"Application of International Law in National Courts and the Integrity of International Law"

Abstract

When national courts interpret and apply principles of international law, the question arises whether their decisions are congruous first, with current substantive International Law and second, with the aims and objectives of *jus gentium* - the law of nations. A further question is whether decisions of national courts fulfil the role contemplated for them under Article 38(1)(d) of the Statute of the International Court of Justice[1] (ICJ) regarding sources of International Law? The increasing frequency with which national courts are seized upon significantly serious International Law issues raises the question of risk that without appropriate and adequate support, they could easily get International Law wrong, and end up undermining both the legitimacy and integrity of the international legal system (ILS). This article examines this challenge in light of growing and seemingly unrelenting tensions between the universal, the supranational and the national spheres of adjudication in the implementation of certain international standards.

Introduction:

Until recently, International Law was not one of the mainstay offerings in Law Schools. Most Law Schools did not offer it at all.[2] For those that offered it at all, the syllabus was in the majority of cases merely introductory and did no more than attempt to introduce students to the historical and theoretical foundations of International Law and then consider its structure, function and a few topical issues. All this was usually accomplished in the limited space of two teaching semesters.

Dedicated monographs to facilitate the pedagogical enterprise of the discipline began to appear. Among them *Oppenheim's International Law*,[3] James Brierly, *The Law of Nations,*[4] Max Sorenson, *Manual of Public International Law*,[5] Weston, Falk and D'Amato, *International Law and World Order*,[6] Ian Brownlie, *Principles of International Law*;[7] Michael Akehurst, *A Modern Introduction to International Law*,[8] and David Harris, *Cases and Materials in International Law*[9] proved quite influential. Particularly within the last two to three decades, International Law has become the most prized

* All Internet sources last accessed 20 March 2017.

[1] 26 June 1945 San Francisco, UKTS 67 (1946) Cmnd. 7015; UNTS 993, 59 Stat. 1031.
[2] Arguing that International Law was not law at all, see Austin, J. (1832) The Province of Jurisprudence Determined: Lecture I (Isaiah Berlin et al. eds. Curwen Press 1954). See also H.L.A. Hart, (2nd ed. 1992) The Concept of Law, Clarendon Press p.16-17; Dworkin, R. (1986) Law's Empire, Fontana Press, London, p.32-3.
[3] (1st ed. 1905) Longman, London.
[4] (1963) OUP.
[5] (1968) Macmillan, London.
[6] Weston, B.H, Falk, R.A. and D'Amato, A. (2nd ed. 1990) International Law and World Order, West Publishing Co. Minnesota p. 171.
[7] (1st ed. 1966) OUP.
[8] (1st ed. 1970) Routledge, London and New York.
[9] (8th ed. 2018) Sweet and Maxwell Publishers, London.

postgraduate teaching area worldwide. It probably now accounts for the longest list on any University Law Library periodical collection.

Nevertheless, while International Law's significance among Law Schools, Students, Politicians, Practitioners, and Purveyors of international diplomacy appears to have certainly eclipsed the Austinian handicap,[10] senior judges in most jurisdictions will have barely studied the subject in Law School, if at all. Consequently, when confronted with International Law issues, they often continue quietly and hope that all passes off without much ado. False confidence can be a problem for judges too. As one prominent jurist has observed: "The habits of certainty and decisiveness so essential to adjudication are not easily laid aside at the lectern when judges approach it. Perspectives are laid out *not* as tentative scholarly arguments *so much as* authoritative findings of fact".[11] It is fair to say that national courts can get International Law very wrong. When that happens, justice is hindered. Legitimacy or, the law's pull of its addressees towards voluntary compliance[12] and law's integrity are undermined.

Dworkin[13] writes that "Law as integrity … is both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges deciding hard cases is essentially, not just contingently, interpretive; law as integrity asks them to continue interpreting the same material that it claims to have successfully interpreted itself."[14] In this sense law as integrity requires judges to decide cases by applying the same methodology from which integrity was derived from with regard to constructive interpretation. A holistic appraisal of the body of relevant law to each case is the best means to ensuring legal conventionalism[15] and legal pragmatism[16] and integrity - all of which contribute to strengthening legitimacy of the judicial enterprise.

When national courts get International Law wrong, the legitimacy of the international legal system is impugned. In particular, the role of national judicial decisions as an evidentiary means for the identification of International Law that is contemplated under Article 38(1)(d) of the Statute of the International Court of Justice[17] (ICJ) is undermined. For this reason, it is important

[10] See also Chigara, B. (2000) "International Tribunal for the Law of the Sea and Customary International Law" 22 *Loyola of Los Angeles Comparative and International Law Review*, No. 4 pp. 433 - 452.
[11] Gearty, C. (2014) "On Fantasy Island: British politics, English judges and the European Convention on Human Rights" UK Const. L. Blog (13th November 2014) (available at http://ukconstitutionallaw.org) My emphasis.
[12] Franck, T.M. (1990) The Power of Legitimacy Among Nations, OUP, Oxford and New York.
[13] (1986) Law's Empire, Fontana Press, London p. 226-8.
[14] Ibid. p. 226.
[15] Ibid. p. 94.
[16] Ibid.
[17] See International Court of Justice website at: http://www.icj-cij.org/documents/?p1=4&p2=2

that decisions of national courts are consistent with substantive provisions of International Law. Experts should be appointed as *friends of the court* that impartially illuminate the intricacies and perambulations of principles of International Law applicable to each case. This level of support should be standard particularly in cases where international treaties, regional treaties, customary international law, regional supranational law, *jus cogens*, bilateral agreements and measures of domestic law all intersect and present a less than straightforward opportunity for the judge(s) to merely apply the law.

In *Madzimbamuto v Lardner Burke*[18] the Judicial Committee of the Privy Council had to determine on appeal the constitutional legality of the actions of a usurper regime regarding the continued detention of individuals held under the previous constitutional order. The General Division of the High Court of Southern Rhodesia (Zimbabwe) had rejected the claim that the white minority regime that had declared unilateral independence from Britain on 11 November 1965 in violation of the Constitution of 1961 was a *de jure* government by virtue of its *effective control* of the country, and also by the complete overthrow of the old order. Secondly, it had observed that the newly inaugurated Constitution of 1965 was not the lawful constitution. Thirdly, it had declared that the Government established under the 1965 Constitution was not the lawful government of Southern Rhodesia. Nevertheless, the Court ruled that the extra constitutional actions of the usurper regime could be upheld based on several International Law principles.

