AN ASSESSMENT OF TANZANIAN COURTS ON REGULATION OF NON-INTERNATIONAL ARMED CONFLICTS

Written by **Joseph Kizange,[1] and Dr. Hashil T Abdallah[2]**

Non-international armed conflicts (NIAC) are traditionally perceived to be illegitimate practices that ought to be dealt under the domestic criminal laws while maintaining state sovereignty over all internal matters. The practice has caused absence of international humanitarian law (IHL) provisions in domestic legislation of many states the fact which brings the role of national courts in IHL implementation and enforcement into direct application. In that regard, this paper assesses the effectiveness of Tanzanian courts in regulating legal issues during non-international armed conflict. The assessment discloses that the absence of IHL provisions in the legislation of Tanzania may cause courts' failure to regulate legal issues in compliance with IHL governing non-international armed conflicts. Furthermore, the situation may cause a series of implications during and in aftermath of non-international armed conflicts. On that note, studies have revealed that in other situations, courts may simply follow the lead of the executive and ignore the potential of IHL application. The paper makes recommendations to fill up these legal loopholes. Therefore, it is time for Tanzania to rethink on the existing statutory lacunae and select a more effective and principled basis for IHL applicability.

***Key Words**: Assessment, Implementation, International Humanitarian Law, Non-International Armed Conflict, Tanzania's Courts Practice.*

[1] *(PhD Candidate, Department of Postgraduate Studies, The Open University of Tanzania, United Republic of Tanzania)*
[2] (*Lecturer, Head of Civil and Criminal Law Department, Faculty of law, The Open University of Tanzania, United Republic of Tanzania)*

1. INTRODUCTION

The term 'Non-international Armed Conflict', also traditionally known as 'internal war' or 'civil war', is in accordance with Protocol II Additional to Geneva Conventions (hereinafter referred to Additional Protocol II), referring to armed conflicts which 'take place within the territory of a single State between its armed forces and dissident armed forces or other organized armed groups, and in which the armed forces of no other State are engaged against the central government'.[3] In *Prosecutor v Tadić,* it was suggested that a non-international armed conflict exists whenever there is 'protracted armed violence between governmental authorities and organized armed groups within a State'.[4] Traditionally, sovereign governments have been ignoring the legality of non-international armed conflicts. In that case, they took efforts to enact strict laws to internally suppress the adversaries while believing that non-international armed conflicts are not subject to international law. However, the time following WW II witnessed a number of treaties advocating application of international humanitarian law (IHL) in non-international armed conflicts. The aim was to ensure there are some minimal international humanitarian protections for the victims of internal armed conflicts.[5] The effort caused a number of sovereign states to ratify or accede the treaties and became the so called 'High Contracting Parties'.

Tanzania is one of the signatories to certain treaties which have explicit provisions of international humanitarian law applicable to non-international armed conflict. According to Article 26 of the Vienna Convention on the Law of Treaties, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith - *Pacta sunt servanda*'.[6] However, the absence of IHL provisions in the legislation of Tanzania may cause failure to regulate legal issues leading to a series of implications during and in aftermath of non-international armed conflicts. This is very important in examining further on the IHL

[3] Article 1 (1) and 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977,1125 UNTS 609 (entered into force 7 December 1978) ('Additional Protocol II').
[4] *Prosecutor v. Tadić* (1996) 105 ILR 419, 488.
[5] Solis G. D, *The Law of Armed Conflict: International Humanitarian Law in War 97,* in Kenneth Watkin and Andrew J. Norris, Non-International Armed Conflict in the Twenty-first Century, International Law Studies, Volume 88, Naval War College Newport, Rhode Island, 2012, at pg. 16.
[6] Article 26 of the Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 January 1980.

enforcement in the courts of Tanzania. It emanates from the fact that judges in virtually every kind of legal system draw on legal materials as they explain and rationalize decisions. The decisions normally become precedents which are used by courts as sources of law and they are useful in filling the existing lacunae in the domestic legislation.

Therefore, this paper attempts to assess the effectiveness of Tanzanian courts on regulating legal issues in compliance with IHL governing non-international armed conflict. In order to achieve the aim, the paper focuses on the main question: "To what extent can the courts of Tanzania regulate legal issues in compliance with IHL governing non-international armed conflicts?"

2. THE BACKGROUND

In 1947, Tanganyika became a United Nations Trust Territory under British administration. In 1959, Her Majesty Queen Elizabeth, under section 2 of the Geneva Conventions Act (Colonial Territories) Order in Council of 1959, ordered the extension of the Geneva Conventions Act 1957 of the United Kingdom, to specified territories including Tanganyika.[7] Moreover, Tanganyika attained her independence from the British Colonial rule on 9th December, 1961. In that regard, Tanganyika became a sovereign state comprising of the main land part of the present day Tanzania.

After the ratification of the Articles of Union on 23rd April 1964, and with its entering into force, Tanganyika merged with Zanzibar to form one sovereign and independent state on 26th April 1964. The ratification and approval of the Articles of Union took place under section 3 of the Acts of Union. The Acts of Union also made the declaration of the United Republic:

> "The Republic of Tanganyika and the People's Republic of Zanzibar shall, upon Union Day and ever after, be united into one United Sovereign Republic by the name of the United Republic of Tanganyika and Zanzibar."[8]

[7] Section 2 of the Geneva Conventions Act (Colonial Territories) Order in Council, 1959, No 1301.
[8] Section 4 of the Union of Tanganyika and Zanzibar Act No 22 of 1964.

In addition, section 7 of the Union Act provides for 'no separate constitution for Tanganyika' that:

> "On the commencement of the interim Constitution of the United Republic, the Constitution of Tanganyika shall cease to have effect for the government of Tanganyika as a separate part of the United Republic."[9]

Moreover, the name "United Republic of Tanganyika and Zanzibar" was later changed to United Republic of Tanzania by the United Republic (Declaration of Name) Act of 1964.[10] The new name was made retrospective to 29th October 1964.[11] Thereafter, the newly United Republic of Tanzania became a member of the United Nations on 27th April 1964.[12]

It is important to note that there are certain treaties which are currently in force for the United Republic of Tanzania which were ratified by the then Republic of Tanganyika. In that case, the merging of the Republic of Tanganyika with the People's Republic of Zanzibar to form one sovereign and independent state had a corresponding effect on, among other things, the treaties which were ratified by the Republic of Tanganyika, in the capacity of a sovereign state, since 9th December 1961 until the time before the Union Day. For instance, in the effort to demonstrate commitment to IHL related to armed conflicts, the Republic of Tanganyika acceded to or ratified the Geneva Conventions of 1949 on 12 December, 1962 and the Additional Protocol (II) to Geneva Conventions of 1977 on 15 February, 1983, just to mention a few.

