A Review of International Legal Instruments

Facilitation of Transport and Trade in Africa

Second Edition

CHAPTER I

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TREATIES

CONVENTIONS

PROTOCOLS

DECISIONS

DIRECTIVES

SSATP
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I. Basic Legal Issues Related to International Instruments

A. Definitions[1]

1. **International agreements.** The following basic definitions apply to all legal instruments described in this review:

- An international agreement is a written instrument between two or more sovereign or independent public law entities such as States or international organizations. It is intended to create rights and obligations between the Parties and is governed by international law.
- Such instruments are designated as treaties, conventions, agreements, or as protocols, covenants, compacts, exchange of notes, memoranda of understanding, agreed minutes, letters, also known as *accords en forme simplifiée* or agreements under simplified format. In what follows, and except in specific cases, the word *treaty* is a generic term designating any treaty, agreement, convention, or other international instrument.
- Treaties may be bilateral or multilateral. Bilateral treaties are contracts in which two parties balance their claims on a specific matter. A multilateral treaty, usually titled convention, sets rules of law to be observed by all parties to the treaty, in their joint or individual interest. A contract in form, it is substantially akin to a law.
- A treaty, even after it has become part of the law of the land after ratification and even when, as a convention, it borrows from the nature of a law, remains a contract and must be interpreted as such. Enforcement of its terms and conditions by a government agency is more than the implementation of domestic law provisions; it is a contribution to international relations. A treaty has therefore an impact on the nation's and state's reputation as partners in such relations.

2. **Ratification.** Ratification is the procedure, possibly set forth by a country's Constitution, by which a treaty is incorporated in the domestic law of one of the Parties to it. Agreements under simplified format are usually ratified by the executive branch, whereas major treaties and conventions are ratified by the legislature. In the United Kingdom, under a non-written Constitution, politically important treaties modifying domestic law or having a financial impact are ratified by Parliament. The constitutions of Anglophone African States do not formulate rules in that respect. Constitutional practice varies from one State to another. It is likely that legislatures have jurisdiction, but it may be distributed between the executive and the legislative branches, according to the importance of the Treaty. In France, the 1958 Constitution stipulates that ratification is by a law or a presidential decree; it indicates which treaty should be ratified by law. One criterion is whether it has a financial impact. If so, a law is needed since the French Parliament is "master of the purse" (see Article 53 of the 1958 Constitution). The same wording is found in many constitutions of Francophone and African States. Others provide for ratification by presidential decree, rendered after agreement is given by the legislature (e.g. Democratic Republic of the Congo—see Article 179 of the Constitution). Finally, in some States such as Equatorial Guinea and the Central African Republic jurisdiction for ratification is left to the President, whatever the treaty. In the United States, executive agreements are quasi-treaties that do not require ratification by the Senate under Article II of the Constitution.

3. **Registration.** All treaties, conventions, and other international agreements entered into must, according to Article 102 of the United Nations (UN) Charter, be registered with and published by the Secretariat of the United Nations. Non-published treaties remain valid between signatories but may not be invoked before any UN organ. Treaties are numbered in the order of registration in the volumes of the UN Treaty Series (http://treaties.un.org/).

4. **Identification and localization of instruments.** At the start of this exercise, it appeared that the existing international and inter-regional legal instruments were quite well known. However, there are many more instruments, conventions, memoranda of understanding, etc. than originally believed. Many of them have not been filed in the UN Treaty Series, but with the African Union (AU)—the successor of the Organization of African Unity (OAU)—which makes them more difficult to locate. Filing of instruments in either system sometimes encounters delays. Many instruments may well be dormant or ig-

nored, while others are obsolete or overlap. It is important to note that at the time of issuing this review,

- Some bilateral instruments, either executed for the implementation of international or inter-regional instruments or executed independently of these instruments, remained unidentified and unanalyzed.
- Domestic laws, regulations, and circulars have to be identified and compared with the multilateral and bilateral instruments with which they may or may not conform.