On appeal, the Privy Council rejected what it called the General Division of the High Court of Southern Rhodesia's erroneous invocations of some of International Law's central principles. Per Lord Pearce: " concepts of *de facto* and *de jure* government were inappropriate in dealing with the legal position of a usurper within the territory of which he had acquired control, and whilst the legitimate government was trying to regain control it was impossible to hold that the usurping government was for any purpose a lawful government".[19]

The Privy Council's ruling disarmed the attempt by the General Division of the High Court of Southern Rhodesia to recognize the supremacy of the usurper government through references to the International Law *doctrine of effective control of territory* – a doctrine that had had been installed to legalize extension of territory by conquest in the empire-building years. The Privy Council admonished the national Court for its adventurism.

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[18] [1968] 3 All ER 561, [1968] UKPC 2, [1968] UKPC 18.
[19] Ibid. p. 562.

By seeking to place the usurper regime's administrative acts under the tent of legal validity, the High Court had completely disregarded the sovereignty of the British Government over Southern Rhodesia. Per Lord Pearce: "Even if there were a principle, depending on implied mandate from the lawful Sovereign, which recognised the need to preserve law and order in territory controlled by a usurper, such principle could not override the legal right of the Parliament of the United Kingdom to make such laws as it thought proper for a territory under the sovereignty of Her Majesty in the Parliament of the United Kingdom."[20] Moreover, "the *de facto* status of sovereignty could not be conceded to a rebel government as against the true sovereign in the latter's own courts".[21]

The case for resorting to expert international lawyers when national courts adjudicate on International Law issues stems firstly from the continual and increasing presentation before national courts of International Law cases. Secondly, this increase has coincided with a rapid and unrelenting fragmentation of International Law into specialized sub-disciplines. These developments have raised the significance of International Law to the extent that its reporting is no longer the preserve of scholarly journals and broadsheet press only, but also of local radio and even tabloid, social media.

Thus, the juridical competence of national judges increasingly requires expanse knowledge of International Law. Nevertheless, the actual study of International Law has only blossomed within the last two to three decades, resulting in the creation of sub-disciplines of specialization. Consequently, it is almost impossible to find anymore, even among international lawyers themselves, one that has competences across the entire range of sub-disciplines of specialization. Why then should a national trail judge be expected to be a master of all aspects of this diversified discipline?

This article proposes a regularized, jurisdiction-controlled use of expert International Law experts as *friends of the Court* that illuminate the deep and steep channels of applicable International Law whenever national courts must decide international law issues, particularly those that fall on the interface of conflicting norms of customary international law, regional supranational law, *jus cogens*, international treaties, and domestic measures. The court, the claimants, and the respondents would all have the opportunity to cross-examine this expert *friend of the Court.*

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[20] Ibid.
[21] Ibid. at p. 562-3.

The article considers a number of examples where national court practice has either enhanced or undermined International Law's legitimacy under the light of Article 38(1)(d) of the Statute of the ICJ. The cases chosen show an intersection of domestic law, regional law and International Law. They show also how critical decisions of national courts are critical to law making and to legitimacy of the international legal system.

Immunity of Head of State in *Pinochet Case*[22] – UK; and *Al Bashir Case*[23] - South Africa

The idea of sovereign immunity from the jurisdiction of foreign courts probably best projects the purpose of *jus gentium* or, the law of nations – which is to regulate relations between independent sovereigns, including their rights, duties and common obligations to one another, and also the objective of maintaining international peace and security.[24] Immunity is two sided. On the one side is 'state immunity' and on the other side is 'sovereign immunity'. Together these two concepts underscore the customary international law principle of *par in parem non habet imperium* – one sovereign power cannot exercise jurisdiction over another sovereign power.

The current law of state immunity has developed predominantly through case law of domestic courts in legal proceedings where jurisdiction of the presiding court was questioned on the *par in parem non habet imperium* principle.[25] The fact that the law of state immunity derives predominantly from national rather than international courts may have transformed the role of judicial decisions from a mere subsidiary means for identifying rules of law as contemplated under Article 38 (1)(d) of the Statute of the ICJ to a primary source of obligations in its own right.

Black-Branch writes that UK Courts got International Law wrong in the *Pinochet Case* in a way that for him threatens stability of the international legal order. He opines that UK courts wrongly interpreted the immunity principle. "English courts should not have asserted criminal jurisdiction over acts committed by Senator Pinochet in his capacity as head of State. Senator Pinochet should have been granted immunity under International Law, and as a consequence, should not have been subjected to extradition".[26]

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[22] *ex parte Pinochet Ugarte No. 3* (1999) 2 WLR 827. See also Blackbranch, J. (2000) Sovereign Immunity Under International Law: The Case of Pinochet in Woodhouse, D The Pinochet Case: A Legal and Constitutional Analysis, pp. 93-113.

[23] Before the North Guateng Division of the High Court of South Africa, Case No. 27740/2015, upheld on appeal to the Supreme Court of Appeal of South Africa, decision of 15 March 2016 Case No. 867/15.

[24] UN Charter preambular declarations.

[25] See also Yang, X (2012) "Sovereign Immunity" Oxford Bibliographies at: http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0018.xml;jsessionid=817AA5B1AC27EA95B9E3B335E76785FA

[26] Black-Branch, J. "Sovereign Immunity under International Law: The Case of Pinochet" in Woodhouse, D. (2000) The Pinochet case: A Legal and Constitutional Analysis, Hart Publishers, Oxford p. 93. See alsoAkande, D. and

How then should the risk be managed that, in their contribution to the development of International Law, judicial decisions of national courts could undermine the legitimacy of International Law and diminish its integrity? Perhaps involvement of *expert friends of the Court* deployed to illuminate the intricacies of oft-conflicting international rules and supranational law and domestic law measures would go some way to ameliorate the challenge. Judges of national courts also need to be clear about this fact, and request such assistance when they need it.

Writing specifically on whether South Africa was under a duty in International Law and under its own domestic law to arrest and surrender President Al-Bashir, Tladi concludes that the judgment of the North Guateng Division of the High Court of South Africa in the *Al Bshir Case* ignored "fundamental rules of International Law".[27] The *Pinochet* and *Al Bashir* cases involved the question of whether a national court had capacity to pronounce on a request to extradite the warrantee - a former President (Senator Pinochet) and a serving President (Al Bashir) respectively to face charges for alleged international crimes.

