the Constitution to grant various reliefs, which include the declaration of rights, injunctions, conservatory orders, and compensation.⁵³⁰ It noted further that the appellants “were a community deprived of their shelter and rendered homeless”; that the State has a constitutional obligation to enact appropriate legislation as well as police measures to ensure access to the rights enshrined in Article 43; that these rights are progressive in nature; that the State, when confronted with an issue such as the one before the Court, is expected to “go beyond the standard objection that the appellants had not demonstrated a right to the land, or how their rights had been violated”; and that the State is obligated to assist the Court by “showing if, and how, it was addressing or intended to address the rights of citizens in the attainment of the social economic rights, and what policies, if any, it had put in place to ensure that the rights are realized progressively.”⁵³¹

After the State filed an affidavit “appending the Government’s Guidelines on Settlement and Evictions,” the Court granted the parties forty-five days to undertake discussions to find an amicable solution to

526. *Id.* ¶ 17.

527. *Id.* ¶ 18.

528. *Id.*

529. *Id.*

530. *Id.* ¶ 19.

531. *Id.*

the issues.⁵³² However, the first respondent filed Civil Appeal No. 218 of 2014 before the KECAP, citing eighteen grounds of appeal.⁵³³ In a judgment, which was delivered on July 1, 2016, the KECAP identified eleven issues for determination.⁵³⁴ On the issue of *locus standi* of the appellants to institute the petition before the trial court, the KECAP cited its decision in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* and held that

every person has the right to institute proceedings claiming that the Constitution has been contravened; that a person in that regard, includes one acting in [the] public interest and further, that pursuant to Article 260 it also includes a company, an association, or other body of persons whether incorporated or unincorporated.⁵³⁵

Regarding whether the trial Court had failed to consider the first respondent's answer to the petition or amended petition, the KECAP held that it was evident from the judgment "that all the issues and grounds in opposition to the petition that were raised and urged by the 1st respondent were considered by the trial Court."⁵³⁶ With respect to the liability of the second and third respondents, the KECAP

upheld the High Court's finding of the 2nd respondent's liability on grounds that under the provisions of Article 156(4)(a) and (b) of the Constitution, the 2nd respondent (Attorney General) is the legal advisor to the Government, and is empowered (other than in criminal proceedings) to represent the Government in Court or in any other legal proceedings to which the National Government is a party.⁵³⁷

The KECAP, however, set aside any liability against the third respondent and concluded that "the trial court, erred in law in making a composite order and issuing directives against the latter."⁵³⁸ The KECAP then reasoned that "after an evaluation of the evidence on record, and the Judgment of the learned Judge," the trial court then made a finding regarding the non-culpability and non-liability of the third respondent (the Commissioner of Lands).⁵³⁹ The KECAP reasoned further that, as

532. *Id.* ¶ 21.

533. *Id.* ¶ 22.

534. *Id.* ¶ 23.

535. *Id.* ¶ 23; *see, e.g., Matemu v. Trusted Soc'y of Hum. Rts. All. & 5 Others* (2014) K.E.S.C. 6 (K.L.R.) (Kenya).

536. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 24.

537. *Id.* ¶ 25.

538. *Id.* ¶ 26.

539. *Id.*

Kenya's Commissioner of Lands, the third respondent "was under no legal obligation to allocate or alienate land that was already alienated and registered to a third party" and that "there was no violation of the appellants' Constitutional right to property (land) under Article 40 of the Constitution and the 3rd respondent neither demolished nor evicted the appellants from the suit property."⁵⁴⁰ The KECAP then set aside in its entirety, the trial court's judgment and decree "and any and all consequential orders and directions applicable and enforceable against the 3rd respondent."⁵⁴¹

To determine whether the trial court "abdicated or delegated its judicial function," the KECAP "considered the provisions of Articles 9, 10 and 23(3) of the Constitution as read with the jurisdictional mandate and functions of the Court as provided for in Article 159(1)."⁵⁴² The KECAP also relied on case law from the U.K. and Kenya and found that the trial court had abdicated its judicial function and had outsourced those functions to entities that were not empowered or vested with the constitutional mandate to resolve disputes between parties.⁵⁴³ The KECAP also faulted the trial court "for delivering a Judgment and then reserving outstanding matters to be dealt with by the same Court," stating that "a Court cannot deliver Judgment and invite further pleadings on contested matters for its consideration and determination."⁵⁴⁴ The KECAP also explained that "by allowing parties to file affidavits and reports after Judgment, the trial Court erred in law as the procedure has the potential to introduce secondary litigation and raise new issues that were not in the original pleadings."⁵⁴⁵ Such a procedure, the KECAP explained, is not provided for in the Civil Procedure Act and Rules and that it is "impermissible to allow parties to file pleadings after Judgment."⁵⁴⁶

Regarding whether the trial court appropriately evaluated "the evidence on record," the KECAP held that the "trial court failed to evaluate critical aspects of the pleadings before it."⁵⁴⁷ For example, the KECAP noted that the trial court had not evaluated the evidence adduced before it to determine whether Mitumba Village and structures in the

540. *Id.*

541. *Id.*

542. *Id.* ¶ 27.

543. *Id.*

544. *Id.* ¶ 28.

545. *Id.* ¶ 29.

546. *Id.*

547. *Id.* ¶ 30.

village were on the flight path to the Wilson Airport.⁵⁴⁸ The KECAP pronounced that “there are instances when eviction of people may be necessary hence considerations of national security was paramount” and that “the security and safety of the flight paths was a limitation on the enjoyment of the rights and freedoms in the Bill of Rights.”⁵⁴⁹ The KECAP then cited cases from the Supreme Court of India to demonstrate that it may be justifiable to evict individuals and demolish their property in the interest of the public, national security, and public policy.⁵⁵⁰

The KECAP agreed with the trial court that “there was no legislation in Kenya meant to regulate forcible eviction and resettlement of persons occupying public or private land” and held that “until such a statute was enacted by the legislature, Courts must interpret and apply the law as is.”⁵⁵¹ With respect to the statutory mandate of the first respondent, the KECAP relied on the decision in the U.K. case *Hawkes v. Eastern Railways Company*, in which it was held that “a statutory corporation, created by an Act of Parliament is limited to the functions and mandate granted by its enabling statute.”⁵⁵² The KECAP then found that the trial court “had erred in issuing orders and directions, applicable to the 1st Respondent while ignoring its express statutory mandate.”⁵⁵³

Regarding whether the trial Court had issued orders that were not sought or prayed for in the amended petition, the KECAP determined that the trial Court had erred in law “in issuing orders and directions on unpleaded issues” and then “faulted the trial Judge’s directions requiring third parties to comment on the policies and guidelines, which it found was not a prayer sought in the amended Petition.”⁵⁵⁴ The KECAP noted further that the Pamoja Trust and the various society organizations that the trial Court had alluded to were neither parties to the case nor were they joined as friends of the Court.⁵⁵⁵

Noting that the provisions of Article 159(2)(c) enjoin courts to promote alternative dispute resolutions, the Court emphasized that this process must be effected before the court issues its judgment.⁵⁵⁶ In addition, the KECAP explained, courts do not have any role in policymaking, which is reserved for the executive and legislative

548. *Id.*

549. *Id.* ¶ 31.

550. *Id.*

551. *Id.* ¶ 32.

552. *Id.* ¶ 33.

553. *Id.*

554. *Id.* ¶ 34.

555. *Id.*

556. *Id.* ¶ 35.

branches of government.⁵⁵⁷ To arrive at these decisions, the KECAP relied on case law from the U.S. Supreme Court (*Marbury v. Madison*), and the Court of Appeal and High Court of Kenya.⁵⁵⁸ In conclusion, the KECAP declared that a court should not “act in vain and issue orders and directions that it cannot implement” and that the court must take into consideration provisions of Article 20(5)(c) of the Constitution when it makes orders in relation to Article 43(1).⁵⁵⁹ Post-judgment supervision, the KECAP concluded, is not a function of the court, because the implementation and execution of judgments “is governed by specific rules and that resort to those rules must be made.”⁵⁶⁰

The KECAP also examined comparative jurisprudence and its relationship to and impact on post-judgment supervision.⁵⁶¹ The Court considered several cases from the ZACC where “structural interdicts were upheld as an appropriate relief and Courts allowed to retain supervisory jurisdiction in Constitutional cases.”⁵⁶² In other ZACC cases, it was declared that “the general principle that ‘a *mandamus* and the exercise of supervisory jurisdiction’ may be necessary to ensure an effective remedy for a breach of any Constitutional right, including a socio-economic right was strongly embraced by the Courts.”⁵⁶³ The KECAP also considered case law from other comparative jurisdictions—the Supreme Court of Canada, the U.S. Supreme Court, and the Supreme Court of India.⁵⁶⁴ These courts, the KECAP explained, “have required submission of specific reports on compliance to the Court or to a Court-appointed assistant after delivery of Judgments.”⁵⁶⁵ Two additional cases from the Indian Supreme Court, the KECAP noted, held that “the concept of continuing *mandamus* enables a trial Court to monitor implementation of its Orders.”⁵⁶⁶

After taking into consideration the “comparative jurisprudence and trends in issuing supervisory Orders,” the KECAP, nevertheless, “faulted

557. *Id.*

558. *Id.*

559. *Id.* ¶ 36. Article 20(5)(c) states that “the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.” Article 43(1) enshrines economic and social rights. *See*: CONSTITUTION, 2010 art. 20(5)(c), (43)(1) (Kenya).

560. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 36.

561. *Id.* ¶ 37.

562. *Id.*

563. *Id.*

564. *Id.* ¶ 38.

565. *Id.*

566. *Id.*

the trial Court's directives" and noted that Kenya's Constitution "does not have provisions similar to Articles 32 and 226 of the Indian Constitution providing for the principle of continuing *mandamus*, or Section 24(1) of the Canadian Charter of Rights and Freedoms and Sections 38 and 172(1)(b) of Constitution of South Africa, whereby both contemplate wide remedial powers for the Courts."⁵⁶⁷ With respect to the trial Court's reliance on the UDHR and the U.N. Guidelines, the KECAP noted that it is imperative for Kenya's courts "to bear in mind the hierarchy of laws in Kenya."⁵⁶⁸ The KECAP explained that before a court in Kenya "can invoke Article 2(5) of the Constitution, it must be satisfied that the rule of international law being invoked is a *general rule of international law* and not simply a *rule of international law*."⁵⁶⁹

On the right to private property and socioeconomic rights, the KECAP held that the trial court had "correctly decided on the issue of adverse possession and determined that the appellants did not have any legitimate claim to the suit property."⁵⁷⁰ However, noted the KECAP, the High Court had failed to consider the tension between socioeconomic rights and the right to private property in the Kenyan context" and then faulted the High Court for employing "a mechanistic approach to precedent in relying on the Indian case of *Olga Telis & Others v. Bombay Municipal Corporation*" and the ZACC case of *Grootboom & Others v. The Government*.⁵⁷¹ The KECAP explained that *Olga Telis* and *Grootboom* involved the interpretation of constitutional provisions in India and South Africa but that "similar provisions are not found in the Kenyan Constitution."⁵⁷²

In order to address the tension between the realization of socio-economic rights and the right to private property in Kenya, the KECAP surveyed Kenya's emerging jurisprudence on the conflict.⁵⁷³ The KECAP explained that the "enforcement and implementation of socio-economic rights cannot confer property rights in the land of another and that the realization of socio-economic rights does not override the provisions of the Limitation of Actions Act (Cap 22 of the Laws of Kenya)."⁵⁷⁴ The KECAP noted further that in interpreting constitutional provisions on

567. *Id.* ¶ 39.

568. *Id.*

569. *Id.* ¶ 40 (emphasis added).

570. *Id.* ¶ 41.

571. *Id.*

572. *Id.*

573. *Id.* ¶ 42.