5. **Issues.** Four basic issues are related to the following:

- The conditions of enforceability of a treaty or other international instrument in the territory and in the legal regime of a State party to such an instrument
- The ranking of legal norms (treaties and domestic law)
- Whether treaties, agreements, and other international instruments are actually enforced
- Whether treaties and other agreements deal with issues of public law (Customs facilitation, traffic police, safety, etc.) or whether they aim to modernize and streamline private law, commercial practice, and procedures (carriage contracts, insurance, etc.), and as a consequence
- Whether they are oriented toward public administration by public agents or toward the association of the community of traders and carriers for viable and sustainable development of the transport system.

These issues are detailed in the sections that follow.

B. ENFORCEABILITY[2]

a. *International enforceability*

6. Signatories. Treaties only bind signatories. Where a State, not a party, accepts its provisions and desires to become a party thereto, it does so by acceding to the treaty, which may be before or after the treaty comes into force.[3]

b. *Territorial enforceability*

7. **General.** Ratification makes a treaty enforceable between signatories. Whether newly created States resulting from the breakup of other States (e.g., Yugoslavia and the Soviet Union) or colonial territories reaching independence are bound by treaties entered into before their creation has been the subject of considerable debate.[4] Different solutions have been proposed or implemented for different categories of treaties. Treaties that include financial obligations have been especially prone to controversy.

8. **Basic principles and the clean slate doctrine.** The current general principle and practice are that, unless there is a formal denunciation, earlier treaties remain in effect. Sometimes, succession is automatic (except when there is a formal declaration to the contrary), and sometimes a formal declaration of adhesion is needed for the treaty to apply such as in many African States. Significant examples are the five East African States (Burundi, Kenya, Malawi, Tanzania, and Uganda) that pleaded the so-called clean slate or Nyerere doctrine.[5] Under this doctrine, these States could not be bound by any treaty signed and ratified prior to independence, even if such treaties were ratified in their name by the colonial power in charge. Whether the instrument was bilateral or multilateral was irrelevant. These States were free to adhere or not to treaties and conventions of their own choice, in all sovereignty, only after they had obtained independence. When Tanzania, on November 16, 1962, adhered through a Declaration of Succession to the 1924 Brussels Convention on certain rules applicable to carriage of cargo by sea under bills of lading, the Tanzanian Government made it clear to the Kingdom of Belgium as depository of the Convention that the words "Declaration of Succession" were purely formal and did not mean that Tanzania recognized inheriting the Convention from Her Majesty's (British) Government despite the fact that it had extended its own ratification to Tanganyika (this was later known as the Nyerere doctrine). Accession to the 1924 Brussels Convention was a sovereign decision, without a precedent, by the Republic of Tanzania.

9. **Doctrine of succession.** Under this doctrine, States succeed to treaties concluded in their name by another power. However, to be enforceable in the newly independent State, the **treaty** must have been specifically enforceable when the future State was under foreign control. The case of colonies was complex. In some systems, they had no juridical personality separate from that of the colonizing State. In others, they were fully incorporated, but they may

have not been juridical entities of international law. Certainly, territories under the League of Nations mandate or United Nations trusteeship should have been considered as international law entities. Protectorates, whose governments concluded protectorate treaties, certainly were. Past and consequently present enforceability by succession necessitated a specific proclamation of extension of the Treaty to such a colony or territory, which occurred for a large number of British possessions. Conversely, France tended to issue specific denial of enforceability for its colonies. But it did associate protectorates (Morocco, Tunisia)[6] and States under mandate (Lebanon) with the ratification of some multilateral conventions (e.g., 1923 Geneva Convention and Statute on the International Regime of Maritime Ports). The Spanish and Portuguese practices seem to have been mixed.

