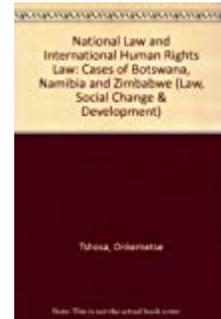




**Onkemetse Tshosa.** *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe.* Aldershot: Ashgate, 2001. ix + 317 pp. \$89.95 (cloth), ISBN 978-0-7546-2175-1.



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**Published on** H-SAfrica (March, 2002)

## **The Role of International Human Rights Law in the Domestic Legal Systems of Southern Africa**

The Role of International Human Rights Law in the Domestic Legal Systems of Southern Africa

The prosecution of leaders accused of gross violations of international humanitarian law by both the International Criminal Tribunal for the former Yugoslavia in The Hague and the International Criminal Tribunal for Rwanda in Arusha, Tanzania, demonstrates the growing importance of international human rights law in both Europe and Africa. The ongoing publication of numerous studies that focus on how international human rights law can be effectively enforced in domestic legal systems throughout the world also reflects the increasing influence of international human rights law.[1] Onkemetse Tshosa's book *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* is a welcome contribution to such studies. One of the main attractions of his book is that it is probably the first systematic and sustained effort to analyse the role and relevance of international human rights law in the protection of human rights in three Southern African countries, Botswana, Namibia and Zimbabwe.

The main aim of Tshosa's study is to examine the

process and strategies through which international law in general, and international human rights law specifically, is incorporated into the national legal systems of Botswana, Namibia and Zimbabwe. The examination of these incorporation strategies is situated within the framework of two principal conventional theories, monism and dualism, relating to the relationship between international law and municipal law. In general terms, monist theory views international law and national law as forming a single normative legal system in which it is assumed that international law is automatically applicable in domestic law. In contrast, dualist theory views international law and municipal law as two distinct legal systems independent of each other. Under dualist theory, international law is not automatically applicable in municipal law and requires internal statutory action to make it applicable.

Tshosa evaluates the strengths and weaknesses of dualism and monism as theories through which to examine the interaction between international law and national legal systems. His analysis reveals a complex relationship between theory and practice—one in which ac-

tual state practice is not in consonance with the theories of dualism and monism. The study, with a total of five parts subdivided into eight chapters, begins with a critical exposition of the theories of monism and dualism. Part two of the book examines the role and status accorded to international law in the domestic legal systems of Botswana, Namibia and Zimbabwe before independence.

The extent to which the status of international law in the domestic legal systems of the three countries under study has adhered to or diverged from the legal traditions they inherited from the colonial period is the main focus of the third and fourth parts of the book. In the pre-independence period, customary international law was automatically applicable in the domestic legal systems of the three countries while international treaties required legislative action to become applicable in municipal law. The approach in all three countries was to “adhere to monist theory with respect to the domestic status of customary international law and dualism in relation to treaties” (p. 46).

Tshosa shows that in the post-independence period, the interaction between international law, especially international human rights law, and the domestic legal systems of the three countries has undergone the most profound changes in Namibia. Namibia’s independence constitution formally and clearly grants international law a role and function in the domestic legal system. It also contains a provision that makes not only customary law, but also international agreements and treaties, directly and automatically applicable in the Namibian domestic legal system, subject to certain qualifications. In contrast, Zimbabwe and Botswana are shown to have generally adhered to their colonial legal heritage.

In the final part of the book, Tshosa draws many important conclusions about the process of incorporating international law into the domestic legal systems of the three countries as well as the limitations of monist and dualist theory in explaining this process. A salient limitation highlighted throughout the book and in his conclusions is the discrepancy between theory and practice in the application of international human rights law in the domestic legal systems of the three countries. The domestic application of international law in many countries is often not in consonance with either classic monist or dualist theory. Post-independence Namibia is shown to have significantly compromised its monist legal tradition. The compromise has mainly resulted from the judiciary’s failure to enforce monist theory in its applica-

tion of international human rights law in municipal law. Similarly, Tshosa shows that in its application of international law in the domestic legal system, Zimbabwe has begun to diverge from the classical dualist approach it inherited from Britain. Although he makes it clear that both monist and dualist theory have limitations, his analysis demonstrates that of the two theories dualism, because it regards international law and national law as separate legal systems, “limits the role and effectiveness of international human rights law in international law” (p. 202).

Tshosa also is careful to avoid giving the impression that the domestic application of international law should take place without taking into account the need to preserve the legislative sovereignty of the countries in which it is applied: “an unqualified domestic application of customary international law is not a preferable option” (p.68). The regulation of international law by the countries in which it is to be applied is also necessitated by the fact that international treaties, including human rights treaties, are often formulated in very general terms and their effective implementation in domestic legal systems requires specific legislative action by national legislatures.