However, international law endeavors to obviate the confusing effects that changes in sovereignty often have on the legal status of treaties through the law of state succession. Accordingly, conventional international law has developed relatively clear rules to address whether treaties continue to be in effect in the event that two states merge into a new state. In particular, article 31 of the Vienna Convention on Succession of States in Respect of Treaties

[9]Ibid. Section 7.
[10] United Republic (Declaration of Name) Act No. 61 of 1964 (Cap. 578 of the Laws).
[11] Ibid, section 1.
[12] Tanganyika was a member of the United Nations from 14th December 1961 and Zanzibar was a member from 16th December 1963.

clarifies for the situation that when two states unite or merge to create one successor state, pre-existing treaties remain operative. It provides that:

> "When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless: (*a*) the successor State and the other State party or States Parties otherwise agree; or (*b*) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."[13]

Therefore, under international law, the United Republic of Tanzania is the successor state to Republic of Tanganyika. So unless denounced, a treaty ratified by the Republic of Tanganyika will remain in force for the United Republic of Tanzania. Surprisingly, despite the ratification of such international legal instruments there are no explicit IHL provisions in domestic legislation of the United Republic of Tanzania.

Currently, the United Republic of Tanzania is a peaceful country in a troubled region. Armed groups do not operate in or from its territory. However, the United Republic of Tanzania has been involved in a situation of armed conflict only once with Uganda in 1979.[14] Otherwise, the armed forces of the United Republic of Tanzania have been participating in peacekeeping operations or enforcement under UN or other auspices. These circumstances raise special issues relating to the application of laws of war where members of the national contingents of peacekeeping forces remain bound by the laws of war binding their respective states.[15] Moreover, on a number of occasions the UN has declared that members of peacekeeping forces must comply with the 'principles and spirit' of the law of war. For instance, the 1999 UN Secretary General's Bulletin on Observance by UN Forces of international humanitarian law provides that "in cases of violations of international humanitarian law, members of the military

[13] Article 31 of the Vienna Convention on Succession of States in Respect of Treaties, adopted on 22August, 1978, opened for signature 23 August, 1978, entered into force on 6 November 1996. United Nations, *Treaty Series*, vol. 1946, p. 3.
[14] See Background to the Report by the United Republic of Tanzania pursuant to article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC/C/OPAC/TZA/1) of 19 October, 2007, at pg. 3.
[15] Roberts A and Guelff R (eds) *Documents on the Law of War*, (3rd Ed.), Oxford: Oxford University Press, New York, at pg. 26.

personnel of a United Nations force are subject to prosecution in their national courts".[16] It implies that there is no excuse for IHL violation in any circumstance of armed conflict.

On this note, Common Articles 49, 50, 129 and 149 of the Geneva Conventions provide that certain serious violations committed in the course of armed conflicts must be punished. In the event of a suspected grave breach of the Conventions, criminal proceedings must be brought against the suspect, unless the person is handed over to a third-party State which then institutes penal proceedings.[17] On the other hand, the preamble to the Rome Statute of ICC emphasize on the principle of complementarity, which is fundamental to the whole of international criminal law enforcement. It shows that national courts both are, and are intended to be, an integral and essential part of the enforcement of international criminal law. On this note, the Statute of ICC affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[18] Further, the Statute insists that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[19] In the case concerning the Arrest Warrant (*Democratic Republic of Congo v. Belgium*), Judges Higgins, Kooijmans and Buergenthal have stated that:

> "The international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play."[20]

The duty to prosecute is set out explicitly in IHL instruments. According to the four Geneva Conventions, states parties 'shall bring [persons alleged to have committed, or to have ordered

[16] Section 4 of the UN Secretary General's Bulletin on Observance by UN Forces of International Humanitarian Law, 1999.
[17] Article 49 of the 1st Geneva Convention on the Amelioration of the condition of the Wounded and Sick in Armed Forces in the field, 12 August 1949; Article 50 of the 2nd Geneva Convention on the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at sea, 12 August 1949; Article 129 of the 3rd Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949; Article 146 of the 4th Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
[18] Preamble to the Rome Statute of International Criminal Court of 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, at para. 4.
[19] The Rome Statute, above note 16, preamble, para. 6.
[20] Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*) 14.2.2002 Separate Opinion para. 51.

to be committed, grave breaches], regardless of their nationality, before its own courts.[21] Thus, the regime for repression of grave breaches in the Conventions is based not on international tribunals but on national enforcement by means of legislation and adjudication before national courts.

However, from the fact that non-international armed conflicts do take place between actors within the territory of the sovereign state, internal legal frameworks of many states, including the United Republic of Tanzania, have been running shot of jurisdictions to regulate legal issues in compliance with IHL principles. The situation poses controversy when applying national laws to determine rights of individuals because the Sovereign may exercise power over the subjects. The situation is highlighted by Rowe in a nutshell that:

> "[The] role of national law as a restraining influence during a non-international armed conflict may not be matched by reality, for a number of reasons [...]. This is more likely to be the case where international human rights treaty obligations have not been incorporated into the national law."[22]

These issues and many others that arise in the course of non-international armed conflicts bring the role of national courts in IHL implementation and enforcement into direct application. Normally, courts faced with cases during non-international armed conflicts are likely to encounter two critical determinations before even reaching the merits of the case: whether to apply IHL, and if so, to what extent. Therefore, this paper assesses the capability of Tanzanian courts in IHL application when regulation legal issues during and after non-international armed conflicts.

3. ASSESSMENT OF THE NATIONAL LAWS

In the context of non-international armed conflict, domestic laws play a primary role in regulating legal issues. In the countries where IHL principles are well embedded in the domestic legal framework, sovereign governments are clearly guided in the course of decision making following complex situations of non-international armed conflicts. The significance of

[21] Geneva Conventions, above note 17.
[22] Rowe P, The Impact of Human Rights Law on Armed Forces, New York: Cambridge University Press, 2006, at Pg. 176 –177.

applying domestic laws during non-international armed conflicts is substantiated by Rowe who bases on the control of the armed forces of the government that:

> "In practice, where the law is applicable to control the actions of a soldier in a non-international armed conflict, this role will fall to the national law (including the military law) of the State concerned. It will be this body of law that will be able to impose the most immediate sanctions on his actions if they are considered by his superiors or by officials of the State to have infringed the law. Any investigations of his conduct are more likely to be held at this level."[23]

Therefore, this part provides a brief assessment on domestic laws of Tanzania in order to determine the existence of IHL provisions governing non-international armed conflicts.

3.1 The Constitution of the United Republic of Tanzania, 1977

The constitution is the supreme (highest) law of the land. All laws and State actions must be in line with the constitution. The constitution of any country is a source of general principles of laws of the land. Therefore, the Constitution of the United Republic of Tanzania (hereinafter the Constitution of Tanzania) does not reflect Grave Breaches and War Crimes Regimes. Instead, it provides for such customary rules or principles which are embodied in the IHL frame work. On this note, article 9 of the Constitution of Tanzania, among other things, allows application of the principles embodied in the Universal Declaration of Human Rights (UDHR) into the Tanzanian legal framework for the purpose of determining individual's rights. It provides that:

> "[T]he state authority and all its agencies are obliged to direct their policies and programmes towards ensuring - (a) that human dignity and other human rights are respected and cherished; … (f) that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights […]."[24]

The Constitution of Tanzania provides for 'equality before the law' that "[a]ll persons are equal before the law and are entitled, without any discrimination, to protection and equality before

[23] Ibid, at pg. 176.
[24] Article 9(a) and (f) of the Constitution of the United Republic of Tanzania, 1977 (As amended).

the law."[25] The article covers the material content embodies in article 7 of the Universal Declaration of Human Rights 1948 (UDHR),[26] article 26 of the International Covenant on Civil and Political Rights 1981 (ICCPR),[27] and article 3 and 4 of the African Charter on Human and Peoples' Rights (ACHPR)[28] respectively.

