REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA

LISBON LAW REVIEW

2018/2

LVIX

Revista da Faculdade de Direito
da Universidade de Lisboa
Periodicidade Semestral
Vol. LVIX – 2018/2

LISBON LAW REVIEW

PROPRIEDADE E SECRETARIADO

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade – 1649-014 Lisboa – Portugal

EDIÇÃO, EXECUÇÃO GRÁFICA E DISTRIBUIÇÃO
LISBON LAW EDITIONS

Alameda da Universidade – Cidade Universitária – 1649-014 Lisboa – Portugal

ISSN 0870-3116 Depósito Legal n.º 75611/95

Data: Dezembro, 2018

ÍNDICE 2018

RFDUL/LLR, LVIX (2018.2), 23-42

Some notes about International Law in the Constitutions of the Lusophone African States

Algumas notas acerca do Direito International nas Constituições dos Estados Africanos Lusófonos

Fernando Loureiro Bastos*

Abstract: The constitutional texts of the African Lusophone states (Angola, Cape Verde, Guinea-Bissau, Mozambique, and São Tomé and Príncipe) were influenced strongly by the Portuguese Constitution of 1976 with regard to the language used to draft them about International Law. The influence of the Portuguese constitution becomes particularly evident when compared with African constitutions affiliated to the francophone tradition or structured according to the *common law* legal system.

In the constitutions of the Lusophone African states, with the exception of Guinea-Bissau, it is possible to find provisions specifically devoted to the incorporation of the sources of International Law into the juridical legal system of the States, with particular emphasis on the effects produced by treaties. With regard to the various stages of the conclusion of treaties, there is great concern about the constitutional organs which have internal competence to approve international commitments, in particular with reference to the matters that relate to the exclusive competence of the parliamentary bodies. In contrast to this, the initial state of negotiation and the signing of international commitments are not usually subject to significant regulation.

Keywords: Constitutions; International Law; Lusophone African States; Sources of International Law; and treaty-making process

Resumo: Os textos constitucionais dos Estados Africanos Lusófonos (Angola, Cabo Verde, Guiné-Bissau, Moçambique e São Tomé e Príncipe) foram intensamente influenciados pela Constituição Portuguesa de 1976 relativamente à redação

* Associate Professor, Faculty of Law, University of Lisbon; Senior Research Fellow, Lisbon Centre for Research in Public Law (Centro de Investigação de Direito Público), Faculty of Law, University of Lisbon; Vice-Chairman of the Institute of Legal Cooperation (Instituto de Cooperação Jurídica), Faculty of Law, University of Lisbon; Director of Studies of the Portuguese Society of International Law (Portuguese Branch of the International Law Association); floureirobastos@fd.ul.pt.

das disposições relativas ao Direito Internacional. A influência da Constituição portuguesa é particularmente evidente em comparação com as constituições africanas integradas na tradição constitucional francófona ou estruturadas de acordo com sistema jurídico de *common law*.

Nas constituições dos Estados Africanos Lusófonos, com exceção da Guiné-Bissau, é possível encontrar disposições relativas à incorporação das fontes de Direito Internacional no ordenamento jurídico dos Estados, com particular destaque para a produção de efeitos dos tratados. Relativamente às diversas fases do procedimento de vinculação internacional, existe uma grande preocupação acerca dos órgãos constitucionais que têm competência para a aprovação interna de compromissos internacionais, com destaque para as matérias que fazem parte da competência exclusiva dos órgãos parlamentares. Em contraponto, a fase inicial da negociação e da assinatura dos compromissos internacionais não é normalmente objeto de uma regulamentação relevante e suficiente.

Palavras-chave: Constituições; Direito Internacional; Estados Africanos Lusófonos; Fontes de Direito Internacional; Procedimento de conclusão de tratados

1. Introduction

Lusophone Africa includes five African countries: Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe. These countries are former Portuguese colonies, and they adopted Portuguese as their official language[1] and structured their legal systems on the legal orders that pertained previous to their independence, which occurred in the seventies of the last century.

The five Portuguese-speaking African states include two large States territorially, namely Angola and Mozambique, two small archipelagos – Cape Verde and São Tomé and Príncipe –, and a small coastal state (Guinea-Bissau).

With regard to the constitutional texts in force in these states the following data must be taken into account[2]: i) Angola: the Constitution of February 5, 2010 (henceforth

[1] The choice of Portuguese as the official language has a constitutional basis with regard to the following Lusophone African States: Angola, paragraph 1 of article 19º of the 2010 Constitution; Cape Verde, paragraph 1 of article 9º of the 1992 Constitution; and Mozambique, article 10º of the 2004 Constitution.

[2] An updated synthesis about the constitutions of the Portuguese-speaking African states can be found in Jorge Miranda and E. Kafft Kosta, *As Constituições dos Estados de Língua Portuguesa.*

CRA), with 244 articles ; ii) Cape Verde: the Constitution of September 25, 1992, as amended on May 3, 2010 (henceforth CRCV), with 295 articles; iii) Guinea-Bissau: the Constitution of February 26, 1993, as amended by five modifications to the text of the constitution of May 16, 1984 (henceforth CRGB), with 133 articles[3]; iv) Mozambique: the Constitution of December 22, 2004, as amended by Law No. 1/2018, of June 12, 2018 (henceforth CRM), with 313 articles; and v) São Tomé and Príncipe: the Constitution of September 20, 1990, as amended on January 29, 2003 (henceforth CRSTP), with 160 articles[4].

The constitutional texts of the African Lusophone states were influenced strongly by the Portuguese Constitution of 1976, both with regard to the systematization of the articles adopted, and also with regard to the language used to draft them[5].

