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Mozambican Courts and International Law

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Mozambique has a monist constitution which deals extensively with international law. The country is also a member of regional international organizations, including the African Union and the Southern African Development Community. This openness to international law is more apparent than real. On the one hand, the Mozambican constitution safeguards its own supremacy and ranks international law on the level of ordinary law. On the other hand, regional integration in Africa is still rudimentary and it does not challenge State sovereignty. Moreover, references to international law in Mozambican courts are scarce and largely peripheral. The picture is not entirely bleak, as a couple of cases show that Mozambican judges are bypassing the constitution, and making every effort to avoid the international responsibility of the State by recognizing international law's supremacy over ordinary law.

Il Mozambico ha adottato una costituzione monista che tratta ampiamente il diritto internazionale. Il paese è anche un membro di organizzazioni internazionali regionali, tra cui l'Unione Africana e la Comunità per lo Sviluppo del Sud dell'Africa. Questa apertura al diritto internazionale è, però, più apparente che reale. Da un lato, infatti, la costituzione del Mozambico tutela la sua supremazia e posiziona il diritto internazionale nella gerarchia delle fonti al rango della legge ordinaria. Dall'altro lato l'integrazione regionale in Africa è ancora rudimentale e non mette in discussione la sovranità statale. Più precisamente i riferimenti al diritto internazionale nelle Corti del Mozambico sono rari ed in gran parte periferici. Il quadro non è però del tutto desolante dal momento che un paio di casi giurisprudenziali dimostrano che i giudici del Mozambico stanno bypassando la costituzione e stanno ponendo in essere ogni sforzo per evitare la responsabilità internazionale dello stato riconoscendo la supremazia del diritto internazionale sulla legge ordinaria.

1. INTRODUCTION

A black hole could euphemistically be used to describe the application of international law by Mozambican courts. Next to nothing is known about how Mozambican judges deal with international legal sources. Doctrinal studies analyze the constitutional provisions governing the domestic incorporation of international law, but do not assess the impact of international law upon judicial practice.

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This article aims at shortening this gap. It starts by portraying the constitutional reception of international law in Mozambique. After listing the references to international law foreseen in the 1975 and 1990 constitutions (1.), it focuses on how the current 2004 Constitution of the Republic of Mozambique (CRM) regulates the incorporation of international law(2.). This is followed by the analysis of the very limited impact of African Union (AU) and the Southern African Development Community (SADC) memberships (3.), and a description of how the CRM positions international law in the domestic hierarchy of legal sources (4.).

Notwithstanding multiple references to international law principles, the Constitution ranks the bulk of international law sources equal to ordinary internal law. The empirical study on the judicial application of international law in Mozambique presented in the second part of this article shows that some judges are making every effort to avoid the international legal responsibility of the Mozambican State, even if that means bypassing the Constitution and recognizing the supremacy of international law *vis-à-vis* ordinary law. This case law analysis also reveals that international law is seldom used in the resolution of disputes, and that Mozambican judges struggle with the application of international law sources (5.).

2. INTERNATIONAL LAW IN THE MOZAMBICAN CONSTITUTION

The first Mozambican Constitution was approved on June 20, 1975, and entered into force on June 25, 1975.[1] Adopted in the context of the Cold War after a long Colonial War of Liberation, it featured a strong national sovereignty bias.[2] The main reference to international law was provided for in Article 23, which provided that "the People's Republic of Mozambique accepts, observes and applies the principles of the Charter of the United Nations and of the Organization of African Unity". The original constitutional text was revised in 1976 (twice), 1977, 1978, 1984, and 1986. Two references to the procedure of conclusion of international treaties and agreements were introduced in 1986.[3]

The second Mozambican constitution was approved on November 2, 1990, and entered into force on November30,1990. References to international law laid down in the constitution of 1975, as revised in 1986, were incorporated within the new constitutional provisions.[4]

The CRM was adopted on November 16, 2004, and entered into force on January 21, 2005. Unlike its two predecessors, it deals comprehensively with the domestic incorporation of international law (2.).

[1] Article 73 CRM1975.

[2] See Article 1 CRM1975 ("The Popular Republic of Mozambique, which is the result of a secular resistance and a heroic and victorious struggle of the Mozambican people (...) against the Portuguese colonial domination and imperialism, is a sovereign, independent and democratic State").

[3] Articles 44(e) and 54(f) CRM1975.

[4] Articles 62(1), 122(b), 123(b), 135(1)(k) and 153(1)(f) CRM1990.

3. INCORPORATION OF INTERNATIONAL LAW IN MOZAMBIQUE

The sources of international law are incorporated into the Mozambican legal order without losing the international legal nature. The CRM is a monist constitution that provides for the conditional reception of international treaties and agreements (2.2. and 2.3.),[5] and for the automatic reception of other international legal sources (2.4.)[6].

The application of international treaties and agreements in Mozambique is subject to three cumulative conditions: i) regularity of the internal procedure of approval and ratification; ii) publication in the official gazette; iii) being binding on the Mozambican State.[7]

The application of treaties and agreements is contingent on respect for the mandated constitutional process for their approval.

The Mozambican Constitution establishes a dual procedure for the adoption of treaties (*strictu sensu)* and (executive) agreements. These are the two kinds of international conventions or treaties *latu sensu*:[8]i) solemn treaties (*strictu sensu*), which require an internal act after their signature, usually ratification, through which the State confirms its intention to be bound by the treaty; and ii)in the case of executive agreements, where the State is bound immediately upon signature.[9]

The procedural sequence set out for the adoption of solemn treaties requires the intervention of three main political institutions of the State. The negotiation is conducted by the Government, through the Council of Ministers, which has the task of "preparing the

[5] Article 18(1) CRM.
[6] Article 18(2) CRM.
[7] Article 18(1) CRM.
[8] The CRM uses the expression "international convention" only once in Article 136(4) ("If the subject-matters referred to in Article 178 (2) are the object of an international convention they can be submitted to a referendum, except if they relate to peace and to the rectification of borders").
[9] Article 11 of the Vienna Convention on the Law of Treaties between States (May 23, 1969) 1155 UNTS 331 (entered into force on January 27, 1980) ("Vienna Convention on the Law of Treaties"). Mozambique deposited its instrument of accession to the Vienna Convention on the Law of the Treaties with the United Nations Secretary-General on May 8, 2001 [2150 UNTS A-18232 (with effects as of June 7, 2001)], following the internal approval by the Council of Ministers through Resolution 22/2000 of September 19, published in the Official Gazette of the Republic, 1.st series, 2nd Supplement, 37, p. 180.

signature of international treaties".[10]The treaty is afterwards signed by the President of the Republic[11] and ratified by the Parliament (Assembly of the Republic).[12, 13]

The conclusion of executive agreements is far simpler. The Council of Ministers is responsible for negotiating, signing, ratifying and acceding to international agreements.[14] The signature ("celebration") of the agreement may be delegated to any minister, and binds the Mozambican State unless made *ad referendum*[15]. However, to be domestically enforced, the agreement must be approved by a resolution of the Council of Ministers.[16]

The decision on which kind of international convention to adopt is taken by the parties during the negotiations. However, the CRM limits the choice of executive agreements to international conventions which include "matters (...) within the executive competence of the Government".[17] This is a wide limitation, as the CRM grants primary and exclusive legislative competence to the Assembly of the Republic.[18] The Government can only legislate in the form of decree-laws with the express consent of the As-

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[10] Article 203 (1)(g) CRM. Within the Government, negotiations are led by the Ministry of Foreign Affairs and Cooperation (MINEC). Pursuant to Article 4(1)(s) and (t) of Presidential Decree 12/95, of December 29, 1995, the MINEC: i) prepares and participates in the negotiation, signature and completion of international treaties and agreements of interest to the Republic of Mozambique, and secures their incorporation into the national legal order; ii) studies treaties and international agreements and submits its ratification or accession by the Republic of Mozambique.