The Constitution of Tanzania further provides for presumption of innocence when determining the rights and duties of individuals in the courts or any other agency. Article 13(6) of the constitution provides that "[n]o person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence".[29] The provision is reflected in article 11 of the UDHR, article 14(2) of the ICCPR and article 7 (1) (b) of the ACHPR respectively. In particular, Additional Protocol II which aims at extending the essential rules of IHL to internal wars provides for a consideration of humanity with regard to the prosecution and punishment of criminal offences related to the non-international armed conflicts where in article 6 the presumption of innocence is reflected that:

> "No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular, […] anyone charged with an offence is presumed innocent until proved guilty according to law."[30]

The Constitution of Tanzania provides for protection against torture that "[n]o person shall be subjected to torture or inhuman or degrading punishment or treatment". The provision is also reflected in article 7 of the ICCPR and article 5 of the UDHR. Article 14 of the Constitution provides for the right to life that "every person has the right to live and to the protection of his life by the society in accordance with the law".[31] The provision is also reflected in article 3 of the UDHR and article 6(1) of the ICCPR, and article 4 of the ACHPR respectively. Also, these are among the prohibited acts under article 4 (2) of Protocol II Additional to the Geneva Conventions as 'fundamental guarantees'.

---

[25] Ibid, article 13 (6) (b).
[26] Article 7 of the Universal Declaration of Human Rights 1948.
[27] Article 26 of the International Covenant on Civil and Political Rights 1966.
[28] African Charter on Human and Peoples' Rights 1981.
[29] The Constitution of Tanzania, above note 22, article 13 (6) (b).
[30] Additional Protocol II, above note 1, article 6(3) (d).
[31] Constitution of Tanzania, above note 22, article 14.

The Constitution of Tanzania provides for restrictions against *ex post facto* laws that is to say, laws that apply retroactively, thereby criminalizing an act that was legal when originally committed.[32]On this note, article 13(6)(c) of the constitution provides for fair trial and restriction for retroactive application of laws against criminal proceedings that:

> "No person shall be punished for any act which at the time of its commission was not an offence under the law, and also no penalty shall be imposed which is heavier than the penalty in force at the time the offence was committed."[33]

The provision is also reflected under article 11 (1) of the UDHR, article 51(1) of the ICCPR, and article 7(2) of the ACHPR respectively. In the context of the study, article 6 to Protocol II provides for fair trial of criminal offences related to non-international armed conflicts by the court offering the essential guarantees of independence and impartiality.[34] In particular, the article provides for fair trial and restricts the application of *ex post facto* laws during trials that:

> "[…] no one shall be held guilty of any offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."[35]

From the foregoing, it could be stated that the Constitution of the United Republic of Tanzania incorporated international law principles as reflected in IHL and other international legal instruments governing non-international armed conflict. That is to say, implementation of IHL rules and principles depends on the relevant domestic legislation.

3.2 Implementing Legislation

The laws of Tanzania reflect matters of general application the fact which can pose challenges when regulating legal issues during non-international armed conflict. The assessment is based

[32] https://definitions.uslegal.com/e/ex-post-facto/ - Accessed on 27/10/2018.
[33] Constitution of Tanzania, above note 22, article 13 (6) (c).
[34] Additional Protocol II, above note 1, article 6 (1) and (2).
[35] Ibid, article 6 (2) (c).

on the legal maxim *"lex specialis derogat legi generali"*. The doctrine states that a law governing a specific subject matter overrides a law that only governs general matters. In this regard, *lex specialis* means a law governing a specific subject matter,[36] whereas, *lex generalis* is a law of general application as contrasted with one applicable to a particular matters.[37]

Therefore, the international law principles embodied in the Constitution of the United Republic of Tanzania comply with the general principles of customary international humanitarian law. However, there is lack of IHL provisions in the implementing legislation of Tanzania. The laws examined include the National Defence Act,[38] the Penal Code,[39] the Emergency Powers Act,[40] the Tanzania Red Cross Society Act,[41] the Prevention of Terrorism Act,[42] and the Mutual Assistance in Criminal Matters Act.[43] The laws are likely to be applied in regulating the conduct of key actors during non-international armed conflicts.

3.3 Treaty Ratification and Domestication Status in Tanzania

One of the determination of the United Nations the "[establishment] of conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".[44] The law of treaties imposes a legal duty upon states to fulfill in good faith international legal obligations; this is in the meaning of article 26 of the Vienna Convention, called *pacta sunt servanda*.[45] Common article 1 to the Geneva Conventions 1949 provides for the same rule of customary international law that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Conventions in all circumstances".[46] Tanzania acceded to a number of treaties relevant to non-international armed conflict including the four Geneva Conventions. In so doing, Tanzania signified the consent to be bound to the four treaties, thus inviting the application of the *pacta sunt servanda* rule as codified by the

[36] https://definitions.uslegal.com/l/lex-specialis/ - Accessed on 18 April 2018
[37] https://www.merriam-webster.com/dictionary/lex%20generalis/ - Accessed on 18 April 2018.
[38] [Cap 192 R.E. 2002].
[39] [Cap 16 R.E. 2002].
[40] Act No. 1 of 1986.
[41] [Cap 66 R.E.].
[42] [Cap 22 R.E. 2002].
[43] [Cap 254 R.E. 2008].
[44] The Charter of the United Nations of June 26, 1945. Entered into force Oct. 24, 1945, preamble, para. 3.
[45] Vienna Convention, above note 4, article 26.
[46] Geneva Conventions, above note 15, Common Article 1.

Vienna Convention on the Law of Treaties. Also Common Articles 49, 50, 129 and 146 of the four Geneva Conventions state that:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention"[47]

On this note, the Geneva Conventions require states to legislate laws to prosecute alleged offenders of IHL violations. However, none of the ratified treaties have been domesticated. The table below shows the treaties ratification and domestication status in Tanzania.

Table 1: Treaty Ratification and Domestication Status

TREATY	ACCESSION	RATIFICATION	DOMESTICATION
Geneva Convention I	12/12/1962	12/12/1962	NONE
Geneva Convention II	12/12/1962	12/12/1962	NONE
Geneva Convention III	12/12/1962	12/12/1962	NONE
Geneva Convention IV	12/12/1962	12/12/1962	NONE
Additional Protocol I to Geneva Conventions 1949	15/02/1983	15/02/1983	NONE
Additional Protocol II to Geneva Conventions 1949	15/02/1983	15/02/1983	NONE
International Covenant on Civil and Political Rights	11/06/1976	11/06/1976	NONE
African Charter of Human and Peoples' Rights	31/05/1982	18/02/1984	NONE
Rome Statute of International Criminal Court	20/08/2002	20/08/2002	NONE

Sources:

[47] *Ibid*, Common Articles 49 (1st), 50 (2nd), 129 (3rd) and 146 (4th).

1. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByCountry.xsp [Accessed on 29/03/2019].
2. http://www.achpr.org/instruments/achpr/ratification/ [Accessed on 29/03/2019].

