4 The Interface between International and National Human Rights Law under the Zimbabwean Constitution

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1 Introduction

We live in a more globalised world than our predecessors and forefathers. As such, it is becoming extremely difficult for all political communities, including the most conservative ones, to ignore the reality that no country is an island unto itself. Globalisation, free trade, travel and migration, education and the internet are connecting people and countries in ways that have never been seen before. This new phenomenon has left no stone unturned, and legal systems have had to cope with new challenges posed by the interaction between international law, foreign law and domestic law. This chapter explores the complexities in the relationship between national and international human rights law, with a particular focus on the theories and constitutional provisions governing this relationship. However, the chapter does not offer to examine broad themes such as the universality or cultural relativity of human rights but engages with theoretical models 'monism and dualism' that have for long been exploited to explain the true nature of the relationship between international law and national law. Further, the chapter discusses the manner in which international law becomes part of or influences the content of national law. In this section, the focus is on the concepts of transformation or incorporation of international human rights law into the domestic human rights system.

Apart from giving a theoretical exposition of the interface between international and national human rights law, the chapter also explains, in some detail, the various ways in which international law influences the outcome of cases at the domestic level. It is demonstrated that international law often achieves this result through three different ways: First, through the provision in the Declaration of Rights that requires courts to take into account international law and all treaties and conventions to which Zimbabwe is a party; through the principle of consistent interpretation; and through the rise of 'worldly' judges who 'embrace' the obligation to apply international law. Further, this chapter explores the ways in which the Constitution anticipates conflicts between domestic law and international law to be resolved and fully explains the ambit of the applicable constitutional provisions. This inquiry is generated by the fact that the Zimbabwean Constitution treats different types of international law differently with regards to their legal position in the realm of domestic law. Accordingly, the chapter explains the implications of the provisions regulating the legal position of customary international law and international treaties, with a particular focus on their (in)adequacy in governing the interface between national and international law. Finally, the chapter discusses the constitutional provisions regulating the legal status of self-executing international treaties as well as international agreements that are not international treaties.

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2 Monism and Dualism

2.1 *Monism*

The monist theory views international law and municipal law merely as ingredients of one body of knowledge called 'law'. In this sense, 'law' is viewed as a "single entity of which the 'national' and 'international' versions are only specific expressions or manifestations".[1] As posited by Viljoen, "[i]n monist states, following French constitutional law, 'once a treaty has been ratified and published 'externally', it becomes part of internal law'. At least in theory, no legislative action is needed to lower the second storey level of international law norms to the ground floor level of national law."[2] The monist theory supposes that both sets of legal rules – whether national or international – govern the same sphere of activity and are primarily "concerned with the same subject matter. Moreover, because they operate concurrently over the same subject matter, there may be a conflict between the two systems: international law may require one result and the provisions of national law another."[3] If this occurs in a particular case, international law supersedes national law. For instance, if international law absolutely outlaws, as it does, torture or cruel, inhuman or degrading treatment or punishment in all circumstances, the theory of monism requires a national court to give effect to this prohibition despite the existence of rule of national law permitting, for instance, the use by the police of torture for purposes of obtaining evidence relating to a criminal trial.

Generally, all monists presume international law's superiority over national law in the event of a conflict between rules of the two systems, but there are different reasons for why this should be so.[4] The presumed superiority of international law is a direct consequence of the existence of a 'basic norm' from which all law gains its validity. In terms of this 'monist-positivist' conception of the relationship between national and international law, international law derives from the practice of states and national law derives from the state as established in international law.[5] This makes the international legal system a superior legal order and is consistent with the conception of the state as an amalgam of individuals than as a separate entity in its own right.[6] Under this conception, international law is considered superior because national law, often used to limit individual freedom and to persecute 'opposing voices' within the nation-state, cannot be trusted to effectively guarantee human rights. The superiority of international law is based on its tendency to amplify rather than to limit individual liberty."

Another similar approach casts the relationship between international and national law as purely monist, with international law still positioned higher in the hierarchy of

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[1] T. Finegan, 'Holism and the Relationship between Municipal and International Human Rights Law', 2:4 *Transnational Legal Theory* (2011) p. 478.
[2] F. Viljoen, *International Human Rights Law in Africa* (2007) p. 531.
[3] M. Dixon, *Textbook on International Law*, 7th edition (2013) p. 90.
[4] For the historical debate of the theories, *see* J. Nijman and A. Nollkaemper (eds.), 'Introduction', in *New Perspectives on the Divide between National and International Law* (2007).
[5] Dixon, *supra* note 3, p. 91.
[6] *Ibid*., p. 91.

laws, but with both systems below an even higher legal order – the law of nature. This is often referred to as the monist-naturalist theory and grounds the validity of all laws on their compliance with natural law. Consequently, there is a hierarchy of legal orders in terms of which natural law is located at the top, followed by international law which is in turn followed by national law.[7]

The various theoretical postulates explained above, from different angles, all attempt to resolve the issue concerning the relative superiority of international law. They constitute an inherent part of the broader debate on the validity of international law as a legal system. Nonetheless, there is a very common monist thread which emphasises the idea that international law and national law are part of the same hierarchical order. As such, "norms of international and national law must be ranked in order of priority should a conflict occur in a concrete case. In this sense, international law is superior".[8] The state's legal institutions, particularly the courts and the legislature, are under an obligatory duty to ensure that the rights and obligations arising from national law comply with international human rights law. They should also guarantee to citizens the right to rely on international law in domestic courts. More importantly, however, municipal courts should recognise and give effect to international law, especially where there is a conflict between international and national law.

2.2 *Dualism*

The theory of dualism is premised on the idea that international and national law do not operate in the same sphere, and deal with different subject matters. From this perspective, international law regulates the relationship between states where as national law deals with domestic issues within a state. Dualists contend that international law regulates the relationship between sovereign states and national law governs the rights and duties of citizens within the territorial boundaries of a state. Similarly, state conduct that may be unlawful in terms of international law may be considered to be valid and require national courts to protect it if there is a clear and unambiguous rule of national law to that effect. In terms of the dualist model, international law retains primacy over municipal law in international decisions, while municipal law has primacy over international law in municipal decisions.[9]

Dualism assumes the existence of two separate legal systems governing the same subject matter and permits the state to act with impunity, at the domestic level, even though its actions constitute clear violations of international law. In *Jones v. Minister of Interior for the Kingdom of Saudi Arabia,*[10] the court permitted state impunity for alleged acts of torture even if torture is unlawful under international law. This implies that when a dualist state tortures suspected terrorists, it would be breaching its legal obligations at the international level (i.e. the duty not to authorise, instigate or

[7] *Ibid.*
[8] *Ibid*., p. 92.
[9] N. Ndeunyema, 'International Law in the Namibian Legal Order: A Constitutional Critique', 9 *Global Journal of Comparative Law* 9 (2020) p. 271, at p. 274.
[10] [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113, [2006] 2 WLR 1424.

condone acts of torture), but national courts may not be seized with that matter since that is a matter for international courts to decide upon.[11] This underlines the central idea that there are dual legal systems operating concurrently with regards to the same rights and obligations. As such, domestic courts should stop concerning themselves "with the meaning of an international instrument operating purely on the plane of international law".[12]

The practical effect of the doctrine of dualism, which is also a paradox, is that a state may be conducting itself perfectly lawfully within its territorial borders, even if it is conducting itself equally unlawfully at the international plane and may incur international responsibility as a result. Accordingly, international law cannot invalidate national law, or vice-versa, and the rights and obligations created by one of the two systems cannot be inevitably transferred to the other. Dualism recognises that international law and domestic law have the potential to and sometimes do conflict with each other because they deal with the same subject, but asserts that each system applies its own rules unless the rules of that system says something to the contrary. International courts or tribunals interpret and apply international law and domestic courts apply, in our case, Zimbabwean law.

The doctrine of dualism posits that "before any rule of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically transformed into municipal law".[13] The transformation takes place through either the amendment of domestic laws or the enactment of new legislation in light of the ratified international treaty or convention. It implies the inclusion of an international instrument and or the principles embodied in an international instrument in domestic law. Dualism supposes that international and domestic laws are fundamentally different from each other and enabling legislation is needed to incorporate international law into the domestic legal system. As observed by Ambani, "[u]nder dualism, treaties are not counted as part of municipal law until transformation or incorporation has occurred".[14]

The central objective behind a dualist approach to the relationship between national and international law is the need to create and enforce checks on the exercise of public power and the performance of public functions at the international level. In *Re McKerr*,[15] a decision of the House of Lords, Lord Steyn observed that the rationale for dualism was to prevent the executive from usurping the law-making functions of the legislature, especially by preventing it from making law without the domestic constitutional requirements for the law-making process. Ratification of international

[11] This view is questionable especially given that most states, even so-called dualists, adopt a monist approach when it comes to the reception of customary international law. It follows that domestic litigants can invoke the customary law prohibition against torture at the national level.