[11] The President of the Republic has the responsibility "to sign international treaties" in the realm of international relations(Article 161(b) CRM). This should be interpreted as referring to the moment of authentication (signature) of the treaties which marks the end of the negotiations. This power, which is given to the President of the Republic as the head of State, is often delegated in the MINEC (A. DIMANDE, *International Treaties in the Mozambican Legal Order*, in II Revista Jurídica Da Faculdade de Direito Da Universidade Eduardo Mondlane, 1997, p. 74. Such delegation breaches the principle of conferral (Article 134 CRM), pursuant to which "modifications of competences must be provided for in the Constitution" (J. BACELAR GOUVEIA, *Direito Constitucional de Moçambique*, Lisboa, 2015) at 467.This seems to be, however, a common constitutional practice in presidential systems of government, as evidenced by the case of Brazil (G. FERREIRA MENDES, P. G. GONET BRANCO, *Curso de Direito Constitucional*, 2016, p. 981.

[12] The process of ratification begins with the submission to the Parliament of a draft resolution by the President of the Republic. The resolution is reviewed by the Parliamentary Committee for International Relations, Cooperation and Communities, approved on a plenary session of the Assembly of the Republic [Articles 91(b), 120, 130(2), of the Organic Law of the Assembly of the Republic, published in the annex to Law 13/2013 of August 12, 2013], and then sent to the Government "for the purposes of issuance of the «letter of ratification» by the Ministry of Foreign Affairs, and deposit with the competent authorities designated by the treaty" (A. DIMANDE, *supra* note 12, at 80.

[13] Article 178 (1)(e) CRMgives the Assembly of the Republic the power to "approve and terminate treaties in matters within its competence". This provision cannot be applied. The ratification materially replaces the approval of the treaty by the Assembly of the Republic. Only if interpreted as referring to executive agreements and not solemn treaties could this provision have any *effect utile*. Such interpretation, however, is *contra legem*, and would make useless the distinction between solemn treaties and executive agreements, as in both cases Mozambique would be bound upon an act of the Assembly of the Republic, namely the ratification of solemn treaties and the approval of executive agreements.

[14] Article 18(1) CRM.

[15] Article 10(b) of the Vienna Convention on the Law of Treaties.

[16] Article 203(1)(g) CRM. The "ratification" and "accession" to agreements referred to in Articles 18(1) and 209(4) CRM are acts of approval by the Council of Ministers which have solely domestic effects. Thus, they do not hinder the possibility of Mozambique being binding on the international level upon the signature of the agreement. SeeLoureiro Bastos, 'O Direito Internacional Na Constituição Moçambicana de 2004', (2010)142 *O Direito*, at 150.

[17] Second part of Article 203(1)(g) CRM.

[18] Article 178(1) CRM.

sembly of the Republic.[19]International conventions which concern matters included within the competence of the Parliament should thus follow the form of a solemn treaty,[20] and international conventions exclusively related to matters included within the administrative competence of the Government should take the form of an executive agreement. The CRM does not foresee any mechanism by which the Parliament can authorize the Government to bind Mozambique to international agreements in domains which fall within the former's legislative competence.

Agreements approved by the Government which include matters falling within the Parliament's legislative scope of competences breach the constitution, and thus are unenforceable in the Mozambican legal order. One example, among many others,[21] is the "Agreement on the Principles and Legal Provisions for the Relationship between the Republic of Mozambique and the Holy See" ("Concordat"), signed on December 7,2011, and ratified by the Government through the Resolution 12/2012, of April 13, 2012. The Concordat was adopted by the Government as an agreement, although it includes matters which are clearly within parliamentary competence, such as tax benefits and exemptions[22],the regulation of marriage[23] or the postponement of military service.[24]

Domestic application of international treaties and agreements is conditional upon their publication. Both are published in the 1st series of the Official Gazette of the Republic, and include, as an annex, the Portuguese version of the treaties and agreements.[25]

Finally, in order to be applicable, international treaties and agreements must be internationally binding on the Mozambican State.[26]

The Mozambican constitution prevents the application of international treaties and agreements which do not yet bind Mozambique. Entry into force of treaties and agreements is contingent on what is established by the parties, either a specific date or, more usually, the consent to be bound by all the States participating in the negotiations (bilateral treaties and agreements) or some of them (multilateral treaties and agreements).[27]

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[19] Article 178(3) and Article 179 CRM.

[20] J. BACELAR GOUVEIA, *Direito Internacional Público,* Coimbra, 2013, p. 366, refers to the existence of a material constitutional limitation, pursuant to which international conventions which concern important matters must be concluded under the form of a solemn treaty.

[21] See Council of Ministers resolution No. 21/2000 of September 19, which ratifies the Convention on privileges and immunities of the United Nations of February 13, 1946.

[22] Article 127(2) CRM and Article 20 of the Concordat.

[23] Article 119(1) CRM and Article 14 of the Concordat.

[24] Article 263(2) CRM and Article 13(1) of the Concordat.

[25] Article 18(1) and Article 143(f) CRM. G. CISTAC, *A Questão Do Direito Internacional No Ordenamento Jurídico Da República de Moçambique,* in Revista Jurídica Da Faculdade de Direito Da Universidade Eduardo Mondlane, VI, 2004, p. 33, mentions the practice of publication of the Council of Ministers' resolutions approving international conventions, which often do not include in attachment the text of the treaties or agreements. AA. LONGO CHUVA, *A eficácia jurídico-constitucional das normas provenientes da Organização Mundial do Comércio (O.M.C.) no direito constitucional moçambicano*, in A. CHUVA et al. (eds.), Estudos de Direito Constitucional Moçambicano: contributos para reflexão, Maputo, 2012), exemplifies with the Resolution of the Council of Ministers 31/94, of September 20, 1994, on the results of the Uruguay Round of multilateral trade negotiations on the General Agreement on Tariffs and Trade (GATT), which does not include any of the texts or annexes of the World Trade Organization agreement.

[26] Article 18(1) CRM.

[27] Article 24(2) of the Vienna Convention on the Law of Treaties provides that, in the absence of a provision or an agreement, "a treaty enters into force as soon as consent to be bound by the Treaty has been established for all the negotiating States."