As far as systematization is concerned, the constitutional texts are normally divided into four or five parts, viz. basic principles, fundamental rights catalogue, economic organization, political power organization, and constitutional guarantee mechanisms (control of constitutionality and constitutional review)[6].

Uma visão comparativa, Editorial Juruá, Lisboa, 2013; and, from the perspective of systems of government, in E. Kafft Kosta, *Sistemas de Governo na Lusofonia: zonas e relações de poder*, AAFDL Editora, Lisboa, 2019, pp. 601-647.

[3] About the Constitution of the Republic of Guinea-Bissau, see Fernando Loureiro Bastos, *The Republic of Guinea-Bissau: introductory note,* available at Oxford Constitutions of the World; and "Introdução à Constituição da República da Guiné-Bissau", in Maria Lúcia Amaral e Selma Pedroso Bettencourt (editors), *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos*, vol. II, Almedina, 2016, pp. 111-157.

[4] About the Constitution of the Republic of São Tomé and Príncipe, see Fernando Loureiro Bastos, *The Constitution of the Republic of São Tomé and Príncipe: introductory note,* available at Oxford Constitutions of the World; and "Introdução à Constituição da República de São Tomé e Príncipe", in Paulo Otero, Carla Amado Gomes e Tiago Serrão (coordenadores), *Estudos em Homenagem a Rui Machete*, Almedina, 2015, pp. 283-308.

[5] On the persistent influence of the Portuguese law in the legal orders of the Lusophone African States see Fernando Loureiro Bastos, "An Overview of Judicial and Executive Relations in Lusophone Africa", in Charles Fombad, (edit.), *Separation of Powers in African Constitutionalism*, Oxford University Press, 2016, pp. 161-163.

[6] The similarities in the systematization of the constitutional texts are self-evident when the Portuguese Constitution of 1976 is compared with the texts of the Constitutions of Angola, Cape Verde and São Tomé and Príncipe. On the one hand, the Portuguese Constitution of 1976 has the following structure: Preamble; Fundamental principles, article 1º to 11º; Part I – Fundamental rights and duties, article 12º to 79º; Part II – Organization of the economy, articles 80º to 107º; Part III – Organization of political power, articles 108º to 276º; Part IV – Guaranteeing and revision of the constitution, articles 277º to 289º; Final and transitional provisions, articles 290º to 296º. On the other hand, the following structure can be found in the constitutions mentioned previously: i) Angola: Preamble;

In relation to the drafting of norms, it is possible to find some cases in which articles or paragraphs of articles of the Portuguese Constitution of 1976 were reproduced virtually without any modification in the text of the constitution of the African Portuguese-speaking states. Taking as an example of this the provisions governing matters related to International Law, it is possible to see that the wording used in paragraphs 1 and 2 of article 8º of the Portuguese Constitution – "[t]he norms and principles of general or common international law form an integral part of Portuguese law" (paragraph 1) and "[t]he norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state" (paragraph 2)[7] – is the source of paragraphs 1 and 2 of article 13º of the Constitution of São Tomé and Príncipe, of paragraphs 1 and 2 of article 12º of the Constitution of Cape Verde, of paragraph 2 of article 18º of the Constitution of Mozambique, and of paragraphs 1 and 2 of article 13º of the Constitution of Angola.

Although article 8º of 1976 Portuguese Constitution has been used as a model for the drafting of the article concerning sources of International Law in the constitutions of the Lusophone African states, it should be noted that the substantial application of those sources of law varies according to a distinct perspective to the way as International Law substantiates (or should substantiate) political decisions[8],

---

Title I – Fundamental principles, articles 1º to 21º; Title II – Fundamental rights and duties, articles 22º to 88º; Title III – Economic, financial and fiscal organisation, articles 89º to 104º; Title IV – Organisation of state power, articles 105º to 197º; Title V – Public administration, articles 198º to 212º; Title VI – Local government, articles 213º to 225º; Title VII – Guarantees of the constitution and control of constitutionality, articles 226º to 237º; Title VIII – Final and transitional provisions, articles 238º to 244º; ii) Cabo Verde: Preamble; Part I – Fundamental principles, articles 1º to 14º; Part II – Fundamental rights and duties, articles 15º to 90º; Part III – Economic and financial organization, articles 91º to 94º; Part IV – exercise of political power, articles 95º to 118º; Part V – Political power organization, articles 119º to 269º; Part VI – Guarantees of defending and revising the Constitution, articles 270º to 292º; Part VII – Final and transitional provisions, articles 293º to 295º; and iii) São Tomé and Príncipe: Preamble; Part I – Principles and objectives, articles 1º to 14º; Part II – Fundamental rights and social order, articles 15º to 65º; Part III – Organization of political power, articles 66º to 143º; Part IV – Guarantee and review of the constitution, articles 144º to 155º; Part V – Final and transitional provisions, articles 156º to 160º.

[7] On paragraphs 1 and 2 of Article 8º of the 1976 Constitution of Portugal see Maria Luísa Duarte, *Direito Internacional Público e Ordem Jurídica Global do Século XXI*, AAFDL Editora, 2016, pp. 318-332.

[8] About a specific African perspective on the sources of international law see Fernando Loureiro Bastos, "The Southern African Approach to the Permanent Sovereignty over Natural Resources and Common Resource Management Systems", in Marc Bungenberg and Stephen Hobe (editors), *Permanent Sovereignty over Natural Resources*, Springer, 2015, pp. 64-69.

being those matters that have strictly internal or external consequences. It should be taken into consideration that the revisions of the Portuguese Constitution, which occurred in 1992, 2001, 2004 and 2005, had as their purpose the need to solve problems related to Portugal's commitment to international treaties (on the one hand, participation in the European integration process, and, on the other hand, the treaty creating the International Criminal Court)[9].These revisions were paralleled only by the modifications introduced in the Guinea-Bissau Constitution concerning its participation in international organizations of regional integration.

