What is international law and why does it matter to Namibia?

International law is a set of rules, norms and standards generally accepted in relations between countries. It creates common legal obligations to guide countries on cross-border issues such as war, diplomacy, trade, the environment and human rights. In general, the purpose of international law is to help countries to follow stable, consistent and organized international relations.

Over the years, international law has also been applied to address internal issues in many countries, primarily through the ratification and domestication of various international human rights treaties.

A clear relationship exists between the Namibian Constitution and international law. For example, the Bill of Rights in the Namibian Constitution is largely based on the 1948 Universal Declaration of Human Rights. In addition, international law is incorporated into Namibian law through Article 144 of the Namibian Constitution. This Article stipulates that "…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 law of Namibia."

One of the important implications of Article 144 is that international law is one of the sources of Namibian law. This was confirmed in the *Mwilima* case, where the Supreme Court referred to Article 144 as a "special mechanism" that introduces international treaties such as the International Covenant on Civil and Political Rights into the law of Namibia.

However, international law has to conform to the Namibian Constitution in order to be valid. This means that, whenever a treaty provision or any other rule of international law is inconsistent with the Namibian Constitution, the Constitutional provision will prevail. Also, a treaty will only be binding in Namibia in terms of Article 144 only if the relevant international and constitutional requirements have been met in terms of the law of treaties and the Namibian Constitution.

Article 144 also confirms the position in the Roman-Dutch common law that the general rules of public international law binding upon Namibia have always been part of national law. For example, in the pre-independence *Binga* decision, the Court stated that

where the terms of legislation are not clear and are reasonably capable of more than one meaning, an international treaty on the topic becomes relevant, because there is a presumption that the legislature did not intend to act in breach of international law.

There are two ways that countries can apply international law. In a monist legal system, international law is considered part of the internal legal order of a state. In contrast, in a dualist legal system, international law stands apart from national law and must be ratified through the legislative process before it can have any effect on rights and obligations at the national level.

Because international agreements become Namibian law when they are ratified by Namibia, the country has a monist legal system - but in practical terms, it contains elements of dualism. While the Namibian Constitution provides for the direct implementation of international treaties, it is often challenging to implement these treaties without a domestic legal framework.

For example, in the *Frank* case, the applicant was denied permanent residence in Namibia even though she was in a long-term same-sex relationship with a Namibian citizen. Under the International Covenant on Civil and Political Rights, as well as other treaties, several advisory opinions over the years on the meaning of the word “sex” had found that this term includes sexual orientation as a category for protection. However, in *Frank*, the Namibian Supreme Court opted to ignore the jurisprudence of international human rights law and found that the term “sex” does *not* encompass sexual orientation. The Court also held, citing the strict interpretation of the Zimbabwean courts, that the term “spouse” covers only someone in a recognized heterosexual marital relationship and not someone who is a “partner in a homosexual relationship”.

Reflecting on the application of international human rights law in Namibia’s jurisprudence, the Supreme Court relied on the *Namunjepo* judgment, which stated, “Whilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such as the International Court of Human Rights… the one major and basic consideration in arriving at a decision involves an enquiry into the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people.”

Another case in point is *Tsumib,* where the High Court was tasked to consider whether to allow the eight applicants in the matter to approach the court in order to represent the Hai||om People in an action to assert their rights over what they regard as their ancestral land. These applicants argued that they would be best suited to bring the action because the Hai||om Traditional Authority was compromised in bringing such action due to its close working relationship with the main defendant, the Namibian Government. In the absence of any statutory provisions on the restitution of ancestral land rights in Namibia, the applicants relied on comparative case law and international human rights law in support of their application for representative action. However, the Court ignored international law, ruling instead that if it were to allow the applicants to

proceed with the action it would aid them in circumventing the rights given to the Hai||om Traditional Authority under the Traditional Authorities Act. As a result, the applicants were left without a remedy as to how they could assert their rights under both international human rights law and Namibian constitutional law.

These cases suggest that Namibian courts are sometimes hesitant to apply international human rights law, especially if it is seen to be in conflict with longstanding practices or traditions in the country - even where those traditions are potentially limiting the human rights of applicants.

In addition, Namibian courts are more likely to refer to decisions of other jurisdictions such as Canada, India, South Africa and Zimbabwe than to apply a provision from an international human rights treaty– which could be partly because legal practitioners who present cases to the courts are typically more comfortable with citing comparative case law than with presenting arguments based on international law.

Namibia is a signatory to several international human rights law, which places a duty on the courts to apply them when appropriate. But it would appear that courts often favour the application of statutory law or comparative case law over international human rights law.

While this is perhaps understandable, the failure of the judiciary to consider and apply the vast body of international human rights law in Namibia more frequently is a lost opportunity. The direct application of international human rights law is not only in line with the Namibian Constitution, but will also give more significance and protection to the human rights of all Namibians.

This column was produced with support from
Bread for the World and the Hanns Seidel Foundation.