From the constitutional requirements of entry into force on the international level and publication in the Official Gazette of the Republic, it follows that the beginning of the domestic enforcement of a treaty or an agreement is:

(a) the date set in the treaty or the agreement, if that date is later than the date of publication in the official gazette;

(b) the date of publication in the official gazette, if this is later than the date of entry into force in the treaty or the agreement;

(c) the date of the notification to the other State (bilateral treaty or agreement) or deposit (multilateral treaty or agreement) of the instrument binding Mozambique to a treaty or an agreement which is already in force, if the notification occurred after the publication of the treaty or publication in the official gazette;

(d) the date of publication in the official gazette, if the latter happened after the notification or deposit of the instrument binding Mozambique to a treaty or an agreement already in force;

(e) the date mentioned in the notification of the deposit of the binding instrument necessary for the entry into force of the treaty or the agreement, if that date is after the publication of the treaty or the agreement in the official gazette;

(f) in the event the binding instrument required for the entry into force of the treaty or the agreement is from Mozambique, the relevant date will be either the date of publication of the treaty or the agreement in the official gazette or the date mentioned in the notification of the deposit of the instrument, depending on which occurs later.

Assessing whether a provision of an international treaty or agreement may be enforced is frequently a difficult task, as no notices are published in the official gazette announcing the entry into force of international treaties or agreements to which Mozambique is bound, and which have already been published in the official gazette. The task is sometimes made almost impossible by the delays of the MINEC in notifying or depositing instruments of ratification and approval of treaties and agreements already published in the official gazette.

Unsurprisingly, Mozambican courts applied provisions of international treaties and agreements published in the official gazette which were not yet binding on the Mozambican State. That was the case in a ruling of the Supreme Court of October 24, 1996,in a dispute regarding the allocation of parental responsibility[28]. A lower court (Judicial Court of the City of Maputo) was censured for not having heard the opinion of the minors "on the measures to be taken which directly concern them", thus disregarding the obligation stemming from the "principle set out in Article 12(1) of the Convention on the Rights of the Child, which is part of the internal legal order after the ratification act which took place by means of Resolution 19/90, of October 23, 1990 (BR 42 – 1st Series – 2nd Supplement)". Although this international convention was already in force when it was published in the official gazette,[29] the instrument of accession of the Mozambican State was only deposited on April 26,1994,[30] after the decision of the referring court (April 13, 1994). In other words, the Convention on the Rights of the Child was

[28] Case 24/95, available at http://www.saflii.org/mz/cases/MZTS/. This judgment was delivered while the 1990 CRM was still in force. This Constitution did not rule on the domestic incorporation of international law.

[29] The Convention on the Rights of the Child was adopted on 20 November 1989 and entered into force on 2 September 1990 (1577 UNTS 3).

[30] The Convention on the Rights of the Child binds Mozambique since 26 May 1994 (1775 UNTS 449).

not enforceable within the Mozambican legal order at the time of the delivery of the lower court ruling.[31]

Article 18(2) CRM establishes that the "rules of international law" produce effects in the Mozambican legal order "according to their method of reception". Given that treaty law incorporation is conditioned by the fulfillment of requisites established in Article 18(1) CRM, the automatic reception of other international law sources can be inferred,[32] namely customary law, general principles of law and unilateral acts of the States[33].

Secondary legislation adopted by international organizations to which Mozambique is a party is applicable under the conditions set forth in their founding treaties, which are in turn incorporated into the domestic legal order pursuant to Article 18(1) CRM. The next section demonstrates that the impact of the law and case law of international organizations and courts is very limited (4.).

4. LAW AND CASE LAW OF INTERNATIONAL ORGANIZATIONS AND COURTS

Mozambique is a founding member of the SADC (1992) and the AU (2000). Although aiming at developing economic integration[34] and at accelerating the political and socio-economic integration of the African continent[35], these international organizations do not have a supranational nature akin to the European Union,[36]as they display decision-making procedures entirely dominated by the Member States, parliaments with mere consultative[37] competences[38], and relatively weak courts, either because they were suspended (the SADC Tribunal) or their establishment delayed (the Court of Justice of the AU)[39].

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[31] This mistake had no relevance. The Supreme Court took no legal consequences from the breach of the Convention by the court of first instance and confirmed the latter's decision.

[32] The broad scope of the domestic reception of every international law sources is confirmed by Article 132(2) CRM, which rules that the Bank of Mozambique is governed "by international provisions to which the Republic of Mozambique is bound and which are applicable thereto".

[33] J. BACELAR GOUVEIA, *supra* note 12, at 409, considers, however, a "remarkable obstacle" the omission of any reference in Article 18 CRM to international customary law and international unilateral acts.

[34] Article 6(1)(a) SADC Treaty.

[35] Article 3(c) and (j) of the Constitutive Act of the African Union.

[36] F. LOUREIRO BASTOS, *A União Europeia e a União Africana – pode um puzzle de que não se conhece a imagem final servir de modelo à integração do continente africano?*, in Estudos jurídicos e económicos em Homenagem ao Prof. Doutor António de Sousa Franco I, Coimbra, 2006, pp. 1037–1038.

[37] The Parliamentary Forum is a "Consultative Assembly" established in 1996 as an autonomous institution of the SADC. It is based in Windhoek, Namibia, and aims at promoting democracy and human rights (F. VILJOEN, A. SAUROMBE, *Southern African Development Community (SADC)*, in R. WÖLFRUM (ed.) Max Planck Encyclopedia of Public International Law, Oxford, 2010).

[38] The Pan-African Parliament is one of the institutions provided for in the Constitutive Act of the AU. Based in Midrand, South Africa, it was established in 2004 after the entry into force of the Protocol establishing the African Economic Community relating to the Pan-African Parliament (signed on March 2, 2001), which grants advisory powers to the institution (Article 11). The recognition of legislative powers is foreseen in the Protocol to the Constitutive Act of the African Union concerning the Pan-African Parliament, signed in Malabo (Equatorial Guinea) on June 27, 2014, which requires the ratification of 28 Member States for its entry into force [in August 2022 only fourteen States had ratified this protocol (see https://au.int/en/treaties/protocol-constitutive-act-african-union-relating-pan-african-parliament).

[39] The Constitutive Act of the African Union foresees the establishment of the Court of Justice as one of the bodies of the AU (Article 5(1)(d) and Article 18). Its composition, competence and procedural rules are laid down in the Protocol of the Court of Justice of the African Union (signed on July 11, 2003, entered into force

Intergovernmentalism is at its most intense in the African context before the SADC, where secondary legislation is adopted unanimously by the Member States[40], and usually takes the form of protocols which have to be signed and ratified by the Member States[41]. The SADC does not impair the sovereign powers of its Member States, which can block the adoption or refuse to ratify protocols deemed contrary to their national interests.