Throughout the study, Tshosa makes many useful propositions about how the incorporation of international human rights law into local municipal law can be effectively carried out to enhance the promotion and protection of human rights in domestic legal systems. He notes that although substantive provisions of the Bill of Rights contained in the national constitutions of Botswana, Namibia and Zimbabwe are essentially in consonance with international human rights standards, internal human rights practice has not always been consistent with the requirements of international human rights treaties.

The domestic application of international law in the three countries has been hindered by several factors, among which is the failure of domestic judiciaries to apply international law in a more frequent and consistent manner. Tshosa recommends that in their legal proceedings domestic courts should move away from excessive reliance on national law and jurisprudence and instead invoke international law more often and consistently. They should also go beyond this and use international human rights law to invalidate practices in domestic legal systems that violate fundamental human rights. In short, he strongly advocates judicial activism as opposed to restraint in the domestic application of international

human rights law. Another important suggestion is that in all three countries there should be legislation clearly defining the role and status of international law in the domestic legal system.

Commenting on the nature of many of the current publications that focus on human rights, Geoffrey Robertson has described them as “incomprehensible to non-lawyers, full of extinct Latin phrases and those alphabet-soup acronyms which stand for the profusion and confusion of UN conventions and committees.”[2] Tshosa’s book clearly does not fit this description, as it is an intelligently argued book written in a style accessible to non-lawyers. However, certain reservations can be expressed about the book’s contents.

Firstly, although Tshosa is to be commended for adopting a regional approach by not confining his study to one country, the reader is not given any explanation about why Namibia, Botswana and Zimbabwe were chosen as case studies. Given the dominant political and economic power of South Africa in the region and the fact that its post-apartheid constitution is regarded by some as perhaps the most democratic in the region, readers may ask why South Africa is not included.

Secondly, the focus on three case studies enables Tshosa to show the diversity in the manner in which international law is applied in domestic municipal law. However, when discussing the failure by domestic courts to enforce certain fundamental human rights enshrined in international human rights law, he tends to understate the extent to which post-independent Zimbabwe has engaged in practices that violate international human rights law. This creates the erroneous impression that human rights violations in post-independent Zimbabwe have been no worse than in Botswana and Namibia. Tshosa rightly states that an uprising against the Zimbabwe government in Matabeleland in the early 1980s resulted in a repressive response from government security forces, especially the North Korean-trained Fifth Brigade. He then goes on to say that during this period, “several people were reported to have been tortured” (p. 220). A comprehensive and authoritative report on the Matabeleland Disturbances published in 1997 convincingly shows that the Fifth Brigade spearheaded serious and systematic violations of human rights in Matabeleland that included mass torture and mass summary executions. Thousands of people, almost all of them Ndebele, are now known to have died at the hands of the security forces in this period.[3] Notwithstanding the fact that this massive and systematic violation of human rights gave rise to a very

limited number of legal challenges against the government, it is important to give an accurate impression of the scale of human rights violations in Zimbabwe in comparison with Botswana and Namibia.

Thirdly, Tshosa’s analysis of the domestic application and enforcement of international human rights conventions outlawing discrimination on the basis of sex falls short of taking into account a relatively recent development in international human rights law that may in future have an important impact on the domestic legal systems of Botswana, Namibia and Zimbabwe. This is the campaign by some human rights activists and scholars who argue, in an increasingly persuasive manner, that international human rights norms should be formulated and interpreted to include rights against discrimination on the basis of sexual orientation.[4] In Zimbabwe and Namibia there have been recent and well-publicised clashes between government officials and advocates of ending discrimination based on sexual orientation. Zimbabwean President Robert Mugabe’s public denunciations of homosexuals, one of which described them as “worse than pigs and dogs” have attracted widespread condemnation from human rights groups and organisations. These include human rights organisations based in South, which in 1996 adopted a new constitution with a Bill of Rights containing a provision which outlaws discrimination on the basis of sexual orientation. Though international human rights law makes no explicit reference to sexual orientation in any of its instruments, ending discrimination on the basis of sexual orientation is increasingly being seen as an emerging international human rights norm.[5]