574. *Id.* ¶ 43.

socioeconomic rights, it is not the function of the courts “to re-engineer and redistribute private property rights.”⁵⁷⁵ Such a role, noted the Court, belongs to the political branches of government and not the judiciary.⁵⁷⁶

On the issue of whether the eviction in question was carried out by the first respondent (the Kenya Airports Authority), the KECAP agreed with the High Court, which had concluded that “the uncontroverted presence of security agents meant that the State was responsible for the eviction and demolition.”⁵⁷⁷ The KECAP found that the trial court had erred in finding the first respondent responsible for evicting the residents of Mitumba Village and demolishing their homes and structures.⁵⁷⁸ According to the KECAP, the burden was on the appellants (the residents of Mitumba Village) to prove that the first respondent had evicted them and demolished their houses and structures.⁵⁷⁹ In the KECAP’s opinion, “the absence of a link between the security agents and the 1st respondent, cast[s] doubt as to the latter’s responsibility.”⁵⁸⁰

After thoroughly examining the decision of the High Court, the KECAP made eleven “conclusions and determinations,” including that the trial Court had erred in law in “making final orders that were applicable and enforceable against the 3rd respondent.”⁵⁸¹ In addition, the KECAP held, “whereas a Court has jurisdictional competence to issue interim orders, the trial court failed to appreciate that the concept of partial or interim Judgment is not part of the Kenyan legal system.”⁵⁸² The KECAP noted that on August 11, 2016, the appellants, having been aggrieved by the trial court’s judgment, “sought the certification of the intended appeal as one raising questions of general public importance under Article 163(4)(b) of the Constitution” and that in a ruling delivered on February 2, 2018, the Court of Appeal certified the appeal.⁵⁸³

Subsequently, the appellants “moved” the Kenya Supreme Court, citing eight broad grounds of appeal.⁵⁸⁴ The appellants argued before the KESC that the “‘learned Judges’ erred in law and in fact.”⁵⁸⁵ The KESC then listed the appellants’ eight grounds of appeal and the reliefs that they

575. *Id.*

576. *Id.*

577. *Id.* ¶ 44.

578. *Id.*

579. *Id.*

580. *Id.*

581. *Id.* ¶ 45(i).

582. *Id.* ¶ 45(vi).

583. *Id.* ¶ 46.

584. *Id.* ¶ 47.

585. *Id.*

sought.⁵⁸⁶ On March 7, 2019, noted the KESC, the Initiative for Strategic Litigation in Africa (ISLA), filed a motion seeking leave to be admitted in the proceedings before the KESC as *amicus curiae*.⁵⁸⁷ The ISLA sought to make submissions on “the meaning of the right to remedy in the context of human rights[] violations; demonstrate how remedies in human rights have evolved and present comparative jurisprudence on the subject.”⁵⁸⁸ In a ruling issued on November 29, 2019, the KESC admitted the ISLA as *amicus curiae*.⁵⁸⁹ The KESC noted that the appellants’ written submissions, which were dated February 28, 2019 and were filed on March 1, 2019, outlined five issues which they prayed the KESC to determine.⁵⁹⁰

With respect to the first issue, the appellants submitted that the KECAP had erred in law when it failed to “analyse whether the state actions of forcefully evicting them was in violation of rights and fundamental freedoms under the Constitution.”⁵⁹¹ The KESC explained that “[i]t is the appellants’ case that the High Court was correct in finding that all rights are interdependent and the violation of the social economic rights affected other rights in the Bill of Rights.”⁵⁹² In addition, the appellants had submitted that their right to fair administrative action under Article 47 of the Constitution was violated and that the Appeal Court had failed to determine whether seven days eviction notice was “adequate and reasonable.”⁵⁹³ In their submission to the KESC, the appellants relied on several Kenya court decisions.⁵⁹⁴ The appellants argued that pursuant to Article 2(6) of the Constitution, since Kenya is a state party to the ICESCR, its obligations under the ICESCR and the General Comments of the CESCR on evictions are binding on Kenya.⁵⁹⁵ The appellants also argued that the respondents had violated paragraph 15(b) of the CESCR’s General Comment No. 7, which states that “the procedural protections

586. *Id.* ¶ 48.

587. *Id.* ¶ 49.

588. *Id.*

589. *Id.*

590. *Id.* ¶ 50.

591. *Id.* ¶ 51.

592. *Id.*

593. *Id.* ¶ 52.

594. *Id.* ¶ 52, 55. They relied on *Ibrahim Sangor Osman v. Minister for Provincial Administration and Internal Security and Others*. See Susan Waithera Kariuki & 4 Others v. Nairobi City Council & 2 Others (2011) K.E.H.C. 4305 (K.L.R.) (Kenya); see also *June Seventeenth Enter. Ltd. v. Kenya Airports Auth. & 4 Others* (2014) K.E.H.C. 6784 (K.L.R.) (Kenya).

595. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 53.

which should be applied in relation to forced evictions include . . . (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction.”⁵⁹⁶ Noting that Parliament has since “legislated on what constitutes Reasonable Notice of Eviction,” the appellants cited Section 152B and 152C of the Land Act, which requires three months’ notice before eviction.⁵⁹⁷

The appellants noted that while the named provisions are part of the law that was enacted in 2016, “the right to adequate notice was constitutionally available to them at the time of eviction as the legislation did not confer a right, but only provided a statutory clarification as to what constitutes an adequate eviction notice.”⁵⁹⁸ The appellants faulted the Court of Appeal for relying on the decisions in *Veronica Njeri Waweru & 4 Others v. The City Council of Nairobi & Others*⁵⁹⁹ and *Kepha Council Omondi Onjuro & Others v. the AG & 5 Others*.⁶⁰⁰ The appellants distinguished the decisions in these cases and urged that the judges of the KECAP had failed to “consider that sufficient notice had been issued to the project affected persons in the two matters.”⁶⁰¹ The appellants also submitted to the KESC that their right to dignity was violated by the first respondent and other agents of the state.⁶⁰² To support their submission, they cited the provisions of articles 10(2)(b) and 19(2) of the Constitution of Kenya, which recognize the right to human dignity, and Article 20(4), which requires that when Kenya courts interpret the Constitution they must do so to promote human dignity as enshrined in Article 28 of the Constitution.⁶⁰³

The appellants relied on the KESC’s decision in *Francis Karioko Muruatetu and Another v. Republic*,⁶⁰⁴ the Preamble of the UDHR, the High Court of Kenya’s decision in *JWI v. Standard Group Limited &*

596. *Id.* ¶ 54; See CESCR, General Comment No. 7 (1997), U.N. Doc 20/05/E/C.12/1997/4, 6th Sess.

597. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 54; see The Land Laws Act, No. 28 (2016) KENYA GAZETTE SUPPLEMENT No. 149.

598. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 54.

599. *Id.* ¶ 55; See *Veronica Njeri Waweru & 4 Others v. City Council of Nairobi & 2 Others* (2012) K.E.H.C. 5667 (K.L.R.) (Kenya).

600. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 55; see *Kepha Omondi Onjuro & Others v. Att’y Gen & 5 Others* (2015) K.E.H.C. 6868 (K.L.R.) (Kenya).

601. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 55.

602. *Id.* ¶ 56.

603. *Id.*

604. *Muruatetu & Another v. Republic*; *Katiba Inst. & 4 Others* (2021) K.E.S.C. 31 (K.L.R.) (Kenya).

Another,⁶⁰⁵ *Satrose Ayuma and 11 Others v. Registered Trustees of the Kenya Railways Retirement Benefits Scheme & 3 Others*,⁶⁰⁶ and the KECAP's decision in *Moi Education Centre Company Ltd v. William Musembi & 16 Others*.⁶⁰⁷ As explained by the KESC, the appellants submitted that the KECAP erred in "its interpretation of the right to property by limiting that said right to land."⁶⁰⁸ In addition to arguing that the word "property" is granted "a broad meaning under Article 260 of the Constitution," the appellants also alleged that the demolition of their houses and the destruction of their household items constituted a violation of their right to property under Article 40 of the Constitution.⁶⁰⁹

The appellants also submitted that their forced eviction and the demolition of their homes pushed them into homelessness.⁶¹⁰ In addition, the appellants argued that the destruction of their schools violated their children's rights under Article 53(2) of the Constitution.⁶¹¹ The appellants also argued that by virtue of their low income and social status, i.e., their position as a marginalized group, they were entitled to protection under articles 21(3) and 56 of the Constitution.⁶¹² The appellants made reference to paragraph 10 of the CESCR's General Comment No. 7, which recognizes that "[w]omen, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction."⁶¹³ These vulnerable groups, the appellants argued, need protection from the state.⁶¹⁴

605. *Jemimah Wambui Ikere v. Standard Grp. Ltd. & Another* (2013) K.E.H.C. 636 (K.L.R.) (Kenya).

606. *Satrose Ayuma & 11 Others v. Reg. Tr. of the Kenya Ry. Staff Ret. Benefits Scheme & 2 Others* (2013) K.E.H.C. 6003 (K.L.R.) (Kenya).

607. *Moi Educ. Ctr. Co. Ltd. v. William Musembi & 16 Others* (2017) K.E.C.A. 107 (K.L.R.) (Kenya); see *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 57.

608. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 58.

609. *Id.*

610. *Id.* ¶ 59.

611. Article 53(2) of the Constitution of Kenya 2010 enshrines the best interests of the child standard. CONSTITUTION, 2010 art. 53(2) (Kenya); see *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 59.

612. Article 21(3) directs all state organs and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious, or cultural communities. Article 56 enshrines special rights for minorities and marginalized groups. CONSTITUTION, 2010 art. 56 (Kenya); see *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 59.

613. CESCR, General Comment No. 7 (1997), U.N. Doc 20/05/E/C.12/1997/4 at ¶ 10, 6th Sess.; see *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 59.

614. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 59.

The appellants noted the selective evictions and demolition, arguing that the respondents had demolished the appellants' houses but had spared high-rise apartments that were also on Wilson Airport's flight path.⁶¹⁵ This selective action by the respondents, stated the appellants, was discriminatory and a violation of their rights under articles 27(4) and 10 of the Constitution.⁶¹⁶ The KESC noted that it is "the appellants' case that Article 21(1) of the Constitution imposes both positive and negative obligations upon the State with regard to protection of rights and freedoms in the Bill of Rights."⁶¹⁷ To support their submission, the appellants relied on case law from the ZACC, specifically, the case of *Glenister v. President of the Republic of South Africa*.⁶¹⁸ In *Glenister*, the appellants argued, the ZACC interpreted provisions of Section 7(2) of the Constitution of South Africa, which is similar to Article 21(1) of the Constitution of Kenya, and upheld the negative and positive obligations to give effect to fundamental rights enshrined in the Kenyan Bill of Rights.⁶¹⁹

The appellants also submitted that it is incumbent upon the government of Kenya to develop and implement policies as well as take other measures to ensure the realization of the rights enshrined in Article 21(2) of the Constitution of Kenya.⁶²⁰ They submitted further that pursuant to the principles and guidelines for the implementation of economic, social and cultural rights provided in the Banjul Charter, the state is obliged to ensure that citizens realize these rights.⁶²¹ With respect to the case before the KESC, the appellants argued that the KECAP had failed to find that the KEAG, as a representative of the national government of Kenya, and being the person who had initiated the forceful removal of the appellants from their homes, "had not protected, promoted or fulfilled the rights to housing and dignity as enshrined in the Constitution."⁶²²

The appellants relied on the CESCR's General Comment No. 4 on the right to adequate housing and argued that the KECAP had failed to "address itself to the normative content of the State's obligation"

615. *Id.* ¶ 60.

616. *Id.*

617. *Id.* ¶ 61.

618. *Glenister v. President of the Republic of S. Afr.* 2011 (3) SA 347 (CC) (S. Afr.); see *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 62.

619. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 62; *Glenister*, (3) SA 347 (CC) paras. 105-107.

620. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 63.

621. *Id.*

622. *Id.* ¶ 64.

regarding citizens' realization of the right to adequate housing and that had the KECAP conducted "a critical analysis of the positive obligation imposed upon the State with regard to the right to housing," this would have helped the KECAP "appreciate the fact that the appellants were entitled to certain remedies."⁶²³ With respect to the progressive realization of Article 43 (economic and social) rights, the appellants argued that "progressive" does not mean that the state can indefinitely "postpone or suspend its obligations."⁶²⁴ On the contrary, submitted the appellants, "the State must not only begin to take steps towards the realization of the rights under Article 43 of the Constitution," it must be seen to be developing and implementing clear policies to help citizens realize this right.⁶²⁵ To support their arguments, the appellants relied on case law from Kenya⁶²⁶ and the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.⁶²⁷

The appellants also submitted that the KECAP had failed to recognize that it was the responsibility of the State of Kenya to "not only demonstrate that resources were not available, but also to demonstrate priority in allocating, to the widest possible enjoyment of the right to housing, having regard to prevailing circumstances including the vulnerability of the appellants."⁶²⁸ On the third issue for determination by the KESC, which involved whether the KECAP had erred in law in its analysis of the applicability of international law in the interpretation of the Constitution, the appellants argued that Article 2(5) of the Constitution of Kenya "incorporates general rules of international law while Article 2(6) incorporates international treaties ratified by Kenya into Kenya laws" and that the KECAP had "misinterpreted the application of international law by the High Court, more so its reliance on UN General Comment No. 7."⁶²⁹ The appellants argued further that although General Comment 7 is not binding on states parties, it derives its authority from Article 21 of the ICESCR and it is an authoritative interpretation of the

623. *Id.* ¶ 66.