In Tanzania, the power to enter into treaties is entrusted completely to the executive branch of the government. The legislature plays no part in the treaty-making process.[48] Under article 63(3) (d) and (e) of the Constitution, the National Assembly is vested with power to 'deliberate upon and ratify all treaties and agreements to which the United Republic [of Tanzania] is a party and the provisions of which require ratification'.[49] It means that the Constitution empowers the National Assembly to enact legislation where implementation [of an international treaty] requires legislation. These provisions show that Tanzania is a dualist state and that international law treaties do not have force of law unless they are domesticated.

However, it is clear that there exist no legislation in Tanzania's statute books which is explicitly dedicated to IHL. The tardiness in IHL domestication extends to a number of other treaties of considerable significance to IHL, including the Rome Statute of International Criminal Court of 1998, the International Covenant on Civil and Political Rights and the African Charter of Human and Peoples' Rights. Therefore, the IHL domestication is pivotal to giving treaties the force of law within national territorial boundaries. Tardiness in domesticating treaties offends the *pacta sunt servanda* rule, in additional to denying Tanzania the requisite regulatory framework to efficaciously prosecute offenders of grave breaches of international humanitarian law.

4. THE PLACE OF INTERNATIONAL LAW IN TANZANIAN DOMESTIC COURTS: AN OVERVIEW

Judges in virtually every kind of legal system draw on international legal materials as they explain and rationalize their decisions.[50] Also national courts invoke treaties and other international legal materials as guides, or aids, in the interpretation of domestic laws, they refer

[48] Murungu B.C., The Place of International Law in Human Rights Litigation in Tanzania, in Magnus Killander (ed) International law and Domestic Human Rights Litigation in Africa, Pretoria University Law Press (PULP), 2010, at pg. 59.
[49] Constitution of Tanzania, above note 22, article 63(3) (d) and (e).
[50] Sloss D., (ed.), Treaty Enforcement in Domestic Courts: A Comparative Analysis, in The Role of Domestic Courts in Treaty Enforcement: a Comparative Study, 2009, pp. 1- 60.

to international legal norms not because they are binding but because they are useful.[51] This mode of interpretation fits with what Bahdi views as "reliance on international law to help uncover values inherent within the domestic regime."[52] Noting that national legislatures of most common law countries had evinced little interest in legislatively incorporating human rights treaties, between 1988 and 1998, a series of eight judicial colloquia were held specifically to address the issue of how (if at all) the common law courts could utilize treaties that have not been legislatively incorporated into domestic legal systems. Judges and legal practitioners attending those colloquia agreed that courts have a special contribution to make in fostering universal respect for fundamental human rights and freedoms. The views emerging from those colloquia concretized in statements that have become known as the Bangalore Principles.[53]

Even under the English law, international treaties are not justifiable in courts of law until they are incorporated into English law by legislation. In *R v Chief Immigration Officer,* Heathrow Airport *Ex-parte* Salamat Bibi, however, the court took into account an undomesticated treaty to interpret ambiguous provisions in the English municipal law.[54] The doctrine was also applied in the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh,*[55] and the New Zealand case of *Tavita v Minister of Immigration*.[56] In the decision of the Canadian Supreme Court *Ahani v Canada,* where it was not applied has widely been criticized.[57] The rationale for applying ratified but undomesticated treaties also stems from the argument that no country can justify breaches of its international treaty obligations on the contention that it has not domesticated them, as provides in article 27 of the Vienna Convention.[58] Therefore, failure to

[51] Glenn H. P., Persuasive Authority, 32 MCGILL L.J, 1987, at pg. 261, 263; Shany Y., How Supreme Is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions Upon the Interpretation of Constitutional Texts by Domestic Courts, 31 BROOK. J. INT'L L, 2006, at pg. 341, 343; Anne-Marie Slaughter, A Typology of Transjudicial Communication, 29 U. RICH. L. REV. 99, 1994, at pg. 124–25.

[52] Bahdi R., Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts, 34 GEO. WASH. INT'L L. REV.,2002-2003, at pg. 556-57

[53] See Waters, M., Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties, Columbia Law Journal, 107, 2007, at pg. 645.

[54] *R v Chief Immigration Officer,* Heathrow Airport *Ex-parte* Salamat Bibi: CA 1976.

[55] [1994-1995] 183 CLR 273, 287.

[56] [1994] 2 N.Z.L.R. 257, 266 (CA).

[57] [2002] 1 S.C.R. 72, 208 D.L.R. (4th) 57.

[58] Vienna Convention, above note 4, article 27.

domesticate treaties or some of their provisions does not render ratification of a treaty a platitudinous or ineffectual act.

The *Charming Betsy* Principle arose from the US Supreme Court decision in *Murray v The Schooner Charming Betsy* where it was held that courts should construe ambiguous federal statutes in such a manner as to avoid violation by US of its treaty obligations or customary international law. In that case, the US Supreme Court stated that "[a]n act of the Congress ought never to be construed to violate the law of nations, if any other possible construction remains".[59] In essence, advocates of these cannon urge the application of the Bangalore Principles to constitutional interpretation, asserting that:

> "Where the constitution is ambiguous, a [court] should adopt the meaning which conforms to the principles of universal and fundamental rights rather than an interpretation that would involve a departure from such rights."[60]

Courts in other countries have followed suit. In *Puli'uvea v Removal Review Authority*, the New Zealand Court of Appeal held that:

> "The Court should strive to interpret legislation consistently with treaty obligations of New Zealand. The result is that interpretation by reference to treaty law is no longer optional, but required, unless the domestic statute is unambiguously incompatible with the treaty obligation."[61]

Applying that principle in the case of *Boyce v The Queen*, where the issue was also the constitutionality of the Barbadian statute providing for a mandatory death sentence when its constitution outlawed inhuman treatment or degrading punishment, the Privy Council stated that:

> "International law can have a significant influence upon the interpretation of the Constitution because of the well-established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the state's international obligations…. [I]f the legislation is ambiguous (in the sense that it is

[59] 6 U.S. (2 Cranch) 64, 118 (1804).
[60] Waters, above note 50, at pg. 679.
[61] *Puli'uvea v Removal Review Authority*, [1996] 3 N.Z.L.R. 538, 542.

> capable of a meaning which either conforms to or conflicts with the [treaty]) the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty."[62]

On that note, when courts of Tanzania refer to foreign case law, they only do so for purposes of being guided and persuaded by such authorities, for such authorities do not bind the courts. Similarly, international human rights instruments, particularly those that Tanzania has ratified, and international law principles are applied as a guide to constitutional interpretation. International treaties are interpretative tools only if they are consistent with the Constitution. The binding law is the law enacted by parliament with the Constitution at the top and judicial precedents from the Court of Appeal and High Court of Tanzania.[63] The former Chief Justice of Tanzania, Francis Nyalali held in *Attorney General v Lesinoi Ndeinai and Joseph Selayo Laizer and two Others*, that when basic human rights are at stake or the question of interpretation of a constitutional provision arises, regard should be had to foreign case law.[64] He said that:

> "On a matter of this nature it is always very helpful to consider what solutions to the problems other courts in other countries have found, since basically human beings are the same though they may live under different conditions."[65]

The concept behind consideration of solutions from other courts is to ensure dignity is preserved and upheld under all circumstances. This is what is directed under article 9(a) and (f) of the Constitution. Therefore, international legal instruments have a role to play in the courts of Tanzania in the sense that they can be consulted for constitutional interpretation when determining rights of individuals. The fact was made clear by Justice Nyalali when he, based on the reference to the UDHR in article 9 of the Constitution, said:

> "[A]lthough the failure by any person or state organ to observe any of the provisions of the Universal Declaration of Human Rights will not attract legal censure or invalidation by court, I have no doubt that the courts are required to be guided by it in

[62] [2005] 1 A.C. 400 at 414-5 (P.C.2004).
[63] Murungu, above note 45, at pg. 61.
[64] *Attorney General v Lesinoi Ndeinai and Joseph Selayo Laizer and two Others*, TLR 214.
[65] Ibid, at 222.