The influence of the Portuguese constitution in the texts of the constitutions of the Portuguese-speaking African states becomes particularly evident when this is compared with African constitutions affiliated to the francophone tradition[10] or structured according to the *common law* legal system[11].

2. Constitutional norms concerning the sources of International Law

2.1. Introductory note

In the constitutions of the Lusophone African states, with the exception of Guinea-Bissau, it is possible to find provisions specifically devoted to the incorporation of the sources of International Law into the juridical legal system of the States, with particular emphasis on the effects produced by treaties[12]. The expression

---

[9] On the evolution of the Portuguese Constitution of 1976, the synthesis of Jorge Miranda, that can be found as a "General introduction", pp. 7-37, to the text in force of the Portuguese Constitution of 1976, updated with the modifications that were introduced by the seventh constitutional review (Jorge Miranda and Jorge Pereira da Silva, *Constituição da República Portuguesa*, 5th edition, Principia, Estoril, 2006).

[10] In that sense, Narcisse Mouelle Kombi, "Les dispositons relative aux conventions internationales dans les nouvelles constitutions des États d'Afrique francofone", *African Yearbook of International Law – Annuaire African de Droit International*, volume 8, 2000, pp. 226-227.

[11] On this matter Tiyanjana MALUWA, *International Law in Post-colonial Africa*, Kluwer Law International, 1999, pp. 36-37, stating, p. 41, that "apart from Malawi and Zimbabwe, none of the former British colonies stipulates any specific role or states for international law, whether customary or treaty".

[12] On the subject, in general taking into consideration all Portuguese-speaking states (including Portugal, Brazil and Timor-Leste), see Jorge Bacelar Gouveia, "O Direito Internacional Público no direito de Portugal e dos Estados de língua portuguesa", in Jorge Bacelar Gouveia, *Direito Constitucional de*

"general or common international law", inspired by article 8º of the Portuguese Constitution of 1976, is intended to refer to customary international law, but not to cover *jus cogens* norms. In some cases, especially in Cape Verde and Mozambique, the issue of the hierarchical position of the sources of International Law in relation to the domestic sources of law, with greater relevance for the Constitution, is expressly regulated[13]. It should also be pointed out that there are constitutional norms presenting a framework of principles for decision-making with regard to external relations with International Law consequences.

2.2. Angola

The 2010 Constitution of Angola provides, in article 13º, that "[g]eneral or common international law received under the terms of the Constitution shall form an integral part of the Angolan legal system" (paragraph 1), and also that "[d]uly approved or ratified treaties and agreement shall came into force in the Angolan legal system after they have been officially published and have entered into force in the international legal system, for as long as they are internationally binding upon the Angolan state" (paragraph 2)[14].

The President of the Republic, in accordance with article 108º CRA, is "the Head of State, the Executive Power and the Commander-in-Chief of the Angolan Armed Forces". Representing the "nation within the country and internationally" (paragraph 4 of article 108º CRA), the President of the Republic must ensure compliance of the international agreements and treaties in force in Angola (paragraph 5 of article 108º CRA). The relevance of the application of international treaties relating to fundamental rights is highlighted in paragraph 2 of article 26º CRA as it

---

Língua Portuguesa. Caminhos de um constitucionalismo singular, Almedina – Faculdade de Direito da Universidade Nova de Lisboa, 2012, pp. 81-101; and Francisco Pereira Coutinho, "Relatório síntese: o Direito Internacional Público nos Direitos de Língua Portuguesa", in Jorge Bacelar Gouveia e Francisco Pereira Coutinho (coordenadores), *O Direito Internacional Público nos Direitos de Língua Portuguesa*, CEDIS, 2018, pp. 15-24. On the Portuguese system of incorporation of international law into national law, see Francisco Ferreira de Almeida, 'Portugal', in Dinah Shelton (editor), *International Law and Domestic Legal Systems. Incorporation, transformation and persuasion*, Oxford University Press, 2011, pp. 500-516.

[13] On the subject, in general taking into consideration all Portuguese-speaking states (including Portugal, Brazil and Timor-Leste), see Bacelar Gouveia, "O Direito Internacional...", pp. 101-132, and 146-154.

[14] Official translation of the 2010 Constitution of Angola available at the site of National Assembly of Angola.

is stated that these should be "interpreted and incorporated in accordance with the (...) African Charter on the Rights of Man and Peoples Rights and international treaties on the subject ratified by the Republic of Angola"[15].

The actions of the President of the Republic must be carried out subject to the subordination of international commitments to the Constitution, inasmuch as paragraph 3 of article 6º CRA expressly stipulates that treaties "shall only be valid if they conform to the Constitution".

Article 12º CRA, dedicated to international relations, sets forth a set of principles that should guide the external relations of the Angolan State, namely: "respect for sovereignty and national independence"; "equality amongst states"; the "rights of peoples to self-determination and independence"; the "peaceful solution to conflicts"; "respect for human rights"; "non-interference in the affairs of other States"; "reciprocal advantages"; and "repudiating and combating terrorism, drugs trafficking, racism, corruption and people and human organs trafficking". The constitutional guidelines for foreign policy are strengthened in the field of defence and national security by reference to compliance with the international treaties which have been concluded in this area (paragraph 1 of article 11º CRA, article 203º, paragraph 1 of article 207º, and paragraph 1 of article 211º CRA)[16].