624. *Id.* ¶ 67.

625. *Id.* ¶ 68.

626. *MMM v. Permanent Sec'y, Ministry of Educ. & 2 Others* (2013) K.E.H.C. 6002 (K.L.R.) (Kenya); *Mathew Okwanda v. Minister of Health and Med. Serv. & 3 Others* (2013) K.E.H.C. 6353 (K.L.R.) (Kenya).

627. The Limburg Principles on the Implementation of the Int'l Covenant on Econ., Soc., and Cultural Rights, U.N. Doc. E/CN.4/1987/17, annex (Jan. 8, 1987), reprinted in 9 HUM. RTS. Q. 122 (1987).

628. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 69.

629. *Id.* ¶ 70.

state party's obligations under ICESCR.⁶³⁰ The appellants noted that General Comment No. 7 was produced by a U.N. treaty body and designed and intended to "assist States Parties in interpreting and complying with their obligations under the treaty."⁶³¹ They then urged that the "General Comments and Guidelines are part and parcel of the ICESCR and are an authoritative interpretative guide on the meaning and the content of the treaty" and that since Kenya is a state party to the ICESCR, the High Court was justified in relying on the U.N. General Comments.⁶³²

To justify their reliance on the CESCR's General Comment No. 7, the appellants submitted that Kenyan courts have regularly relied on the general of comments of U.N. treaty bodies as "persuasive value in interpreting different provisions of the Constitution" as they did in cases such as *Attorney General & Others v. Kituo cha Sheria & 7 Others*,⁶³³ where the KECAP relied on the ICCPR and the U.N. Human Rights Committee's General Comment No. 27.⁶³⁴ The appellants also cited *PAO & 2 Others v. Attorney General*,⁶³⁵ a case in which the High Court of Kenya applied the CESCR's general comments nos. 14 and 17 in determining the right to health.⁶³⁶ The appellants then turned to the KESC's advisory opinion in the following cases: *In The Matter of the Principle of Gender Representation in the National Assembly and the Senate*⁶³⁷ and *In the Matter of the Kenya Commission on Human Rights*,⁶³⁸ as well as the KESC's opinion in *Communication Commission of Kenya & 5 Others*⁶³⁹ and urged that in interpreting Article 2(5), "the Constitution

630. *Id.* ¶ 71.

631. *Id.*

632. *Id.*

633. *Att'y Gen. v. Kituo Cha Sheria & 7 Others* (2017) K.E.C.A. 773 (K.L.R.) (Kenya).

634. *Id.*; *See Human Rights Comm., CCPR General Comment No. 27: Art. 12, U.N. Doc CCPR/C/21/Rev.1/Add.9* (November 2, 1999).

635. *PAO & 2 Others v. Att'y Gen.; Aids Law Project (Interested Party)* (2012) K.E.H.C. 5133 (K.L.R.) (Kenya).

636. *Id.*; *see Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 72; *see also* CESCR, General Comment No. 14 (2000), U.N. Doc E/C.12/2000/4, ¶ 1, 4, 22nd Sess. and CESCR, General Comment No. 17 (2005), U.N. Doc E/C.12/GC/17 ¶ 35, 35th Sess.

637. *In the Matter of the Principle of Gender Representation in the Nat'l Assembly and the Senate* (2012) K.E.S.C. 5 (K.L.R.) (Kenya).

638. *In the Matter of Kenya Nat'l Comm'n on Hum. Rts.* (2014) K.E.S.C. 33 (K.L.R.) (Kenya).

639. *Commc'ns Comm'n of Kenya & 5 Others v. Royal Media Serv. Ltd.* (2014) K.E.S.C. 53 (K.L.R.) (Kenya).

must be read holistically and in a manner that provides the most robust and expansive protection of fundamental rights and freedoms.”⁶⁴⁰

The appellants submitted that the KECAP “was required to adopt a more expansive interpretation of the scope of Article 2(5) to include sources of law other than customary international law” and the KECAP’s judges should have taken into consideration the CESC’s General Comment No. 7 in order to arrive at an interpretation “that most favours the enforcement of rights.”⁶⁴¹ Finally, the appellants submitted that, in its interpretation of constitutional provisions, the KECAP ignored widely adopted “international human rights law standards.”⁶⁴²

The fourth issue was whether the KECAP erred in law in the interpretation and application of the political doctrine question.⁶⁴³ Specifically, the appellants submitted that by relying on *Marbury v. Madison* and applying the political question doctrine, the KECAP ignored several provisions of the Constitution of Kenya, as well as the jurisprudence of the KESC that has granted Kenyan courts greater powers in “upholding, interpreting and applying the Constitution.”⁶⁴⁴ The appellants submitted further that the KECAP’s reliance on the political question doctrine “had flown in the face of Article 20(1) [of] the Constitution, which clearly envisages that Courts and tribunals have power to review policy decisions, concerning socio-economic rights.”⁶⁴⁵ Finally, submitted the appellants, the decision by the KECAP to apply the political question doctrine disregarded the KESC’s rulings in several cases, including *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others*⁶⁴⁶ and *Judges & Magistrates Vetting Board v. Center for Human Rights Democracy*.⁶⁴⁷

The fifth issue is whether the KECAP erred in its interpretation of appropriate remedies under Article 23(3) of the Constitution, which

640. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 73.

641. *Id.*

642. *Id.*

643. *Id.* ¶ 74.

644. *Id.*

645. *Id.* ¶ 75.

646. *Id.* ¶ 76; *see also* *Comm’n of Kenya & 5 Others v. Royal Media Serv. Ltd.* (2014) K.E.S.C. 53 (K.L.R.) (Kenya) (In this case, the Supreme Court cautions that “[t]here is always the danger that unthinking deference to canons of interpreting rules of common law, statutes, and foreign cases, can subvert the theory of interpreting the Constitution.”).

647. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 76; *see also* *Judges and Magistrates Vetting Bd. & 2 Others v. Ctr. for Hum. Rts. and Democracy & 11 Others* (2014) K.E.S.C. 9 (K.L.R.) (Kenya) (where the Supreme Court held that the political question doctrine and the separation of powers concept cannot oust the courts’ jurisdiction to interpret the Constitution and determine the constitutionality of all laws).

empowers the High Court to issue remedies, including “structural interdicts, injunctions, continuing mandamus, supervisory orders or any other appropriate relief.”⁶⁴⁸ After citing several Kenyan cases, the appellants submitted that the High Court had interpreted the term “‘appropriate remedy’ to mean ‘effective remedy to a constitutional violation’”⁶⁴⁹ and that “a structural/supervising interdict is a remedy available in Kenya under Article 23(3) of the Constitution.”⁶⁵⁰ Such a remedy, submitted the appellants, was “fashioned in the South African case of *Fose v. Minister of Safety and Security*”⁶⁵¹ and later applied in at least two Kenyan High Court cases.⁶⁵² In the Kenyan cases, the High Court issued structural interdicts “as a remedy to protect the right to the highest attainable standards of health, regarding inmates with infectious tuberculosis.”⁶⁵³

In conclusion, the appellants faulted the KECAP for failing to abide by the principle of *stare decisis* and not following binding precedent set by the KESC on the use of structural interdicts or other reliefs,⁶⁵⁴ and that “where a Court makes a structural remedial Order, it cannot be said to have become *functus officio*, as it would not have completed its judicial task.”⁶⁵⁵

After this overview of the appellants’ case, the KESC then proceeded to review the respondents’ cases, beginning with that of the first respondent.⁶⁵⁶ The KESC noted that in response to the appeal, the first respondent had filed “Grounds of Opposition dated 20th February, 2019, written submissions dated 8th March, 2019, and a List of Authorities dated 19th May, 2019.”⁶⁵⁷ The KESC explained that the first respondent had relied on twelve grounds of opposition and that in “written and oral submissions,” the latter had addressed the Supreme Court on five issues.⁶⁵⁸ The first respondent urged caution when courts resort to

648. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 77.

649. *Id.*

650. *Id.* ¶ 78.

651. *Id.*; see *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (S. Afr.).

652. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 78. As submitted by the appellants, these cases are: *Republic v. Council of Legal Edu. & Another Ex-Parte Mount Kenya Univ.* (2016) K.E.H.C. 7535 (K.L.R.) (Kenya) and *Daniel Ng’etich & 2 Others v. Att’y Gen. & 3 Others* (2016) K.E.H.C. 8207 (K.L.R.) (Kenya).

653. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 78.

654. *Id.* ¶ 79.

655. *Id.* ¶ 80.

656. *Id.* at section (b).

657. *Id.* ¶ 81.

658. *Id.* ¶¶ 82(i)-(iii), 83.

structural interdicts “by considering the context in which such remedies emerged in South Africa.”⁶⁵⁹ The first respondent cited several South African cases, including, for example, *Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)*,⁶⁶⁰ where the ZACC held that the High Court had the jurisdiction to issue structural interdicts against the government.⁶⁶¹

The first respondent also made references to Canadian case law where the Supreme Court upheld the High Court’s jurisdiction to issue structural interdicts, but only in appropriate cases.⁶⁶² The first respondent submitted that structural interdicts are only suitable in situations where the executive branch of government

is shown to be intransigent or incompetent; where there is evidence that declaratory orders may not be of assistance on account of past conduct of the government; where all attempts and efforts at persuasion and assistance to the state have been made and failed; and where the order is not ambiguous, but clear and specific as to what is required of the parties.⁶⁶³

With respect to whether the first and second respondents had failed to meet their obligations towards the appellants under Article 21 of the Constitution, the first respondent submitted that it was not responsible for the forceful “eviction from or demolitions of the appellants’ premises.”⁶⁶⁴ Regarding whether the KECAP erred in law in its analysis of the applicability of international law, the first respondent concurred with the KECAP’s holding and submitted that “while applying the general rules of international law, the Courts ought to have regard to the hierarchy of laws in Kenya and the supremacy of the Constitution as set out in Article 2(4) of the Constitution.”⁶⁶⁵ The first respondent then submitted that jurisdictions in the United States, Canada, Nigeria, South Africa, and India, “more often than not, tend to gravitate towards upholding the supremacy of their domestic Constitutions.”⁶⁶⁶

659. *Id.* ¶ 84.

660. *Minister of Health v. Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) (S. Afr.).

661. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 84; *see Treatment Action Campaign*, (5) SA 721 (CC) para. 113.

662. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 84; *see Doucet-Boudreau v. Nova Scotia (Minister of Educ.)*, [2003] 3 S.C.R. 3, paras. 84-86 (Can. N.S. C.A.).

663. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 86.

664. *Id.* ¶ 87.

665. *Id.* ¶ 89.

666. *Id.* ¶ 90.

Regarding whether the KECAP failed to interpret the progressive realization of the right to housing under articles 21 and 23, the first respondent submitted that the KESC had the opportunity to decide the issue of progressive realization of socioeconomic rights in its advisory opinion *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*.⁶⁶⁷ In that advisory opinion, the first respondent submitted, the KESC held that “progressive realization simply refers to the gradual or phased-out attainment of a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State.”⁶⁶⁸

As to whether the KECAP erred in its interpretation of Article 24 of the Constitution on the limitation of rights, the first respondent concurred with the KECAP “to the effect that public interest, public policy, and national security, may be taken into account to limit individual rights under the Bill of Rights.”⁶⁶⁹ The first respondent relied on *S v. Manamela & Another (Director General of Justice Intervening)*,⁶⁷⁰ a case of the ZACC, and urged that “key factors have to be considered in an overall assessment as to whether or not a limitation is reasonable and justifiable in an open and democratic society.”⁶⁷¹

Next, the KESC examined the submissions of the second and third respondents.⁶⁷² The Court noted that these two respondents made submissions on four issues, including whether the KECAP erred in failing to find that the respondents violated the appellants’ rights under various provisions of the Constitution, whether the KECAP failed to properly interpret and apply the concept of progressive realization of the right to housing under Article 21 of the Constitution, whether a self-help group can hold property in its own capacity, whether the KECAP erred in its interpretation of Article 24 of the Constitution on limitations of rights, and whether the learned judges of the KECAP were justified in interfering with the High Court’s discretionary grant of structural interdicts under Article 23 of the Constitution of Kenya.⁶⁷³ In its submissions, the second and third respondents relied on the UDHR, several Kenyan authorities, and a case of the ZACC.⁶⁷⁴

667. *Id.* ¶ 91; see *In the Matter of the Principle of Gender Representation in the Nat’l Assembly and the Senate* (2012) K.E.S.C. 5 (K.L.R.) (Kenya).

668. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 91.

669. *Id.* ¶ 92.

670. *S. v. Manamela and Another (Dir. Gen. of Just. Intervening)* 2000 (3) SA 1 (S. Afr.).

671. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 91.

672. *Id.* ¶ 93.

673. *Id.* ¶¶ 93, 95-96, 99-101.

674. *Id.* They also reference the Land Registration Act.

Finally, the KESC examined the submissions of the *amicus curiae*.⁶⁷⁵ Of particular interest to this article is the *amicus*' submission on the evolution of the right to a remedy under international law.⁶⁷⁶ First, the *amicus* embraced the principle "enunciated in the *Chorzów Factory Case* by the Permanent Court of International Justice (PCIJ).⁶⁷⁷ The respondents noted that the PCIJ had held that "repatriation must remove the consequences of the illegal act, and revert to the situation that would have existed if the act was not committed."⁶⁷⁸ The *amicus* then concluded that the *Chorzów Factory Case* "signals that *restitution* and *compensation*, are effective remedies that Courts of law should resort to in cases of human rights violations."⁶⁷⁹ The *amicus* submitted further that under the "international sphere," Article 2(3) of the ICCPR provides "for an effective remedy for violation of the rights and freedoms provided for in the Convention."⁶⁸⁰

With respect to the African context, the *amicus* noted that the Banjul Charter does not have a provision "mandating its supervisory bodies, with an express authority to grant remedies for violation of human rights."⁶⁸¹ However, noted the *amicus*, the African Human Rights Court Protocol in Article 27, obliges the Court to grant appropriate remedies for violations of human and peoples' rights.⁶⁸² In addition, submitted the *amicus*, the African Commission held in *Sir Dawda Jawara v. The Gambia* that states are obligated to provide "remedies that must be effective, available and sufficient" and that the African Commission has "granted remedies crafted with great deference to states concerned, such as ordering the state to take measures to align them to the [Banjul] Charter."⁶⁸³

675. *Id.* ¶ 102.

676. *Id.* ¶ 105.

677. *Id.*; see *Factory at Chorzów*, (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, (Sept. 13).

678. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 105.

679. *Id.* (emphasis in original).

680. *Id.*; Article 2(3)(a) of the ICCPR states as follows: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. . . ." ICCPR, *supra* note 126, at art. 2(3)(a).

681. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 106.

682. *Id.*; see also Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *adopted* June 10, 1998, 21 I.L.M. 58, entered into force on January 25, 2004. Article 27(1) states as follows: "If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

683. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 107; see *Sir Dawda K. Jawara v. Gambia*, Nos. 147/95 and 149/96, Decision, African Commission on Human and Peoples' Rights

The amicus also submitted that, pursuant to Rule 112 of its rules, the African Commission has, through several of its decisions, directed states parties to the Banjul Charter “to report to it on the measures undertaken to implement its recommendations.”⁶⁸⁴ To support its submission, the amicus cited the case *African Commission on Human and Peoples’ Rights v. Republic of Kenya*,⁶⁸⁵ the case in which the African Human Rights Court ordered Kenya to take all measures, within a reasonable timeframe, to remedy the violations of the rights of the Ogiek Community and then report to the African Human Rights Court on the measures taken within six months.⁶⁸⁶ The African Human Rights Court, the amicus submitted, “has recognized structural interdicts as appropriate remedies for the enforcement, full realization and implementation of Court orders and recommendations.”⁶⁸⁷

The amicus then turned to the Inter-American human rights system and noted that the Inter-American Court on Human Rights (IACtHR) has “also embraced what can be considered as structural edicts as forms of remedy to redress human rights violations” and added that the IACtHR has “consistently ordered parties to report back on measures the states parties have taken to comply with the decisions handed down on human rights violation claims.”⁶⁸⁸ The amicus also submitted that the European Human Rights System “guarantees the right of victims to an effective remedy under Articles 13 and 41 of the [ECHR].”⁶⁸⁹ Under the European System, noted the amicus, “a remedy must be effective in practice and in law as decided by the [ECtHR] in the *MSS v. Belgium and Greece*.”⁶⁹⁰

Noting that in addition to “restitution and compensation,” courts are increasingly resorting to “structural interdicts” in human rights cases, the amicus cited several cases of the ZACC.⁶⁹¹ The amicus then cited *Decision T-760* of 2008 of the Colombian Constitutional Court (CCC)

[Afr. Comm’n H.P.R.], (May 11, 2000), <https://hrlibrary.umn.edu/africa/comcases/Comm147-95.pdf>.

684. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 108.

685. *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, No. 006/2012, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], (May 26, 2017), <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/5fe/9a9/5f55fe9a96676974302132.pdf>.

686. *Id.* ¶ 227 (On the Merits) (ordering the Respondent (the State of Kenya) “to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of measures taken within six (6) months from the date of this Judgment”).

687. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 108.

688. *Id.* ¶ 109.

689. *Id.* ¶ 110.

690. *Id.*; see *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Eur. Ct. H. R. (2011).

691. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 110.

where the CCC used twenty-two accumulated cases to address regulatory failures detected in the twenty-two cases, which represented “a violation of the competent authorities’ constitutional obligations to respect, protect and fulfill the right to health.”⁶⁹² The amicus explained that the CCC’s judgment has been “fully implemented” and that it “is significant in granting Orders that are geared towards public policy reforms.”⁶⁹³

With respect to the situation in Kenya, the amicus submitted that Article 23(3) of the Constitution permits “for resort to structural interdicts as appropriate forms of relief” and that an appropriate relief is “a remedy that is sufficient, effective, and able to address the violation in question.”⁶⁹⁴ Regarding the “actual content, shape, and form of these remedies,” the amicus submitted that these should be left to the discretion of Kenyan courts.⁶⁹⁵ To support this argument, the amicus cited the decisions of Kenya’s High Court in *Republic v. Council of Legal Education* and *Daniel Ng’etich & 2 Others v. Attorney General & 3 Others*.⁶⁹⁶ In these cases, the High Court “issued structural interdicts against the Ministry of Health.”⁶⁹⁷ The amicus cited to the *Communications Commission of Kenya* case and urged that Article 23(3) of the Constitution “does not limit the Court to the reliefs listed.”⁶⁹⁸

Finally, the amicus submitted that emerging jurisprudence from “international and regional human rights bodies demonstrates the expanding resort to structural interdicts as appropriate and effective reliefs in human rights cases” and that “Article 23(3) of the Constitution [of Kenya] gives the [country’s] Courts wide powers to fashion appropriate remedies on a case by case basis.”⁶⁹⁹ Hence, concluded the amicus, “a court of law does not become *functus officio* after it delivers a Judgment in the form of a structural interdict.”⁷⁰⁰

692. *Id.* ¶ 111; ESCR-Net, *Decision T-760 of 2008: Nature of the Case*, July 30, 2009, <https://www.escr-net.org/caselaw/2009/decision-t-760-2008/> (Dec. 20, 2024).

693. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 111.

694. *Id.* ¶ 112.

695. *Id.*

696. *Republic v. Council of Legal Educ. & another* (2016) K.E.H.C. 7535 (K.L.R.) (Kenya); *Daniel Ng’etich & 2 others v. Att’y Gen & 3 others* (2016) K.E.H.C. 8207 (K.L.R.) (Kenya).

697. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 112.

698. *Id.* See *Comm’n of Kenya & 5 Others v. Royal Media Serv. Ltd.* (2014) KESC 53 ¶ 358 (K.L.R.) (Kenya). In this case, the Supreme Court cautions that “[t]here is always the danger that unthinking deference to canons of interpreting rules of common law, statutes, and foreign cases, can subvert the theory of interpreting the Constitution.” *Id.*

699. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 113.

700. *Id.*

After reviewing the submissions of the appellants, the respondents, and the amicus, the KESC then proceeded to analyze all the submissions and make its decision.⁷⁰¹ The Court began its analysis by noting that although the appeal was certified “as one involving a matter or matters of general public importance by the Court of Appeal,” the latter, however, “did not identify the issues or points of law, that the Supreme Court ought to pronounce itself upon.”⁷⁰² Taking this into consideration, the KESC noted, it had no option but to revisit its holding in *Hermanus Phillipus Steyn v. Giovanni Gnnecchi-Ruscone*, where it stated as follows:⁷⁰³

[F]or a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest.⁷⁰⁴

The KESC stated further that:

a matter meriting certification as one of general public importance, *if it is one of law*, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below.⁷⁰⁵

After taking into consideration these principles, the KESC then identified the list of “issues/questions of law as meriting [its] attention under Article 163(4) of the Constitution.”⁷⁰⁶

The KESC started its analysis by examining the “points of divergence between the High Court and Court of Appeal, regarding the place of structural interdicts as forms of relief in case of alleged human rights violation by the State.”⁷⁰⁷ The KESC explained that the trial judge “had no or little hesitation in granting interim Orders requiring the

701. *Id.* ¶ 114.

702. *Id.*

703. *Hermanus Phillipus Steyn v. Giovanni Gnnecchi-Ruscone* (2013) K.E.S.C. 11 (K.L.R.).

704. *Id.* ¶ 60(i) (emphasis added).

705. *Id.* ¶ 60 (emphasis added by KESC).

706. The issues are: “1. What is the place of Structural Interdicts (if any) as forms of relief in human rights litigation under the Constitution? 2. What is the effect of Article 2(5) and 2(6) of the Constitution regarding the applicability of international law in general and international human rights in particular? 3. To what extent are Guidelines by UN bodies relevant in the interpretation and application of Socio-Economic Rights by Kenyan Courts under the Constitution? 4. Under what circumstances may a Right to Housing accrue (if at all) in accordance with the provisions of Article 43(1)(b) of the Constitution?” *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 115.

707. *Id.* ¶ 116.

respondents to furnish the Court, with information regarding policies and programmes on provision of shelter and access to housing.”⁷⁰⁸ However, noted the KESC, the KECAP’s opinion was that the High Court “could not reserve for itself, any outstanding issues, since it had become *Functus-Officio* after delivery of the Judgment.”⁷⁰⁹

After examining the orders of the High Court regarding the issue of structural interdicts and the KECAP’s view of them, the KESC declared as follows: “It is clear from the foregoing, that the two superior Courts hold diametrically opposed views regarding *structural interdicts or interim Orders*.”⁷¹⁰ To examine “the place and scope of interim orders in [Kenya’s] human rights enforcement architecture,” the KESC regarded Article 23(1) and 23(3) of the Constitution as “the launching pad” of such an analysis.⁷¹¹ The KESC noted that it had the opportunity to consider the scope of Article 23(3) of the Constitution as read with Article 165(3)(d) of the Constitution in *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others* and in that case, the KESC stated that

a close examination of these provisions (article[s] 23(3) and 165(3)(d) of the Constitution) shows that the Constitution requires that Court to go even further than the U.S. Supreme Court did in *Marbury*, and that article 23(3) grants the High Court powers to grant appropriate relief ‘including’ meaning that this is not an exhaustive list.⁷¹²

In *Communications Commission of Kenya*, the Supreme Court stated further that:

It is emerging already, in this Court’s path of jurisprudential development, that we have endeavoured to enhance and, as far as possible, stabilize the objective normative yardsticks that assure certainty and predictability in

708. *Id.*

709. *Id.*

710. *Id.* ¶ 117 (emphasis in original).

711. *Id.* Article 23(1) of the Constitution states as follows: “The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.” See CONSTITUTION, 2010 art. 23(1) (Kenya). In proceedings brought under Article 22, a court may grant appropriate relief, including: (a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of judicial review. See *id.* at art. 23(3).

712. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 118.