10. **Denunciation and obsolescence.** A treaty, like any agreement or contract, can be denounced. The denunciation can take place when a new treaty on the same subject and whose provisions cannot be reconciled with the provisions of the former treaty has been entered into. For example, the 1885 Berlin convention on the regime of the River Niger expired de facto when the 1964 Niamey Convention between Chad, Mali, Niger, and Nigeria came into effect (see **Annex VII-35** of this review).

c. *Enforceability under common law regimes*

11. **English law.**[7] Under English law doctrine and practice, treaties are not self-executing.[8] They cannot operate by themselves within the State; they require the passage of an enabling statute. Governments or Heads of State may retain the right to sign and perhaps to ratify treaties. However, ratification is in many States the privilege of the legislature. Jurisdiction is divided between the legislative and executive branches, depending on the importance of the instrument. The executive branch can create obligations by signing and ratifying, but only the legislature can decide how the obligation borne with the Treaty is to be performed. In the United Kingdom, for example, an act of Parliament is needed before a treaty can become part of English law. For a treaty to become effective, three successive steps are necessary: signature, ratification, and statute. The record of court decisions indicates that the process is similar in Australia and Canada. And it is likely to be the approach in Anglophone Africa.

12. **U.S. law.**[9] U.S. law makes a distinction between self-executing and non-self-executing treaties. The former are able to operate automatically, and the latter require enabling acts of municipal legislation before they can function in the country and be accepted by courts. Whether a treaty belongs in one category or the other is left to the interpretation of the courts based on its political content. For example, because of its political content the UN Charter has not been judged to be a self-executing treaty.

d. *Enforceability under civil law regimes*[10]

13. **French law.** Under French law, international instruments are valid and applicable as soon as they are ratified and published. Ratification and publication are therefore successive and necessary steps to complete the enabling procedure. Indeed, the courts are strict on the need for publication, including of agreements under simplified format—*accords en forme simplifiée* such as exchange of letters. According to the 1958 French Constitution, ratification is either by an act of parliament or by decree. One criterion for ratification by the legislature is whether the treaty raises issues of public finance since the power of the purse rests with the Parliament. The text of the Treaty is attached verbatim to the text of the act or decree of ratification (the treaty is *de facto* self-executing). Both are then published in the government gazette (*Journal Officiel)*. Meanwhile, a rule of reciprocity applies: the treaty is enforceable only if ratified and enforced by the other Contracting Party.

14. **Francophone African States.** Francophone States in Africa follow the civil law model. Treaties are attached to the law or decree of ratification. Both are published in the Government gazette *(Journal Officiel)*. The constitutions of a few States such as Rwanda and Burundi (1998, Article 168) or Madagascar (1992, Article 82-VIII) specify that, if the provisions of a treaty are contrary to the Constitution, it cannot be ratified before the Constitution has been modified.

e. *Conclusion*

15. **Enforceability versus enforcement**. The signing of a treaty or an agreement is only a first step toward performing the obligations created by that treaty or agreement. The instrument must be published locally, distributed to the relevant agencies, and its enforcement monitored. A number of treaties solemnly concluded never came in effect as governments had second thoughts and used

delaying or other procedures to escape their obligations. A State may sign a treaty as a gesture of political significance and then delay its ratification indefinitely. Such circumstances apply to some of the treaties and agreements reviewed here. Moreover, when a treaty is formulated in general terms and thus detailed domestic statutes are necessary for its effective enforcement, especially regulations issued by decree and for the guidance of the civil service, failure to issue these statutes renders the treaty ineffective, even if duly ratified, proclaimed, or published. Significantly, the following legal issues have been identified as major legal obstacles to economic integration in Africa:[11]

- Ratification and implementation of instruments
- Derogation from national sovereignty of Member States
- Diversity and variations of constitutional laws, especially their interaction with public international law
- Dissimilarities and divergence between municipal laws, with local legislation ignoring duly ratified conventions and treaties
- Lack of fully developed and mainly accepted legal principles regulating, for example, contractual liability and liability in tort
- Lack of rules on the conflict of laws
- Poorly equipped courts of law

A more detailed review would be needed to establish whether such problems affect the enforcement of transit and other transport agreements in Africa.