Intergovernmentalism in the AU is less apparent. Not only are the decisions of AU bodies adopted by two thirds of the Member States if consensus is not reached, but secondary legislation also includes binding acts. Among them is the decision of the Assembly (of Heads of State and Government) authorizing the use of force against a Member State where international crimes are committed[42]. This would be a serious challenge to the principle of sovereign equality of States and non-interference in their internal affairs, but the decision of the Assembly needs to be supported by a resolution of the United Nations Security Council which expressly authorizes the use of force under Chapter VII of the United Nations Charter.[43]

The law of the regional international organizations to which Mozambique is a party lack the autonomy of European Union law. In 1963, the Court of Justice of the European Union declared in *Van Gend & Loos* that the European Economic Community Treaty, as it was then called, created a new legal system for the benefit of which the Member States limited their sovereign rights and whose subjects also encompassed their nationals.[44] This decision initiated a praetorian process of transformation of a set of legal instruments of international law into an autonomous legal order, from which stem rights which can be invoked by individualist national courts. Such a declaration of independence *vis-à-vis* the authority of the Member States would be impossible in the SADC or in the AU for the prosaic reason that the courts set forth in their founding treaties are not currently functioning (3.3. and 3.4.).

The SADC Tribunal is an institution of the SADC[45]. It has jurisdiction to deliver advisory opinions and deal with disputes on the application of the SADC Treaty, its protocols and acts, upon request from Member States, individuals (after all internal remedies

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on February 19, 2008). The establishment of the Court of Justice was delayed by the possibility of its merger with the African Court of Human and Peoples' Rights, which was finally decided in the Protocol on the Statute of the African Court of Justice and Human Rights (signed on July 1, 2008). In August 2022, the Protocol on the Statute of the African Court of Justice and Human Rights had collected just eight of the fifteen ratifications required for its entry into force (seehttps://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights).

[40] Article 19 SADC Treaty.

[41] Article 22 (3) SADC Treaty.

[42] Article 4(h) Constitutive Act of the AU.

[43] According to Article 53(1) of the United Nations Charter, no coercive action will be carried out in accordance with agreements or regional organizations without the authorization of the United Nations Security Council. It has been argued that Article 4(h) of the AU Constitutive Act should be interpreted as implying the prior consent of the Member States to unilateral humanitarian interventions of the AU in their territories (A.J. BELLAMY, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, in Ethics and International Affairs, 20, 2006, pp. 158–159. Such an interpretation cannot be accepted. Not only does it breach the supremacy of the Charter over treaty law (Article 103 of the Charter of the United Nations), but also introduce an unacceptable derogation of the United Nations system of collective security. See A. ABASS, *Calibrating the Conceptual Contours of Article 4(H*", in D. KUWALI, F. VILJOEN (eds.), Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act, Oxon, 2014, p. 38.

[44] *Van Gend& Loos*, 26/62, 61962CJ0026, p. 210.

[45] Article 16 SADC Treaty.

have been exhausted) and national courts.[46]Decisions on disputes are final and binding[47], and their execution secured by the Member States and the institutions of the SADC[48].

The SADC Tribunal is located in Windhoek, Namibia, and was established on November 18, 2005[49]. Its first rulings date from 2007. The court declared in *Mike Campbell* that the expropriation of white farmers' property carried out in 2005 by the Zimbabwean Government breached the right of access to justice[50] and the prohibition of discrimination based on race,[51] and ordered Zimbabwe to pay a compensation to the victims.[52] After Zimbabwe's refusal to comply with the judgment, the SADC Summit of Heads of State and Government decided to suspend the SADC Tribunal.[53] This episode is revealing in terms of the absolute ineffectiveness of the institutional mechanisms for monitoring compliance with SADC law.[54]

Overall, the SADC Tribunal dealt with fifteen cases.[55] None involved Mozambique.

An active international judicial body linked with the AU which holds mandatory jurisdiction over Mozambique is the African Court on Human and Peoples' Rights (AfCHPR).[56]

The AfCHPR has jurisdiction to deliver advisory opinions and to rule on disputes regarding the interpretation and application of the Charter, the Protocol and other relevant human rights instruments, at the request of the African Commission on Human and Peoples' Rights (ACHPR), States, intergovernmental organizations, non-governmental organizations and individuals.[57]Petitions from non-governmental organizations and individuals can only target States that have deposited a declaration accepting the Court's jurisdiction to decide complaints submitted by those entities.[58]AfCHPR decisions are binding on States which are parties to the Protocol.[59]

On July 17,2004, Mozambique ratified the Protocol, but failed to submit the declaration referred to in Article 5(3)AfCHPR Protocol. This explains why the Mozambican State received only one complaint before the AfCHPR. That sole petition was submitted

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[46] Articles 14, 15 and 16 of the Protocol to the SADC Tribunal, adopted on August 7, 2000 (entered into force on August 14, 2001).

[47] Article 16(4) and 20 SADC Treaty.

[48] Article 32(2) of the Protocol to the SADC Tribunal.

[49] The first President of the Court was a Mozambicannational (H.J. HENRIQUES, *A europeização indirecta do Direito Constitucional moçambicano – cláusula internacional*, in A.A. LONGO CHUVA (ed.), Estudos de Direito Constitucional Moçambicano: contributos para reflexão, Maputo, 2012, p. 149.

[50] Article 4(c) SADC Treaty.

[51] Article 6 (2) SADC Treaty.

[52] *Mike Campbell (Pvt) Limited (vs). Republic of Zimbabwe (2/2007) [2008] SADCT 2* (28 November 2008).

[53] The suspension was initially decided in 2010 and confirmed in Maputo on August 18, 2012. See O. JONAS, *Neutering the SADC Court by Blocking Individuals" Access to the Tribunal*, in International Human Rights Law Review*, 2, 2012, p. 294.*

[54] The SADC Treaty provides that Member States shall implement the decisions of the SADC Tribunal. Any failure to comply with this obligation must be informed to the SADC Summit of Heads of State and Government (Article 32(5) of the Protocol to the SADC Tribunal). Following Zimbabwe's refusal to comply with the *Mike Campbell* judgment, the SADC Tribunal informed the Summit accordingly, but the latter failed to adopt any appropriate measures (F. VILJOEN, A. SAUROMBE, *supra* note 38, at 33).

[55] Available at http://www.saflii.org/sa/cases/SADCT/.

[56] This court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, which was adopted by the Assembly of Heads of State and Government of the Organization of the African Union on June 10, 1998, in Ouagadougou, Burkina Faso, and entered into force on January 25, 2004.

[57] Articles 3, 4 and 5 AfCHPR Protocol.

[58] Articles 5(3) and 34(6) AfCHPR Protocol.

[59] Article 46 AfCHPR Protocol.

by individuals, and thus prompted a decision of inadmissibility on grounds of lack of jurisdiction of the AfCHPR to rule on the case[60].

In the African system of human rights, complaints against breaches of the African Charter on Human and Peoples' Rights made by individuals and non-governmental organizations which cannot be submitted to the AfCHPR may be referred to the ACHPR[61]. The legal nature of the ACHPR's decisions is unclear, but that has not affected its relevance to the development of the international law on human rights.[62]

Mozambique filed a complaint related to the SADC Summit's decision to suspend the SADC Tribunal. The ACHPR considered that there was no breach of the African Charter on Human and Peoples' Rights[63]. Two other complaints were declared inadmissible because the claimants did not exhaust the available national legal remedies[64].