2.3. Cape Verde

The Constitution of Cape Verde devotes a specific part of its text to international relations and international law: Title II of Part I, with four articles. Those constitutional provisions are very detailed regarding the incorporation of the sources of International Law into the legal order of Cape Verde and the hierarchical relationship of these with domestic sources of law.

---

[15] On the fundamental rights recognized by the 2010 Constitution of Angola see Carlos Feijó (with the collaboration of Kiluange Tiny and Rute Martins Santos), "Os fundamentos da Constituição Angolana: Princípios e Direitos Fundamentais", in Carlos Maria Feijó (coord.), *Constituição da República de Angola: Enquadramento Dogmático – A nossa visão*, Volume III, Almedina, 2015, pp. 70-87, giving to the International Law on fundamental rights a "near-constitutional" ("para-constitucional") hierarchical position (p. 77).

[16] About constitutional norms concerning the sources of International Law in the 2010 Constitution of Angola see Maria João Carapêto, "Direito Internacional Público na Ordem Jurídica de Angola", in Jorge Bacelar Gouveia e Francisco Pereira Coutinho (coordenadores), *O Direito Internacional Público nos Direitos de Língua Portuguesa*, CEDIS, 2018, pp. 25-31.

Paragraphs 1 and 2 of article 12º CRVC deal with the issue of incorporating customary law and conventional international commitments in accordance with the Portuguese model. Paragraph 3 of the same article, in contrast is particularly innovative. The Constitution of Cape Verde can be presented as an example of an African Constitution worried about the consequences of the participation in regional integration organizations and taking into account the effects in domestic law of the acts of international supranational organizations in which the state can participate[17]. It should be noted that this is an absolutely exceptional text in this respect, even outside the African region[18]. Paragraph 3 of article 11º of the Constitution of Cape Verde provides that "[t]he legal acts emanating from the relevant organs of the supranational organizations of which Cape Verde is a member, shall enter directly into force in the domestic legal order, provided that is so established in the respective constitutive instruments". It is possible to understand the wording of this articles only by recognizing the influence that Portuguese constitutionalism, namely the Portuguese Constitution of 1976, has in the constitutionalism of Cape Verde. The system is inspired by the legal order of the European Union, having relevance in Cape Verde because of its participation in ECOWAS (Economic Community of West African States).

The Cape Verde Constitution deals with the question of the hierarchy of international law within its legal system in an explicit way by providing that "norms and principles of general or common international law and of conventional international law validly approved or ratified have a prevalence, after its entry into force in the international and internal legal order, on all internal legislative and normative acts of infra-constitutional value". Although the position taken in relation to international custom, and the non-reference to the rules of *jus cogens*, can be criticized, the superiority of the conventional international law in relation to the sources of law of domestic origin should be emphasized as being very straightforward.

In accordance with article 125º CRVC, the President of the Republic represents the Republic of Cape Verde internally and externally (paragraph 1) and must monitor and ensure compliance with the international treaties into force in the Cape Verde legal order (paragraph 2).

---

[17] On the effects of the participation in international supranational organizations, from a Portuguese perspective, see Duarte, *Direito Internacional...*, pp. 336-351.

[18] The exceptional nature of the provision is demonstrated by the questions raised by Maluwa, *International Law...*, p. 40, particularly when he questions himself about the meaning of "supranational organizations", despite using an English translation of paragraph 3 that is not appropriate (because the English translation used refers to "judicial acts emanating from competent offices of supranational organizations").

Article 11º CRCV, which deals with international relations, provides that Cape Verde should act externally in accordance with the "principles of national independence, respect for international law and human rights, equality between States, non-interference in internal affairs of other States, reciprocal advantages, cooperation with all other peoples and peaceful coexistence"[19].

2.4. Guinea-Bissau

The 1993 Constitution of Guinea-Bissau completely ignores the way in which the incorporation of international law into national law should be done. In the same way, the text of the Constitution is completely silent about how the sources of international law should produce their effects in the internal legal order[20] or what the hierarchy of the sources of international law would be in relation to the other sources of law. So, there are no rules, in general terms, about the effects of international customary law, conventional agreements, and acts of international organizations, and, in more specific terms, about acts of regional economic, political, and legal integration organizations, because of the participation of Guinea-Bissau in ECOWAS (Economic Community of West African States), WAEMU (UEMOA) (Economic and Monetary Union West African) and OHBLA (OHADA) (Organization for Harmonization in Africa of Business Law).

The issue is particularly relevant with regard to the participation of Guinea-Bissau in ECOWAS, WAEMU (UEMOA)[21] and OHBLA (OHADA)[22] insofar as their

---

[19] About constitutional norms concerning the sources of International Law in the 2010 Constitution of Angola see José Pina Delgado, "Direito Internacional Público no Direito Cabo-Verdiano", in Jorge Bacelar Gouveia e Francisco Pereira Coutinho (coordenadores), *O Direito Internacional Público nos Direitos de Língua Portuguesa*, CEDIS, 2018, pp. 81-122.

[20] The Supreme Court of Justice of Guinea-Bissau in Judgment 21/2005 of October 2005, concerning the application of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, deals with that matter without clarifying the terms in which international treaties produce effects in the Guinea-Bissau legal order legal.

[21] About the relationship between "freedom of circulation of peoples in the territory of the WAEMU member states and the constitutional guarantees of expulsion of aliens", see Judgment 5/2007, of March 13, 2007, of the Supreme Court of Justice, which states the expulsion of aliens can take place only "after a fair trial" in Guinea-Bissau.