The *Pinochet Case* had been triggered by the arrest in London on 16 October 1998 of Senator Pinochet Ugarte under a provisional warrant issued by a Metropolitan Stipendiary Magistrate pursuant to Section 8(1) of the Extradition Act 1989.[28] This followed directly from the issue on the same day in Madrid of an international arrest warrant against Senator Pinochet on claims of *torture* and of *hostage taking* which were crimes also under UK law.[29]

On 22 October 1998, a second Section 8(1) arrest warrant was issued upon receipt of a second international arrest warrant issued by the Spanish Court alleging that during his rule of Chile, between 1973 and 1990, Senator Pinochet Ugarte had ordered his officials to commit acts of *torture* and of *hostage taking*. Per Lord Browne-Wilkinson,[30] the *jus cogens* nature of the international crime of torture justifies States in taking *universal jurisdiction* over torture wherever committed. Offences *jus cogens* may be punished by any State because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution. International Law policy on torture points to an unequivocal, absolute prohibition. Per Lords Millet and Phillip "… The systematic use of torture was an *international crime* for which there could be *no immunity* even before the Convention came into effect and consequently there is no

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Shah, S. (2010) "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" 21 European Journal of International Law No. 4 pp. 815-852.

[27] Tladi, D. (2015) "The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law" *Journal of International Criminal Justice* p. 1.

[28] The Act transforms into UK law, the European Convention on Extradition ETS No.24 Paris 13 December 1957.

[29] *ex parte Pinochet Ugarte No.3* [1999] H.L. 2 WLR p. 843.

[30] *ex parte Pinochet Ugarte No.3* [1999] H.L. 2 WLR, p. 841.

immunity under customary international law for the offences relating to torture alleged against the applicant."[31] The Spanish National Court Criminal Division, in a Plenary Session of 5 November 1998 stated that Spain was competent to judge the events committed in Chile under Senator Pinochet's rule "by virtue of *the principle of universal prosecution for certain crimes – a category of international law* – established by our internal legislation."[32]

It seemed that the UK courts were under international spotlight to spell out the scope and effect of the crimes of International Law referred to above, and to confirm the effect if any of the defence of immunity of head of State under International Law that Senator Pinochet Ugarte sought to rely on. The case attracted intense international media attention from start to finish. UK courts' implementation of current International Law on immunities of a head of State in particular was under spotlight.

Nevertheless, compared to *Al Bashir Case* [2015] before the North Guateng Division of the High Court of South Africa - a decision upheld by South Africa's Supreme Court of Appeal on 15 March 2016,[33] *ex parte Ugarte* [1999] appears to have been a relatively simple and straightforward case. This is because of the absolute quality of International Law policy on the prohibition against torture, and against hostage taking – the two main crimes that Senator Ugarte was charged with.

Secondly, the *jus cogens quality of the prohibition* against the main offences that Senator Ugarte was charged with meant that only a norm of similar quality could exonerate him. The defence of immunities and privileges of head of State does not possess *jus cogens* quality and could not therefore suffice to exonerate him. The Vienna Convention on the Law of Treaties (1969)[34] provides in Article 53 that treaties are void, if, at the time their conclusion, they conflict with a peremptory norm of general international law.

Thirdly, the *universal jurisdiction quality* of the offences alleged against Senator Ugarte required the UK either to prosecute those offences or to surrender to another State that was willing and able to prosecute them.

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[31] *ex parte Pinochet Ugarte No.3* [1999] H.L. 2 WLR, p. 829.
[32] *ex parte Pinochet Ugarte* [1998] H.L. 3 WLR, p. 1463.
[33] Case no: 867/15.
[34] The Vienna Convention on The Law Of Treaties - 23 May 1969, UN Doc. A/Conf. 39/27; UKTS 58 (1980) Cmnd. 7964.

Fourth, and perhaps most important of all, the asymmetry of international treaty law, customary international law, and *jus cogens* with regional EU Law and UK Law on the matter provided for a situation where all the dots appeared to form a dotted straight line for the Court to join up, which it did, admirably too. In so doing, Lord Browne Wilkinson[35] clarified and amplified the limits of the scope of the immunities and privileges of a Head of State doctrine by stating that the doctrine of State immunity applies to exonerate from prosecution Heads of States or former Heads of States only for those of their acts that properly fall into the category of 'official duties'. Their official duties properly construed exclude the commission of crimes, which International Law prescribes against by way of customary international law, convention or *jus cogens*.

While the *Al Bashir Case* appears similar to the *Pinochet Case* with regard to the *jus cogens* and *universal jurisdiction quality* of the offences alleged against the defendant; the challenge for the South African courts (both first instance and Supreme Court of Appeal) - a challenge that the courts appeared oblivious to, arose from a dissymmetry of relevant laws. *Special lexis* supranational constitutional law of the African Union (AU); general international law; and a host agreement contract between South Africa's government and the Commission of the AU[36] appeared to authorise conflicting outcomes.

Neither the North Guateng Division of the High Court nor the Supreme Court of Appeal of South Africa examined the AU Directive supported emergent State Practice against ICC jurisdiction regarding immunity of African Heads of State. In fact, both courts completely ignored *lex specialis* AU anti-ICC law that proscribes ICC jurisdiction on African issues. This probably renders their attention to South Africa's international obligations in the matter incomplete.

David Dyzenhaus[37] remarks in *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* about the failings of South Africa's judiciary. "So stark was the distance between law's humanistic promise and its workaday betrayals [under apartheid South Africa]…. The question is whether we can change this, today, and how."[38] In the words of one actor, Law and Justice were like two distant cousins that hardly spoke to each other under apartheid South

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[35] *ex parte Pinochet Ugarte* [1999] H.L. 2 WLR p.827, at p. 846.
[36] See paras. 10-12 Supreme Court of Appeal decision of 15 March 2016, Case No. 867/15
[37] (1998) Hart Publishing, Oxford.
[38] Ibid. p. vii.

Africa.[39] Perhaps the change that Dyzenhaus hoped for remains illusory considering the Courts' handling of the recent *Al Bashir Case*.