[12] Per Simon Brown LJ in *Campaign for Nuclear Disarmament v. Prime Minister of the United Kingdom* [2002] EHC 777 (QB).

[13] M. N. Shaw, *International Law* (1997) p. 104.

[14] J. O. Ambani, 'Navigating Past the 'Dualist Doctrine': The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya', in M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (2010) pp. 25 and 27.

[15] [2004] UKHL 12. *See also* Lord Bingham in *R v. Jones* [2006] 2 WLR 772 rejecting the notion that crimes under international customary law are automatically crimes under national (i.e. UK) law.

treaties signed by or under the authority of the president ensures that only those international instruments that are ordained by national legislative structures acquire the force of law. Initially designed a mechanism to elevate parliamentary sovereignty over the other branches of the state, ratification has become a safeguard against the arbitrary exercise of executive powers and functions.

Following English law, the doctrine of dualism portrays the domestic legal system as composed of two separate, but co-existing systems of law, each performing different functions and intended to govern the conduct of different parties, with sovereign states being the subjects of international law and individuals the subjects of national law.[16]

Thus, the dualist approach to international law is not only anchored on the existence of two separate legal regimes, but also public fear about the danger associated with granting the executive extensive power to enter into binding agreements with foreign states. Further, the fact that the separation of powers doctrine prescribes that law-making be within the exclusive province of the legislature implies that allowing the executive to enter into binding agreements with foreign states without requiring the involvement of parliament would constitute an assault on one of the central principles of modern democracy.

However, the practical relevance of these theories (monism/dualism) is increasingly being questioned. State practice on the reception of international law varies widely and does not follow either of the theories in its original form. The debate between the two schools, whilst by no means moot, negates the reality that portraying the interaction between national and international law in either/or oppositional terms does "not only hide a wide variety of complexity in the implementation of the doctrines, but also serves to overstate the differences between them".[17] In any case, a state cannot use deficiencies in its national law as a justification for non-compliance with its international law obligations. This is particularly important when, as often happens, a treaty or other rule of international law imposes on states an obligation to enact a particular rule as part of their municipal law.

Further, the main purpose of Article 27 of the Vienna Convention on the Law of Treaties (VCLT) is to reassert the fundamental principle that international treaties must be performed in good faith. To this end it rules out the most mundane justification for non-compliance, the deviant legal situation within a state. This follows the fact that the objective of many treaty making processes is to change the states parties' domestic legal situation, treaties would be necessarily doomed to immediate failure if non –performance could be justified by deviant domestic laws.[18] To this end, Article 27 of the VCLT confirms a fundamental rule of the law of state responsibility

[16] W. A. Bradley and K. Ewing, *Constitutional and Administrative Law* (1993) p. 326.
[17] A. Chandra, 'India and International Law: Formal Dualism, Functional Monism', 57 *Indian Journal of International Law* (2017) p. 25, at p. 29. *See also* E. Denza, 'The Relationship between International and Domestic Law', in M. Evans (ed.), *International Law*, 3rd edition (2010) pp. 417 and 418.
[18] O. Dorr and K. Schmalenbach, 'Article 27, Internal Law and Observance of Treaties', Vienna Convention on the Law of Treaties (2011) p. 453.

which signifies that a state cannot escape its responsibility on the international plane by referring to its domestic legal situation.

3 Theories Governing the Reception of International Law in the National Legal System

Theoretically speaking, the doctrines of transformation and incorporation / harmonisation perform an important function in explaining the reception of international law at the domestic level. Incorporation or harmonisation is closely related to the monist approach and transformation is closely related to the dualist approach to international law. The doctrine of harmonisation posits that international law rules become part of domestic law without any further need for explicit adoption by parliament or national courts. In other words, rules of international law are directly implicitly incorporated into national law by virtue of them being rules of international law. The automatic incorporation of an international law rule remains operative unless there is a clear and unambiguous provision of national law, whether an act of parliament or court decision, which explicitly prohibits the use of the rule in question. Accordingly, once it is determined that an international law rule exists and that it is relevant to the case under consideration, that rule becomes, without more, part of national law and may be applied by national courts.[19] The Zimbabwean Constitution follows the incorporation or harmonisation approach with regards to the legal position of customary international law in the domestic sphere, but this is the legal position only if there is no statutory provision declaring otherwise.[20]

Under normal circumstances, where a state adopts the incorporation or harmonisation approach to international law, it is usually a result of some constitutional provision of its own. More importantly, the incorporation or harmonisation model drastically shifts from the claim of conflict between international law and municipal legal orders.[21] It challenges the overall correctness of monist and dualist positions by arguing that the attempt to resolve conflict by asserting the automatic superiority of one legal order over the other does not reflect prevailing reality.[22] Namibia comes across as one of the notable exceptions to the dualist approach followed by many African jurisdictions as its national Constitution states that international treaties and general rules of public international law become part of the laws of the land once they are ratified. Section 144 thereof provides that "[u]nless 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". Thus, for instance, an application of section 144 to the ICESCR implies that the Covenant became part of Namibian constitutional law on 28 February 1995 when Parliament ratified the

[19] *See* section 326(1) of the Zimbabwean Constitution.
[20] Section 326(1) of the Constitution provides that "[c]ustomary international law is part of the law of Zimbabwe unless it is inconsistent with this Constitution or an Act of Parliament". Section 326(2) provides that courts should interpret legislation in a manner consistent international law.
[21] *See generally Vishaka v. State of Rajasthan* (1997) 6 SCC 241 and *Attorney General for Canada v. Attorney General for Ontario* 9 [1937] AC 326 (Privy Council).
[22] Ndeunyema, *supra* note 9, p. 275.

Treaty. As such, the provisions of the ICESCR – particularly all the rights provided for therein – have direct and immediate application within the Namibian legal system, thereby opening the floodgates for all citizens to pray for the enforcement of their internationally recognised rights in the national courts. To this end, Namibian courts have confirmed that the effect of Article 144 of the Constitution is to render international instruments directly enforceable at the national level, unless there is a legislative provision to the contrary.[23] Thus, socio-economic rights, though not fully protected in the Bill of Rights and explicitly stated as principles of state policy, are directly enforceable in the Namibian courts.

In terms of the theory of transformation, rules of international law do not automatically become part and parcel of the domestic legal system, unless such rules have been explicitly adopted by the state, usually through legislation[24] For example, if a state follows the transformation theory, it can continue implementing practices which violate the international prohibition on torture if it has not expressly domesticated the Convention Against Torture. Unless and until the applicable international law principles have been transformed by an act of parliament or similar conduct, the state will remain subject to the jurisdiction of the national courts regardless of the prescriptions contained in international law.[25] This is a direct consequence of the application of the doctrine of dualism. As observed by Ndeunyema:

> The transformation doctrine reflects an 'extreme' dualist position in asserting that individual rules of international law will only become part of municipal law where they are consciously transformed or incorporated into the municipal law by way of a legislative act, the promulgation of a treaty or other appropriate constitutional gesture. The transformation doctrine presupposes that international law is independently inapplicable in a municipal court, and hence must be 'transformed' into municipal law through the agencies of the sovereign will, the Legislature and Executive.[26]

As is demonstrated in other sections of this chapter, this appears to be the legal position in Zimbabwe, especially in relation to international law derived from treaties and conventions.

The central distinction between incorporation or harmonisation and transformation is that the former recognises international law as part of the domestic legal system just because it is international law while the latter requires a deliberate act, on the part of the state, domesticating international obligations. Incorporation implies that rules of international law form part of the domestic legal system unless they are expressly excluded by national law, but transformation suggests that such rules form part of national law only if they are clearly included in national law. The central features of incorporation and transformation respectively mirror the theories of monism and dualism. As stipulated above, the theory of monism stipulates that international and domestic law constitute central elements of a single unified system and this position

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[23] *Thudinyane v. Edward* (SA 17/2005) [2012] nasc 22 [18], para. 18.
[24] *See generally* L. Henkin, 'The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny', 100 *Harvard Law Review* (1987) p. 853, at p. 864.
[25] *Ibid.*
[26] Ndeunyema, *supra* note 9, p. 274.

is demonstrated by the fact that once signed and ratified, international treaties and conventions automatically become part of national law. Contrariwise, dualists posit that international law and national law operate in different spheres of competence, and that rules of international law become operative at the domestic level only if they have been deliberately transformed into national law through the requisite national processes.