> applying and interpreting the enforceable provisions of the Constitution and all other laws."[66]

In the case of *John Byombalirwa v Regional Commissioner, Kagera and Regional Police Commander*, the High Court Bukoba held that when interpreting the constitutional right to property the provisions of UDHR should be consulted. The Court held:

> "If there is any doubt as to the obligation of the law enforcement agencies and other members of the executive branch of the Government in returning the seized goods to the suspects who have been cleared by the courts I wish to point to Art. 17(2) of the Universal Declaration of Human Rights of 1948 which provides that no one shall be arbitrarily deprived of his property."[67]

Apart from the UDHR, the Court of Appeal of Tanzania insists on taking account of the ACHPR to interpret the Bill of Rights enshrined in the Constitution of Tanzania. In the case of *Director of Public Prosecutions v Daudi Pete*, while interpreting the constitutional right to bail, the Court held that:

> "This view is supported by the principles underlying The African Charter on Human and Peoples` Rights which was adopted by the Organization of African Unity in 1981 and came into force on 21 October, 1986 after the necessary ratifications. Tanzania signed the Charter on 31 May, 1982 and ratified it on 18 February, 1984. Since our Bill of Rights and Duties was introduced into the Constitution under the Fifth Amendment in February, 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of that Charter in interpreting our Bill of rights and Duties." [68]

The Court then considered the preamble to the African Charter and held that:

---

[66] Paper presented at the University of Dar es Salaam Law Society, on the question of the Bill of Rights, quoted in *John Mwombeki Byombalirwa v Regional Commissioner and Regional Police Commander*, Bukoba Another [1986] TLR 73, 84.

[67] *Mwombeki Byombalirwa v Regional Commissioner and Regional Police Commander*, Bukoba Another [1986] TLR 73, 84

[68] *Director of Public Prosecutions v Daudi Pete* [1993] TLR 22, 34-35.

> "[I]t seems evident in our view that the Bill of Rights and Duties embodied in our Constitution is consistent with the concepts underlying the African Charter on Human and People's Rights as stated in the Preamble to the Charter".[69]

In the case of *Paschal Makombanya Rufutu v The Director of Public Prosecutions*, the High Court gave the following guidance which is in line with the approach in many other common law countries:

> "[I]f there is any ambiguity or uncertainty in our law, then the courts can look at the international instruments as an aid to clear up the ambiguity and uncertainty seeking always to bring it into harmony with the international conventions.".[70]

In this regard, it is obvious that international law can have a significant influence upon the interpretation of the Constitution because of the well-established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the state's international obligations.

Therefore, the national courts invoke treaties and other international legal materials as guides, or aids, in the interpretation of domestic laws; they refer to international legal norms not because they are binding but because they are useful.[71]At this point, it is correct to argue that courts of Tanzania comply with international principles regarding application of ratified but undomesticated treaties to interpret matters of concern for the purpose of determining rights of individuals provided the courts are consistent with the Constitution.

5. APPLICATION OF IHL IN THE COURTS AND JUDICIAL MECHANISMS: A CONCEPTUAL OVERVIEW

A variety of courts and judicial mechanisms; that is, national courts, courts-martial, military commissions, regional courts, international tribunals, and hybrid tribunals, to name a few,

---

[69] *Ibid*, at 35.
[70] *Paschal Makombanya Rufutu v The Director of Public Prosecutions*, Miscellaneous Civil Cause No 3 of 1990 (unreported) 10-11.
[71] Glenn H. P., Persuasive Authority, 32 MCGILL L.J., 1987, at pg. 261, 263; Shany Y., How Supreme Is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions Upon the Interpretation of Constitutional Texts by Domestic Courts, 31 BROOK. J. INT'L L. 2006341, at pg. 343; Slaughter Anne-M. A., Typology of Transjudicial Communication, 29 U. RICH. L. REV. 99, 1994, at pg. 124–25.

apply and enforce IHL during and after armed conflict. With the exception of national and regional courts, the remaining courts and tribunals are specifically designed or constituted to apply the law of war to persons and actions during wartime.[72] Once a court incorporates IHL into its analysis as one of multiple sources that bear on the case at hand, a range of additional factors are relevant for understanding how courts will approach this task. As noted above, IHL is fundamentally international law but also forms part of the domestic law of most states. How a court chooses to address IHL's key provisions, principles and obligations will vary widely depending on how the court relates to other courts in the international system, how it views international law in general, and other considerations.[73]

The first and most foundational factor is how international law is incorporated into or viewed in relation to a state's domestic law. For example, states with a monist system treat international treaties as automatically incorporated into national law.[74] In states with a dualist tradition, international law must be translated into national law through legislation.[75] In the United States, another consideration is whether a particular treaty is self-executing, meaning it has direct effect as law in domestic courts.[76]

In the case of the Geneva Conventions (the primary modern law of war treaties) states take different approaches to how these treaty obligations are incorporated into national law. Some states have legislation implementing the Geneva Conventions and the obligations therein,[77] while others have national traditions (such as monism) that automatically give the Conventions

[72] Benvenisti E., Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, 102 AM. J. INT'L L. 2008, at pg. 241; Weissbrodt D., & Nesbitt N.H., The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law, 95 MINN. L. REV. 2011, at pg. 1339; Mc Goldrick D., Human Rights and Humanitarian Law in the U.K. Courts, 40 ISR. L. REV. 2007, at pg. 527; Ferraro T., Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities, 41 ISR. L. REV. 2008, at pg. 331.

[73] Blank L.R.., *Understanding When and How Domestic Courts Apply IHL*, 44 Case West Reserve Journal of International Law, Vol. 44(1), 2011, at pg. 222. Available at: http://scholarlycommons.law.case.edu/jil/vol44/iss1/12 - Accessed on 02/12/2018.

[74] Mc Dougal M.S., The Impact of International Law Upon National Law: A Policy-Oriented Perspective, 4 S.D. L. REV. 25, 26 (1959).

[75] Cassesse A., International Law in a Divided World, Oxford, Eng: Clarendon Press, 1986, at pg. 14–16; Akehurst's M., Modern Introduction to International Law (4th Ed.) Routledge 29 West 35th Street, New York, NY 10001, 1982, at pg. 45.

[76] See generally Kirgis F.L., International Agreements and U.S. Law, AM. SOC'Y OF INT'L LAW INSIGHTS (Sept. 29, 2011), http://www.asil.org/insigh10.cfm.