Finally, Tshosa’s recommendations about how the role of international human rights law can be enhanced and more effectively enforced in domestic legal systems seem to give the judiciary and parliament, as opposed to the executive, a leading role in the protection of human rights. He argues that judicial activism is crucial to effective implementation of human rights norms and treaties in domestic legal systems. However, some scholars have pointed out the inadequacy of any approach that privileges the judiciary and parliament in the observance and enforcement of human rights. This is because governments can curtail judicial activism through intimidation of judges and other means. Governments can also simply refuse to implement court orders aimed at protecting human rights and can, in fact, pass legislation which undermines adherence to international human rights norms and encourages a culture of impunity for human rights violations.[6] For instance, in Zimbabwe the government

has not only engaged in intense and well-publicised intimidation of the judiciary but has also on many occasions officially pardoned and even promoted known violators of human rights. At the same time, other scholars have also highlighted the growing importance of non-state actors, such as Amnesty International and other human rights organisations in the application and implementation of international human rights norms.[7] Tshosa's recommendations do not seem to assign a role to non-state actors in the enforcement of human rights.

Tshosa states that his focus "is not so much on...compliance with or implementation of international human rights law...[but] on the process of translating this law into municipal law" (p. 103). However, he does discuss domestic enforcement of international human rights norms. It would not be useful to have human rights laws that cannot be enforced, especially given that some human rights scholars have argued that the twenty-first century signals a new era of human rights—one which they have termed the age of enforcement.[8]

As more a recommendation than a criticism, it can be said that Tshosa is predominantly concerned about the enriching effect that international human rights law has on the domestic legal systems and notes the need for domestic legal regimes to keep up with developments in the former. However, as one human rights scholar has argued, harmonization of international with national human rights law should go beyond merely ensuring that the latter is compatible with the former. It should also result in the increased effectiveness of international human rights law.[9] Tshosa's book is largely silent about the impact of national human rights law on international law. It is also largely silent on the role that regional human rights law can play in fostering the development of international law-friendly legal systems in Botswana, Namibia and Zimbabwe.

None of the above reservations detract from what is overall a clearly argued, well researched and important study for all those interested in understanding the role and status of international human rights law in Southern African domestic legal systems.

#### Notes

[1]. Some of the published studies which deal with the relationship between international human rights law and domestic legal regimes include Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press, 1994; Roman Wieruszewski, "National Implementation of Human

Rights," in Allan Rosas and Jan Helgesen (Eds.), *Human Rights in a Changing East-West Perspective*, London, Pinter, 1990, pp. 264-289; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford: Clarendon Press, 1989.

[2]. Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, London: Penguin Books, 2000, p. xx.

[3]. See Breaking the Silence Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 to 1988, Harare: Catholic Commission for Justice and Peace and the Legal Resources Foundation, 1997. Minor factual errors relating to Zimbabwe in Tshosa's book are incorrect references to the Zimbabwe African People's Union (ZAPU) as Zimbabwe African People's Unity. The first name of Zimbabwean legal scholar Welshman Ncube is incorrectly spelt as Welchman Ncube.

[4]. Some scholars who argue strongly in favour of this position include Eric Heinze, *Sexual Orientation: A Human Right*, London: M. Nijhoff, 1995; Robert Wintemute, *Sexual Orientation and Human Rights*, Oxford, 1995 and Nicholas Bamforth, "Human Rights, Sexual Orientation and the Social and Legal Impact of Law and Law Reform," in Conor Gearty and Adam Tomkins (Eds.), *Understanding Human Rights*, London: Mansell, 1996, pp. 293-320.

[5]. For a detailed discussion of homosexuality in Southern African municipal law and in international law, see Chris Dunton and Mai Palmberg. *Human Rights and Homosexuality in Southern Africa*, Uppsala: Nordiska Afrikainstitutet, 1996.

[6]. On the importance of government involvement in the promotion and protection of international human rights norms, see Rick Lawson, "Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century," in Monique Castermans-Holleman, Fried Van Hoof and Jacqueline Smith (eds.), *The Role of the Nation State in the 21st Century: Human Rights International Organisations and Foreign Policy: Essays in Honour of Peter Baehr*. The Hague: Kluwer Law International, 1998, pp. 91-116.

[7]. See Fried Van Hoof, "International Human Rights Obligations for Companies and Domestic Courts: An Unlikely Combination?," in Castermans-Holleman, pp. 47-59.

[8]. Geoffrey Robertson, *Crimes Against Humanity*. London: A. Lane, 1999, pp. xiii-xxi.

[9]. Fried Van Hoof, "International Human Rights Obligations," p. 52.

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**Citation:** Tapiwa Zimudzi. Review of Tshosa, Onkemetse, *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe*. H-SAfrica, H-Net Reviews. March, 2002.

**URL:** <http://www.h-net.org/reviews/showrev.php?id=6017>

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