To add to the disparities, the South African government had just gazetted in Parliament exonerations from public authority of all delegates arriving for the duration of the AU Summit.[40] This meant that unlike the *Pinochet case* where all relevant laws were confirmatory, here they were all over the place, each recommending a different outcome. This required South Africa's domestic courts - not so accustomed to processing International Law matters, to demonstrate extreme competence and mastery of appraising and navigating conflicting straits and channels of ICC Law, emergent supranational *lex specialis* anti-ICC AU Law, international and regional treaty obligations, and domestic law.

Like the *Pinochet Case* at the end of the last millennium, international media attention attended the *Al Bashir Case* from start to finish, punctuated by pleas that South Africa should do the 'right thing.' These came from the UN Secretary General,[41] the President of the Assembly of States to the Rome Statute of the ICC,[42] and others. But what was that right thing?

For its part the South African government contested the application and lost, and later appealed the High Court decision to the Supreme Court of Appeal.[43] Notably, the Government had requested the introduction of a Professor of International Law to illuminate the substantive International Law surrounding the case. The North Guateng Division of the High Court of South Africa had confidently, and flatly declined that request. This raised the question whether the Court would also be able to surgically disect the complex nerve centre of international legal principles at hand, and reach a decision that would elicit compliance of the parties. In the end, the Court's decision provoked outrage as African States immediately signalled intention to withdraw en-mass from the ICC.

The case arose from the arrival in South Africa on 13 June 2015 of Sudan's President Al Bashir to attend the 25th Assembly of the AU scheduled for 7-15 June 2015. On 14 June 2015 the

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[39] Written by John Briley and directed by Richard Attenborough and set in late-1970s apartheid ruled South Africa. See also: https://www.youtube.com/watch?v=n2imqm4hwDU
[40] paras. 11-13 Case No. 867/15 decision of 15 March 2016 in the Supreme Court of Appeal.
[41] See "Shameless Sudanese president shouts 'God is greatest' as he lands back in his country after ignoring court orders to stay in South Africa and face genocide charges" Daily Mail website at: http://www.dailymail.co.uk/news/article-3124552/Lawyer-Sudans-al-Bashir-wanted-ICC-SAfrica.html
[42] ICC Press Releases, 13 June 2015 ICC website at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1117.aspx
[43] Case No. 867/15.

North Guateng High Court of South Africa issued on, an interim order[44] preventing President Omar Al Bashir of Sudan from leaving the country until it had decided on a request to compel South African authorities to arrest and surrender the President to the ICC[45] in compliance with the ICC's arrest warrant on charges of war crimes, crimes against humanity, and genocide.

As a State Party to the Rome Statute South Africa had a duty to cooperate with the ICC, including arresting and detaining fugitives from the ICC in order to ensure that individuals that have been indicted by the ICC are transported to the Netherlands to stand trial. South Africa's Act No. 27 in 2002[46] had transformed the ICC Statute into South African national law and underscored its commitment to cooperate with the ICC. Article 9 of Act No. 27 provided a procedure for dealing with any ICC fugitive that landed on South African shores.[47]

However, for a considerable period of time now, the African Union appears to have been developing unequivocal *lex specialis* supranational regional anti-ICC standards of its own. For over eight years now ICC hopes of prosecuting President Al Bashir for war crimes, crimes against humanity and genocide in Darfur have not materialized in spite of President Bashir's numerous travels across Africa, including to Member States Parties of the ICC, including Kenya, Chad, Malawi, Democratic Republic of Congo, Uganda, Djibouti, Egypt and South Africa. Does this suggest the supremacy of emergent *lex specialis* AU supranational anti-ICC Law?

The 13th AU Summit had concluded on 6 July 2009 that AU Member States Parties should "… not co-operate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of Sudanese President Omar al Bashir to the ICC."[48] South Africa's President Jacob Zuma unequivocally stated that the AU position reflected South Africa's position on the matter. "There is an African stance on this and we are not different from

[44] Case No. 27740/15, North Gauteng HC, Pretoria.
[45] Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 U.N.T.S 90 (entered into force July 1, 2002).
[46] See Republic of South Africa Government Gazette Vol. 445 Cape Town 18 July 2002 No. 23642 at: www.saflii.org/za/legis/num_**act**/iotrsot**icc**a2002699.pdf
[47] See also SALC's Founding and Supplementary Affidavits at: http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Notice-of-Motion-founding-affidavit.pdf; http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Supplementary-Affidavit-Bashir-Matter.pdf
[48] South African Government News Agency, "AU leaders will not extradite Al Bashir" at: http://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir

it. … the United Nations Security Council should have listened to Africa before issuing the interdict".[49]

At the AU *Extraordinary Summit on Africa-ICC Relationship* the highest decision making organ of the AU – the Assembly decided on 12 October 2013[50] to codify this position into *lex specialis* by declaring:

(i) That no International Court or Tribunal has capacity to commence or to continue charges against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.
(ii) That the trials by the ICC of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office.
(iii) To fast track the establishment of the criminal jurisdiction of the African Court on Human and Peoples' Rights and to table for discussion at the Assembly of State Parties of the ICC, amendments to the ICC on immunity of heads of state and government among other matters.[51]

Even without the passage of much time,[52] these *lex specialis* outcomes of the AU Extraordinary Summit probably point to the emergence of *sudden or wild customary international law*[53] that is not constrained by custom's regular secondary rules of recognition of State practice coupled with the psychological belief that such practice was obligated by International Law.[54] Prost and Clarke write that:

> … the emergence of the hypothesis of "instant" customs, whereby custom is essentially based on the recognition, formally expressed in certain international instruments, of a "need for law". Admittedly,

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[49] South African Government News Agency, "AU leaders will not extradite Al Bashir" at: http://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir

[50] Ext/Assembly/AU/Dec.1(Oct.2013). See also Dersso, S.A. (2013) "The AU's Extraordinary Summit decisions on Africa-ICC Relationship" *EJIL: Talk* at: http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/

[51] Ext/Assembly/AU/Dec.1 (Oct.2013)

[52] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* ICJ Reports 1969 p.4. The Court ruled that although the passage of only a short period of time is not necessarily, or of itself a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. p. 43.

[53] Prost and Clarke (2006) "Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?" *Chinese Journal of International Law*, Vol. 5, No. 2, 341–370

[54] Article 38(1)(b), Statute of the ICJ (1946). "Even without the passage of any considerable period of time, a very widespread and representative participation in the Convention might suffice of itself, provided it included that of States whose interests were specifically affected". *North Sea Continental Shelf Cases* ICJ Reports 1969 p. 42.