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the application of the Constitution and the law to the merits of particular cases.⁷¹³

The KESC, in the case at bar, then provided an overview of its orders in *Communications Commission of Kenya* and explained that in issuing these Orders, the Court “was well aware of their interim nature, and that in doing so, it was giving effect, to Articles 23(3) and 165(3)(d) of the Constitution pursuant to Section 3 of the Supreme Court Act.”⁷¹⁴ However, noted the KESC, the KECAP merely stated, but without elaboration or explanation, that it was aware of the Supreme Court’s orders in *Communications Commission of Kenya* case.⁷¹⁵ In addition, explained the KESC, the KECAP also took notice of two important High Court decisions, namely, *Satrose Ayuma & 11 Others v. The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 Others*⁷¹⁶ and *Kepha Omondi Onjuro & Others v. Attorney General & 5 Others*.⁷¹⁷ The KESC noted that in these two named cases, the High Court issued orders that are similar to the ones issued by the trial Court in the “instant case,”—that is, the case before the Supreme Court.⁷¹⁸

The Supreme Court then cited its decision in *Francis Karioko Muruatetu & Another v. Republic*⁷¹⁹ and then explained that, by not distinguishing its decisions in the *Communications Commission of Kenya* and *Muruatetu* cases and, in addition, by faulting the High Court’s approach in the three cases, the KECAP “had simply disregarded [the Supreme Court’s] signal, concerning interim reliefs that a Court may issue to redress the violation of a human right.”⁷²⁰ Instead, noted the KESC, the KECAP “was categorical that a Court of law becomes *functus-officio* once it has delivered Judgment.”⁷²¹ The KECAP, the Supreme Court noted, “placed critical emphasis on Order 21 of the Civil Procedure Act, which can be regarded as the embodiment of the *functus-officio* doctrine”⁷²² and

713. *Commc’ns Comm’n of Kenya & 5 Others v. Royal Media Serv. Ltd.* (2014) KESC 53 ¶ 412 (K.L.R.) (Kenya).

714. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 119.

715. *Id.*

716. *Satrose Ayuma & 11 Others v. Reg. Tr. of the Kenya Ry. Staff Ret. Benefits Scheme & 2 Others* (2013) K.E.H.C. 6003 (K.L.R.) (Kenya).

717. *Kepha Omondi Onjuro & others v. Att’y Gen. & 5 others* (2015) K.E.H.C. 6868 (K.L.R.) (Kenya).

718. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 119.

719. *Francis Karioko Muruatetu & another v. Republic* (2017) K.E.S.C. 2 (K.L.R.) (Kenya).

720. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 120.

721. *Id.*

722. *Id.*

appeared to have “shut the door, to the use of interim reliefs or structural interdicts, in human rights and other Constitutional litigation when it declared that ‘the concept of partial Judgment or interim Judgment after hearing of the parties is unknown to the Kenyan law.’”⁷²³

The KESC held that it was in agreement with the submissions made by the appellant and the amicus “to the effect that Article 23(3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right.”⁷²⁴ The Court then noted that since it had already made an authoritative pronouncement on the matter of structural interdicts, it did not intend to say anymore on the topic.⁷²⁵ While the Court acknowledged the fact that “the *functus-officio* doctrine retains its validity, even vitality, in the majority of cases, both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case by case basis.”⁷²⁶ The KESC then concluded that “[t]o subject Article 23 of the Constitution to the limitations of Rule 21 of the Civil Procedure Act, would stifle the development of Court-sanctioned enforcement of human rights as envisaged in the Bill of Rights” and that “[w]here a Court of law issues an order, whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.”⁷²⁷

The KESC then added that “interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the Courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a Constitutional or statutory mandate to enforce the order.”⁷²⁸ The KESC emphasized that in issuing “such orders,” the Court must be “realistic, and avoid the temptation of judicial overreach, especially in matters [of] policy” and that the “orders should not be couched in general terms, nor should they be addressed to third parties who have no Constitutional or statutory mandate to enforce them.”⁷²⁹ Finally, declared the Supreme Court, “[w]here necessary, a court of law may indicate that the orders it is

723. *Id.*

724. *Id.* ¶ 121.

725. *Id.*

726. *Id.*

727. *Id.*

728. *Id.* ¶ 122.

729. *Id.*

issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.”⁷³⁰

The second issue that the Supreme Court examined is the applicability of international law under Articles 2(5) and 2(6) of the Constitution of Kenya. Article 2(5) provides that “[t]he *general rules of international law* shall form part of the law of Kenya” and Article 2(6) states that “[a]ny *treaty or convention ratified by Kenya* shall form part of the law of Kenya under this Constitution.”⁷³¹ The KESC then explained that these constitutional provisions “have given rise to different and often conflicting judicial interpretations regarding their import and meaning.”⁷³² According to one school of thought, the KESC noted, the provision in Article 2(6) of the Constitution “has transformed Kenya from a dualist to a monist nation as far as its approach towards international treaties, conventions, and protocols, is concerned.”⁷³³ Before the 2010 Constitution entered into force, an international treaty ratified by Kenya had to be domesticated through domestic legislation in order to create rights that were justiciable domestically. However, according to this school, Article 2(6) effectively makes a treaty ratified by Kenya “directly applicable in the Country’s legal system without more.”⁷³⁴ Based on this assumption, the KESC explained, a number of the country’s courts “have declared certain treaties and conventions as ‘*binding*’ upon all our institutions of governance” and that this conclusion apparently “derives from the Courts’ interpretation of the expression, ‘*shall form part of the law of Kenya*’ to mean *shall be directly applicable in Kenya*.”⁷³⁵

A second school of thought, noted the KESC, however, has adopted a more restrictive approach to or view of Article 2(5) and (6) of the Constitution regarding the applicability of international law in Kenya’s legal system.⁷³⁶ According to this school, “international law is subordinate to the Constitution, and as such, can only apply subject to the supreme law of the land.”⁷³⁷ Supporters of this school, the KESC explained, do not subscribe to the view that as a result of Article 2(5) and (6) of the Constitution, Kenya is now a monist state.⁷³⁸ Before providing the definitive interpretation of these provisions, the KESC reiterated that

730. *Id.*

731. CONSTITUTION, 2010 art. 2(5), 2(6) (Kenya) (emphasis added).

732. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 124.

733. *Id.*

734. *Id.*

735. *Id.* ¶ 125 (emphasis in original).

736. *Id.*

737. *Id.*

738. *Id.*

Article 2(5) refers to “the general rules of international law” while Article 2(6) refers to “treaties and conventions” ratified by Kenya.⁷³⁹

The KESC began its analysis by noting that these provisions are better understood by “revisiting the relationship between international law and municipal law, and the circumstances under which, one takes precedence over the other.”⁷⁴⁰ At the international level, “international law is binding on all states, and every state is obliged to give effect to it.”⁷⁴¹ Although the international obligation is imposed on the state and not on any “particular branch, institution, or any individual member of its government,” the KESC explained, “the state is responsible for the violation of international law by any of its organs” and “[i]t is an established principle that a State cannot plead its own domestic law as an excuse for non-compliance with international law.”⁷⁴² The Court then referenced Article 13 of the Declaration of Rights and Duties of States,⁷⁴³ which was adopted by the International Law Commission in 1949 and which provides as follows:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.⁷⁴⁴

This principle, the Court explained, was later incorporated into the Vienna Convention on the Law of Treaties.⁷⁴⁵ With respect to the domestic side, the Court explained that “since a state’s responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic Courts apply and give effect to international obligations.”⁷⁴⁶ States, the Court noted, do routinely employ particular means or mechanisms to carry out their international obligations.⁷⁴⁷ As an example, the Court noted that states may take “legislative and other measures to

739. *Id.* ¶ 126.

740. *Id.*

741. *Id.*

742. *Id.*

743. Draft Declarations on Rights and Duties of States with Commentaries, G.A. Res. 375(IV), at annex art. 13, (Dec. 6, 1949), *reprinted in* [1949] 1 Y.B. INT’L L. COMM’N 286.

744. *Id.*

745. The provision was incorporated into the Vienna Convention on the Law of Treaties as Article 27, which states that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S 331.

746. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 127.

747. *Id.*

give full effect to their treaty obligations under international law.”⁷⁴⁸ The ICCPR, the KESC explained, imposes an obligation on states parties to “enact laws to protect and ensure respect for rights” under the ICCPR while the Convention on the Prevention and Punishment of the Crime of Genocide imposes an obligation on states parties to criminalize genocide.⁷⁴⁹ The KESC also referenced the U.N. Convention Against Corruption, which requires states parties to take various domestic legislative and other measures to effectively combat corruption.⁷⁵⁰ Whether domestic courts are required or permitted by their national laws to give effect to the State’s international obligations, the KESC explained, differs from state to state.⁷⁵¹

How then should the expression “shall form part of the law of Kenya,” which is provided in Article 2(5) (6), be interpreted or what meaning should be given to it, asked the KESC?⁷⁵² The Court then cited *The Paquete Habana* Case, which considered the place of customary international law in the legal system of the United States.⁷⁵³ In *The Paquete Habana*, Justice Gray stated as follows:

*International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.*⁷⁵⁴

The KESC noted that even before the American Revolution, English Courts were applying customary law to the adjudication of domestic cases and cited *Triquet & Others v. Bath*, a case in which Lord Mansfield held that “the law of nations was part of the law of England.”⁷⁵⁵ The KESC

748. *Id.*

749. *Id.*

750. *Id.*

751. *Id.*

752. *Id.* ¶ 128.

753. *The Paquete Habana*, 175 U.S. 677 (1990).

754. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 128 (emphasis added by KESC); see *The Paquete Habana*, 175 U.S. 700.

755. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 129; see *Triquet & Others v. Bath*, [1764] 1 Black 471 (S.C.) 938.

then cited *Chung Chi Cheung v. The King* in which the Privy Council declared as follows:

The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.⁷⁵⁶

The KESC then concluded that where the expression “as part of our law” has been used, as in the judicial decisions referred to earlier, it means that “domestic Courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that the same are relevant, and not in conflict with the Constitution, statutes, or a final judicial pronouncement.”⁷⁵⁷ The phrase “rules of international law,” on the other hand, noted the KESC, “viewed restrictively . . . in the context in which it was used in the American and English cases quoted above, refers to customary international law.”⁷⁵⁸ In the Kenyan context, Article 2(5) and 2(6) of the Constitution “embraces both international custom and treaty law” and that this constitutional provision “can be said to be both outward, and inward looking.”⁷⁵⁹

The KESC explained that the provision in Article 2(5) and (6) is outward-looking in that “it commits Kenya—the State, to conduct its international relations in accordance with its obligations under international law,” which derives from the fact that, as a member of the international community, “Kenya is bound by its obligations under customary international and its undertakings under the treaties and conventions, to which it is a party.”⁷⁶⁰ Article 2(5) and (6), the Court explained, is inward-looking in that it “requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement.”⁷⁶¹ The KESC held that Article 2(5) and (6) of the Constitution recognizes both customary and treaty law as a source of law in Kenya.⁷⁶² Similarly, the KESC explained, a court of law “is at liberty,

756. *Chung Chi Cheung v. The King* [1939] AC 160 (PC) 168 (appeal taken from H.K.).

757. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 130.

758. *Id.*

759. *Id.* ¶ 131.

760. *Id.*

761. *Id.* ¶ 132.

762. *Id.*

to refer to a norm of international law, as an aid in interpreting or clarifying a Constitutional provision.⁷⁶³

The KESC then concluded that Article 2(5) and (6) of the Constitution of Kenya “has nothing or little of significance to do with the *monist-dualist* categorization” and that the expression “shall form part of the law of Kenya” as used in this provision of the Constitution “does not transform Kenya from a dualist to a monist state as understood in international discourse.”⁷⁶⁴ Given developments in contemporary treaty-making, the KESC noted,

the argument about whether a state is *monist or dualist*, is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols, are Non-Self Executing, which means that, they cannot be directly applicable in the legal systems of [S]tates [P]arties, without further legislative and administrative action.⁷⁶⁵

The third issue that the KESC examined is the role of the U.N. Guidelines in the interpretation and clarification of the Bill of Rights. The KESC noted that the trial judge in the case at bar had relied on the U.N. Guidelines on Evictions and CESCR General Comment No. 7 “to determine the conditions under which forced evictions may be undertaken in Kenya.”⁷⁶⁶ The Court noted that in *Kepha Omondi Onjuro and Satrose Ayuma*, the High Court had also adopted the U.N. Guidelines on Evictions “as part of the law of Kenya pursuant to Article 2(5) of the Constitution.”⁷⁶⁷ However, the KECAP took issue with the High Court’s reliance on the U.N. Guidelines.⁷⁶⁸ The KESC declared that although it agreed with the KECAP’s statement on the hierarchy of laws, it was “at pains to understand why the Appellate Court, faulted the High Court’s reference to the Guidelines, on grounds of *inconsistency with the Constitution*.”⁷⁶⁹ The KESC added that “it is unclear to us, how the principle of *hierarchy of laws* came into play” and that it was not clear from the KECAP’s opinion what provisions in the Guidelines “have fallen afoul of the Constitution so as to be declared inconsistent?”⁷⁷⁰

763. *Id.* In the Matter of the Principle of Gender Representation in the Nat’l Assembly and the Senate (2012) K.E.S.C. 5 (K.L.R.) (Kenya).

764. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 133.

765. *Id.*

766. *Id.* ¶ 134.