[22] On the enforcement of OHADA law in the legal order of Guinea-Bissau see the Judgments 28/2007, of August 14, 2007, and 9/2008, of March 18, 2008. In the first of these judgments, the Supreme Court of Justice states the superiority of OHADA law in relation to domestic law, taking into consideration its "supranational" features.

legal systems were based on the principles of primacy and the direct applicability of some of the rules enacted by those regional integration legal systems. The understanding of the specificity of regional integration law cannot be reduced to the principles of constitutional law, despite the fact that the political power and the Bissau-Guinean legal community should find the legal basis for the adoption of international binding commitments by the State in the Constitution[23].

2.5. Mozambique

The Constitution of Mozambique of 2004 provides in paragraph 1 of article 18 that "[t]he international treaties and agreements, duly approved and ratified, shall be in force in the Mozambican legal order after their official publication and while internationally binding to the State of Mozambique", without any express reference to the incorporation of other sources of International Law into the Mozambican legal order. At the same time, paragraph 2 of the same article stipulates that "[t]he norms of international law have in the internal legal order a similar value to the infra-constitutional normative acts emanating from the Assembly of the Republic and the Government, depending on their respective form of reception".

One way to overcome this approach to the question would be to interpret paragraph 2 of article 18 in accordance with International Law, so as to understand that, in the drafting of the constitution, the expression "norms of international", as a counterpoint to "treaties and international agreements", was intended to cover, in general terms, all existing sources of International Law. Accordingly, it would be possible for the Republic of Mozambique to recognize the incorporation into its legal order of all "international norms" that can be found in International Law, including international custom, treaties and international agreements, and also even the acts produced by international organisations of which it is a member (whose effects would be analysed in accordance with their constituent treaty).

The 2004 Constitution of Mozambique faces the problem of the hierarchical positioning of International Law in the domestic legal order in particularly restrictive terms. This is an embodiment of paragraph 4 of article 2, which provides, in general terms, that "constitutional rules prevail over all other legal system rules". It is a

---

[23] About constitutional norms concerning the sources of International Law in the 1993 Constitution of Guiné-Bissau see Filipe Falcão Oliveira, "A aplicação do Direito Internacional Público na Guiné-Bissau", in Jorge Bacelar Gouveia e Francisco Pereira Coutinho (coordenadores), *O Direito Internacional Público nos Direitos de Língua Portuguesa*, CEDIS, 2018, pp. 177-181.

surprising constitutional option if it meant to subordinate all sources of International Law that may produce effects internally to the text of the Constitution. This is incompatible with the characteristics of contemporary International Law, in that it does not take due account of the multiplicity of sources of International Law to which Mozambique is subjected irrespective of a manifestation of concordant will, such as the rules of *jus cogens*, international custom, and some resolutions of the Security Council of the United Nations. In a non-strictly International Law approach, it is inconsistent with article 43º CRM insofar as this constitutional provision states that "constitutional precepts relating to fundamental rights should be interpreted and integrated in accordance with the Universal Declaration of Human Rights and the African Charter of Human and Peoples' Rights". It seems also to be inadequate for the Republic of Mozambique's insertion into the international community, as it can be considered to be in complete contradiction to the generous and open enunciation of principles and orientations on foreign policy that can be found in articles 17º and 19º to 22º CRM. In this sense, it contradicts the statement that the "Republic of Mozambique accepts, observes and applies the principles of the Charter of the Organization of the United Nations and the Charter of the African Union" (paragraph 2 of article 17 CRM).

The choice made by the drafters of the constitution to expressly subordinate International Law to the constitutional text is not accompanied by the prevision of any mechanism to control the constitutionality or the legality of International Law. Article 213º CRM provides that "[i]n cases submitted to decision a court cannot apply laws or principles that offend the Constitution", without any reference being made to "International Law" or to the sources of International Law. In consonant terms, article 244º CRM limits the intervention of the Constitutional Council to the assessment and declaration of the "unconstitutionality of laws" and to the "illegality of other normative acts". Prior control of constitutionality is also not considered[24], since paragraph 1 of article 245 limits its effects to acts of domestic law.

The 2004 Constitution of Mozambique is particularly prolix in the enunciation of principles and guidelines for international relations. In chapter II of Title I (Fundamental principles), devoted to "Foreign Policy and International Law", five provisions can be found on this subject: article 17º CRM (International relations);

---

[24] On the matter, taking into consideration the constitutions of African Francophone states, Kombi, "Les dispositions relatives aux conventions...", p. 257, states that "le mécanisme du contrôle préalable de la constitutionnalité des traités a pour conséquence l'élimination préventive de tout risque de conflit entre une convention internationale et la loi fondamentale", adding that "[d]ans la quasi totalité des Etats étudiés est prévue la possibilité d'une révision incidente de la constitution, en cas de contrariété de son contenu avec un traité ou un accord".

article 19º CRM (International solidarity); article 20º CRM (Support for the freedom of peoples and asylum); article 21 CRMº (Special ties of friendship and cooperation); and article 22º CRM (Peace policy)[25].

2.6. São Tomé and Príncipe

Article 13º of the 1990 Constitution of São Tomé and Príncipe regulates the reception into the Santomean legal order of the most important sources of International Law. The "rules and principles of general or common international law" produce legal effects in the Santomean legal order automatically, without any type of incorporation, as sources of International Law, without the necessity of the issuing of any internal act which permits or regulates them. Rules of international conventions, treaties and international agreements produce effects in the legal order of São Tomé and Príncipe after the completion of the applicable procedure of international commitment.