> solemn resolutions such as those emanating from the United Nations, have a decisive influence in the genesis of "instant" or "wild" customs. They are often regarded as their means of expression par excellence.[55]

African States have solidified their opposition to and distrust of the ICC by producing constitutional anti-ICC customary international laws and corresponding State practice. Developments antecedent to and post the *Al Bashir Case* [2015] appear to confirm this. This '*emergent supranational anti-ICC African constitutional customary international law'* appears to express African States' desire to be involved in the creation of a genuinely fair and unbiased international legal system - something that they have hitherto failed to achieve except perhaps only in International Labour Law.[56]

Could South African courts have considered supranational AU constitutional customary international law and still have dismissed it? Quite the opposite because then it would not be supranational law at all. Secondly, that would result in democratic dysfunctionalism specifically because the idea of separation of powers would become unworkable in the area of foreign policy of the State. The South African executive had endorsed emergent supranational AU constitutional customary international law on the relationship between the AU and the ICC.[57] Dis-recognization of emergent supranational AU constitutional customary international law on the relationship between the AU and the ICC by South African courts risks judiciary usurpation of executive authority. under the doctrine of separation of powers under a democratic constitution. In fact in the *Mazibuko Case*[58] the Constitutional Court of South Africa warned sternly that it would not venture into policy matters that are the province of the Executive.

Nevertheless, against the South African government's case in *Al Bashir* were *inter alia* the following points:

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[55] Prost and Clarke (2006) "Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?" 5 *Chinese Journal of International Law* No. 2 pp. 341–370.

[56] African States were actively involved in the revision of International Labour Conventions and Recommendations, the majority of which had been established prior to their joining the ILO as sovereign independent States. That exercise resulted in the setting aside of numerous Conventions and Recommendations that make up the ILO legislative code. See Chigara, B. (2007) "Latecomers to the ILO and the Authorship and Ownership of the International Labour Code" 29 *Human Rights Quarterly* pp. 706 – 726.

[57] See declaration of SA's President President Jacob Zuma, 6 July 2009, 13th AU Summit in Libya, supra. n. 49.

[58] *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009)

(i) As a member of the ICC[59] regime that had issued arrest warrants against a serving head of State for alleged crimes *jus cogens*[60] the Republic of South Africa, had UN *lex specialis* obligations to abide by.

(ii) The Republic of South Africa had transformed the ICC Statute into its own national law[61] - creating for itself domestic law obligations towards the ICC.

(iii) The African Union (AU) had inaugurated supranational anti-ICC Constitutional Customary International Law and AU Directives[62] that rendered any ICC arrest warrants issued against a serving Head of State inoperable, including the ones against President Al Bashir of Sudan[63] - creating emergent regional supranational obligations for the Republic of South Africa.

(iv) The government of the Republic of South Africa was contractually bound under part VIII of its 'host agreement' with the Commission of the AU, which had also been incorporated into South African Law by Government Gazette No. 38860[64] to ensure that all delegates attending the 25th AU Summit scheduled for 7-15 June 2015 were immune "from personal arrest or detention and from any official interrogation as well as from inspection or seizure of their personal baggage" – a binding treaty obligation subject to *pacta sunt servanda* principle. It is important to note that of all its international agreements, including with the ICC and the AU, this bilateral agreement with the Commission of the AU came last. But did it override all previous related agreements?

These facts combined to make this a very difficult case to decide without reference to emergent AU supranational constitutional laws on the operability of ICC law against African Heads of State. These AU laws effectively block out the jurisdiction of the ICC against African Heads of State.

[59] Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 U.N.T.S 90 (entered into force July 1, 2002).
[60] ICC-02/05-01/09.
[61] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, See Republic of South Africa Government Gazette Vol. 445 Cape Town 18 July 2002 No. 23642 at: www.saflii.org/za/legis/num_act/iotrsoticca2002699.pdf
[62] Ext/Assembly/AU/Dec. 1(Oct.2013).
[63] See *Draft Decision of the 24th AU Summit on the ICC and the African Court of Justice and Human Rights*, Doc. Assembly/AU/18 (XX14); Ext/Assembly/AU/Dec. 1(Oct.2013). See also Dersso, S.A. (2013) "The AU's Extraordinary Summit decisions on Africa-ICC Relationship" *EJIL: Talk* at: http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/
[64] *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development and Others*, Case No. 27740/2015 paras. 14, 16 and 17.

The question of applicable law was probably the single biggest issue in the *Al Bashir Case*. Ancillary to that question was the question whether South Africa's courts could have benefited from International Law experts appointed to illuminate substantive law on the matter. Both the North Guateng Division of the High Court and the Supreme Court of Appeal proceeded as if:

(i) Emergent supranational *lex specialis* AU constitutional laws on the inoperability of ICC law against African Heads of State did not exist at all.

(ii) South Africa had no obligations arising from its contract with the AU to hold the Summit meeting in Johannesburg that had brought President Al Bashir to South Africa, which provided for immunity of all delegates from intrusion by officials of State.

(iii) It had no duty to justify its selection and rejection of applicable law in light of South Africa's entangled obligations individually to the ICC, the AU, and to the Commission of the AU regarding the Summit hosting agreement. The Court's brief judgment demonstrated enormous power, particularly as it did not attempt to justify its decision to ignore important international laws that applied equally because they were already binding on South Africa.

(iv) It did not follow Dworkin's integrity principle[65] and appears unmindful of the role contemplated for judicial decisions of domestic courts under Article 38(1)(d) of the Statute of the ICJ.[66]

The Supreme Court of Appeal's judgment noted that the North Guateng Division of the High Court of South Africa, and similarly itself, could not be criticised for not having considered arguments that had not been presented to the Court.[67] Strict adherence to this rule in Criminal Law matters is settled. However, in Public International Law, which is what this case raised before South African Courts, is problematic under the light of Article 38(1)(d) which contemplates judicial decisions of domestic courts as appropriate content for the development of rules of International Law.