767. *Id.*

768. *Id.* ¶ 135.

769. *Id.* (emphasis in original).

770. *Id.* ¶ 136.

The KESC noted that the KECAP also faulted the High Court's application of the U.N. Guidelines "on grounds that what Article 2(5) of the Constitution envisages by the words '*general rules of international law*' are *peremptory norms of international law* or *JUS COGENS* and not all rules of international law."⁷⁷¹ The Supreme Court explained that there are two basic sources of international law: (i) international treaties (either bilateral, multi-lateral, or universal) and (ii) international custom.⁷⁷² It then concluded that it did not find any "wording of Article 2(5) of the Constitution that the words '*general rules of international law*' refer only to the *peremptory norms of international law* or *jus cogens*."⁷⁷³ International law, the Supreme Court explained, "governs relations between independent states *qua* states and other subjects of international law," and the rules binding upon states "emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate their relations or achieve common aims."⁷⁷⁴

The Statute of the International Court of Justice, the KESC explained, is the most authoritative statement on the sources of international law.⁷⁷⁵ *Jus cogens*, on the other hand, the Court explained, accounts for "a very tiny *corpus* of the general rules of international law," and "[i]nternational custom remains the basic source of general rules of international law," which is generally referred to as "customary international law."⁷⁷⁶ The KESC then asked, "Is it conceivable then, that the framers of the Constitution, in their use of the words '*general rules of international law*' could have been referring to the limited and still evolving concept of *jus cogens* as opposed to the whole corpus of customary international law?"⁷⁷⁷ The Court answered in the negative and stated that even if the KESC were to "entertain such a possibility, the same is definitely not apparent on the face of Article 2(5) of the Constitution."⁷⁷⁸ The Court then held that "the words general rules of international law in

771. *Id.* ¶ 137 (emphasis in original).

772. *Id.*

773. *Id.* ¶ 138.

774. *Id.* The Court also cited Article 38 of the Statute of the International Court of Justice, which states, *inter alia*, that the Court is to apply "(a) International conventions, whether general or particular, establishing rules expressly recognized by contesting states; and (b) International custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice art. 38, Oct. 24, 1945, 188 U.N.T.S. 137.

775. *Mitu-Bell Welfare Soc'y*, K.E.S.C. 34 (K.L.R.) ¶ 138.

776. *Id.* ¶ 140.

777. *Id.* (emphasis in original).

778. *Id.*

Article 2(5) of the Constitution refer to customary international norms, including *jus cogens*.”⁷⁷⁹

However, noted the KESC, it was still necessary for it to determine whether the U.N. Guidelines and CESC Comment No. 7 can be regarded as general rules of international law within the context of Article 2(5) of the Constitution of Kenya.⁷⁸⁰ The Court explained that there is a significant literature on “the effect of U.N. Resolutions, Declarations, Comments, and Guidelines and their norm-generating quality in international law” and that the “consensus emerging from such discourse is that, generally speaking, such resolutions, declarations, and comments do not ordinarily amount to norms of international law” and that “[a]t best they constitute what is called in international jurisprudence, *Soft Law*.”⁷⁸¹ In addition, noted the Court, it is generally accepted that certain U.N. General Assembly Declarations and Resolutions “can ripen into a norm or norms of customary international law, depending on their nature and history leading to their adoption.”⁷⁸²

The Court then referenced the UDHR, a declaration of the U.N. General Assembly, which had long been considered “part of customary international law before the adoption of the [ICCPR] and the [ICESCR].”⁷⁸³ The U.N. Guidelines and the ICESCR, however, noted the Supreme Court, do not qualify as general rules of international law, “which have a binding effect on members of the international community.”⁷⁸⁴ Nevertheless, the Court explained, the U.N. Guidelines are “meant to breathe life into the Right to Dignity and the Right to Housing under the ICCPR and the ICESCR respectively” and, as a consequence, they “constitute *soft law* in the language of international jurisprudence.”⁷⁸⁵ In the case at bar, the Supreme Court explained, “while the trial Judge cannot be faulted for having referred to the Guidelines per se, being soft law, as opposed to general rules of international law, the learned Judge ought not to have elevated them to the status of Article 2(5) of the Constitution.”⁷⁸⁶ However, noted the KESC, since the trial judge was “interpreting and giving life to the Bill of Rights, specifically the Rights to Dignity, Property, and Housing under the Constitution, she

779. *Id.*

780. *Id.* ¶ 141.

781. *Id.*

782. *Id.*

783. *Id.*

784. *Id.* ¶ 142.

785. *Id.*

786. *Id.*

could have been in order to refer to the Guidelines as an aid in fashioning appropriate reliefs during the eviction of the appellants.”⁷⁸⁷

More significantly, explained the KESC, the U.N. Guidelines in question were “issued pursuant to Article 21” of the ICESCR and thus, strictly speaking, these guidelines can only be considered under Article 2(6) of the Constitution of Kenya, which refers to “international treaties and conventions ratified by Kenya.”⁷⁸⁸ These guidelines, however, cannot be considered part of the treaty under which they were issued.⁷⁸⁹ Rather, the KESC explained, these guidelines represent “tools or aids directed to states parties to help the latter in implementing the treaty or better fulfilment of their obligations there-under.”⁷⁹⁰ In conclusion, the KESC held that the U.N. Guidelines are not binding upon states parties and that they are not “part of the law of Kenya in the language and meaning of Article 2(6) of the Constitution.”⁷⁹¹ They could, however, become part of the law of Kenya if they have “ripened into a norm of customary international law, as evidenced by widespread usage.”⁷⁹² The KESC emphasized, however, that there was nothing wrong or inappropriate in a Kenyan court making reference to the U.N. Guidelines as “an interpretative tool aimed at breathing life into Article 43 of the Constitution.”⁷⁹³

The fourth issue that the KESC examined was the right to housing as guaranteed under Article 43(1) of the Constitution.⁷⁹⁴ The Court noted that the appellants had been “uprooted from their habitation by the Government, on grounds that their settlements lay on the flight path to Wilson Airport, thus posing danger to the security of the public and air travelers.”⁷⁹⁵ The Court explained that through this action, “the appellants were deprived of their right to shelter (read “housing”) for however informal, however decrepit, these settlements had been home to their existence, their aspirations, and their very humanity.”⁷⁹⁶ The appellants’ case, the Court explained, is that the state, “through its duty-bearing

787. *Id.*

788. *Id.* ¶ 143.

789. *Id.*

790. *Id.*

791. *Id.*

792. *Id.*

793. *Id.*

794. *Id.* ¶ 144.

795. *Id.*

796. *Id.*

organs, had an obligation to respect and protect their right to housing under Article 21(1) of the Constitution.”⁷⁹⁷

The respondents, however, had submitted that the appellants did not have any recognizable title to the land from which they were justifiably evicted on grounds of security and that “a right to housing[] cannot accrue from an illegal occupation of land by the claimants.”⁷⁹⁸ The Court then referenced and examined the relevant constitutional provisions.⁷⁹⁹

The Court then noted that the right to accessible and adequate housing in Article 43(1)(b) must be read with Article 21(2)’s “progressive realization,”⁸⁰⁰ as described in the case *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*.⁸⁰¹

The Court explained that the right to accessible and adequate housing, “just like any other right under Article 43, requires the State to take legislative, policy and other measures to achieve it” and that under Article 20, courts and tribunals are constitutionally empowered “to apply the provisions of the Bill of Rights effectively by developing the law and adopting the interpretation that most favours the enforcement of the right.”⁸⁰² With respect to the rights under Article 43, the Court referenced Article 20(5) of the Constitution, which states, inter alia, that “[i]n applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—(a) It is the

797. *Id.*

798. *Id.* ¶ 145.

799. Article 43(1)(b), which provides that “[e]very person has the right to accessible and adequate housing, and to reasonable standards of sanitation”; Article 21(1), which states that “[i]t is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms in the Bill of Rights”; and Article 21(2) which provides that “[t]he State shall take legislative, policy, and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.” *Id.*; see CONSTITUTION, 2010 art. 43(1)(b), 21(1), 21(2) (Kenya).

800. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 146.

801. The Court stated as follows: We believe that the expression “progressive realization” is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal—a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action. In the Matter of the Principle of Gender Representation in the Nat’l Assembly and the Senate (2012) K.E.S.C. 5 (K.L.R.) ¶ 53 (Kenya).

802. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 147.

responsibility of the State to show that the resources are not available”⁸⁰³

Article 20(5), the KESC explained, “clearly empowers a Court or tribunal, presiding over a dispute, in which the petitioners are claiming that the State, has either neglected, or failed in its responsibility to effectuate a socio-economic right, to demand evidence that would exonerate the latter from liability.”⁸⁰⁴ A court or tribunal can issue “interim Orders to that effect,” however, the orders “have to be directed at the state organ responsible for the requisite measures.”⁸⁰⁵ In addition, noted the KESC, these orders “must be interim, before the Court issues final Orders.”⁸⁰⁶ The Court concluded, however, that “the question as to when the right to housing accrues . . . is not dependent upon its progressive realization” but that it accrues to “every individual or family, by virtue of being a citizen of [Kenya].”⁸⁰⁷ That right, the Supreme Court explained, is enshrined in the Bill of Rights and that the persistent problem in Kenya is that the right’s realization is dependent on “the availability of land and other material resources.”⁸⁰⁸

The KESC explained that the problem of realizing the access to housing is complicated by the fact that, “for reasons incomprehensible, the right to housing in Kenya is predicated upon one’s ability to ‘own’ land” and that unless “one has ‘title’ to land under [Kenya’s] land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.”⁸⁰⁹ The failure of many Kenyans to secure land titles, the KESC explained, has led to the mushrooming of “informal settlements.”⁸¹⁰ The Court noted that many Kenyans who do not have legal titles to land often occupy empty spaces on private and public lands and erect shelters on which they and their families live.⁸¹¹ Unfortunately, these “settlers,” the Court explained, usually face “the permanent threat of eviction” either by the private owners of the land on which they had settled or the state, in the case where they had settled on public lands.⁸¹² In seeking to evict these settlers, the

803. CONSTITUTION, 2010 art. 20(5) (Kenya).

804. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 148.

805. *Id.*

806. *Id.*

807. *Id.* ¶ 149.

808. *Id.*

809. *Id.*

810. *Id.* ¶ 150.

811. *Id.*

812. *Id.*

Court noted, private land owners raise “the sword of title” and state agencies raise “the shield of public interest.”⁸¹³

In analyzing the right to housing guaranteed by Article 43 of the Constitution, the KESC acknowledged its agreement with the submission of the respondents that “an illegal occupation of private land, cannot create prescriptive rights over that land in favour of the occupants.”⁸¹⁴ However, the Court explained that it is of the opinion that “where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same.”⁸¹⁵ The KESC noted that the Constitution of Kenya Act of 1969 did not create “a specific category of land known as ‘public land,’” but it “recognized what is referred to as ‘un-alienated government land’” whose title was vested in the president of the republic and who could alienate the land at will through the Commissioner of Lands.⁸¹⁶ The 2010 Constitution, however, created a radically different land tenure regime in which “all land in Kenya belongs [to] the people of Kenya collectively as a nation, communities and individuals.”⁸¹⁷ The Court concluded that “every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable, or however transient, in *public land*.”⁸¹⁸

The Court explained that “[t]he right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land” and that this right “derives from the principle of equitable access to land under Article 60(1)(a) of the Constitution.”⁸¹⁹ The Court explained further that once a “settler” is faced with “an eviction on grounds of public interest,” such a person has “a right to petition the Court for protection.”⁸²⁰ The protection does not necessarily have to be “in the form of an order restraining the State agency from evicting the occupants, given the fact

813. *Id.*

814. *Id.* ¶ 151.

815. *Id.*

816. *Id.*

817. *Id.* Article 61(1) of the Constitution of Kenya states as follows: “All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.” See CONSTITUTION, 2010 art. 61(1) (Kenya).

818. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 151.

819. *Id.* ¶ 152. This provision of the Constitution states that: “Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—(a) equitable access to land. . . .” See CONSTITUTION, 2010 art. 61(1)(a) (Kenya).