More importantly, it needs to be emphasised that the immaculate theoretical equilibrium explored above is hardly entirely precise as many countries either choose between the two theories or deliberately adopt an 'ambiguous' approach to international law; thereby prompting the courts to address issues on a case by case bases.[27] Holistically, Zimbabwe can be classified as falling within the latter group of countries because the relevant provisions entrench variations in how courts should refer to various forms of international law. In virtually all cases, states exercise – through the national constitution and/or legislation – their sovereign right to decide whether or not to adopt the doctrine of incorporation or transformation.[28] Whether the state adopts either the incorporation or transformation approach only reveals what method the state has preferred as a way of giving effect to its international obligations in the domestic legal system. It does not necessarily explain whether the state is monist or dualist.

4 International Law in the Zimbabwean Legal System

This section explains, in some detail, the various ways in which international law influences the outcome of cases at the domestic level. It is demonstrated that international law often achieves this result through three different ways: First, through the provision in the Declaration of Rights that requires courts to take into account international law and all treaties and conventions to which Zimbabwe is a party; through the principle of consistent interpretation; and through the rise of 'worldly' judges who warmly 'embrace' an obligation to apply international law. Anecdotal evidence suggests, it is argued, that some of these judges are not even aware of their obligatory duty to consider international law and refer to it on their own volition.

4.1 *The Role of Constitutional Interpretation*

4.1.1 Preliminary Remarks

The interpretation of fundamental human rights and freedoms is an important aspect of constitutional law. If rights are wrongly or narrowly interpreted, citizens would not adequately enjoy what is constitutionally due to them. The interpretation clause is part of the Declaration of Rights in the Zimbabwean Constitution. It provides courts, legal practitioners, law and policy-makers with guidance on how to interpret the

[27] *See* A. Cassese, *International Law*, 2nd edition (2005) p. 236.
[28] *See generally* F. Francioni, 'International Law as a Common Language for National Courts', 36 *Texas International Law Journal* (2001) p. 587.

provisions in both the Declaration of Rights and Acts of Parliament. To give appropriate meaning and content to the rights and freedoms set out in the Declaration of Rights, it is important to ensure that human rights are interpreted in a way that pays homage to the letter and spirit of the interpretation clause. Our Constitution stipulates that when they are interpreting the Declaration of Rights, domestic courts "must take into account international law and all treaties and conventions to which Zimbabwe is a part"'. Thus, international law should play an important role in the interpretation of the rights in the Declaration of Rights. To this end, this chapter explains the true meaning of the provisions governing the relationship between international human rights law and national law, thereby enabling the courts to take full advantage of the interpretation clause (section 46(1)-(2)) and sections 326(2) and 327(6) of the Constitution. It is to these provisions that the analysis turns.

4.1.2 The Peremptory Obligation to Take into Account International Law and All Treaties and Conventions to Which Zimbabwe Is a Party

Regardless of the above mentioned constitutional imperatives, it remains questionable whether all legal practitioners and judges are aware of their obligation to take international law into account when performing their interpretive functions. For those who have read the provisions governing the relationship between international law and domestic law, it may be difficult to determine what it means to take international law into account. Does it mean that international law has persuasive value? (if it does, why have the provision in the first place, especially given that all sources of law that are not strictly legally binding on the courts have persuasive value?) Or does it mean that international law is now part of Zimbabwean law? (if it does, why not just provide, as the Constitution of Namibia does, that international law forms part of the law of Zimbabwe?) Or does it mean that the force of international law in domestic courts is somewhere between being persuasive authority and mandatory authority? (if it does, what exactly does this mean?). Section 39(1)(b)-(c) of the South African Constitution (1996) provides that "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law". In *S v. Makwanyane and Another*,[29] the Court addressed the question of the applicability of international law in the interpretation of the Bill of Rights. Chaskalson stated that the international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. It has been stated that the South African Constitution strengthened the role of international law in the interpretation process as it obliges courts to apply international law where it is applicable, and since virtually every provision in the South African Bill of Rights has been governed by general principles of international law, it is difficult to imagine situations where public international law would not be applicable.[30]

[29] *S v. Makwanyane and Another* 1995 (3) SA 39 (CC).
[30] J. Dugard, 'The Role of International Law in Interpreting the Bill of Rights', 10 *South African Journal on Human Rights* (1994) p. 212. *See also Azapo and others v. the President of the Republic of South Africa*1996 (4) 671(CC) paras. 26 –32.

Under the Zimbabwean legal system, international law constitutes both a direct and indirect source of law. International law is a direct source of law in two respects. First, section 326(1) stipulates that customary international law forms part of the law of Zimbabwe unless it is inconsistent with this Constitution or an Act of Parliament. Thus, general principles of public international law need not be incorporated into domestic law by statute for them to be binding on all agencies of government. Customary international law is binding on Zimbabwe as long as there is no domestic statute or constitutional provision providing for the contrary.[31] In applying principles of customary international law, courts and other decision-making forums should attempt to reach an interpretation that is consistent with the Constitution or municipal legislation, but if this is not feasible, domestic law will always prevail. Second, section 327(2)(a)-(b) provides that "an international treaty which has been concluded by the President … does not bind Zimbabwe until it has been approved by Parliament and does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament".

International law is an indirect source of law in that it aids the courts in their interpretation of the provisions of the Declaration of Rights. Many provisions of the Constitution prescribe an important interpretive role for norms of public international law – whether customary in nature or contained in international treaties.[32] Section 46(1)(c) imposes on those interpreting the Declaration of Rights the peremptory duty to "take into account international law and all treaties and conventions to which Zimbabwe is a party". This provision leaves the courts with no discretion over whether or not they should consider international law when interpreting constitutional provisions entrenching fundamental rights and freedoms. Section 46(1)(c) also indirectly imposes on practicing lawyers an ethical duty to refer to all applicable laws to ensure that the court is acquainted with the relevant international norms when locating the meaning and scope of the constitutional provision or right in question. There are limited, if any, sections of the Declaration of Rights which do not have corresponding provisions at the international level. As such, it is highly likely that the interpretation of constitutional rights almost invariably requires the consideration of equivalent provisions at international law.

The duty imposed on the courts is to 'take into account' international law when interpreting fundamental human rights and freedoms. At a general level, the phrase 'take into account' means 'to take consideration of something' or to pay attention to something. Accordingly, section 46(1)(c) prescribes that the court should 'consider' the scope of the right in question under international law. As Chisala-Tempelhoff and Bakare would have it, courts are under an obligation "to interpret laws in such a way as to avoid creating breaches [of] international law or international agreements. [In other words], the judiciary must make every effort to take judicial notice of all treaties

[31] For comparative literature, *see* M. J. Nkhata, *Malawi Country Report*, <http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf>.

[32] *See,* for example, sections 46(1)(c), 326(2) and 327(6) of the Constitution, which are discussed below.

that are binding on the country."[33] The duty to 'take into account' does not, however, mean that the court is required to interpret the right in exactly the same way it has been interpreted by international courts, treaty-monitoring bodies and other forums. As O'Shea would observe, the duty to 'consider' international law "means that an inquiry must be made into the relevant provisions of international law; however they need not necessarily be applied to the particular situation if there are other overriding considerations arising out of other rules of interpretation".[34] The position would, however, be different if the Constitution of a particular country – Namibia is a good example – has a provision stipulating that customary international law and all international treaties to which the country is a state party form part of domestic laws and need no domestication for them to be binding on the country in question.