Mozambican procedural law does not provide for the review of a judicial decision irreconcilable with a binding ruling delivered by an international court. The low probability of a conviction of the Mozambican State in an international jurisdiction prevents the risk of international responsibility stemming from this loophole. The SADC tribunal is currently suspended, and Mozambique does not accept the jurisdiction of the AfCHPR in procedures initiated by non-governmental organizations and individuals. Mozambique has also not submitted a declaration accepting the compulsory jurisdiction of the International Court Justice (ICJ) pursuant to Article 36(2) of the Statute of the ICJ,[65]and has not ratified the Statute of the International Criminal Court (ICC).[66]

The external impulses which have impelled changes in the Mozambican legal system have came from soft law instruments adopted by human rights bodies, such as recommendations from the ACHPR[67]and the United Nations Human Rights Council.[68]

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[60] Petition 005/2011, *Daniel Amare and Mulugeta Amare vs. Republic of Mozambique and LinhasAéreas de Moçambique*, available at http://www.african-court.org/fr/images/documents/Court/Cases/Judgment/Decision-%20Requete%20No%20%20005.2011%20%20Muluget%20c.%20Mozambican%20Airlines.pdf.

[61] The ACHPR was created by the African Charter on Human and Peoples' Rights (1520 UNTS 217, OAU Doc. CAB/LEG/67/3 Rev. 5, UN Reg in I-26363) and instituted in 1987. It includes eleven commissioners. Among its powers is the submission, every two years, of reports on the implementation of the African Charter on Human and Peoples' Rights in the Member States (Article 62 of the African Charter on Human and Peoples' Rights), and assessing complaints concerning the violation of the African Charter on Human and Peoples' Rights submitted by Member States and by individuals (Articles 47 to 59 of the African Charter on Human and Peoples' Rights).

[62] See R. MURRAY, D. LONG, *The Implementation of the Findings of the African Commission on Human Peoples´ Rights*, Cambridge, 2015, pp. 50–58.

[63] Petition 409/12, Luke Tembani Munyandu and Benjamin John Freeth (represented by Norman Tjombe) vs. Angola and thirteen other States, available at http://www.achpr.org/communications/decision/409.12_/.

[64] Petition 361/08,*J.E Zitha & P.J.L.Zitha* (represented by Liesbeth Zegveld) [available at http://www.achpr.org/communications/decision/361.08/] e Petition 434/12, *Filimão Pedro Tivane* (represented by Simeão Cuamba) [available at http://www.achpr.org/communications/decision/434.12/].

[65] As a member of the United Nations and a party to the Statute of the ICJ, Mozambique could be sued by another State –something which has never happened – but the case will only proceed to the merits with Mozambican consent.

[66] The accession of Mozambique to the Rome Statute of the ICC must be preceded by a constitutional amendment in order to overcome the prohibition of expulsion or extradition of nationals (Article 67(4) CRM) and the prohibition of extradition for crimes liable to a life sentence (Article 67(3) CRM).

[67] The ACHRP report concerning the period between 1999 and 2010 is available at http://www.achpr.org/pt/states/mozambique/reports/1-1999-2010/.

[68] The United Nations Human Rights Council was established by the UN General Assembly resolution 60/251, of March 15, 2006, with the objective of promoting the universal respect and protection of human rights and fundamental freedoms. The Council includes 47 States, 13 of which must be from Africa. According to F. CRUZ, *Proteção Dos Direitos Humanos Em Moçambique Realidade Ou Apenas*

5. HIERARCHY OF INTERNATIONAL LAW IN THE DOMESTIC SOURCES OF LAW

International law norms have "the same importance as infra-constitutional normative acts stemming from the Assembly of the Republic and the Government".[69]This is a corollary of the principle of constitutionality, according to which "constitutional provisions shall prevail over all other norms of the legal order".[70]

The supremacy of constitutional law will only be enforced if mechanisms of constitutional review of international law norms are available.

That is not the case of *ex ante* or preventive constitutional review by the Constitutional Council[71], which can only address laws of the Assembly of the Republic sent to the President of the Republic for promulgation[72].

Article 2(4) CRM unequivocally grants ordinary courts the power to refuse to apply international legal norms that breach the Constitution. The Constitutional Council has the final word, as it must adjudicate on any judicial decisions that refuse to "apply a legal provision based on its unconstitutional nature"[73].

Fernando Loureiro Bastos argues against the possibility of judicial review of international law based on the lack of any reference to provisions of international law or international legal sources in Article 213 CRM, which states that "courts shall not apply laws or principles which are contrary to the Constitution"[74]. However, it is not possible to infer from a *contrariu sensu* argument an authorization for courts to breach the Constitution whenever applying international law. Moreover, in this provision of the Constitution – and also in others (*e.g.* Article 245 (1)) –the word "laws" is broadly encapsulated with the meaning of "norms". A restrictive interpretation limiting the scope of Article 213 CRM to "laws"(*stricto sensu*) of the Assembly of the Republic would be contrary to the purpose of this provision, which is to prevent the application of unconstitutional provisions. This interpretation also opens the door to the possibility of abstract constitutional review of international law: pursuant to Article 244(1) CRM "the Constitutional Council appreciates and declares, with general binding force, the «unconstitutionality of *laws*»(italics added)upon the request of the President of the Republic, the President of Assembly of the Republic, one third of Members of Parliament, the Prime-Minister, the Attorney-General, the Ombudsman or two thousand citizens".[75]

The normative superiority of the Constitution over international law is not – and could never be – absolute. One of the effects of the process of globalization of the last

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Idealismo?, in P. JERÓNIMO (ed.), Os Direitos Humanos No Mundo Lusófono: O Estado Da Arte, Braga, 2015, p. 123."(in) the 2011 periodic review, Mozambique «willingly» accepted most recommendations made by Member States and observers to the Human Rights Council".

[69] Article 18(2) CRM.

[70] Article 2(4) CRM.

[71] Article 240(1) CRM grants the Constitutional Council the specific competence to administer justice in constitutional law matters. The court comprises seven judges nominated by the President of the Republic (one), the Parliament (five), and the Superior Council of the Judiciary (one) (Article 241(1) CRM).

[72] Article 162(1) and Article 245(1) CRM.

[73] Article 246(1)(a) CRM.

[74] F. LOUREIRO BASTOS, *supra* note 17, at p. 461.

[75] According to L.A. MONDLANE, *Relatório Sobre Moçambique à I Assembleia Da CJCPLP*, in Fiscalização Da Constitucionalidade e Estatuto Das Jurisdições Constitucionais Dos Países de Língua Portuguesa, 2010, p. 17, abstract constitutional review may address "legal provisions in force in the domestic legal order, as long as they were adopted by State bodies". See also F. LOUREIRO BASTOS, *supra* note 17, at p. 461.

decades is the constitutional relevance of core principles and standards of an international legal order which is no longer exclusively centered on the Westphalian paradigm of sovereign equality between States.[76] The international legitimacy of States is now largely dependent on the constitutional recognition of democratic principles and the protection of human rights.[77] These principles are manifestations of an *in fiery* international constitutionalism. They materialize in the so-called mandatory rules of general international law (*jus cogens*), which nowadays may be even regarded as a heteronomous limit to the original *pouvoir constituant*.