[77] See Bothe M., The Role of National Law in the Implementation of International Humanitarian Law, in Christophe Swinarski (ed.,) Studies And Essays on International Humanitarian Law and Red Cross Principles, 1984, at pg. 301, 304–05.

the full force of domestic law.[78] However, among the wide range of issues that arise during armed conflict, national courts will usually be willing to adjudicate some and ignore others. The likelihood of a court decision infringing on executive authority or supremacy in a particular area is often a deciding factor in how courts choose to treat these cases.[79] For example, studies have revealed that courts will usually refrain from hearing cases regarding the targeting of specific enemy property, on the theory that such decisions are wholly within the parameters of the executive's war-making authority. In the case of *El-Shifa Pharmaceutical Industries Co. v United States*, it was held that the decision to destroy property was a "strategic matter of war-making belonging [to the President]," as a part of his executive authority.[80] Yet a court's involvement, or lack thereof, will have major consequences for the protection of individual rights and the enforcement of obligations.

In other situations, courts may simply follow the lead of the executive and ignore the potential IHL application, such as in the numerous cases addressing questions arising from the conflict in Northern Ireland.[81] Also The Russian Government has also consistently denied that the hostilities in Chechnya constituted an armed conflict.[82] In a third approach, "[t]he situation in Colombia is one in which the State does not recognize the existence of an armed conflict, but still acts as if it were the case, including as regards the application of international humanitarian law". [83]

Therefore, from a strategic perspective, if a court demonstrates a propensity to follow the executive's lead, relying solely on IHL for the substantive legal arguments would likely not be the most effective approach because the court will likely conclude that there is no armed conflict (consistent with the executive's argument) and reject any IHL-based arguments. When

[78] See Rosenthal E., and Sundram C.J., International Human Rights in Mental Health Legislation, 21 N.Y.L. SCH. J. INT'L & COMP. L. 2002, at pg. 469 & 480; see also Janis M.W., An Introduction to International Law, Fordham International Law Journal, Volume 12, Issue 4 (Article 7), 1988, at pg. 71
[79] Blank, above note 70, at pg. 214.
[80] *El-Shifa Pharmaceutical Industries Co. v. United States*, 378 F.3d 1346, 1365– 66 (Fed. Cir. 2004).
[81] See Quénivet N., The Application of International Humanitarian Law to Situations of a (Counter-) Terrorist Nature, in Roberta Arnold & Pierre-Antoine Hildbrand (eds.,) International Humanitarian Law and The 21st Century's Conflicts 2005, at pg. 25 & 31.
[82] See Abresch W., A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya, 16 EUR. J. INT'L L. 2005, at pg. 741, 754.
[83] Constantin von der Groeben, The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces, 16 J. CONFLICT & SECURITY L. 141, 145 n. 18 (2011), at 149.

national courts refrain from applying IHL in relevant situations, they are effectively abdicating their responsibility to implement and enforce IHL, leaving the executive to be the driving force in the development of the law, a highly problematic result.

6. THE APPROACH OF TANZANIAN COURTS TO INTERNATIONAL HUMANITARIAN LAW

The fact that the Constitution of the United Republic of Tanzania directs obligations to state authorities and all agencies to ensure that human dignity and other human rights are respected and upheld in accordance with the spirit of UDHR is generally implemented by the courts in Tanzania. However, the approach of Tanzanian courts to ensure implementation of IHL in NIAC would perhaps rely on how a court chooses to address IHL's key provisions, principles and obligations. The situation will vary widely depending on how the courts of Tanzania relate to other courts in the international system, how they view international law in general, and other considerations.[84] Therefore, the first and most foundational factor is how international law is incorporated into or viewed in relation to a state's domestic law. According to article 63 of the Constitution of the United Republic of Tanzania, it is obvious that Tanzania is a State with dualist tradition where international law must be translated into national law through legislation prior to its application in the courts.

In that note, it is the practice of Tanzanian courts that when they refer to foreign case law, they only do so for purposes of being guided and persuaded by such authorities, for such authorities do not bind the courts. Similarly, international human rights instruments, particularly those that Tanzania has ratified, and international law principles are applied as a guide to constitutional interpretation. International treaties are interpretative tools only if they are consistent with the Constitution. The binding law is the law enacted by parliament with the Constitution at the top and judicial precedents from the Court of Appeal and High Court of Tanzania.[85] This is a quite common practice in dualistic countries.

However, it is obvious that situations of non-international armed conflicts have never been experienced and, cases of serious IHL violations have not been reported in Tanzania. Although

[84] For more details see generally, Blank, above note 70, at pg. 222.
[85] Murungu, above note 45. at pg. 61.

practice in Tanzania shows that courts may refer to foreign case laws and international principles as a matter of guidance and persuasion, reality on the court's desire to consider international law principles and foreign courts solutions for the purpose of determining right involving non-state actors during non-international armed conflicts is still needs controversial. The lack of experience in NIAC has caused absence of directly involvement in the use and application of the various IHL principles by the courts of Tanzania, save on a peripheral level, and in other cases which are very indirectly. On this view, Justice Twaib Fauz once noted that:

"Being a matter that concerns some of the most atrocious crimes that human beings have ever committed against other humans beings, it is with a sense of gratitude and relief that we in Tanzania can say that we have never been directly involved in the use and application of the principle, save on a peripheral level, and very indirectly. Being probably the only country in the East Africa region that has never experienced civil strife of such a magnitude as to give rise to acts of genocide, war crimes and crimes against humanity, Tanzanians have, thanks God, largely been spared the undesirable atrocities experienced by its brothers and sisters in neighbouring countries, where its citizens have found themselves victims of serious human rights abuses of the kind that have given rise to the principle of universal jurisdiction."[86]

In that case, it means that the involvement in the use and application of customary international rules by the courts of Tanzania has been practiced in other circumstances of criminal act than NIAC environments. It is due to the fact that Tanzania has never experienced NIAC the magnitude of which may qualify acts of the crimes of genocide, crimes against humanity war crimes and crimes of aggression in the meaning of Article 8(2) of the Rome Statute of ICC.[87] The situation extends to principles such as universal jurisdiction which entitles a State to exercise its jurisdiction to apply its laws even if the act has occurred outside its territory; presumption of innocence which restricts treatment of guilty before a criminal offence proved guilty by impartial and independent court; *ne bis in idem* (not again about the same) which restricts prosecution of a crime more than once; *nullum crime sine lege* (no crimes without law)

[86] UNIVERSAL JURISDICTION AND TANZANIA presented by FAUZ TWAIB, Judge, High Court of Tanzania & President, East African Magistrates and Judges Association (EAMJA) at the Annual Conference, Kigali - Rwanda, 05/01/ 2012, at pg. 2-3. Accessed at https://www.google.com/search?q=universal+jurisdiction+in+Tanzania+pdf, on 11/03/2019.
[87] Rome Statute, above note 16, article 8(2), (provides for the meaning of "war crimes").

which restricts *ex post facto* laws; *aut dedere aut judicare* (prosecute or extradite) which advocates a duty either to punish the offender or to surrender him to the State seeking his return, and many others which are applicable in the context of non-international armed conflicts.

Therefore, the practice of Tanzanian courts shows general applications of these international law principles in general criminal matters other than those which could be found in the context of non-international armed conflicts. The situation poses a legal challenge as to whether the courts can apply the same principles to regulate legal issues in compliance with IHL during and after non-international armed conflict when the situation arises.