Nonetheless, the phrase 'must take into account' suggests that international law should play more than a persuasive role in the interpretation of fundamental human rights and freedoms. It means that it is inadequate for the court to just have a glance at international law, but for it to genuinely consider its role in the interpretation of Declaration of Rights provisions. Accordingly, it will be inconsistent with the Constitution for judicial officers to just cast a ceremonial glance at international law and then proceed to hastily dismiss its relevance to constitutional issues before the courts. One renowned scholar in the region made compelling remarks which resonate with the way the Constitution anticipates our courts to approach international law when interpreting rights or legislation. He posited that:

> [t]he position … is that where … a party to a treaty containing provisions that are relevant to the facts of a case at hand, it is peremptory that if a court is interpreting the Constitution, it must demonstrate that it paid due regard to that treaty. The courts, as an organ of the state, will be bound not to act in a manner that defeats the object and purpose of such a treaty in interpreting the Constitution. In cases where the treaty has been domesticated, it will obviously easily be directly enforceable by the courts as part of domestic law.[35]

Under the VCLT, it is imperative that where a state party has signed a treaty without ratifying it, the same state may not act in a manner which is not consistent with the spirit and object of the treaty it has signed. Perhaps one of the shortcomings of the interpretation clause is that it does not provide guidelines on how the process of 'taking into account' should be conducted and how international legal norms should be read into the Declaration of Rights' interpretive matrix. At common law, there is a presumption that parliament would not make laws that are contrary to the state's international obligations.[36] This common law position appears to have been codified in and expanded upon by the Constitution.

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[33] *See* S. Chisala-Tempelhoff and S. S. Bakare, 'Malawi', in V. O. Ayeni (ed.), *The Impact of the African Charter and the Maputo Protocol in Selected African States* (PULP, Pretoria) p. 149, at p. 153.
[34] *See* A. O'shea, 'International Law and the Bill of Rights', in LexisNexis *Bill of Rights Compendium* (1996) p. 7A1, at para. 7A2.
[35] R. E. Kapindu, 'The Relevance of International Law in Judicial Decision-Making in Malawi', in Southern African Litigation Centre *et al.*, *Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi and Zambia* (2015) p. 74, at p. 84.
[36] *See generally Maynard v. The Field Cornet of Pretoria* (1894) SAR 214; and *S v. Penrose* 1966 1 SA 5 (N) p. 11E-F.

4.2 *The Principle of Consistent Interpretation*

National courts in many jurisdictions apply a canon of construction that requires the interpretation of national law in a manner that is consistent with international obligations arising from both international customary law and provisions of ratified treaties.[37] This also appears to be the practice in neighbouring South Africa.[38] Sloss posits that:

> [c]ourts in both monist and dualist states frequently apply an interpretive presumption that statutes should be construed in conformity with the state's international legal obligations derived from both treaties and customary international law. This interpretive presumption is sometimes called a 'presumption of conformity' or a 'presumption of compatibility'… Labels aside, the presumption of conformity is probably the most widely used transnationalist tool. Courts in [many jurisdictions] have applied the presumption in cases involving vertical treaty provisions to help ensure that government conduct conforms to the nation's international treaty obligations.[39]

Often, the presumption is portrayed as manifesting hypothetical parliamentary intent that unless there is concrete evidence to the contrary, legislators do not intend to compromise their country's international obligations through statutes.[40] One recurring theme relates to the threshold conditions or circumstances that are necessary to trigger the application of the 'presumption of compatibility'. There is general consensus that domestic courts may apply the presumption in the event that the applicable legislative provisions are facially vague or ambiguous. However, some courts refuse to endorse a broader role for international conventions in statutory interpretation other than where law-making bodies have clearly prescribed such a role.

Thus, apart from directing courts to 'take international law into account' when interpreting the Declaration of Rights, most states usually require judicial officers to construe legislation in a manner that is consistent with their international obligations. This can be an essential method for ensuring that international law becomes part of 'the law of the land' even if it is not incorporated into domestic law through implementing legislation. Thus, international law may still have a huge impact on the domestic legal system if local judicial officers interpret domestic legislation by

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[37] For comparative jurisprudence, *see Murray v. Schooner Charming Best*, 6.U.S. 64, 118 (1804), where the Supreme Court of the United States held that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains".

[38] Considering the relevance of international law to matters regulated by domestic law, Mohamed DP, in *Azanian People's Organisation (AZAPO) v. President of the Republic of South Africa* 1996 1 BHRC 52 (CC) paras. 65H-66A, held as follows: "International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that *the law-makers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms on international law.*"

[39] D. Sloss, 'Domestic Application of Treaties', in D. Hollis (ed.), *The Oxford Guide to Treaties* (2012).

[40] *See* Y. Shany, 'How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts', 31 *Brook Journal of International Law* (2006) p. 341.

drawing heavily on international human rights law.[41] More importantly, the Constitution protects a legal construct which may broadly be termed the 'principle of consistent interpretation'. Under this approach to statutory or constitutional interpretation, the incorporation or transformation of international norms is not the sole means by which international law enters the municipal legal order. Accordingly, while international law which has not been incorporated or transformed into the domestic legal system does not form part of the law of the land, it may still have the effects of an incorporated treaty if local judges interpret national law by drawing heavily on international law.[42]

Our Constitution instructs local courts to construe domestic law in a manner that is consistent with the country's international obligations. This is made possible by the principle of consistent interpretation, a principle in terms of which domestic courts are obliged to interpret domestic law in a manner consistent with international law. As D'Aspremont would argue:

> [D]omestic courts are obliged to interpret domestic law in a manner consistent with international law. As a result, they necessarily heed international law and give weight to it in the domestic legal order. As such, the application of the principle of consistent interpretation does not endow international law with a self-executing character in domestic law – the question of the self-executing character of an international legal instrument being chiefly a question of international law rather that a question of domestic law. *However, the role that international can play through interpretation is far from negligible and it surely gives it an indirect effect in domestic law. The principle of consistent interpretation is sometimes a means to bypass missing requirements of incorporation and apply international law short of any measure of incorporation.*[43]

The principle of consistent interpretation places on judges a general duty to ensure that they seriously take heed of international law and pay due regard to it in the interpretation of constitutional and statutory provisions under the domestic legal order. As briefly stipulated above, the principle does not only call upon courts to interpret domestic law in a manner consistent with international law, but also to pay heed and give effect to international law. However, the principle of consistent interpretation does not confer on the instrument in question self-executing characteristics of some international treaties, but ensures that international human rights law performs a pivotal role and takes centre stage in the interpretation of domestic legislation affecting the enjoyment of human rights. In addition, the

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[41] J. D. Aspremont and F. Dopagne, 'Kadi: The ECJ's Reminder of the Abiding Divide between Legal Orders', 5 *Int'l Org L Rev* (2008) p. 371.

[42] *See generally* R. G. Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction', 43 *Vanderbilt Law Review* (1990) p. 1103; Y. Dausab, 'International Law vis-à-vis Municipal Law: An Appraisal of Article 144 of the Namibian Constitution from a Human Rights Perspective', in A. Bösl *et al.* (eds.), *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (2010) p. 261, at p. 267 and J. Turley, 'Dualistic Values in an Age of International Legisprudence', 44 *Hastings Law Journal* (1993) p. 185.

[43] J. D'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in A. Nollkaemper and O. K. Fauchald (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2012) p. 141, at pp. 143 and 144. *See also* the House of Lords' decision in: *A (FC) v. Secretary of State for the Home Department (Conjoined Appeals)* (2005) UKHL 7; and, for Canadian experiences, R. Provost, 'Judging in Splendid Isolation', 56 *American Journal of Comparative Law* (2008) p. 125.

principle may also prove to be useful where counsel or the court wishes to bypass the legal requirements of incorporation and ensure that international law influences the interpretation of domestic legislation without any measure of incorporation.

An accurate reading of the Constitution demonstrates that incorporation is not the 'all or nothing' procedure required for the application of international law in domestic courts. For purposes of the principle of consistent interpretation, there are two relevant constitutional provisions addressing the role of international law in the interpretation of legislation. First, section 326(2) stipulates that "[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, *in preference to an alternative interpretation inconsistent with that law".* Second, section 327(6) follows this injunction by providing, in the context of the application of treaty law, that "[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, *in preference to an alternative interpretation inconsistent with that convention, treaty or agreement"*. There is no doubt that these provisions codify and reinforce the principle of consistent interpretation of legislation in line with principles of customary international law and the treaties or conventions that are binding on Zimbabwe. The phrase 'any international convention, treaty or agreement which is binding on Zimbabwe' must be interpreted to mean all conventions and treaties that have been duly ratified by the country since these are already binding on the country regardless of whether or not they have been incorporated.