The CRM recognizes the obligations stemming from *jus cogens* rules by stating that the Mozambican State "accepts, observes and applies the principles of the Charter of the United Nations and the Charter of the African Union"[78]. In the Mozambican Constitution, other references are made to principles of international law, such as the respect for the sovereignty and territorial integrity, non-interference in internal affairs and sovereign equality,[79] self-determination of peoples,[80] and the prohibition of the use of force and peaceful resolution of conflicts[81]. International human rights law is expressly acknowledged through the statement that the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights shall be used as a standard for the interpretation and integration of fundamental rights provided for in the Constitution[82].

International law is recognized by the CRM as having the same hierarchical rank as normative acts adopted by the Assembly of the Republic or the Government. According to Article 142 CRM, the internal normative acts include legislative acts (laws of the Assembly of the Republic and decree-laws of the Government), regulatory acts (decrees of the Government) and political acts (motions and resolutions of the Assembly of the Republic). By virtue of the principle *lex posterior derogat lex priori*, treaties do not prevail over laws or decree-laws which were enforced afterwards, and the same happens with agreements, which do not take precedence over laws, decree-laws or Government decrees enacted on a later date. Other international legal sources can also be negated by the entry into force of incompatible provisions of a law, decree-law or government decree[83].

International law is part of the Mozambican legal order. From the moment of its entry into force, any incompatible legislative acts will become inapplicable. The problem

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[76] S. BESSON, *Sovereignty*, in R WÖLFRUM (ed.), Max Planck Encyclopedia of Public International Law, Oxford, 2011, pp. 48–49.

[77] According to A. PETERS, *The Globalization of State Constitutions*, in J. NIJMAN, A. NOLLKAEMPER (eds.), New Perspectives on the Divide between National and International Law, Oxford, 2007, p. 45. These principles were forged by national constitutionalism, exported to the international legal order, and more recently re-imported to the national constitutions. This phenomenon has led to a "vertical" convergence of international and constitutional law: in other words, the globalization of national constitutions and the constitutionalization of international (or global) law.

[78] Article 17(2) CRM.

[79] Article 17 CRM.

[80] Articles 19 and 20 CRM.

[81] Article 22 CRM.

[82] Article 43 CRM.

[83] As the relationship between international law and internal law is not one of validity, no revocation occurs. The incompatibility of emerging norms of national law does not have the effect of invalidating conflicting international law norms, but simply of precluding the production of effects of the latter in the national legal order. The revocation of those internal norms will allow the international law norms to fully resume its effects. The same applies *mutatis mutandis* in the case of conflict between domestic norms and subsequent international law norms.

is that the opposite also occurs: norms laid down in legislative acts trump the application of conflicting international law norms as of the moment of their entry into force.

There is accordingly a significant risk that the *pacta sunt servanda* principle will be infringed within the Mozambican legal order. The international responsibility of the Mozambican State will stem from the adoption of a law by the Assembly of the Republic or a decree-law or decree by the Government which includes, albeit inadvertently, norms that are contrary to the international obligations of the Mozambican State.[84]

Legal doctrine always considered international law to be ranked below the Mozambican constitution.[85]Article 18(2) CRM settled any remaining doubts on this matter. Fernando Loureiro Bastos qualifies this constitutional option as "open to criticism" and even "surprising", "to the extent that it is incompatible with the characteristics of international law and inconsistent with the incorporation of the Republic of Mozambique within the international community",[86] as well as "incongruous", because the constitutional text itself recognizes in Article 43 the importance of international legal instruments in the interpretation of fundamental rights.[87]

Ranking international law below the constitution cannot be regarded as surprising, as this remains the norm in comparative law.[88] The supremacy of constitutional law is mitigated in Mozambique by the recognition of the supra-constitutional nature of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' rights ,[89] and the constitutionalization of several *ius cogens* rules and principles.[90] What surprises is the constitutional decision not to position international law above ordinary law.[91] In light of the increasing number of international conventions concluded by States, the decision to rank international treaties and agreements on the same level as legislative and regulatory acts increases the risk of breach of international treaty obligations. This may be rationalized as a defense mechanism against an international legal order which continues to be identified as preserving a European public law *ethos* with covert hegemonic and neo-colonial aspirations:

> «There is a certain resistance on the part of the Mozambican legislator regarding the reception of international law. Such resistance seems to be justified by the need to preserve legal monism. That is, the need to preserve the legal system's architecture, with the aim of achieving stability, coherence and harmony within the system. On the other hand, this resistance finds its deeper roots in the sovereign spirit and the self-determination of colonized and enslaved peoples – the aversion to a new neo-capitalist and capitalist trend. Regardless of its international integration and openness to globalization, the Mozambican legislator is still strongly and negative-

[84] This risk is avoided when national law expressly foresees the supremacy of potentially conflicting norms of international law. According to H.J. HENRIQUES, *supra* note 50, at p. 158.This strategy was followed by Article 67 of the Law on Arbitration, Conciliation and Mediation (Law 11/99 of 8 July 1999), which establishes that "the multilateral or bilateral agreements or conventions adopted by the State of Mozambique in the context of arbitration, conciliation and mediation take precedence over the provisions of this law."

[85] Among others, A. DIMANDE, *supra* note 12, at p. 85, or G. CISTAC, *supra* note 26, at 47–48.

[86] F. LOUREIRO BASTOS, *supra* note 17, at p. 459 and p. 461.

[87] *Ibid.*, at p. 460.

[88] A. PETERS, *supra* note 78, at p. 259.

[89] Articles 43 CRM.

[90] Articles 17, 19, 20 and 22 CRM.

[91] V.S. VERESHTIN, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law,* in European Journal of International Law, 7, 1996, p. 37.

> ly marked by foreign law –the classic international law – which was imposed over many centuries and is still nowadays a symbol of servitude».[92]

6. APPLICATION OF INTERNATIONAL LAW BY MOZAMBICAN COURTS

6.1. *GENERAL REMARKS*

Any study of the application of international law by Mozambican courts is severely constrained by the limited availability of judicial databases. The sole exception is the Constitutional Council, which publishes all its decisions.[93] Some rulings of the Supreme Court are published by the *Southern African Legal Information Institute*[94]and by the *Legis Palop*.[95] The Supreme Court and the Administrative Court also publish some of their decisions online.[96]Some other decisions of these courts were included in collections organized by judges of the Supreme Court or law professors.[97]

A search of jurisprudential databases reveal a very small number of cases of application of international law by Mozambican higher courts: one in the Constitutional Council[98]; four in the Supreme Court[99]. This is an improvement from 1997, when Armando César Dimande noticed that in Mozambique, there was no example of the application of treaties "at least at the level of the Supreme Court and the district Court of Maputo".[100]

Analysis of the rulings which applied international law shows that Mozambican courts invoke international law to adjudicate legal disputes (5.2.), and also as a parameter within the interpretation and integration of domestic law (5.3.).