7. A CRITICAL ASSESSMENT ON THE COURTS PRACTICE IN TANZANIA

Criminal justice system refers to a process through which an accused passes until his accusation is disposed of or is punished. The system consists of law enforcement (police), adjudication (courts which include magistrates/judges, prosecutors, defence lawyers) and corrections (prisons, probation officers, and parole officers). According to article 13(6) of the Constitution of the United Republic of Tanzania, the distinct agencies are required to operate together under the principles of rule of law so as to determine rights of the victims. In that note, to ensure equality before the law, the Constitution of Tanzania, particularly in the preamble, establishes 'a Judiciary which is independent and dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected'.[88] Article 107B of the Constitution provides further that "[i]n exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land".[89] Therefore, the very important captions to note, in this regard, are the 'freedom of the courts' and 'observance of the provisions of the Constitution and those of the laws of the land' in which lies the basis of this assessment.

However, from the fact that non-international armed conflicts do take place between actors within the territory of the sovereign state, internal legal frameworks of many states have been running shot of jurisdictions to regulate legal issues in compliance with IHL principles. The situation poses challenges when applying national laws to determine rights of individuals

[88] Constitution of Tanzania, above note 22, preamble, para. 2.
[89] *Ibid*, article 107B.

because in the absence of IHL the courts are likely to exercise power with manipulation of laws. The situation is highlighted by Rowe in a nutshell that:

> "[The] role of national law as a restraining influence during a non-international armed conflict may not be matched by reality, for a number of reasons [...]. This is more likely to be the case where international human rights treaty obligations have not been incorporated into the national law"[90]

It has been observed that the jurisprudence of Tanzanian courts with regard to IHL application in NIAC depends on how the court relates to other courts in the international system, how it views international law in general, and other considerations.[91] It is the practice, in Tanzania, that when courts refer to foreign case law, they only do so for purposes of being guided and persuaded by such authorities, for such authorities do not bind the courts. Similarly, international human rights instruments, particularly those that Tanzania has ratified, and international law principles are applied as a guide to constitutional interpretation. International treaties are interpretative tools only if they are consistent with the Constitution. The binding law is the law enacted by parliament with the Constitution at the top and judicial precedents from the Court of Appeal and High Court of Tanzania.[92] This is a common practice in dualistic countries.

However, in the situations of non-international armed conflicts, the courts desire to consider solutions in other countries for the purpose of determining rights involving non-state Actors needs a careful assessment where IHL provisions have not been incorporated in domestic legislation. Studies have revealed that in other situations of NIAC, courts may simply follow the lead of the executive and ignore the potential of IHL application.[93] The government is likely to take the view that the 'rebels', whatever their purpose, are clothed with illegality to whom fewer 'rights' are owed than to its own legitimate armed forces as realized in the case of *Mejıa v. Peru*.[94] Also national law may be amended during the course of the conflict (unlike international humanitarian law), as the conflict increases in intensity the State may take greater

[90] Rowe, above note 20.
[91] For more details see generally Blank, above note 70.
[92] Murungu, above note 45, at pg. 61.
[93] See Quénivet, above note 78, at pg. 25, 31.
[94] *Mejıa v. Peru* Report No.5/96, Case 10.970, 1 March 1996.

powers of action through this law. Eventually, national leaders may see the 'risk' of human rights claims as being of a less immediate concern than the defeat of the rebels.[95] All these manipulations are possible under the sovereign especially when IHL treaties have not been incorporated into the national laws.

It is true that Tanzania is a peaceful country where situations of non-international armed conflicts have never been experienced and, cases of serious IHL violations have not been reported. However, the reality on the court's desire (as a practice) to consider international law principles and foreign courts solutions for the purpose of determining right involving non-state actors during non-international armed conflicts is still controversial. Due to strategic reasons the executive is likely to lead the decisions of the courts as far as IHL application in times of non-international armed conflicts is concerned. Therefore, the reason is that absence of IHL provisions in the domestic legislation together with the defence of State Sovereignty can cause the executive to intervene and manipulate which law applies (most likely domestic criminal laws) against non-state actors, hence the courts may end up with submissive decisions.

8. CONCLUSION

The fact that non-international armed conflicts do take place between actors within the territory of a sovereign state has caused internal legal frameworks of many states to run shot of IHL provisions to regulate legal issues during and after non-international armed conflict. It has been shown that Tanzania follows a dualist approach to international law in which international law does not have the force of law unless domesticated or transformed into municipal law. On the other hand, courts apply international law principles to interpret domestic human rights provisions in the Constitution. However, the courts of Tanzania have rarely experienced issues of non-international armed conflict which invite application of IHL principles. Therefore, in the absence of IHL provisions, the courts of Tanzania are likely to face challenges from the acts of the executive when it comes a time of regulating legal issues during non-international armed conflicts.

9. RECOMMENDATIONS

[95] Rowe, above note 20.

Domestication of IHL is pivotal to giving treaties the force of law within national territorial boundaries. Therefore, to ensure full IHL application by the courts and a better understanding of its principles during non-international armed conflicts, the following measures and strategies should be taken by the stakeholders in Tanzania:

a) The judiciary arm should take necessary steps to establish special jurisdiction over law of war issues in Tanzania. The step will ensure availability of jurisprudence or practice by the state institutions and agencies with regard to IHL application in non-international armed conflicts.

b) National laws should be reviewed and IHL provision be incorporated with the aim of striking balance between the protection of national interests and ensuring humanitarian values during non-international armed conflicts.

c) To incorporate a separate heading in the Penal Code [Cap 16 R.E. 2002] the sections under which should encompass prohibitions of war crimes in the meaning of section 8(2) of the Rome Statute of International Criminal Court of 1998.

d) A new Act to implement Geneva Conventions and Protocols additional thereto should be enacted in order to ensure prevention and punishment of grave breaches of Conventions and Protocols and to provide for other matters connected therewith.

REFERENCES

Books

Cassesse A., International Law in a Divided World, Oxford, Eng: Clarendon Press, 1986.

Akehurst's M., Modern Introduction to International Law (4th Ed.) Routledge 29 West 35th Street, New York, NY 10001, 1982.

Roberts, A., & Guelff, R., (eds.) Documents on the Law of War, (3rd Ed.), Oxford: Oxford University Press, New York.

Rowe, P., The Impact of Human Rights Law on Armed Force, Cambridge University Press. 2006.

Book Chapters

Murungu C.B., The place of international law in human rights litigation in Tanzania, in Magnus Killander (Ed.) International Law and domestic human rights litigation in Africa, Pretoria University Law Press (PULP), 2010.

Quénivet N., The Application of International Humanitarian Law to Situations of a (Counter-) Terrorist Nature, in Roberta Arnold & Pierre-Antoine Hildbrand (eds.,) International Humanitarian Law and the 21st Century's Conflicts, 2005.

Journal Articles

Abresch W., A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya, 16 EUR. J. INT'L L. 741, 754 (2005).

Anne-Marie Slaughter, A Typology of Transjudicial Communication, 29 U. RICH. L. REV. 99, 124–25, 1994.

Bahdi R., Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts, 34 GEO. WASH. INT'L L. REV. 2002-2003.

Benvenisti E., Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, 102 AM. J. INT'L L. 2008.