The rule of interpretation enshrined in sections 326(2) and 327(6) of the Constitution impose an obligatory duty on the courts to follow the dictates of international law even in circumstances where there is another reasonably feasible interpretation that is inconsistent with international law. In other words, the court may not depart from the interpretation that is consistent with international law, in favour of an interpretation that is not consistent with international law. Thus, the discretion to choose which interpretation to follow is taken away in favour of an approach more in line with international human rights instruments. More importantly, however, the two provisions are seemingly targeted at 'forcing' conservative and nationalistic judges to consider perspectives given by the international legal system and to avoid being combative when the application of international law is in issue. This helps orientate judicial officers, particularly in dualist legal systems, away from interpretations and remedies that dominate the domestic sphere to those that are developed at the international level.

The two provisions referred to above amount to more than a mere common law presumption. A common law presumption that the legislature would not make laws that are inconsistent with international law is subject to rebuttal by the litigant against whom the presumption is being invoked. Thus, if one of the two alternative interpretations of legislation is inconsistent with international law, the other interpretation would normally be preferred, but it does not have to be the preferred interpretation if the interpretation that is inconsistent with international law seems to be more appropriate in the context of the legislation in question. Section 327(6)

requires more than this because it mandates the courts to prefer an interpretation which is consistent with international law provided the interpretation is reasonable, even if the other possible interpretation makes more sense within the context of the particular statute.[44] Given that the Constitution itself was adopted in the form of an Act of Parliament, it is arguable that the rules entrenched in 326(2) and 327(6) must equally apply to the interpretation of constitutional provisions, particularly those entrenching fundamental rights and freedoms.

4.3 *Domestic Courts as Architects of an Integrationist Approach to International Law*

Domestic courts can act as architects of an integrationist approach to the relationship between national and international law, whether through design or out of a desire to buttress conclusions they have already reached. More often, the application of international law in the national legal system is often a result of the rise of 'worldly judges'. Incorporation, transformation and consistent interpretation aside, the developing influence of international law in the national legal system sometimes arises from the general amenability of local judges towards the international legal system, regardless of whether the applicable rules of international law are strictly binding on the presiding judge.[45] In the Zimbabwean context, domestic courts have consistently referred to international law without necessarily referring to constitutional provisions governing incorporation of international treaties, the principle of consistent principle or the positive duty to consider international law when interpreting rights provisions in the Declaration of Rights.[46]

In *Mapingure v. Minister of Health and Others*,[47] the Court held that it was "both proper and instructive to have regard to [international law] as embodying norms of great persuasive value in the interpretation and application of our statutes and the common law".[48] Apart from demonstrating the absence of a systematic approach to the interpretation of rights and freedoms, this passage shows an inclination towards treating international merely as a source of law with persuasive value. This approach does violence to the purpose behind the peremptory obligation to consider international law when interpreting the Declaration of Rights. The use of the phrase 'must take into account international' suggests that international law is more than persuasive authority and should systematically influence the meaning of the provisions entrenching fundamental rights. There is an emerging or developing tendency for judges to view the national legal and human rights systems not as islands unto themselves, but as an intrinsic part or offshoot of the international legal order. Behind this tendency is a subtle rise of 'worldly judges' who view themselves as agents of the international legal order and cherish the steady influence of international law on the content of domestic court decisions.[49] Some local judges

[44] *See* O'shea, *supra* note 30, para. 7A-8, at para. 7A2.
[45] *See generally Mudzuru and Another v. Minister of Justice, Legal and Parliamentary Affairs* CCZ12/15.
[46] *Ibid.*, pp. 24–26.
[47] (2014), Judgment No. SC 22/14, Civil Appeal No. SC 406/12.
[48] *Ibid.*, at p. 16.
[49] K. Young, 'The World Through the Judge's Eye', 28 *AustYBIL* p. 27, at p. 42.

consider themselves to be guardians of the international legal system, but the emerging accommodativeness of the courts is often not based on a sense of a legal obligation imposed on them by the domestic legal system, but is rather predominantly grounded on the persuasive value of international law. This creates room for domestic deliberation and engagement with international law without necessarily giving the impression that judges are legally bound to follow international law.[50] Under such an approach to the interpretive value of international law, domestic courts are inclined to take ownership of the processes through which international law creeps into the legal system and to own the outcome or consequences of making decisions based on international law.

A survey of court decisions demonstrates that Zimbabwean courts do make reference to international law although few of them base their decisions squarely on it alone. In *Mapingure v. Minister of Health and Others*,[51] the Court considered the normative content of international law to be a very important factor in delineating the rights of women who are victims of sexual violence (rape). From the onset, however, the Court made it categorically clear that international instruments "cannot operate to override or modify domestic law unless and until they are internalised and transformed into rules of domestic law".[52] This observation echoes tremors of dualism. Yet, the Court underscored that it is appropriate and necessary for domestic courts, "as part of the judicial process, to have regard to the country's international obligations, *whether or not they have been incorporated into domestic law.* By the same token, it is perfectly proper in the construction of municipal statutes to take into account the prevailing international human rights jurisprudence."[53] If this decision is anything to go by, it indicates an inclination by the bench to consider and refer to international human rights instruments even where they have not been transformed into domestic law.

Further, courts have, without making any reference to their duties in terms of the interpretation clause or examining the legal status of international law in the domestic system, taken international law into account when making decisions.[54] In *Makoni v. Commissioner for Prisons and Another*,[55] the Constitutional Court of Zimbabwe was called to determine whether the imposition, on a convict, of a life sentence without the possibility of parole amounts to inhuman and degrading treatment in

[50] E. Benvenisti and G. W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *European Journal of International Law* (2009) pp. 59–72.
[51] Judgment No. SC 22/14.
[52] *Ibid*., at p. 14. To this end, the Court drew inspiration from section 327(2)(b) of the Constitution.
[53] *Ibid*. The Court relied on Gubbay CJ's holding in *Rattigan &Others v. Chief Immigration Officer &Ors* 1995 (2) SA 182 (ZSC) pp. 189G-190I and *S v. A Juvenile* 1990 (4) SA 151 (ZSC) p. 155G-I, where Dumbutshena CJ held that the "[c]ourts of this country are free to import into the interpretation of s 15(1) interpretations of similar provisions in International and Regional Human Rights Instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights. In the end, international human rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisdiction is enriched".
[54] *See Mudzuru v. Minister of Justice* and Others, pp. 38 and 42. For similar remarks, *see* pp. 47 and 49 of the same judgment.
[55] CCZ 8/16

contravention of the rights to human dignity and freedom from torture or cruel, inhuman treatment or punishment as enshrined in sections 51 and 53 of the Constitution. In addressing the legal issue at hand, the Constitutional Court observed that international and foreign law provide useful guidance in the interpretation of the rights in the Declaration of Rights. The Court summarised the relevance of international law in the following terms:

> In addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution, courts and tribunals must take into account international law and all treaties and conventions to which Zimbabwe is a party and may, where appropriate, consider relevant foreign law. Furthermore, insofar as concerns statutory interpretation generally, the courts are enjoined by section 326(2) of the Constitution to interpret legislation in a manner that is consistent with international customary law. In similar vein, section 327(6) requires the adoption of an interpretation that is consistent with any treaty or convention that is binding on Zimbabwe.[56]

In the penal context, the Court correctly pointed out that a comparative analysis of international law "further fortifies the point that penological theory has evolved from sentencing as a tool of retribution to one of rehabilitation and the resocialisation of prisoners".[57] It observed that while the Mandela Rules are of a soft law variety, they are highly persuasive in influencing and regulating the treatment of prisoners and the administration of penal institutions generally. They are regarded as being the primary source of standards relating to treatment in detention and as the key framework used by monitoring and inspection mechanisms in assessing the treatment of prisoners."[58] In light of the relevant provisions of the Constitution, especially section 50 thereof which constitutionalised international standards, the Court saw "no reason to depart from the foreign and international jurisprudence that has developed on the subject over the part sixty years. As a result, the Court concluded "that an irreducible life sentence without the possibility of release in appropriate circumstances, constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of sections 51 and 53 of the Constitution".[59] This is one of the cases where the Constitutional Court partly relied on international law to outlaw the oppressive elements of domestic laws and to promote the rights of persons sentenced to life imprisonment without the option of parole. However, it is unfortunate that the Court never saw its reliance on international law as a constitutional obligation, but as an elective strategy to solve pressing legal problems.

In *Mudzuru and Another v. Minister of Justice, Legal and Parliamentary Affairs*,[60] the applicants complained about the infringement of the fundamental rights of girl children subjected to early marriages and sought a declaratory order that section

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[56] *Ibid.*, p. 6.
[57] *Ibid.*, p. 9.
[58] *Ibid.*, p. 12
[59] *Ibid*., at p. 14. *See also Kachingwe and Others v. Minister of Home Affairs NO and Another* (17/03) [2005] ZWSC 134 (18 July 2005), where the Supreme Court of Zimbabwe adopted a similar approach to the relationship between international and domestic law before the adoption of the current Constitution.
[60] CCZ12/15.