820. *Mitu-Bell Welfare Soc’y*, K.E.S.C. 34 (K.L.R.) ¶ 152.

that, the eviction may be entirely justifiable in the public interest.”⁸²¹ Pursuant to Article 23(3) of the Constitution, the KESC explained, a court may “craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of human conditions during eviction (U.N. Guidelines), the provision of alternative land for settlement, etc.”⁸²²

The realization of the right to housing, at its very elementary level (i.e., the right to shelter), the KESC noted, does not have to be “predicated upon ‘title to land.’”⁸²³ When the government has failed to provide accessible and adequate housing to all the country’s citizens, the Court explained, the very least that it must do is “to protect the rights and dignity of those in the informal settlements,” and it is the duty of the courts “to ensure that such protection is realized,” otherwise, these citizens will be forced indefinitely to “wander the corners of their country, in the grim reality of ‘wretched of the earth.’”⁸²⁴

With respect to the orders granted by the trial court, the KESC explained that it did not have the jurisdiction “to revisit the factual findings of either the High Court or Court of Appeal” and that it had already addressed the “four critical questions in exercise of [its] jurisdiction under Article 163(4)(b) of the Constitution.”⁸²⁵ The Court then examined whether the orders issued by the trial court “were inappropriate as held by the Court of Appeal.”⁸²⁶ Since the appellants had already been evicted and that this had violated their rights to dignity and housing, as submitted by them, the KESC ruled that the most effective relief open to the appellants was a claim for compensation.⁸²⁷ The Court noted that if the appellants had still been in occupation of the land in question, all the other reliefs that were examined earlier by the Court would have been available to them.⁸²⁸

The Court knew the eviction of the appellants was “carried out in contravention of a court order” and that during the eviction, “the appellants’ houses and property, including schools, were destroyed.”⁸²⁹ In addition, noted the Court, it could not “close its eyes to these uncontroverted findings on the record,” and that actions by organs of the

821. *Id.*

822. *Id.*

823. *Id.* ¶ 153.

824. *Id.*

825. *Id.* ¶ 154.

826. *Id.* ¶ 155.

827. *Id.*

828. *Id.*

829. *Id.* ¶ 156.

state, which are “carried out in flagrant disregard of court orders, do undermine our constitutional order, more so, if they result in the violation of citizens’ rights.”⁸³⁰ If a trial court, concluded the KESC, is “so moved, there is no reason why it cannot grant relief to the aggrieved.”⁸³¹

The case *Mitu-Bell Welfare Society* is important because through it, Kenya’s Supreme Court established a landmark precedent regarding the right to housing for all Kenyans, including those living in informal settlements. The Court affirmed the right of these persons to seek redress against forced evictions. Most importantly for this article, the Supreme Court’s decision in *Mitu-Bell Welfare Society* highlighted the applicability of international law in the resolution of disputes in Kenya, including those involving the violation of socioeconomic rights. The decision affirmed the use of international law, including U.N. Guidelines on Evictions, to inform domestic legal interpretations regarding eviction practices. Finally, the Supreme Court’s decision clarified how effect should be given to “general rules of international law” and treaties or conventions ratified by Kenya in Kenya’s domestic legal system.⁸³² The Court’s decision in *Mitu-Bell Welfare Society* represents an important contribution to the role played by international law in the development of jurisprudence on human rights in Africa.

In 1994, Malawi adopted a new constitution that provided the foundation for the country’s transition from an authoritarian regime to a constitutional democracy, undergirded by the separation of powers and a system of checks and balances.⁸³³ The new Constitution enshrined provisions that granted a prominent role for the utilization of international law in domestic judicial decisions.⁸³⁴ Since 1994, courts in Malawi have used the power provided them by various provisions of the constitution to develop a relatively significant jurisprudence on human rights. These constitutional provisions provide a legal avenue for Malawi’s domestic courts to use international law as a tool to interpret the constitution in general and the Bill of Rights in particular.

One way to determine how international law is helping domestic courts in Malawi develop human rights jurisprudence is to examine some case law. For example, in *Kafantayeni and Others v. Attorney General*,⁸³⁵ the High Court of Malawi affirmed the essence of Section 11(2)(c) of the

830. *Id.*

831. *Id.*

832. CONSTITUTION, 2010 art. 2(5), 2(6) (Kenya).

833. CONSTITUTION OF THE REPUBLIC OF MALAWI, 1994.

834. *Id.* at art. 11(2)(c), 44(1), 45(4)(a), 135(a), 211.

835. *Kafantayeni and Others v. Attorney General* (2007) MWHC 1.

Constitution when it declared as follows: “We accept and recognise that the [ICCPR] forms part of the body of current norms of public international law and in terms of section 11(2) of the Malawi Constitution courts in Malawi are required to have regard to its provisions in interpreting the Constitution.”⁸³⁶ In the case *In Re David Banda*, the High Court of Malawi (Lilongwe Registry) held that courts must interpret the Constitution and other laws in ways that avoid conflict with international law.⁸³⁷ In the subsection that follows, this Article will examine *In Re David Banda* to determine the extent to which the High Court employed international law as an interpretive tool.

E. In Re David Banda (High Court of Malawi, Lilongwe Registry)

In 2006, Guy Ritchie and Madonna Ritchie (the petitioners) jointly presented a petition before Malawi’s High Court for the adoption of an infant named David Banda.⁸³⁸ On October 12, 2006, the High Court issued an interim order granting custody of the infant to the petitioners.⁸³⁹ The interim order was supposed to “subsist for eighteen months,” and if this probationary period was successfully completed to the satisfaction of the Court, the latter would “consider making an order of adoption.”⁸⁴⁰

The Court granted the interim order pursuant to Section 7(1) of the Adoption of Children Act.⁸⁴¹ Writing for the Court, Justice Nyirenda noted that the matter had attracted a lot of attention inside and outside Malawi, making it necessary for the Court to establish “what should be the position . . . in Malawi with regard to inter-country adoption.”⁸⁴² In that regard, the Court granted the applications of the Malawi Human Rights Commission (MHRC) and the Malawi Human Rights Consultative Committee (MHRCC) to be joined as *amici curiae*.⁸⁴³ In granting the applications of these two human rights institutions, the Court recognized that the case involved “the human rights and welfare of children” in Malawi.⁸⁴⁴

836. *Id.*

837. *In re: David Banda*, [2008] MWHC 3.

838. *Id.* at 1.

839. *Id.* at 2.

840. *Id.*

841. Adoption of Children Act, Ch. 26:01 (Malawi 1949) § sect. 7(1) [hereinafter Adoption of Children Act].

842. *In re: David Banda*, MWHC 3 at 3.

843. *Id.*

844. *Id.*

Justice Nyirenda noted, however, that even though the MHRCC did not appear at the hearing and did not explain its absence, he had had the opportunity to review all the case authorities that the MHRCC had filed with the Court in support of its position.⁸⁴⁵ He concluded that he did not see any reason why he should not take into consideration those case authorities if he found “them of guidance.”⁸⁴⁶ Justice Nyirenda explained that the infant in question was born on September 24, 2005, but his mother died seven days after his birth, leaving his care and upbringing in the hands of his father.⁸⁴⁷ However, the father and his extended family were not able to care for the infant and he was eventually placed at an orphanage, where the petitioners identified him and eventually applied for his adoption.⁸⁴⁸

Justice Nyirenda noted that the detailed and comprehensive report of the guardian ad litem “described the infant as in dire need of care which the father or the extended family could not provide even if time was allowed for it.”⁸⁴⁹ The guardian ad litem’s report also “revealed the opportunity and potential the infant had in the care of the petitioners.”⁸⁵⁰ Justice Nyirenda noted that it was clear from the report that “the petitioners were driven by the desire to rescue the infant from dire deprivation” and finally, that it was on “this basis that [the High Court] made an interim Order of custody.”⁸⁵¹

Justice Nyerinda then provided an overview of the relevant provisions of the Adoption of Children Act (ACA).⁸⁵² He noted Section 3(5) of the ACA, which requires that “[a]n adoption order shall not be made in favour of any applicant who is not resident in Malawi or in respect of any infant who is not so resident.”⁸⁵³ Justice Nyerinda then explained that the reason the petitioners’ application had attracted so much attention is that the laws of Malawi might not permit the adoption to proceed depending on the interpretation of the residency requirement in Section 3(5) of the ACA.⁸⁵⁴ However, Justice Nyerinda explained that it was necessary that the Court consider “the wider content of the law in

845. *Id.*

846. *Id.*

847. *Id.*

848. *Id.*

849. *Id.* at 4.

850. *Id.*

851. *Id.*

852. Adoption of Children Act, § 2(3), 3(3), 3(5), 4.

853. *Id.* § 3(5).

854. *In re: David Banda*, MWHC 3 at 7.

Malawi as it relates to matters of children's welfare and adoptions in particular."⁸⁵⁵

Justice Nyerinda began the analysis of the petition by noting that the human rights provisions of Malawi's Constitution were designed "to enhance and uphold the rights of all manner of people in our nation in order to preserve their dignity."⁸⁵⁶ Justice Nyerinda specifically referenced Section 19(1) of the Constitution, which "stresses that the dignity of all persons shall be inviolable" and that in order to protect and preserve the dignity of Malawians, Section 30 of the Constitution "obligates the State to ensure the right to development at every stage and level of humanity."⁸⁵⁷ Justice Nyerinda noted that the Court was aware that beyond these provisions, Malawi's Constitution "carries with it international law in accordance with the international obligation that we have undertaken and that which we will in future undertake."⁸⁵⁸

Justice Nyerinda then noted that courts and legal commentators in Malawi have, since the 1994 Constitution entered into force, "teased out the implications of section 211," particularly, "whether *binding* international agreements referred to in section 211(b) automatically form part of [the law of Malawi]."⁸⁵⁹ He explained that the discussion in this case will evolve around two international human rights instruments: the U.N. Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Child Charter).⁸⁶⁰ These international and regional human rights treaties, Justice Nyerinda explained, "are binding on Malawi by choice."⁸⁶¹

Justice Nyerinda explained that Malawi had "consciously and decidedly undertaken the obligations dictated by these Conventions," and the country's courts had a solemn duty to comply with the provisions of these human rights treaties.⁸⁶² He explained further that even if, for a moment, one were to consider the argument that these treaties are not part of the law of Malawi, it would still be necessary for a domestic court to

855. *Id.*

856. *Id.* at 7-8.

857. *Id.* at 8. *See* Constitution of the Republic of Malawi art. 19(1), 30(1-4). Section 19 deals with human dignity and personal freedoms, while Section 30 guarantees the right to development.

858. *In re: David Banda*, MWHC 3 at 9.

859. *Id.* at 10 (emphasis in original).

860. Convention on the Rights of the Child, 1577 U.N.T.S. 3 (Nov. 20, 1989) (hereinafter CRC); African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

861. *In re: David Banda*, MWHC 3 at 10.

862. *Id.*

interpret and apply the country's statutory law "so far as the spirit of the statute could allow, so that it is in conformity and not in conflict with [Malawi's] established obligation under these Conventions."⁸⁶³ Therefore, concluded Judge Nyerinda, unless a statute, "by its words and spirit compels [Malawi's] Courts to ignore international law[] that is binding on us, the practice of our Courts is to avoid a clash and the way is to construe the domestic statute in such a way as to avoid breaching the obligation."⁸⁶⁴

Justice Nyerinda also referenced Section 11 of the Constitution, which states, *inter alia*, that "[i]n interpreting the provisions of this Constitution a court of law shall: . . . (c) where applicable, have regard to current norms of public international law and comparable foreign case law."⁸⁶⁵ Justice Nyerinda then reiterated the two points that he had established: first, that it is the courts' singular constitutional obligation to uphold binding international law, and second, that if a law is in conflict with Malawi's international obligations, "it runs the risk and the likelihood of being in conflict with [Malawi's] Constitution."⁸⁶⁶ The High Court is called upon "to apply such interpretation of the act or law as is consistent with the Constitution, and by extension, international law, because applicable international law and the Constitution are supposed to work in tandem."⁸⁶⁷

Justice Nyerinda concluded that in determining the merits of the petition before the High Court, he was compelled to consider two important treaties and other foreign case law "as might be considered appropriate."⁸⁶⁸ Particularly relevant to the Court's decision, noted Justice Nyerinda, was Article 3 of the CRC, which enshrines the best interests of the child principle.⁸⁶⁹ With respect to adoption of children, Justice Nyerinda referenced the CRC's Article 21, which states, *inter alia*, that "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount

863. *Id.*

864. *Id.* at 11.

865. *Id.* at 11-12.

866. *Id.* at 12.