Blank L.R.., *Understanding When and How Domestic Courts Apply IHL*, 44 Case West Reserve Journal of International Law, Vol. 44(1), 2011. Available at: http://scholarlycommons.law.case.edu/jil/vol44/iss1/12 - Accessed on 02/12/2018.

Bothe M., The Role of National Law in the Implementation of International Humanitarian Law, in Christophe Swinarski (ed.,) Studies And Essays on International Humanitarian Law and Red Cross Principles, 1984.

Constantin von der Groeben, The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces, 16 J. CONFLICT & SECURITY L. 141, 145 n. 18, 2011.

Ferraro T., Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities, 41 ISR. L. REV. 2008.

Glenn H. P., Persuasive Authority, 32 MCGILL L.J. 1987.

Janis M.W., An Introduction to International Law, Fordham International Law Journal, Volume 12, Issue 4 (Article 7), 1988.

Kirgis F.L., International Agreements and U.S. Law, AM. SOC'Y OF INT'L LAW INSIGHTS (Sept. 29, 2011), http://www.asil.org/insigh10.cfm.

McDougal M.S., The Impact of International Law Upon National Law: A Policy-Oriented Perspective, 4 S.D. L. REV. 1959.

Mc Goldrick D., Human Rights and Humanitarian Law in the U.K. Courts, 40 ISR. L. REV. 2007.

Rosenthal E., and Sundram C.J., International Human Rights in Mental Health Legislation, 21 N.Y.L. SCH. J. INT'L & COMP. L. 2002.

Shany Y., How Supreme Is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions Upon the Interpretation of Constitutional Texts by Domestic Courts, 31 BROOK. J. INT'L L.2006.

Sloss D., (ed.), Treaty Enforcement in Domestic Courts: A Comparative Analysis, in The Role of Domestic Courts in Treaty Enforcement: a Comparative Study, 2009.

Solis G. D, *The Law of Armed Conflict: International Humanitarian Law in War 97*, in Kenneth Watkin and Andrew J. Norris, Non-International Armed Conflict in the Twenty-first Century, International Law Studies, Volume 88, Naval War College Newport, Rhode Island, 2012.

Walters, M., Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties, Columbia Law Review, Vol. 107, 2007.

Waters, M. Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties Columbia Law Journal, 107, 2007, pp. 628-705.

Weissbrodt D., & Nesbitt N.H., The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law, 95 MINN. L. REV. 2011.

Government Publication and Manuals

Background to the Report by the United Republic of Tanzania pursuant to article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC/C/OPAC/TZA/1) of 19 October, 2007.

United Nations. Secretary General's Bulletin on Observance by UN Forces of International Humanitarian Law, 1999.

Unpublished Papers, Submissions, Reports and Resolutions

Background to the Report by the United Republic of Tanzania pursuant to article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC/C/OPAC/TZA/1) of 19 October, 2007, at pg. 3.

UN Secretary General's Bulletin on Observance by UN Forces of International Humanitarian Law, 1999.

Universal Jurisdiction and Tanzania a presented by Fauz Twaib, Judge, High Court of Tanzania & President, East African Magistrates and Judges Association (EAMJA) at the Annual Conference, Kigali - Rwanda, 05/01/ 2012, at pg. 2 - 3. Available at https://www.google.com/search?q=universal+jurisdiction+in+Tanzania+pdf, Accessed on 11/03/2019.

Internet Sources

https://definitions.uslegal.com/l/lex-specialis/ - Accessed on 18 April 2018

https://www.merriam-webster.com/dictionary/lex%20generalis/ - Accessed on 18 April 2018.

Cases Decided by International and Regional Human Rights Bodies

Mejia v. Peru, Report No. 5/96, Case 10.970, 1 March 1996.

Prosecutor v Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, 2 October 1995.

Prosecutor v. Tadić (1996) 105 ILR 419, 488.

Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*) 14.2.2002 Separate Opinion, at para. 51.

Cases from Foreign Jurisdictions

R v Chief Immigration Officer, Heathrow Airport Ex-parte Bibi.

Boyce v The Queen, [2005] 1 A.C. 400 at 414-5 (P.C.2004).

Puli'uvea v Removal Review Authority, [1996] 3 N.Z.L.R. 538.

El-Shifa Pharmaceutical Industries Co. v United States, 378 F.3d 1346, 1365– 66 (Fed. Cir. 2004).

Minister for Immigration and Ethnic Affairs v Teoh, [1994-1995] 183 CLR.

Tavita v Minister of Immigration. [1994] 2 N.Z.L.R. 257, 266 (CA).

Ahani v Canada [2002] 1 S.C.R. 72, 208 D.L.R. (4th) 57.

Murray v The Schooner Charming Betsy 6 U.S. (2 Cranch) 64, 118 (1804).

Tanzanian Cases

Attorney General v Lesinoi Ndeinai and Joseph Selayo Laizer and two Others [1980] TLR.

Paschal Makombanya Rufutu v The Director of Public Prosecutions, Miscellaneous Civil Cause No. 3 of 1990 (unreported).

John Mwombeki Byombalirwa v Regional Commissioner and Regional Police Commander, Bukoba Another [1986] TLR 73, 84.

Director of Public Prosecutions v Daudi Pete [1993] TLR 22.

Union of Tanganyika and Zanzibar Act No 22 of 1964 [Cap]

United Republic (Declaration of Name) Act No. 61 of 1964 (Cap. 578 of the Laws).

Selected Treaties and other International and Regional Documents

Universal Declaration of Human Rights GA Res 217A, UN GAOR, 3rd Session, 183rd Plenary Meeting, UN Doc A/RES/217A (III) (1948) (UDHR).

The Charter of the United Nations and the Statute of the International Court of Justice of June 26, 1945. Entered into force Oct. 24, 1945.

Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force 27 January 1980.

Vienna Convention on Succession of States in Respect of Treaties, adopted on 22August, 1978. Opened for signature 23 August, 1978. Entered into force on 6 November 1996. United Nations, *Treaty Series*, vol. 1946, p. 3

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, opened for signature 12 August 1949,75 UNTS 31 (entered into force 21 October 1950).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, opened for signature 12 August 1949, 75 UNTS 85 (entered into force21 October 1950)

Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, opened for signature 12 August 1949, 75 UNTS 135 (entered into force21 October 1950).

Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977,1125 UNTS 609 (entered into force 7 December 1978) ('Additional Protocol II').

African Charter on Human and Peoples' Rights (also known as the Banjul Charter), Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

Rome Statute of International Criminal Court of 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.

Constitution

The Constitution of the United Republic of Tanzania (Cap.2) of 1977 (as amended)

Legislation in Foreign Jurisdictions

Geneva Conventions Act (Colonial Territories) Order in Council, 1959, No 1301.

Geneva Conventions Act, 1957 [Cap 52] of the United Kingdom.

Domestic Legislation

The Criminal Procedure Act, Cap. 20 R.E. 2002.

The Penal Code, Cap. 16 R.E. 2002.

The National Defence Act [Cap 192 R.E. 2002].

The Emergence Power Act, No. 1 of 1986.

The Judicature and Application of Law Act [Cap 358 R.E. 2002].

The Mutual Assistance in Criminal Matters Act No. 24 of 1991 [Cap 254 R.E 2008].

The Union of Tanganyika and Zanzibar Act No 22 of 1964.

The United Republic (Declaration of Name) Act No. 61 of 1964 [Cap. 578].