C. Ranking of Norms[12]

Whether international instruments prevail over domestic legislation is the second basic issue.

a. *Ranking of norms in common law*

16. **English law and the incorporation doctrine.**[13] The rule is that international law is part of the law of the land—that is, international law (e.g., treaties) has no *a priori* preeminence. When reviewing statutes in the light of a treaty, English law makes a distinction between statutes that are intended to bring a treaty

> or agreement into effect and other statutes. Where the provisions of a statute implementing a treaty are capable of more than one meaning, and if one interpretation is compatible with the terms of the Treaty while others are not, the legislation under review will be construed in a way that avoids a conflict with the international law that is the treaty. But where the words of an existing statute are unambiguous, there is no choice but to apply them irrespective of any conflict with international agreements. The treaty, while incorporated in municipal law (the incorporation doctrine) does not automatically prevail. This is likely to be the rule in Anglophone Africa.

Because of the well-established incorporation doctrine, references to duties under international law are therefore few in the constitutions of the Anglophone states south of the Sahara. Article 40 of the Constitution of Ghana states:

> "In its dealings with other nations, the Government shall . . . (c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means; (d) adhere to the principles enshrined in or as the case may be, the aims and ideals of i) the Charter of the United Nations; ii) the Charter of the Organisation of African Unity; iii) the Commonwealth; iv) the Treaty of the Economic Community of West African States; and v) any other international organisation of which Ghana is a member."

This is a broad statement of policy rather than a specific rule of law that courts may use for guidance in interpreting statutes and treaties. A similar policy statement can be found in Article 14 of the 1975 Constitution of Angola—a civil law country—whereby the State considers itself bound by the principles of the UN Charter and the OAU Charter. Article 144 of the Constitution of Namibia refers to international law, but it places domestic law above international law and agreements, meaning that at any moment the Parliament could free Namibia from a binding obligation. The article stipulates: "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the laws of Namibia."

Treaties may be specific as to their rank among legal instruments. For example, Article XVI, 4, of the 1994 Agreement Establishing the World Trade Organization (see chapter II of this review) states: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

This stipulation refers to the standard trade agreements annexed to the main World Trade Organization Agreement.

17. **U.S. law and the Last in Time doctrine.**[14] U.S. law is even stricter. Early efforts in U.S. constitutional history to make treaties paramount to acts of legislation did not prevail. Treaties and acts of legislation are on the same footing, and in any case the U.S. Constitution prevails domestically as the supreme law of the land, even if it places the United States in violation of international law at the international level. In case of direct conflict between a self-executing treaty and a legislative act or statute of Congress, the last in time prevails (the Last in Time doctrine). At any moment, then, the position of a foreign party to a treaty with the United States, when exposed to the Last in Time doctrine, may be very weak.

b. *Ranking of norms under civil law*

18. **Treaties as paramount in civil law.** Civil law States, whose legal tradition has a strong influence on non-Anglophone African countries, tend to consider international law as paramount to domestic law. According to the 1958 French Constitution:

- Treaties ratified and published operate as laws within the domestic system.
- The provisions of a particular treaty are superior to those of domestic laws, but only if this situation also applies to the other party or parties to the treaty (rule of reciprocity).

The French courts may also declare a statute inapplicable if it conflicts with an earlier treaty—a totally different approach from that taken by the Last in Time doctrine. In fact, then, the courts can prohibit the legislature from issuing a statute that would contradict a treaty. The Basic Law of the Federal Republic of Germany goes further by stating that the general rules of public international law are an integral part of federal law, which goes beyond treaties and includes custom, a major source of international law. Treaties take precedence over laws and directly create rights and duties for the inhabitants of the German territory. In other words, treaties are self-executing.

19. **African States.** Most constitutions of Francophone African States follow the civil law model, using the following wording:[15]

> "Treaties and agreements ratified or approved in accordance with statutes on the matter, as soon as they are published, shall have an authority

> superior to that of laws, contingent upon the application by the other party, for such agreement or treaty."