867. *Id.*

868. *Id.*

869. Article 3 of the CRC states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." CRC, *supra* note 842, at art. 3.

consideration.”⁸⁷⁰ Justice Nyerinda noted that the African Child Charter provides similar provisions.⁸⁷¹

Justice Nyerinda then referenced the order that he had made on October 12, 2006 and noted that it contained certain conditions that had to be satisfied pursuant to Section 4 of the ACA before the Court could consider issuing an order of adoption.⁸⁷² Justice Nyerinda explained that the Court had the opportunity to examine the consent of both the Banda family and that of the petitioners and made up its mind regarding the consent of both parties.⁸⁷³ In addition, noted Justice Nyerinda, the reports presented by the MHRC and the guardian ad litem were quite informative.⁸⁷⁴ He noted that the reports “established informed consent” and that he was satisfied that “the consent is genuinely informed as to the implications of this petition.”⁸⁷⁵

Justice Nyerinda then discussed concerns of the requirement of “residence” in Section 3(5) of the ACA, which is especially troubling in the case at bar because the petitioners were not residents of Malawi, making the issue before the Court one of an inter-country adoption.⁸⁷⁶ Justice Nyerinda then cited cases from several jurisdictions and concluded that “[t]he common view in these cases is that ‘*residence*’ when used in a provision requires some degree of permanence.”⁸⁷⁷ After establishing that “every civilized society has an obligation to bring up its own children in order for the society itself to be sustained,” Justice Nyerinda noted that there may be instances “where it is not possible to care for and provide for the child with a decent family life and where they can grow under the love and care of their natural parents.”⁸⁷⁸ In such a situation, adoption is a clear option.⁸⁷⁹ However, if adoption is to be allowed, then the state and its organs must be satisfied that the child will be safe with its adoptive parents.⁸⁸⁰

Justice Nyerinda then posited that in 1949 when the ACA was enacted, the most effective and practical way to ensure that the child was safe with its adoptive parents was for state authorities to “have known

870. *Id.* at art. 21

871. *Id.*

872. *In re: David Banda*, MWHC 3 at 14.

873. *Id.*

874. *Id.* at 15.

875. *Id.*

876. *Id.*

877. *Id.* at 16 (emphasis in original).

878. *Id.* at 17.

879. *Id.*

880. *Id.*

such parents among our society for a while and thereby be able to speak for their commitment from personal interaction with them” and that “[s]urely the requirement of residence was not for the purpose of making sure the child remains in Malawi.”⁸⁸¹ Justice Nyerinda then explained that there is nothing in the ACA that says that once a child is adopted, he or she cannot leave Malawi with the adoptive parents and settle in some other country.⁸⁸² In addition to the fact that the “period of residence” is not specified in the ACA, the term “residence” is not defined either, and cannot be automatically equated to nationality.⁸⁸³

What is clear, Justice Nyerinda explained, is that the residence requirement “was and is intended to protect the child, and to ensure that the adoption is well intended.”⁸⁸⁴ He noted that he was of the opinion that “the requirement as to residence, be it important, is merely a means to an end” and that that end is the best interests of the child.⁸⁸⁵ It is for this reason, Justice Nyerinda affirmed, that national policy in Malawi stresses that the best interests of the child is paramount in matters concerning children.⁸⁸⁶ Most importantly, noted Justice Nyerinda, it is for this reason that Malawi voluntarily accepted the obligations imposed on it by the CRC and the African Child Charter.⁸⁸⁷ In addition, explained Justice Nyerinda, Malawi’s Constitution “entrenches and prioritizes the right to development of children” and that the two treaties “support and respond more to the aspirations of the Constitution.”⁸⁸⁸

Justice Nyerinda then cited *Lakshmi Kant Pandey v. Union of India*, a case in which India’s Supreme Court clarified and modified the directions regarding the adoption of children.⁸⁸⁹ Justice Nyerinda quoted extensively from the decision of Justice Bhagwati regarding the importance of child welfare to a civilized society.⁸⁹⁰ Justice Nyerinda then explained that after analyzing “law and case authority on inter-country adoption,” he had formulated “a number of key considerations” and concluded that inter-country adoption should be “a last resort when all other options of the placement of the child have failed.”⁸⁹¹ He declared

881. *Id.*

882. *Id.*

883. *Id.* at 18.

884. *Id.*

885. *Id.*

886. *Id.*

887. *Id.*

888. *Id.*

889. *Lakshmi Kant Pandey v. Union of India* [1984] (2) SCR 795.

890. *Id.*

891. *In re: David Banda*, MWHC 3 at 23.

that he would go along with the conclusions of the MHRC that adoptions should be guided by the following principles:

1. Family-based solutions are generally preferable to institutional placement.
2. Permanent solutions are generally preferred to inherently temporary solutions.
3. National (domestic) solutions are generally preferable to those involving other countries.⁸⁹²

This practice, noted Justice Nyerinda, would complement and align with the best interests of the child standard and “guide decisions regarding long-term care for children once the need for such care has been demonstrated.”⁸⁹³ Given that inter-country adoption results in “permanent deprivations of the biological family environment, permanent change in the child’s ethnic, cultural, linguistic and sometimes religious settling, the process must be circumscribed by sufficient safeguards and standards.”⁸⁹⁴ According to Article 21 of the CRC, “where inter-country adoption is considered an alternative[,] States shall ensure that the child concerned enjoys safeguards and standards equivalent to those existing in the case of national adoption.”⁸⁹⁵ An important safeguard, Justice Nyerinda explained, is for administrative authorities and courts in Malawi to be fully and absolutely satisfied “about the motive and the entire circumstances of the adoptive parents even before making any kind of order be it an interim order of custody.”⁸⁹⁶

In Malawi, Justice Nyerinda explained, the reality is that many children are “in dire situation[s] of material deprivation characterized by poverty, lack of access to essential nutrition, lack of access to education, lack of access to proper sanitation and lack of access to adequate health care.”⁸⁹⁷ The infant in the case at bar “was among [Malawi’s] many materially deprived children whose only remaining parent was forced, because of his circumstances, to place him at an orphanage” and that this was “the closest to a local solution that the only surviving parent and relatives could get.”⁸⁹⁸ Thus, in seeking to adopt the infant, Justice

892. *Id.*

893. *Id.*

894. *Id.* at 23-24.

895. *Id.* at 24.

896. *Id.*

897. *Id.*

898. *Id.* at 26.

Nyerinda concluded, the petitioners were not interfering with “any permanent domestic solution for the infant.”⁸⁹⁹

Justice Nyerinda explained that since he issued the interim order, he has been provided with two additional reports by the guardian ad litem who had personally visited the petitioners in the U.K. where the infant was residing at the time and that in all the reports, “the conclusion is that the infant’s development is excellent and is assured, physically and mentally.”⁹⁰⁰ Finding that there was sufficient legal basis for the petition and that the best interests of the child would be served by approving the petition, Justice Nyerinda signed the “final order of adoption of the infant David Banda by spouses Guy Stuart Ritchie and Madonna Louise Ritchie jointly pursuant to section 2(3) of the Adoption of Children Act of the Laws of Malawi.”⁹⁰¹

In Re David Banda is an important case because it clarified issues concerning international adoption of Malawian children, especially the debate over whether a couple that was not resident in Malawi could adopt a child from that country. Making use of international law as a tool of interpretation, particularly the CRC and the African Child Charter, as well as foreign comparative law, the High Court held that the adoption of the infant David Banda by a nonresident couple was in the child’s best interests. The ruling clarified the law on adoptions generally and inter-country adoptions in particular, by holding that in these situations, the best interests of the child were more determinative than the residency requirement. Finally, the High Court’s decision in *In Re David Banda* is an important addition to the application of international law to the development of human rights jurisprudence in Africa.

IV. SUMMARY AND CONCLUSION

An important innovation of the early-to-mid-1990s African reforms was the recognition and adoption of international law, particularly international human rights law, as a tool to interpret national constitutions and statutory laws. One motivation for these reforms was to ensure that all domestic laws conform to the provisions of international and regional human rights instruments. Through this process, domestic courts can use

899. *Id.*

900. *Id.*

901. *Id.*

international law to help them develop jurisprudence on the recognition and protection of human rights.⁹⁰²

Even in situations where national constitutions do not require that they do so, courts in many African countries are seeking guidance from international human rights law, when they interpret their bills of rights and other laws. Through this process, they are contributing to the development of a substantive jurisprudence on human rights in the continent.⁹⁰³ Thus, domestic courts in Africa have become important change agents in the continent's efforts to significantly improve the recognition and protection of human rights and fundamental freedoms.

To more effectively understand and appreciate the contributions of international law to the development of human rights jurisprudence in Africa, this Article has examined case law from South Africa, Uganda, Kenya, and Malawi. In *Makwanyane*, the ZACC determined the constitutionality of the death penalty. Employing international and foreign comparative law as a tool of constitutional interpretation, Justice Chaskalson declared the death sentence inconsistent with South Africa's Constitution and, hence, null and void.⁹⁰⁴ The ZACC's decision in *Makwanyane* represents a very important addition to South Africa's human rights jurisprudence and, more importantly, to the use of international human rights law in the development of human rights jurisprudence in Africa.

Although Uganda's Constitution does not specifically impose an obligation on its domestic courts to consider international law when they interpret their Bill of Rights, the country's courts have, however, sought guidance from international and comparative foreign law when they adjudicate cases, including especially those involving human rights and fundamental freedoms. In *Susan Kigula & 417 Others*, which involved the constitutionality of the mandatory death penalty, the UGSC used international and comparative foreign law as a tool of interpretation and declared that the mandatory death sentence is inconsistent with various

902. *S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.). Here, Justice Chaskalson, writing for the ZACC, used international and comparative foreign case law to declare the death penalty unconstitutional and in the process, contributed to the development of South African jurisprudence on human rights.

903. See *Attorney General v. Susan Kigula* (Const. Appeal No. 03 of 2006) (Judgment of January 21, 2009) (Uganda) (where the Supreme Court of Uganda used international and regional human rights law as an interpretive tool to declare the mandatory death sentence unconstitutional, and hence, null and void).

904. Specifically, Justice Chaskalson held that "the provisions of section 277(1)(a) of the Criminal Procedure Act, 1977 must be held to be inconsistent with section 11(2) of the Constitution." See *Makwanyane*, (3) SA 391 (CC) para. 146.

provisions of Uganda's Constitution and, hence, unconstitutional.⁹⁰⁵ The UGSC concluded that the mandatory death sentence denies the trial court the right to exercise its constitutional function and arrive at an appropriate sentence for the convicted individual. The Court's decision in *Susan Kigula & 417 Others* represents an important addition to the use of international human rights law in the development of human rights jurisprudence in Africa.

Kenya's 2010 Constitution includes provisions that deal with the application of international law by domestic courts.⁹⁰⁶ In *Mitu-Bell Welfare Society*, the KESC determined several issues, including the applicability of international law in general, and international human rights law in particular, in Kenya and the right to housing under the Constitution.⁹⁰⁷ After reviewing the judgments of both the trial court and the KECAP and referencing various international human rights instruments and comparative foreign law, the KESC established the applicability of international law in the resolution of disputes in Kenya, including those involving the violation of socioeconomic rights. In affirming the use of international law, including the U.N. Guidelines on Evictions, to inform domestic legal interpretations of laws governing evictions, the KESC contributed significantly to the development of human rights jurisprudence in Africa.

In 1994, Malawi adopted a new constitution, which specifically made references to international law. The case *In Re David Banda* offered the High Court of Malawi the opportunity to employ international law as a tool to interpret a provision of the Adoption of Children Act.⁹⁰⁸ After citing international and regional human rights instruments, such as the CRC and the African Child Charter, as well comparative foreign law, Nyerinda J, writing for the High Court, approved the adoption and issued a final order of adoption of the infant David Banda by spouses Guy and Madonna Ritchie, jointly pursuant to Section 2(3) of the ACA.⁹⁰⁹ This is an important case because it clarified issues concerning the international adoption of Malawian children and held that adoptions, as well as other decisions involving children, should be governed, *inter alia*, by the best interests of the child principle.⁹¹⁰

905. *Kigula*, (Const. Appeal No. 03 of 2006) (Judgment of Jan. 21, 2009).

906. CONSTITUTION, 2010 art. 2(5), 2(6) (Kenya).

907. *Mitu-Bell Welfare Soc'y v. The Kenya Airports Auth. and Others* (2021) K.E.S.C. 34 (K.L.R.) ¶ 156 (Kenya).

908. *In re: David Banda*, [2008] MWHC 3.

909. *Id.* at 26.

910. *Id.*

An important lesson from examining these cases is that courts in African countries are playing a critical role in improving and advancing the protection of human rights and fundamental freedoms, as well as strengthening democracy and the rule of law throughout the continent. For example, courts in Uganda have declared the mandatory death sentence unconstitutional, those in South Africa have invalidated the death penalty, and courts in Kenya have affirmed the constitutionally guaranteed right to housing, including those living in informal settlements. Through these cases, African courts are making significant contributions to the development of human rights jurisprudence in the continent.