22(1) of the Marriage Act, which permitted children aged 16 years or older to marry, was unconstitutional. Without attempting an orderly explanation of the relevant parts of the interpretation clause or the relationship between international law and constitutionally enumerated rights, the Constitutional Court started the analysis on the merits with a vague statement that section 46(1)(c) of the Constitution imposes an obligation on the courts to take international law – including all treaties and conventions to which Zimbabwe is a party – into account when interpreting all provisions in the Declaration of Rights.[61] In the view of the Court, sections 22(1) of the Marriage Act and 78(1) of the Constitution arose from the provisions of international human rights law prevailing at the time of their respective enactment.[62] Ultimately, it would be difficult to ascertain the meaning of section 78(1) without paying due regard to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions on matters of marriage and family relations at the time when the current Constitution became law.[63]

More importantly, however, the Court expressed the view that Article 1 of the Convention on the Rights of the Child (CRC) and Article 21(2) of the African Children's Charter rendered the provisions of section 22(1) of the Marriages Act and any other law permitting child marriage to be:

> inconsistent with the obligations of Zimbabwe under international human rights law to protect children against early marriage ... The abolition of the impugned statutory provisions would be consistent with the fulfilment by Zimbabwe of the obligations it undertook in terms of the relevant conventions and the Charter ... Section 78(1) of the Constitution was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under Article 21(2) of the ACRWC to specify by legislation eighteen years as the minimum age for marriage and abolish child marriage … Zimbabwe had to see through its obligations under the conventions to which it is a party requiring it to specify eighteen years to be the minimum age of marriage and to abolish child marriage. As the obligations were specific in terms of what the states parties had to do, the compliance by Zimbabwe was also specific.[64]

This is the best it gets in the judgment, but the reader is left perplexed by the lack of clarity about the relationship between national and international human rights law. Are we a dualist or a monist state and what effect does each classification have on the life course of our jurisprudence on international law in domestic courts? What does the interpretation clause mean when it stipulates that when interpreting rights in the Declaration of Rights, every court 'must take into account international law and all treaties and conventions to which Zimbabwe is a party? In more than ten pages, the Constitutional Court discusses academic literature and international soft law documents, without making any attempt to explain how the information being discussed relates to the interpretation clause or the Declaration of Rights as a whole.

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[61] *Ibid.*, at pp. 25–26.
[62] *Ibid*., p. 26.
[63] At p. 26, the Constitutional Court made vague, but promising statements without explaining what the Court meant. In one of the paragraphs it claimed that 'regard must also be had to the emerging consensus of values in the international community of which Zimbabwe is a party, on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood'.
[64] *Ibid*., at pp. 38 and 42. For similar remarks, *see* pp. 47 and 49 of the judgment.

In fact, the bulk of these pages explain why international law has failed to protect the young from the scourge of child marriage, without explaining the relevance of this failure to the enjoyment of children's rights under the Zimbabwean Constitution. In the circumstances, it is difficult to identify how this very general and vague discussion fits into the tools of interpretation, particularly international law, that are clearly outlined in section 46(1) and (2) of the Constitution. In the rare cases in which the Constitutional Court refers to international law, the purpose of the referral is usually to reinforce constitutional provisions rather than to introduce any progressive interpretation of the Constitution or legislation.

Whilst our courts appear to be manned by judges that are inclined to incorporate international law into our legal system, it is equally surprising that judicial analysis on how exactly international law becomes an integral part of domestic law is often done in a haphazard manner. There is no jurisprudence, for instance, that unpacks the relationship between the substantive provisions of the Declaration of Rights, the interpretation clause and the provisions relating to the position of international law in the domestic legal system. Court practice tends to indicate that judges predominantly refer to international human rights instruments when it is convenient for them to do so. Critical analysis on how international legal obligations translate into binding duties at the municipal level is scant although courts loosely refer to international instruments. The lack of a systematic approach to the relationship between international law and the provisions of the Declaration of Rights creates room for judges to differ in their application of international law in domestic courts. There is wide room for contradicting interpretations from different courts, especially at the level of the high courts and below. Thus, it is possible for national courts to reach very different decisions and to even reach decisions that restrict the application of international law.

5 The Relationship between National Law and Various Types of International Law

The Zimbabwean Constitution treats different types of international law differently with regards to their legal position in the realm of domestic law. This section explores the ways in which the Constitution anticipates conflicts between domestic law and international law to be resolved and fully explains the ambit of the applicable constitutional provisions.

5.1 *National Law and Customary International Law*

Section 326(1) of the Constitution stipulates that customary international law shall form part of the law of Zimbabwe unless it is inconsistent with the Constitution or an Act of Parliament. The consequence of this provision is that as long as a rule of international customary law is not in contradistinction with either any constitutional provision or an Act of Parliament, it becomes incorporated into the national law without any further enabling enactment. The position is, however, different with regards to international conventions, treaties and agreements which, pursuant to section 327 of the Constitution, neither bind Zimbabwe until they have been

approved by Parliament nor form part of Zimbabwean law unless an Act of Parliament transforms such convention, treaty or agreement into national law.

Just like in the United Kingdom, customary international law, as indicated in the foregoing, forms part of the law of Zimbabwe under the doctrine of incorporation which is to the effect that international law rules become part of domestic law without any further need for explicit adoption by Parliament or national courts. This, in essence, means that unless there is a contrary statutory provision, rules of customary international law are directly incorporated into national law and maybe operative therein by virtue of them being rules of customary international law.[65] The incorporation of customary international law rules remains operative unless there is a clear and unambiguous provision of national law, more specifically an Act of Parliament, which explicitly prohibits the use of the rules in question. Consequently, once it is determined that a customary international law rule exists and would be relevant to the case under consideration and that it is consistent with the Constitution and the other laws in Zimbabwe, that rule becomes, without more, part of national law and may be applied by national courts.

A number of cases, both domestic and foreign cases also provide support for the views posited above. In *Mann v. Republic of Equatorial Guinea,*[66] it was held that is a trite position that certain human rights may be regarded, by virtue of their content and universal acceptance, as having entered into the realm of customary law and thus become applicable to nations that may not have assented to the particular instruments protecting these rights by virtue of the superiority of international customary law over all other laws.[67] The same sentiments were echoed in the Court's *dicta* in *Barker McCormac Pvt Ltd v. Government of Kenya,*68 where it was confirmed that customary international law is part of national law and would be applied when the rules founded under it were consistent with domestic law. It follows that even if the country would not have assented or ratified some international treaty that protects certain rights, for example the laws that prohibit torture and degrading treatment, the contents of those laws would hence become part of the domestic law by virtue of their content and public acceptance despite the fact that Zimbabwe would not be party to relevant treaties like the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Constitution does not stipulate that customary international law shall 'automatically' become part of domestic law. The fact that the Constitution recognises it should not be taken to mean that the rights and obligations founded on customary international law will be enforced directly in national courts. Arguably, the position is that a customary international law rule will be incorporated only if it is that

[65] Dixon, *supra* note 3, p. 108.
[66] Case No.CA 507/07 [2008] ZWHHC.
[67] In the Zimbabwean context, however, the Constitution is, pursuant to section 2(1) and (2) thereof, the supreme law of the land and the yardstick upon which every other law is measured. Sections 2(1) and 326(1) read conjunctively clearly illustrate the position of Zimbabwe with regard to customary international law being part of municipal law only if it is 'consistent with the Constitution and statutory law'.
[68] 1983 (1) ZLR 137.

type of a rule that is justiciable in the domestic legal system and is a kind where implementation would not be contrary to basic constitutional precepts our legal system. As was correctly stated in *Simbi (Steelmakers) Pvt Ltd v. Shamu and Others*,[69] it is a well settled position that customary international law can be invoked as a definite and decisive part of our law. Even then, the rules founded on customary international law certainly cannot be applied so as to override and negate provisions embodied in Acts of Parliament and the supreme law of the land, the Zimbabwean Constitution. It follows that a customary international law rule, right or obligation that is to be incorporated within the national legal system, it should be one whose existence is compatible with the rules of the domestic legal system.