In terms of the hierarchy of the sources of law in the legal order of São Tomé and Príncipe, conventions, treaties, and international agreements are placed in an intermediate position between the constitution and legislative acts. Accordingly, paragraph 3 of article 13 CRSTP provides that international commitments "prevail (...) on all legislation and internal regulations of infra-constitutional value" after the completion of two conditions: i) approval and ratification by the internal organs competent in accordance with the domestic rules; and ii) its entry into force domestically and internationally. Paragraph 2 of article 144º CRSTP seems to make an exception for the production of effects of international commitments where there are irregularities in the completion of the internal procedure provided that there is implementation by the other party. Its application is very limited, since it is difficult to conceive of any situations of organic or formal unconstitutionality of international treaties regularly ratified where, at the same time, there has been no violation of a fundamental provision.

The Constitution provides a set of directives for action in international relations in article 12º CRSTP by ensuring that the State: i) contributes to "safeguarding world peace"; ii) contributes to "establish[ing] relations of equal rights and mutual respect of sovereignty amongst all States"; and iii) contributes to the "social progress of mankind". The activities to be undertaken in those areas by the state of São Tomé

[25] About constitutional norms concerning the sources of International Law in the 2010 Constitution of Angola see Francisco Pereira Coutinho, "O Direito Internacional na Ordem Jurídica Moçambicana", in Jorge Bacelar Gouveia e Francisco Pereira Coutinho (coordenadores), *O Direito Internacional Público nos Direitos de Língua Portuguesa*, CEDIS, 2018, pp. 229-240.

and Príncipe must have the "principles of international law and peaceful coexistence" as their basis (paragraph 1 of article 12 CRSPT).

Within the framework of international cooperation, paragraph 3 of article 12º CRSTP states that São Tomé and Príncipe: i) maintain special ties with the Portuguese-speaking countries and countries receiving Santomean migrants; and ii) promotes and develops special close ties with countries in the region[26].

3. Treaty-making process in the Constitutions of the Lusophone African States

3.1. Introductory note

The treatment given to the treaty-making process in the Constitutions of the African Lusophone states is influenced by the Portuguese Constitution of 1976, in line with what it has previously been said in relation to the incorporation of International Law into the legal order of those States. With regard to the various stages of the conclusion of treaties, there is great concern about the constitutional organs which have internal competence to approve international commitments, in particular with reference to the matters that relate to the exclusive competence of the parliamentary bodies. In contrast to this, the initial state of negotiation and the signing of international commitments are not usually subject to significant regulation.

There are three aspects that deserve special mention in this field. Firstly, there is an express reference to the requirement of the internal publication of treaties and international agreements in the Constitutions of Cape Verde and Mozambique. Secondly, there are provisions related to constitutional control, with an emphasis on the prior review of constitutionality, in the Constitutions of Angola, Cape Verde and São Tomé and Príncipe. And thirdly, there is the express reference in the Constitution of Angola and that of Mozambique to the constitutional organs which have the competence to approve the international withdrawing of the State from previously assumed international commitments.

---

[26] About constitutional norms concerning the sources of International Law in the 1990 Constitution of São Tomé e Príncipe see Jonas Gentil, "O Direito Internacional Público e a Ordem Jurídica São-Tomense", in Jorge Bacelar Gouveia e Francisco Pereira Coutinho (coordenadores), *O Direito Internacional Público nos Direitos de Língua Portuguesa*, CEDIS, 2018, pp. 313-322.

3.2. Angola

The 2010 Constitution of Angola does not make any express reference to the competence to negotiate international commitments. In the exercise of the competence in international relations, the President of the Republic has the power for "signing and ratifying international treaties, conventions, agreements and other instruments, as appropriate and after they have been passed" (subparagraph c) article 121º CRA). Although a definition of "other [international] instruments" is not given, it is possible to consider that they are international commitments in simplified form, provided they are binding and do not constitute a *soft law* document (in particular *memoranda of understanding* or MOUs[27])[28].

The competence for the internal approval of international commitments is divided between the President of the Republic and the National Assembly. The National Assembly may, in accordance with subparagraph k) of article 161º CRA[29], approve any type of international commitment, having exclusive powers over matters within its absolute legislative competence (article 164º CRA), and treaties "to which Angola is a party involving international organizations, the rectification of borders, friendship, cooperation, defense and military affairs". The President of the Republic is responsible for approving international agreements that are not within the competence of the National Assembly, which may happen after the Council of Ministers has given proper consideration to them (subparagraph f) of paragraph 4 of article 134º CRA).

The 2010 Angola Constitution provides that "international treaties, conventions and agreements" may be subject to a control of constitutionality, in accordance with subparagraph b) of article 227º CRA, with prior review of constitutionality and ex-post abstract control being contemplated. The President of the Republic may submit to the Constitutional Court a prior review of constitutionality of the norms of international commitments (subparagraph c) of article 119 CRA and paragraph 1 of article 228 CRA). A declaration of unconstitutionality submitted under an ex-post abstract control can be requested from the Constitutional Court

---

[27] On the normative character of MOUs see Anthony Aust, *Modern Treaty Law and Practice*, 3rd edition, Cambridge University Press, 2013, pp. 28-54.

[28] As can be confirmed by paragraph 1 of article 6 of Law No. 4/11, of 14 January 2011 (Law on International Treaties or *Lei sobre Tratados Internacionais*).

[29] Article 4º of Law No. 4/11 of 14 January 2011 adds some other subject-matter to the constitutional provision, such as those falling within the absolute legislative competence of the National Assembly, and international commitments which imply the revision of domestic legislation.

by the following entities: the President of the Republic; one tenth of the Members of the National Assembly in full exercise of their office; the Parliamentary Groups; the Attorney-General; the Ombudsman; and the Bar Association of Angola (subparagraphs a) to f) of article 230º CRA). Decisions on unconstitutionality resulting from a prior control of constitutionality will prevent Angola from participating in the international commitment under consideration except when there is the possibility of its renegotiation or the formulation of reservations (although subparagraph 3 of article 229º CRA has been drafted with domestic acts in mind).