For instance, the *Corfu Channel Case,*[68] the ICJ did not declare a state of *non-liquet* because the UK had based its case against Albania on a treaty that Albania was not even a party to. Instead, and without either party having mentioned it, the ICJ inaugurated a new norm of customary

[65] Supra. n. 13.
[66] Supra. n. 25.
[67] para. 48 Case no: 867/15.
[68] (UK v. Albania) ICJ Reports 1949 p.4.

international law on the duty of common humanity to warn others of any risks known to them that others approaching their shores should be mindful of. Unfortunately, the ICJ omitted to show State practice and *opinion juris* suggested under Article 38(1)(b) of the Statute of the ICJ as custom's secondary rules of recognition.[69]

Consequently, unlike the *Pinochet Case*, the *Al Bashir Case* failed to clarify the important questions around the relationship between ICC arrest warrants and the emergent supranational *lex specialis* AU constitutional laws on the inoperability of ICC law against a serving African Head of State. It failed to clarify the relationship between South Africa's Act No. 27 of 2002,[70] which had transformed the ICC Statute into South African national law with supranational *lex specialis* counter ICC law of the AU that is also binding on South Africa. It failed to develop in any meaningful way the scope and or, limits of bilateral agreements of host States and regional organisations like the AU in cases like *Al Bashir* where *lex specialis* International Law that is supported by Security Council arrest warrants seeks to penetrate and trump any immunity accorded to a target fugitive like President Al Bashir.

In the end, both the North Guateng Division of the High Court of South Africa and the Supreme Court of Appeal missed a glorious opportunity to contribute significantly to jurisprudence on the operation of International Law in domestic courts under the light of complexities thrown up by the *Al Bashir Case.* They cannot shield themselves from criticism under the veil of the principle that a Court may not litigate for parties. This approach undermines faith that judicial decisions of the High Court of South Africa and of the Supreme Court of Appeal can be relied upon to deliver the Article 38(1)(d) hope of identifying and implementing International Law in a way that upholds integrity of the international legal system. Moreover, the *Kadi Case*[71] recommends the view that supranational law trump UN Security Council measures if they go against the constitutional core values of the supranational organization. Is this where the South African Courts did not wish to go, namely, appraising the constitutional core values of the *evolving supranational* AU?

Mabo No. 2[72] **– Australia**

The High Court of Australia wasted no such opportunities in *Mabo No. 2*. Instead its judgment

[69] See also Chigara, B. (2001) Legitimacy Deficit in Custom: A Deconstructionist Critique, Ashgate, Aldershot.
[70] See Republic of South Africa Government Gazette Vol. 445 Cape Town 18 July 2002 No. 23642 at: www.saflii.org/za/legis/num_act/iotrsoticca2002699.pdf
[71] Case C–402/05 P and C–415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351
[72] *Mabo and Others v. Queensland No. 2* (1992) 175 CLR 1 F.C. 92/014

methodically explored and appraised relevant doctrines of International Law applicable to that case and produced an elegant decision that has updated and enhanced the integrity of International Law generally.[73]

Mabo referred to the hitherto unresolved issue of native claims to lands forcibly alienated without any form of compensation upon colonisation by the British. The Case recognized the land rights of the Meriam people, traditional owners of the Murray Islands (which include the islands of Mer, Dauer and Waier) in the Torres Strait. The Case had challenged two doctrines of International Law relied upon to deny the Meriam People access and restoration of lands expropriated following colonization in 1778. *Terra nullius*[74] arguments had been invoked all along to insist upon the view that Aboriginal and Torres Strait Islander peoples had no concept of land ownership prior to British colonial occupation in 1788. *Sovereignty*[75] arguments had also been relied upon hitherto, to insist that colonization of Australia had delivered complete ownership of all land in the new colony to the British Sovereign, 'abolishing any existing rights that may have existed previously'.

But Per Brennan J declined. He observed that:

> If the International Law notion that inhabited land may be classified as *terra nullius* no longer commands general support, [then] the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organization' that it is 'idle to impute to such people some shadow of the rights known to our law' … can hardly be retained. *If it were permissible in past centuries to keep the common law in step with International Law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.*[76]
>
> [And] … The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law … The policy appears explicitly in the the Judgment of the Privy Council in Re Southern Rhodesia in rejecting the argument that the native people 'were the owners of the unalienated lands long before either the Company or the Crown became concerned with them and from time immemorial …. And that the unalienated lands belonged to them still.[77]

Brennan J summed up the current position and in so doing updated both Australian Land Law and International Law policy in his *ratio decidendi* as follows:

(i) A mere change in sovereign does not extinguish native title to land.

(ii) The indigenous inhabitants of a settled colony are equal to the inhabitants of a conquered colony '… in respect of their rights and interests in land'.[78]

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[73] See also the Australian Institute of Aboriginal and Torres Strait Islands Studies, at: http://aiatsis.gov.au/explore/articles/mabo-case; Chigara, B. (2012) *Southern African Development Community Land Issues: Towards A New Sustainable Land Relations Policy*, Routledge, London.

[74] See Cane, P. and Conaghan, J. (2008) The New Oxford Companion to Law, OUP pp. 1160-1.

[75] See also Dicey, A.V (8th ed. 1914) Introduction to the Study of the Law of the Constitution, OUP; Freeman M.D. (9th ed. 2014) Lloyd's Introduction to Jurisprudence, Sweet & Maxwell, London.

[76] *Mabo and Others v. Queensland No. 2* (1992) 175 CLR 1 F.C. 92/014 para. 4 (my emphasis)

[77] Ibid. para. 42 (my emphasis)

[78] Ibid. para. 61 (my emphasis)

(iii) The notion that, when the Crown acquired sovereignty over colonial territory it thereby also acquired the absolute beneficial ownership of the land therein is *incongruous with common law*.

(iv) Rather, the correct view is that: '… the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory *survived the change in sovereignty. Those antecedents rights and interests thus constitute a burden on the radical title of the Crown*'.[79]

(v) Finally, it must be acknowledged that this judgment overrules cases which have held the contrary because ' … *To maintain the authority of those cases could destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged in possessing rights and interests in land'*.[80]

Mabo No. 2's influence extended to updating Australian Land Law which recognised for the first time, the doctrine of native land claim rights. This led to the Federal Native Title Act 1993.[81] *Mabo* overturned the *Gove Land Rights Case* (1971),[82] which two decades earlier, had maintained the 'legal fiction' of the *terra nullius* doctrine. The Applicants had claimed enduring indigenous rights over lands that the Federal Government had granted Nabalco Corporation a twelve-year mining lease. They sought declarations to occupy the land free from interference of Nabalco Corporation. Instead, Blackburn J made a triple-lock declaration against the aspirations of the Applicants.