5.2 *National Law and International Conventions, Treaties and Agreements*

International conventions, treaties and agreements do not bind Zimbabwe until they have been approved by Parliament and do not form part of the domestic legal system unless they have been incorporated into the law through an Act of Parliament. Section 327(2) of the Constitution provides as follows:

> An international treaty which has been concluded by the President or under the President's authority
> (a) does not bind Zimbabwe until it has been approved by Parliament and
> (b) does not form part of the law of Zimbabwe until it has been incorporated in the law through an Act of Parliament.[70]

These provisions imply that even if a treaty is concluded by the president or an authorised functionary and Zimbabwe has become party to it, the treaty would not be binding unless and until Parliament has approved it and would not form part of the law of Zimbabwe unless and until it has been transformed into our law through an Act of Parliament. In the case of *Minister of Foreign Affairs v. Jenrich and Others*,[71] Uchena J observed that section 327(2)(a) of the Constitution can only mean that the agreement concluded by the president or by someone under the president's authority becomes binding on its being approved by Parliament. It needs not be domesticated for it to be binding on Zimbabwe. The only impediment to its attaining binding status is its approval by Parliament.

Section 327(2)(a) of the Constitution alone gives international treaties a binding effect even if they have not yet been transformed into Zimbabwean law, at least at the international plane. Furthermore, for a treaty, convention or agreement to become part of our law, it needs to have been transformed into the laws of Zimbabwe by an Act of Parliament. From the above, it follows that it is possible for a treaty to be binding but still not forming part of the laws of the country. This position was succinctly enunciated in the case of *Minister of Foreign Affairs v. Jenrich and Others*. Rights and obligations arising from treaties have to be transformed into national law by an Act of Parliament because Zimbabwe follows the dualist approach to

[69] Civil Appeal No. SC 477/14 [2015] ZWSC 71.
[70] Section 327(1) of the Constitution.
[71] HC 232/15 [2015] ZWHHC 232.

international law. As was observed in *Magodora & Others v. Care International Zimbabwe*:[72]

> I do not think that the courts are at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognisable where it is inconsistent with an Act of Parliament.[73]

The above position can also be seen in the UK legal system. In the case of *Maclaine Watson v. Dept of Trade and Industry* (*Tin Council Cases*),[74] the House of Lords confirmed that a treaty to which the United Kingdom was a party does not alter its domestic laws except when that treaty becomes transformed into the laws of the country by statute. The same is true in the Zimbabwean context. Domestic courts have no basis to enforce treaty rights and obligations as long as the applicable treaty has not been domesticated through an Act of Parliament. As the *Magodora* case illustrated, even in the event that a treaty has been approved and technically becomes binding on Zimbabwe and has even been domesticated by an Act of Parliament and becomes part of Zimbabwean law, the laws and obligations contained therein cannot henceforth be used to override existing domestic laws. It follows that if there are inconsistencies between an international treaty and an Act of Parliament, the laws enshrined in the Act of Parliament will prevail because international treaties, conventions or agreements will not be invoked to strike down the clear and unambiguous language of an Act of Parliament. The provisions referred to and arguments proffered in this section do not apply to self-executing treaties as these treaties are directly enforceable at the domestic level even if certain constitutional requirements are not met. This argument is pursued in some detail below.

6 Self-executing Treaties

The question of what constitutes a self-executing treaty originated from American law and remains a complex and difficult issue even in the American legal system. In *Foster v. Neilson*, an early case decided by the United States Supreme Court, Chief Justice Marshall laid out the basis for distinguishing between self-executing and non-self-executing treaties.[75] A self-executing treaty is a treaty that is capable of being enforced in a court of law without prior legislative domestication by Parliament and a non-self-executing treaty is one that may not be enforced without the adoption of implementing legislation.[76] The idea of self-executing treaties plays a pivotal function

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[72] SC 24/14.
[73] At p. 6.
[74] [1988] 3 ALL ER 257.
[75] *Foster v. Neilson* 27 United States (2PET)253 (1829) Although this case is generally recognised as the leading case on the origin of the doctrine of self-executing treaties, one can trace the origin of the doctrine as far back as *Ware v. Hylton* 3, US (3DALL)199 (1796).
[76] *See generally Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork J., concurring), cert. denied, 470 U.S. 1003 (1985); *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575 (4th Cir. 1983); *British*

in distinguishing international or regional treaties that require an act of the legislature to become judicially enforceable from those that require an act of the legislature to take away or modify the court's power or duty to enforce such treaties.[77] Thus, the doctrine performs an important separation of powers function as it allocates between the judicial and legislative branches of the state, the responsibility for enforcing compliance with treaties by everyone i.e. the state, individuals and private entities. To minimise non-self-executing treaty violations by states parties, drafters of national constitutions usually empower the judiciary to enforce treaties at the behest of affected citizens without having to wait for authorisation by the legislature. This is usually done through the constitutionalisation of a provision that expressly stipulates that international law is an integral part of domestic law and is directly enforceable in the courts of the country in question.

The Zimbabwean Constitution follows a different route with regards to the legal position of self-executing treaties and, as has been shown above, does not anticipate direct enforcement of international treaty obligations without the adoption of implementing legislation. However, it gives the legislature the power to adopt an Act of Parliament which would facilitate the inclusion of some, not all, international treaties into the laws of Zimbabwe without courts having to follow the formalities relating to legislative domestication of international treaties. There are two forms of self-executing treaties envisaged in the supreme law of the land: First, self-executing treaties expressly declared to be so by an Act of Parliament and, second, self-executing treaties declared to be so by a resolution of Parliament provided that such treaty neither requires the appropriation of funds from the Consolidated Revenue Fund (CRF) nor modifies the law of Zimbabwe. These different versions of self-executing treaties and the conditions regulating their enforcement shall be dealt with in turn.

6.1 *Self-executing Treaties Declared to Be So by an Act of Parliament*

Self-executing treaties are an exception to the general rule that all treaties must be approved by Parliament and must have implementing legislation for them to acquire the force of law at the domestic level. In the Zimbabwean context, there are three explanations to this approach to international treaty obligations. First, it is both a cause and a consequence of the doctrine of dualism that has been discussed in some detail above. Second, it also forms part of our colonial legal heritage which follows the British parliamentary system in terms of which the legislature performs extensive supervision over how the executive exercises public power and performs public functions. As part of that colonial legal heritage, the provisions of the Constitution seek to preserve the power the legislature has over the executive branch of the state. Third, it emphasises the centrality of representative democracy in the new legal order, particularly the idea that major governance decisions should

Caledonian Ainvays v. Bond, 665 F.2d 1153, 1160 (D.C. Cir. 1981); and T. Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', (1992) P. 235 (IV) *RECUEIL DES COVRS* 303, 317.

[77] C. M. Vasquez, 'The Four Doctrines of Self-Executing Treaties', 89 *The American Journal of International Law* (1995) p. 695, at p. 696.

be made after consulting with Parliament, which has the mandate to make legislative decisions on behalf of the people.

The executive's duty to consult with Parliament is mooted and reiterated in the founding values, especially the principles of good governance.[78] The applicable provisions underline the significance of the principles of an electoral system based on adequate representation of the electorate";[79] the "observance of the principle of separation of powers;[80] and respect for the people of Zimbabwe, from whom the authority to govern is derived.[81] Cumulatively, these provisions have the effect of underlining the symbolic and empirical value of involving the legislature in executive decisions that generate treaty obligations at the international and domestic levels.

Against the backdrop described above, it is perhaps not surprising that our Constitution foresees and prescribes the constant involvement of Parliament in deciding whether or not a particular treaty is self-executing. To this end, section 327(4) stipulates as follows:

> An Act of Parliament may provide that subsections (2) and (3)
> (a) do not apply to any particular international treaty or agreement or to any class of such treaties and agreements; or
> (b) apply with modifications in relation to any particular international treaty or agreement or to any class of such treaties or agreements.

These provisions imply, in theory at least, that only Parliament has the authority to make a final decision on the self-executing or non-self-executing nature of an international treaty. In addition, Parliament should ideally exercise this power through a statute which unequivocally states that a particular treaty or class of treaties is self-executing. Where Parliament expressly confers on the executive the power to sign directly enforceable treaties belonging to a particular class, the need for domestication does not arise provided the executive complies with all the conditions stipulated in the parent Act of Parliament. Thus, the executive may not usurp the popular mandate of the legislature by classifying as 'self-executing' treaties that contravene the specific conditions enumerated in the principal Act of Parliament which describes the kind of treaties that are truly self-executing. A treaty that violates the applicable conditions may not be regarded as 'self-executing', particularly with regards to provisions that directly contradict the relevant Act of Parliament.