6.2. *INTERNATIONAL LAW IN JUDICIAL DISPUTE RESOLUTION*

The Mozambican constitution provides common courts with power to take decisions as far-reaching as the non-application of a law they deem unconstitutional.[101]It also grants them the power "to secure the observance of the law"[102] and to punish "breaches of legality".[103]

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[92] H. J. HENRIQUES, *supra* note 50, at p. 161.

[93] Available at http://www.cconstitucional.org.mz/Jurisprudencia.

[94] This database includes a few judgments delivered between 1992 and 2007, and is available at: http://www.saflii.org/mz/cases/MZTS/.

[95] Legis Palop is the official database of the African Countries of Portuguese Official Language, better known by the acronymn PALOP. It includes legislation and some case law. See http://www.legispalop.org/bd/.

[96] Available at http://www.ts.gov.mz/Jurisprudencia and http://www.ta.gov.mz/rubrique.php3?id_rubrique=134.

[97] See G. CISTAC, *Jurisprudência Administrativa de Moçambique - Vol. I (1994-1999)*, Maputo 2003.G. CISTAC, *Jurisprudência Administrativa de Moçambique - Vol. II (2000-2002)*, Maputo 2006), and J.F. GUIBUNDA, *100 Acórdãos Da Jurisdição Administrativa*, Maputo, 2012.

[98] Judgment No. 04/CC/2009, of March 17, available at www.cconstitucional.org.mz/Jurisprudencia.

[99] Case 24/95, judgment of 24 October 1995; Case 151/98, judgment of 26 March 1999; Case 213/99-A, judgment of 3 October 2002; Case 214/99, judgment of 23 February 2000. All these decisions are available at http://www.saflii.org/mz/cases/MZTS/.

[100] A. DIMANDE, *supra* note 12, at 87.

[101] Article 213 CRM.

[102] Article 211(1) CRM.

[103] Article 211(2) CRM.

The constitutional review of legality has been broadly interpreted by Mozambicans judges to include international law. This was the case in particular before the Supreme Court in a judgment of October 3,2002 (213/99), concerning a traffic accident which occurred in Maputo in 1995 involving two vehicles driven by a Mozambican citizen and a Nigerian citizen. A Maputo lower court condemned the Nigerian citizen to pay a penalty for several traffic misdemeanors and to compensate the Mozambican citizen.

The Attorney General requested the annulment of this judgment on the ground of its manifest illegality, arguing that the Nigerian citizen was a diplomat serving at the Embassy of Nigeria.

After qualifying the problem as concerning the application of diplomatic immunities, the Supreme Court stated that:

> "(...) the (Vienna Convention Diplomatic Relations) was received into the internal legal order through ratification by the People's Assembly –which is the Parliament and the highest legislative body, *and the supreme organ of authority of the State*– through Resolution4/81, of September 2, 1981. It has, therefore, formal legal rank equal to laws in a strict sense." (italics in the original)

Although the 1990 CRM, which was in force at the time of the ruling, did not take a stance on the position of international law in the domestic legal order, the Supreme Court granted international law a hierarchical rank similar to laws of the Assembly of the Republic. That was then the predominant doctrinal opinion,[104] which was later reflected in Article 18(2) CRM.

The first instance court's ruling was annulled by the Supreme Court as it contained a "manifest illegality", consisting of the breach of the immunities provided for in Article 31(1) of the Vienna Convention on Diplomatic Relations. The Supreme Court never discussed the possible normative conflict between this international legal provision and the Civil Procedure Code (CPC) rules granting jurisdiction to the court of first instance. In any case, despite the CPC being of the same hierarchical rankas the Vienna Convention on Diplomatic Relations, the provisions of the latter would always prevail as they bear the nature of *lex specialis*, and were adopted and enforced afterwards–in Mozambique the 1939 Portuguese Civil Procedure Code, which is still in force.

Two other first instance cases confirm the efforts of Mozambican judges to avoid the State's liability for the breach of international legal obligations.[105]

The first case concerned the enforcement of a court decision which condemned the Embassy of the United States of America to pay compensation for the unlawful dismissal of an employee. The Embassy did not intervene in the proceedings challenging the dismissal and did not appeal the Court's ruling. After a bank account of the Embassy was seized by a court order, the MINEC notified the Court that the enforcement order breached the Vienna Convention on Diplomatic Relations.

The intervention of the administration motivated the immediate lifting of the enforcement order. The court then asked the MINEC to clarify the legal force of the ruling condemning the Embassy, and rightly questioned "whether the Embassy should have used the means available to protect its interests?"

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[104] See A. DIMANDE, *supra* note 12, at p. 87. For whom international conventions applicable in Mozambique would have the "binding force of ordinary laws".

[105] The two cases were reported to me by A. Miguel Ndapassoa and by A. Leão, to whom I express my gratitude.

The MINEC answered in an opinion issued on August 11, 2008. According to the Mozambican Ministry for Foreign Affairs, the judicial decision that condemned the Embassy was invalid as it breached the immunities provided for in the Vienna Convention on Diplomatic Relations. In a singular interpretation of the principle of separation of powers, it also added that it bears the responsibility for the correction of miscarriages of justice:

> "The fact that (the MINEC) had to intervene shows that the Mozambican authorities were forced to put an end to the violation of the law by one of their own courts, and were informed of this situation by the diplomatic representation of a foreign country. This is both humiliating and unnecessary. In our view, this issue must be studied in the judicial training center, in addition to being necessary to inform judges about diplomatic immunities".[106]

The second case originated in a challenge to a dismissal brought against the World Food Program (WFP) in a provincial court of Sofala.[107] The court found it had no jurisdiction to rule on the matter based on Article 105 of the Charter of the United Nations, and Articles 2 and 8, section 29(a), of the Convention on Privileges and Immunities of the United Nations.[108]The ruling refers to an opinion of the public prosecutor of October 27, 2009, in which it is argued that national labor law rules were not applicable to the employment contract, and that any dispute was subject to international arbitration mechanisms agreed upon between the parties. The simultaneous application of Article 105 of the Charter of the United Nations and Article 2 of the Convention on Privileges and Immunities of the United Nations granted jurisdictional immunity to the WFP. Moreover, pursuant to Article 8, section 29(a), of the Convention on Privileges and Immunities of the United Nations, disputes arising from contractual relations established under private law in which the United Nations is a party shall be subject to appropriate modes of settlement to be established by the United Nations.

A similarity between these two cases is the absence of any reference to Article 18(2) CRM. The hierarchical equivalence between international law and normative acts of the Assembly of the Republic and the Government envisaged in this provision was ignored. In the first case, the seizure of the bank accounts ordered by the first instance court was cancelled following an (unconstitutional) administrative order. In the second case, the public prosecutor seems to assume the superiority of international law*vis-à-vis* ordinary law by over-ruling the precedence of internal law– Law 23/2007 (labor law code) –adopted after the entry into force in the Mozambican legal order of the two international conventions and which were relied upon to obtain immunity for an international organization.