He held firstly, that native title was not part of the law of Australia. Secondly, even if such title had existed before, any native title rights had been extinguished by the Crown. Thirdly, even if extinguishment had not occurred the Applicants could not prove the elements required to establish native title. He conceded however, that the Applicants had a previously established system of law. He ruled also that they could enjoy the ritual and economic use of those lands.[83]

But in recognizing that Indigenous Australians had a prior title to land that Cook's Declaration of Possession of 1770 could not have extinguished, Brennan J had in *Mabo* affirmed that indigenous land rights are immune to change of sovereignty under International Law.

Beyond Australia *Mabo* served to update Public International Law by renouncing the fiction of *terra nullius*, which by 1992 visibly contradicted the International Human Rights Law agenda of

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[79] Ibid. para. 62 (my emphasis)
[80] Ibid. para. 63 (my emphasis)
[81] See also Chief Justice French, "Native Title – A Constitutional Shift?" University of Melbourne Law School, JD Lecture Series, 24 March 2009 at: Speeches/Articles by Chief Justice French AC on the High Court of Australia website: http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac
[82] *Milirrpum v Nabalco Pty Ltd. and The Commonwealth of Australia* (1971) 17 FLR 141.
[83] Ibid. p. 143.

anti-discrimination, anti-intolerance and restoration of native dignity in formerly colonised territories.[84] *Mabo* might have encouraged also the subsequent indigenous Barngarla native title claims (2010) in the Federal Court; and the Olkola Aboriginal Corporation native claims (2014) in the Brisbane Federal Court;[85] and possibly other similar claims including *Kerindun v Queensland* (2009),[86] *Kuuku Ya'u People v State of Queensland* [2009],[87] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002),[88] *Coconut on behalf of the Northern Cape York No. 2 Native Title Claim Group v State of Queensland* [2014].[89]

When national courts step into the unfamiliar realm of complex International Law issues that crosscut national and regional supranational laws, they should seriously consider their aptitude for the task and engage expert international lawyers as necessary. The impact of their decisions on the integrity and development of International Law generally could mean progress in human rights protection of individuals and their communities through clarification of International Law– *Mabo No. 2* for example or, disaster for human rights protection as happened post *Campbell Case*[90] by the reduction of the Tribunal's jurisdiction to exclude individual petitions.

Case of S. and Marper v UK[91]

More recently, the UK Supreme Court has dealt with challenging claims where the asymmetry of treaty, custom and supranational law seen in *ex parte Pinochet Ugarte* was not so apparent. Some of the decisions of the Supreme Court have been challenged at the ECtHR – a possible motivation for Lord Hoffman's piece on *The Universality of Human Rights*[92] that remains a favourite on my reading lists.

In the *Case of S. and Marper v UK (2008)* three hierarchical UK domestic courts had reached the same decision regarding the limits of the right to privacy under Article 8 of the Human Rights Act (1998), of persons arrested but not convicted with any criminal offences. Both applicants had asked for their fingerprints and DNA samples to be destroyed, but in both cases, the police refused. The applicants applied for judicial review of the police decisions not to destroy the

[84] UN General Assembly Declaration on the Rights of Indigenous People, OHCHR website at: http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx
[85] *Woosup on behalf of the Northern Cape York Group No. 1 v State of Queensland No 3* [2014] FCA 1148.
[86] (2009) 258 ALR 306.
[87] [2009] FCA 679.
[88] (2002) 214 CLR 422.
[89] [2014] FCA 629.
[90] *Campbell Case* 48 ILM 534 (2009)
[91] Applications nos. 30562/04 and 30566/04 (Judgment 4 December 2008) (2009) 48 EHRR 50; 25 BHRC 557; 48 EHRR 50; [2008] ECHR 1581.
[92] Lord Hoffmann (2009) "The Universality of Human Rights" 125 *Law Quarterly Review* pp.416-32.

fingerprints and samples.

On 22 March 2002 the Administrative Court[93] rejected the application. On 12 September 2002 the Court of Appeal upheld the decision of the Administrative Court.[94] The Court underscored the necessity of retaining DNA samples. Per Lord Justice Waller:

> Fingerprints and DNA *profiles* reveal only limited personal information. The physical samples potentially contain very much greater and more personal and detailed information. The anxiety is that science may one day enable analysis of samples to go so far as to obtain information in relation to an individual's propensity to commit certain crime and be used for that purpose within the language of the present section [Section 82 of the Criminal Justice and Police Act 2001]. It might also be said that the law might be changed in order to allow the samples to be used for purposes other than those identified by the section. It might also be said that while samples are retained there is even now a risk that they will be used in a way that the law does not allow. So, it is said, the aims could be achieved in a less restrictive manner... Why cannot the aim be achieved by retention of the profiles without retention of the samples? The answer to [these] points is as I see it as follows. First the retention of samples permits (a) the checking of the integrity and future utility of the DNA database system; (b) a reanalysis for the upgrading of DNA profiles where new technology can improve the discriminating power of the DNA matching process; (c) reanalysis and thus an ability to extract other DNA markers and thus offer benefits in terms of speed, sensitivity and cost of searches of the database; (d) further analysis in investigations of alleged miscarriages of justice; and (e) further analysis so as to be able to identify any analytical or process errors. It is these benefits, which must be balanced against the risks identified by Liberty. In relation to those risks, the position in any event is first that any change in the law will have to be itself Convention compliant; second any change in practice would have to be Convention compliant; and third unlawfulness must not be assumed. In my view thus the risks identified are not great, and such as they are they are outweighed by the benefits in achieving the aim of prosecuting and preventing crime.[95]

Following a review of the legislative history of the enabling statutory provision - Section 64 (1A) of the Police And Criminal Evidence Act 1984, the House of Lords (as it then was) on 22 July 2004 dismissed the Applicants' appeal. The House of Lords' interpretation of Article 8 guarantees of the right to privacy rendered DNA sample retention by Police a moderate intrusion and therefore reasonable in light of the purpose to detect crime.