The National Assembly has had conferred upon it the exclusive competence for "approving withdrawal from treaties, conventions, agreements and other international agreements", pursuant to paragraph 1 of article 161º CRA.

3.3. Cape Verde

The 1992 Cape Verde Constitution is very precise in the way it distributes the competences with regard to the treaty-making process between the Government, the National Assembly and the President of the Republic.

The Government is entitled to "negotiate and adjust international conventions" under subparagraph i) of paragraph 1 of article 203º CRCV. The internal approval of the international commitments is shared between the National Assembly and the Government. The National Assembly, in accordance with subparagraphs a) and b) of article 179, is competent to approve three categories of treaties and international agreements: i) treaties and international agreements "involving the participation of Cape Verde in international organizations (...), of friendship, peace, defense, establishment or rectification of frontiers and the those relating to military matters"; ii) treaties and international agreements relating to "matters within its exclusive competence"; and iii) treaties and international agreements that the "Government submitted to its consideration". In contrast, the Government is competent to approve treaties and international agreements "whose approval is not within the competence of the National Assembly or has not been submitted to it" (subparagraph j) of paragraph 1 of article 203º CRCV, subparagraph d) of paragraph 2 of article 204º CRCV, subparagraph e) of article 206º CRCV, and subparagraph a) of paragraph 2 of article 261º CRCV). The President of the Republic has the power to ratify treaties (subparagraph b) of article 136º CRCV, with an incorrect mention of the ratification of "international agreements") and request prior control of the constitutionality of treaties (paragraph 1 of article 135º CRCV).

The mandatory publication in the official gazette of the Republic of Cape Verde of all international commitments and all internal acts of ratification and accession, "under penalty of legal ineffectiveness", is provided for in subparagraph c) of paragraph 1 of article 269º CRCV, following what is stated for in paragraph 2 of article 12º CRCV.

The 1992 Constitution of Cape Verde provides for a very complex system of review of constitutionality, organized on the system of the Portuguese Constitution of 1976, which includes: i) prior review of constitutionality (article 278º); ii) abstract review of constitutionality (article 279º); and iii) concrete review of constitutionality (article 281º). A norm of a treaty or an international agreement is unconstitutional when it violates the provisions of the Constitution or its principles, but questions of organic or formal unconstitutionality relative to their internal approval "will not prevent the application of the norms they contain in the Cabo Verdean legal order" if they are "confirmed by the Government and approved by a majority of two thirds of the Deputies", according to subparagraph 2 of article 277 CRCV.

The prior review of constitutionality focuses on norms of international agreements or treaties. A prior review of constitutionality must be requested by the President of the Republic within eight days after the receipt of the document for ratification (subparagraph a) of paragraph 1 and subparagraph a) of paragraph 3 of article 278º CRCV). The Constitutional Court normally has twenty days to rule on the issue, but this period may be shortened for reasons of emergency (paragraph 5 of article 279º CRCV). When the Constitutional Court ruling is that of unconstitutionality under the prior review of constitutionality, the President is obliged to return the international commitment to the organ that has approved it without ratification. Owing to the participation of other subjects of international law, their ratification can take place only if the agreement or treaty will be approved in the National Assembly, after consideration of the Governments' opinion, by a qualified majority of two thirds of the Deputies in full exercise of their office. The confirmation by the National Assembly does not preclude a future requirement of abstract review of constitutionality of the international commitment that was ruled as unconstitutional under a prior review of constitutionality.

The courts that comprise the judicial organization of Cape Verde may refuse the application of any rule of a treaty or an international agreement on the grounds of its unconstitutionality. There will be an appeal to the Constitutional Court for the purposes of a concrete review on constitutionality when courts have refused the application of any norm on the grounds of its unconstitutionality, according to articles 281º and 282º CRCV.

3.4. Guinea-Bissau

The 1993 Constitution of Guinea-Bissau does not regulate the treaty-making process adequately enough, neither does it regulate the distribution of powers among the various organs of sovereignty in respect of the conduct of foreign policy and the assumption of international commitments. From the text of some of the constitutional provisions it is possible to conclude that: i) negotiation is a responsibility of the Government, owing to the combination of subparagraph f) of paragraph 1 of article 100º CRGB, with paragraph 2 of article 96º CRGB ("lead the general policy of the country") and paragraph 3 of article 97º CRGB ("it is for the Prime Minister to inform the President on matters relating to the conduct of domestic and foreign policy of the country"); ii) signing international commitments should also be a competence of the Government to the extent that in subparagraph f) of paragraph 1 of article 100º CRGB the term "conclude" is used; and iii) internal confirmation of the manifestation of the State's consent to be bound by international treaties is a competence of the President of the Republic, in accordance with subparagraph e) of article 68 CRGB.

The practice in these matters shows, however, that the proposed interpretation of the constitutional provisions cited is not clear, because, on various occasions, the practice has been the subject of dispute between the President and the Prime Minister who is the organ constitutionally assigned to conduct foreign policy and to assume international commitments.

In strictly legal terms, there are also difficulties relative to the division of competence of the internal approval of international commitments. The power of approval of the Popular National Assembly, in accordance with subparagraph h) of paragraph 1 of article 85º CRGB, appears to be exclusively confined to treaties that involve the participation of Guinea-Bissau in international organizations, treaties of peace, defense, rectification of frontiers, and also any other matters that the Government refers to it. It follows that the remaining treaties and all other international agreements fall within the competence of the Government, which seems to violate the logic of the legislative powers reserved to the Popular National Assembly, pursuant to articles 86º and 87º CRGB.