Under the 2004 CRM, the Constitutional Council first took a stance on the incorporation and positioning of international law in the Mozambican legal order in a request for the preventive review of the constitutionality of a law submitted by the President of the Republic.[109]

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[106] The opinion was distributed to the members of the public ministry by the ordinance of the Attorney-General 312/GAB-PGR/2009, of August 20, 2009.

[107] Case 37/2006, of October 24, 2012 (Judge Ana Paula Sebastião José Muanheue).

[108] 1 UNTS 15 (signed on February 13, 1946, entered into force on 17 September1946).

[109] Case 04/CC/2009, of March 17, available at http://www.cconstitucional.org.mz/Jurisprudencia.

The Constitutional Council was asked to decide on the constitutionality of a provision of a law which granted the President of the Republic the authority to appoint the Chairman and the Vice-Chairman of the National Commission for Human Rights. The President of the Republic considered that the provision extended its competences in breach of the principle of conferral of presidential competences.

In an opinion referred to the Constitutional Council, the Commission for Legal Affairs, Human Rights and Legality of the Parliament argued that the competence attributed to the President of the Republic to appoint the Chairman and Vice-Chairman of the National Commission for Human Rights is an obligation stemming from the "Paris Convention on the Establishment of National Human Rights Commissions", which was "signed without any reservations by the Republic of Mozambique". This opinion was rejected by the Constitutional Council:

> "Firstly, the Convention adopting the so-called «Paris Principles» does not mandate a particular form of appointment of board members of the National Commission for Human Rights. On the contrary, regarding the «Composition and guarantees of independence and pluralism», the Convention calls for a discretion in the choice of the form of nomination, establishing, in paragraph 1, that «the composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation (...)», and, in paragraph 3, that «in order to ensure a stable mandate for the members of the national institution, without which there can be no independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate».
> Secondly, even if the Convention established a particular form of appointment which implied granting the President of the Republic a competence not included in the constitution, in compliance with the principle set forth in Article 18(2) of the Constitution, such an assignment would be subject to constitutional review."

Two conclusions on the incorporation of international law in the Mozambican legal order may be drawn from this decision: i) international legal provisions do not take precedence over the constitution; and ii) are subjected to the constitutional review mechanisms provided for in the CRM. The latter include the possibility of incidental review of the constitutionality of international law within the ambit of preventive review of the constitutionality of laws.

Another assumption which can be inferred from this case concerns the difficulties of Mozambican courts in determining the legal nature of international law sources. Both the Assembly of the Republic and the Constitutional Council refer to a "Paris Convention on the establishment of National Human Rights Commissions" and to a "Paris Convention on Human Rights", which were signed"(...) without reservations by the Republic of Mozambique". No such conventions exist. What the Constitutional Council presumably referred to are the "Principles relating to the Status of National Institutions (the Paris Principles)", adopted by UN General Assembly Resolution 48/134,onDecember 20,1993.[110]Therefore, they are *soft law* principles not binding on States[111].

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[110] UN Doc. A/RES/48/134.

[111] R. MURRAY, *The Role of National Human Rights Institutions*, in M. BADERIN, M. SSENYONJO (eds.), International Human Rights Law: Six Decades After the UDHR and Beyond, Oxon, 2010, p. 306.

6.3. *INTERNATIONAL LAW AND THE INTERPRETATION AND INTEGRATION OF NATIONAL LAW*

The supremacy granted to the constitution in Article 2(4) CRM requires that its provisions should be heeded when interpreting any other norm applicable in the Mozambican legal order, including international legal norms. The exceptions are the norms of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, which are themselves an interpretative and integrative parameter of fundamental rights enshrined in the Constitution.[112]

No cases before the Mozambican courts have employed a consistent constitutional interpretation of situations involving the application of international legal provisions. This could have been the path followed by the Supreme Court decision of October 24, 1996 (Case 24/95). The Supreme Court considered that a first instance court failed to observe the obligation stemming from Article 12 of the Convention on the Rights of Children that the wishes of a minor be taken into account regarding which parent should be awarded parental responsibility. Although this was a self-executing provision,[113] the convention did not bind Mozambique at the time the first instance court decision was rendered. Given that the applicable national law allowed the court to carry out "all the essential steps" before delivering a decision,[114] the courts could have based the hearing of the minor upon an interpretation of national law in accordance with international law.

International law has occasionally been used as an additional argument in support of a particular interpretation of national law. References to international legal provisions have arisen when Mozambican courts make contextual remarks on the legal framework of the substantive matters at issue: i) in a decision of March 26, 1999 (Case 151/98-C), the Supreme Court stated that the case concerned the right to freedom, which is "one of the fundamental rights of the human person, enshrined in the constitutions of almost every country (see, in our case, Article 98), and in several international conventions, some already ratified by Mozambique and adopted as national law"; ii) in a decision of February 23, 2000 (Case 214/99-C), the Supreme Court concluded that pre-trial detention is a measure of coercion "strictly exceptional, not compulsory and subsidiary", which is based on "Articles 98 and 101 of the Constitution, as well in other ordinary law provisions (see Articles 286 and 291 of the Penal Code and Article 9(3) of the International Covenant on Civil and Political Rights, of December 16, 1966, which was received by national law through Resolution 5/91, of December12,1991, of the Assembly of the Republic"). None of these references to international law was decisive for the interpretation of national law.

7. CONCLUSIONS

Judicial references to international law in the Mozambican legal order are very limited. This is a relevant indicator that international law is generally being ignored by Mozambican judges, although the scarcity of available judicial databases does not allow for any definitive conclusion. Within the small number of cases in which international

[112] Article 43 CRM.

[113] S. DETRICK, *Commentary on the United Nations Convention on the Rights of the Child*, The Hague 1999, p. 28.

[114] Article 96(1) of the Statute of Jurisdictional Assistance to Minors, approved by Decree-Law 41/71, of 28 December 1971.

law norms were invoked, there were substantive references, which even led to the non-application of conflicting internal norms, and *ad abundantiam* references, which were used for the purpose of reinforcing a certain interpretation of a national legal norm.

Formally, international legal norms incorporated pursuant to Article 18 CRM are integrated *qua tale* in the Mozambican legal order, and are given a hierarchical rank similar to normative acts of the Assembly of the Republic and of the Government. Analysis of the case law shows that Mozambican courts — or, at least, the Constitutional Council – deliberately trump international norms that breach the constitution, but that in other conflicts with national law of inferior rank, they may give prevalence to international law. This jurisprudential sample is not, however, sufficiently representative to allow for a definitive conclusion as to a definitive trend in the case law recognizing international law's supremacy over ordinary law. The sample is nonetheless revealing of the Mozambican courts' concern to avoid the responsibility of the State for the breach of international obligations which would most certainly arise from the resolution of normative conflicts between ordinary national law and international law through the application of the *lex posterior derogat lex priori* principle.