The ECtHR considered Lord Steyn's view that the mere retention of fingerprints and DNA samples did not constitute an interference with the guarantees to respect for privacy and that if it did, any such interference was very modest indeed and that it was justified by the noble aim of

[93] [2002] EWHC 478 (Admin) see also: http://www.bailii.org/ew/cases/EWHC/Admin/2002/478.html
[94] [2002] EWCA Civ 1275. See also: http://www.bailii.org/ew/cases/EWCA/Civ/2002/1275.html
[95] para. 13 at http://www.bailii.org/eu/cases/ECHR/2008/1581.html

the prevention of crime and the protection of the right of others to be free from crime; and that this was already 'provided for by law' as required by Article 8.[96]

The ECtHR also appraised the five factors that had led to the House of Lords' majority conclusion that the interference with the protection of privacy was proportionate to the aim of preventing and solving crime.

(i) The fingerprints and samples were kept only for the limited purpose of the detection, investigation and prosecution of crime.
(ii) The fingerprints and samples were not of any use without a comparator fingerprint or sample from the crime scene.
(iii) The fingerprints would not be made public.
(iv) A person was not identifiable from the retained material to the untutored eye.
(v) The resultant expansion of the database by the retention conferred enormous advantages in the fight against serious crime.[97]

The ECtHR found for the Applicants and laid out the test to be followed in similar terms to the UN Human Rights Committee General Comment No. 16 (1988) on the protection of the right to privacy under Article 17 of the International Covenant on Civil and Political Rights (1966).[98]

Regarding the retention of *cellular and DNA* samples under the light of the requirement to protect individuals' right to privacy (Article 8), the Court stated that nothing could be more personal than genetic information of individuals whose potential use cannot be accounted for as scientific technologies move forward. In particular, the personal information contained in *cellular samples* is so vast and infinitely personal that its retention *per se* must be regarded as interfering with the right to respect for the privacy of the individuals concerned.[99]

While *DNA profiles* themselves they contain a more limited amount of personal information extracted from cellular samples in a coded form, "The possibility the DNA profiles create for inferences to be drawn as to ethnic origin makes their retention all the more sensitive and susceptible of affecting the right to private life".[100] The Court concluded therefore, that the retention of both cellular samples and DNA profiles constituted breaches of the guarantee to respect for privacy within the meaning of Article 8 (1) of the Convention.[101]

Regarding *the retention of fingerprints*, in light of the requirement under Article 8 to protect

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[96] Ibid. paras. 19-20.
[97] Ibid. para. 21.
[98] Ibid. paras 70-86.
[99] Ibid. para. 73.
[100] Ibid. para. 76.
[101] Ibid. para. 77.

individuals' right to privacy, the Court stated that:

> … the applicants' fingerprints were initially taken in criminal proceedings and subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal-identification purposes. … because of the information they contain, the retention of cellular samples and DNA profiles has a more important impact on private life than the retention of fingerprints. However, the Court, like Baroness Hale … considers that, while it may be necessary to distinguish between the taking, use and storage of fingerprints, on the one hand, and samples and profiles, on the other, in determining the question of justification, *the retention of fingerprints constitutes an interference with the right to respect for private life.*[102]

The case underscores the view that policing, detection and prevention of crime are not valid grounds for trumping Article 8 human rights guarantees under the ECHR.

These cases, and others not discussed here[103] show that domestic courts can get International Law wrong, particularly in cases regulated by domestic, regional and International Laws. Such cases require of national courts an adept handling of the issues. Expert *friends of the Court* that illuminate the applicable International Law could very much reduce that risk.

Conclusion:

Because Article 38(1)(d) of the Statute of the International Court of Justice contemplates a significant role for judicial decisions of national courts in identification of rules of International Law, national courts necessarily participate in the recognition and rejection of 'rules' in the development of International Law.[104] To that extent, judicial decisions of national courts are capable of both enhancing or undermining the integrity of International Law depending on whether they are congruous with current substantive rules of International Law or not; and also on whether they are consistent with the aim, scope and objectives of the international legal system. Therefore, particularly when national courts hear cases that involve general international law, supranational regional law and national measures, great care needs to be taken to ensure accurate appraisal and application of relevant International Law.

The incidence of national judges deciding matters that lie on the interface of international treaties, bilateral treaties, supranational law, customary international law and measures of domestic law is rising steadily across all jurisdictions. Unfortunately, many senior judges in most domestic jurisdictions would barely have studied international law in Law School, if at all. Until

[102] Ibid. para. 86.

[103] See also *In A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 087; *Gillan and Quinton v UK*, Application No. 4158/05 - Chamber Judgment [2010] ECHR 28 (28 June 2010)

[104] See also Weston, B.H, Falk, R.A. and D'Amato, A. (2nd ed. 1990) International Law and World Order, West Publishing Co. Minnesota p. 171.

recently International Law was controversial as a subject that many derided as politics masquerading as law. John Austin and his positivist disciples insisted that there was nothing of law about it. However, International Law has, particularly in the last two to three decades, grown and fragmented into specialist areas of practice such that it is almost impossible now to find international lawyers with competencies that traverse the full length and breath of the discipline. Like tax lawyers, international lawyers now demonstrate particular specialisms.

This creates the real risk that without appropriate support, judicial decisions of national courts could undermine the legitimacy of International Law – understood as the law's pull of its addressees towards voluntary compliance. Cases like *Al Bashir* [2015] and *S and Marper v UK* (2008) point to that risk. Cases like *ex parte Pinochet Ugarte* (1999) and *Mabo No. 2* (1992) are elegant examples of national courts not only identifying and applying applicable International Law as envisaged under Article 38(1)(d) of the Statute of the ICJ but also clarifying the law and developing specific doctrines so that they enhance developments in the broad corpus of *jus gentium*.

To limit the incidence of bad cases that may negatively impact the standing of International Law, this article recommends that national courts - especially lower courts, should *a priori* consider whether the matters before them would be best served by appointing an expert '*friend of the court*' to illuminate the contested International Law. More so when the issues are on the interface of international treaty law, bilateral laws, customary international law, norms *jus cogens*, supranational regional law, and domestic measures. Judges themselves should be the first to declare the need to appoint an expert international lawyer as an impartial friend of the court to illuminate the international law involved.

Secondly, where a party to the dispute requests the appointment of such an expert as happened in the *Al Bashir Case* before the North Guateng Division of the High Court of South Africa, the presumption should be to appoint and not to decline. Parties would be able to cross-examine the evidence of the *expert friend of the Court*.