This rule is set forth in the Constitutions of Benin (1990, Article 147), Burkina Faso (1991, Article 151), Cameroon (1996, Article 46),[16] the Central African Republic (1994, Article 69), Chad (1996, Article 222), Côte d'Ivoire (2000, Article 88), Guinea (1990, Articles 77 to 79), Mali (1992, Article 116), Mauritania (1990, Article 88), Niger (1996, Article 121) and Senegal (2001, Article 98). Yet it is missing in the Constitutions of the Congo (1992), Gabon (1994) or Madagascar (1991), and in civil law States such as Cabo Verde, São Tomé and Principe, and Guinea-Bissau.

20. **Example.** The influence of the civil law doctrine of paramount ranking of treaties is well illustrated by the instruments concerning the West African Economic and Monetary Union (WAEMU). The 1994 Dakar WAEMU Convention between eight Francophone States stipulates a comprehensive regime, clearly owing much to the European Union system:

> "Instruments resulting from the Union or issued by the Union take precedence over any past, present or future national legislation. Partner States shall take all necessary measures to eliminate contradictions or overlapping of prior instruments, commitments or conventions entered into or acceded at, with third parties." (Article 14)
> "Regulations issued by WAEMU are directly enforceable in Partner States." (Article 43)

In addition:

> "Directives indicate which results ought to be obtained and as such, are binding obligations for Partner States."
> "The implementation of WAEMU decisions by Partner States is compulsory."

In WAEMU, only recommendations and opinions are not directly enforceable. All instruments are to be issued with motives. Writs of execution are issued and enforceable in accordance with the domestic rules of civil procedure.

D. PUBLIC LAW VERSUS PRIVATE LAW

21. **Importance of public law.** Many of treaties or conventions reviewed here seem to be instruments oriented toward the performance of government regulatory functions. They deal with issues of public law. In all the institutions described,

it is clear that authorities and government staff are everywhere and in charge. There is hardly any mention of transport professionals, chambers of commerce, consultative procedures, etc. Five exceptions are, however, significant:

- WAEMU officially gives chambers of commerce a role, reflecting the French legal setup. Such a setup considers chambers of commerce to be official entities, representatives of traders who are assigned tasks and missions of public interest such as port and airport management concessions, bonded warehouses, training, etc.
- The Walvis Bay Corridor is essentially a private project in which professionals and operators are organizing a public service of opening two corridors to the hinterland.
- The treaty establishing the Organization for the Harmonization of Business Law in Africa (OHADA), deals with the modernization of business law and law of transport and addresses the problems of the carrier and its clients.
- The Southern African Development Community Treaty provides for private sector representation in the road authorities to be established.
- The 1999 Agreement establishing a uniform river regime and creating the International Commission for the Congo-Oubangui-Sangha provides for the representation of carriers on its Management Committee.

22. **Lesser importance given to private law**. In many instruments, except third-party insurance schemes, very little attention seems to be paid to the transport operation and to the carrier itself. In fact, they seem to be strangers to the process. Significantly, no State appeared eager to ratify the UN Convention on International Multimodal Transport of Goods. Incoterms[17] and their use are never mentioned. The legal regime of waybills is obscure. How litigation is settled between carriers and shippers and consignees is not known. The shortage of financial resources limits access to law reports and legal periodicals, and impoverished courts of law lack the information needed to adjust their jurisprudence to changing laws and legal doctrines. The information gap is a permanent concern of judges and the bar. Whether the recourse to law courts or arbitration is frequent is unknown.

E. PRESENTATION

23. The **position** of African States in various conventions is described in the rest of this review. Conventions fall into three groups:

- Worldwide conventions, either setting rules of general policy or specific to a transport mode
- Regional instruments that are valid or projected to be valid in the whole of the African continent
- Subregional instruments, conventions, and treaties specific to Africa.

Each section or subsection summarizes the stipulations of the convention under discussion and indicates the status of ratification or adhesion. Whether the instrument described is attached as an annex to this review is indicated.