3.5. Mozambique

In Mozambique, the "President of the Republic being the Head of State", according to paragraph 3 of article 145º CRM, the negotiation of international commit-

ments is divided between the President of the Republic and the Government. The Government, through the Council of Ministers, has the responsibility to "prepare the conclusion of treaties and to conclude (...) international agreements regarding their executive competence" (subparagraph g) of paragraph 1 of article 203º). The President of the Republic is responsible for "concluding treaties" in matters of defense and public order (subparagraph b) of article 160º CRM), and "concluding international treaties" in matters of international relations (subparagraph b) of article 161º CRM). Articles 160º CRM, 161º CRM and 203º CRM provide that the President of the Republic and the Government have the authority to sign all international agreements and treaties.

The Assembly of the Republic has the responsibility to "approve (...) treaties dealing with matters within its competence" (subparagraph e) of paragraph 2 of article 178º). The Government shall approve international agreements on all other matters referred to as "matters within their executive competence", according to article 203º CRM. The possibility that the subject of the approval of treaties being within the competence of the Assembly of the Republic, with the exception of those relating to "peace and rectification of borders", could be the subject of referendum is established in paragraph 4 of article 136º CRM.

The authority to denounce international commitments is expressly shared between the Assembly of the Republic and the Government in particularly illuminating terms. Under subparagraph e) of paragraph 1 of article 178º CRM, it is the responsibility of the Assembly of the Republic to "denounce treaties dealing with matters within its competence", and it is incumbent upon the Government to "denounce international agreements in matters of its governmental competence" (subparagraph g) of paragraph 1 of article 203º CRM).

The texts of the international commitments and domestic acts approved in connection with the internal confirmation of the consent of the Republic of Mozambique to be internationally committed are subject to internal publication in the official gazette (paragraph 2 of article 18º CRM and subparagraph f) of paragraph 1 of article 143º CRM).

3.6. São Tomé and Príncipe

The competence for negotiating international commitments in São Tomé and Príncipe is distributed between the Government and the President of the Republic, without a clear distinction between agreements in simplified form and solemn treaties in this matter. The competence of the President of the Republic to perform

in concert with the Government is restricted to "international agreements on defence and security" (subparagraph e) of article 82º CRSTP). The authority to sign international commitments is not expressly established, but it should be understood as belonging to the Government by reason of subparagraph e) of article 111º CRSTP, when it provides that the Government "concludes agreements and international conventions". The confirmation of the internal manifestation of consent of the State to be bound by international treaties, to be pursued through ratification[30], is a competence of the President of the Republic in accordance with subparagraph e) of article 82º CRSTP.

Two groups can be distinguished with regard to the internal approval of international commitments. A first group of exclusive approval competence of the National Assembly, in accordance with subparagraph j) of article 98º CRSTP, includes, on the one hand, treaties which concern matters of law which are included in the exclusive legislative competence of this sovereign body provided in article 98º CRSTP and, on the other hand, "treaties that involve the participation of São Tomé and Príncipe in international organizations, treaties of friendship, peace and defense". A second group of concurrent approval competence of the National Assembly and the Government includes all other international commitments. The mention of international treaties in the constitutional text should be understood as covering solemn treaties and agreements in simplified form, taking into account the autonomy of the two categories in paragraph 1 of article 145º CRSTP, in relation to the prior review of constitutionality.

4. Brief concluding remarks

In the constitutions of the Lusophone African states, with the exception of Guinea-Bissau, it is possible to find provisions specifically devoted to the incorporation of the sources of International Law into the juridical legal system of the States, with particular emphasis on the effects produced by treaties. With regard to the

[30] Although international law does not provide for the ratification of international agreements, paragraph 1 of article 145 provides that the President may require "prior review of the constitutionality of any provision of an agreement or international treaty that has been submitted for ratification". This wording is not in line with the provisions of subparagraph b) of article 82, which empowers the President of the Republic with competence in the field of international relations to "ratify international treaties after they have been duly approved".

various stages of the conclusion of treaties, there is great concern about the constitutional organs which have internal competence to approve international commitments, in particular with reference to the matters that relate to the exclusive competence of the parliamentary bodies. In contrast to this, the initial state of negotiation and the signing of international commitments are not usually subject to significant regulation.

The expression "general or common international law", inspired by article 8º of the Portuguese Constitution of 1976, is intended to refer to customary international law, but not to cover *jus cogens* norms. In Cape Verde and Mozambique, the issue of the hierarchical position of the sources of International Law in relation to the domestic sources of law, with greater relevance for the Constitution, is expressly regulated. There are provisions related to constitutional control, with an emphasis on the prior review of constitutionality, in the Constitutions of Angola, Cape Verde and São Tomé and Príncipe.

The constitutional texts of the African Lusophone states were influenced strongly by the Portuguese Constitution of 1976 with regard to the language used to draft them. The influence of the Portuguese constitution in the texts of the constitutions of the Portuguese-speaking African states becomes particularly evident when this is compared with African constitutions affiliated to the francophone tradition or structured according to the *common law* legal system. Considering the provisions governing matters related to International Law, it is possible to see that the wording used in paragraphs 1 and 2 of article 8º of the Portuguese Constitution is the source of paragraphs 1 and 2 of article 13º of the Constitution of São Tomé and Príncipe, of paragraphs 1 and 2 of article 12º of the Constitution of Cape Verde, of paragraph 2 of article 18º of the Constitution of Mozambique, and of paragraphs 1 and 2 of article 13º of the Constitution of Angola. Although article 8º of 1976 Portuguese Constitution has been used as a model for the drafting of the articles concerning sources of International Law, it should be noted that the substantial application of those sources of law varies according to a distinct perspective to the way as International Law substantiates (or should substantiate) political decisions.