It is also within the exclusive preserve of Parliament to determine whether the provisions relating to ratification and domestication of international treaties apply with or without modifications to any particular treaty or class of treaties. This is stipulated in section 327(4)(b) read with section 327(2) and (3) of the Constitution. There are multiple possibilities foreseen in these provisions of the Constitution: First, the Act of Parliament may provide that a particular treaty or class of treaties signed by or under the authority of the president and ratified by Parliament does not need implementing legislation to be enforceable in the courts of Zimbabwe. In other words, Parliament

[78] *See* section 3(2) of the Constitution.
[79] Section 3(2)(b)(iii) of the Constitution.
[80] Section 3(2)(e) of the Constitution.
[81] Section 3(2)(f) of the Constitution.

would be acting within its constitutional authority if it were to adopt a piece of legislation stating the kinds of treaties that do not require domestication for them to have the force of law at the domestic level. The assumption here is that the international treaty in question would be compliant with other conditions of the legislative scheme governing the status of international instruments at the domestic level.

In addition, there is also a possibility that Parliament may, through an Act of Parliament, waive its authority to determine whether or not agreements that are not international treaties should be binding on Zimbabwe. Section 327(3)(a) and (b) provides that agreements that are not international treaties that have been concluded by or under the authority of the president with one or more foreign organisations or entities, and impose financial obligations on Zimbabwe, are not binding on Zimbabwe until they are approved by Parliament. These provisions and their relationship with section 327(4)(a) and (b) need to be unpacked. First, it needs to be emphasised that these provisions address the legal status of agreements that are not international treaties and have been signed between the government and foreign, not international, organisations. Second, it is also clear that these agreements are not binding on Zimbabwe, without the approval of Parliament, if they impose financial obligations on the country.

Third, a holistic reading of the provisions of section 327(3) and (4) suggest that Parliament, through an Act regulating the legal status of international treaties and other agreements that are not treaties, may waive its authority to determine whether or not agreements that are not international treaties should bind Zimbabwe. In essence, this implies that it is within the exclusive preserve of Parliament to provide in an Act of Parliament that agreements that are not international treaties are binding on Zimbabwe even if they impose financial obligations on the country. By way of speculation, this kind of approach may be necessary for national development projects that are jointly administered and implemented by the government and foreign companies. A good example here could be agreements relating to extensively huge dam constructions or energy generation projects that impose financial obligations on the state. In this respect, the need for Parliament to relinquish its oversight role arises from the further need to expedite decisions and ensure that national development is not held back by formalities that characterise parliamentary proceedings. In such cases, the fact that the agreements impose fiscal obligations on the state may not necessarily justify the involvement of the legislature in determining the legal status of such agreements, especially in light of the social and economic significance of national development projects.

Finally, the discussion in this section is premised on the supposed existence of an Act of Parliament regulating the legal position of self-executing international treaties or agreements that are not international treaties. Unfortunately, Zimbabwe has not yet adopted such a piece of legislation. However, once an Act of Parliament stipulating the kinds of international treaties or agreements that are self-executing is in place, Parliament does not necessarily have to approve of such treaties or agreements for them to be binding on Zimbabwe. In the same vein, Parliament would not have to enact legislation every time a self-executing treaty or agreement is

concluded for such treaty to become part of Zimbabwean law. This means that rights and obligations contained in self-executing treaties and agreements would automatically apply in Zimbabwe without having to wait for Parliament to approve or enact legislation to that effect. This approach gives meaning to rights entrenched in self-executing treaties or agreements and promotes the principle of expediency. It is thus unfortunate that Zimbabwe does not have in place an Act of Parliament regulating the legal position of different international treaties or agreements in the domestic legal system. It would make sense if the issues discussed in this section were addressed in a specific piece of legislation.

6.2 *Self-executing Treaties Declared to Be So by Parliamentary Resolutions*

Our Constitution also confers on Parliament the duty to determine, through resolutions, whether or not certain international treaties are self-executing. The relevant provisions are couched in the following terms:

> Parliament may by resolution declare that any particular international treaty or class of international treaties does not require approval under subsection (2), but such a resolution does not apply to treaties whose application or operation requires—
>
> i. the withdrawal or appropriation of funds from the Consolidated Revenue Fund; or
> ii. any modification of the law of Zimbabwe.[82]

There are enormous similarities between the provisions of section 327(4) and (5) of the Constitution, especially with regards to Parliament's power to declare any particular treaty or class of treaties to be self-executing and, as such, to not require the adoption of implementing legislation for them to have the force of law on the domestic plane. However, there is a huge variation on the legal method to be used by Parliament to do so and the conditions governing the self-executing character and scope of the international treaty in question. The matter relating to method can be easily disposed of by indicating that under section 327(4), Parliament should ideally stipulate the classes of self-executing treaties in a statute drafted and adopted for that purpose. However, under section 327(5), Parliament performs the same function through resolutions that are made to respond to the exigencies of the prevailing situation and the demands of each period in the country's history, present or future. It suffices to reiterate that both provisions underline the importance of consulting with the people, through their elected representatives, in issues relating to whether or not international treaties should directly have the force of law in the domestic legal system.

With regards to the conditions governing the self-executing character and scope of international treaties, it is imperative to notice that section 327(5) prescribes the circumstances under which a Parliamentary resolution suffices for an international treaty to be self-executing. It provides that a Parliamentary resolution suffices for this purpose only if the 'application or operation' of the treaty in issue requires "(a) the withdrawal or appropriation of funds from the CRF or (b) any modification of the law of Zimbabwe". With regards to the first condition, it is patent that the objective of the

[82] Section 327(5) of the Constitution.

provision is to block the executive from assuming concrete financial obligations without first prompting Parliament to make laws to that effect. To this end, not even Parliament has the authority to declare by resolution an international treaty to be self-executing if that treaty requires the withdrawal or appropriation of funds from the CRF. If Parliament wishes to do that, it only has one option, i.e. to adopt legislation to that effect. The underlying tone of the applicable constitutional provisions is that decisions that impose on the state financial obligations should not be made lightly, even in the context of ratifying or domesticating international treaties.

Lastly, a parliamentary resolution that an international treaty is self-executing does not apply to a treaty that requires the modification of the law of Zimbabwe. If Parliament makes such a resolution, the later remains null and void. According to the separation of powers doctrine, law-making is a function preserved for Parliament, the only branch of the state which is closest to representing the will of the people. Nonetheless, Parliament is constitutionally required to perform this function publicly and in a transparent manner that is open to everyone.[83] Section 141 of the Constitution provides that Parliament must:

> (a) facilitate public involvement in its legislative and other processes and in the processes of its committees;
> (b) ensure that interested parties are consulted about Bills being considered by Parliament, unless such consultation is inappropriate or impracticable; and
> (c) conduct its business in a transparent manner and hold its sittings, and those of its committees in public …

Parliament's duty to ensure constant public access to and involvement in all law-making processes is indirectly built into provisions regulating the processes by which treaties become self-executing. This partly explains why the Constitution provides that Parliament lacks the authority to declare an international treaty to be self-executing by a mere resolution if that treaty requires the 'modification of the law of Zimbabwe'. Accordingly, both the executive and Parliament may not connive to modify the statutory laws of Zimbabwe by arranging for Parliament to pass resolutions stipulating that certain international treaties that modify domestic laws are self-executing. This constitutional prohibition is indirectly anchored on the idea that no laws should be passed without the involvement of the public in the law-making process and that if Parliament is to declare an international treaty which modifies our law to be self-executing, it should perform this function through an Act of Parliament. The assumption here is that the Act of Parliament authorising Parliament to declare a treaty to be self-executing would be adopted after meaningful public access to and involvement in the making of that law. This way, the general public would still have an influence on whether or not a particular treaty or class of treaties is self-executing.

[83] *See* section 141 of the Constitution.

7 Conclusion

This chapter sought to analyse the role of international human rights law in the interpretation and application of fundamental rights in the domestic legal sphere. By way of theoretical background, it briefly unpacked the doctrines of monism and dualism as philosophical postulates against which the application of international law in domestic legal systems should be measured. The theory of dualism is hinged on the premise that international law and national law operate in different spheres and deal with different subject matters. As such, it governs the interaction between sovereign states where as national law deals with domestic issues within a state. These dichotomous standpoints have been sustained by two further theories, namely, incorporation and transformation, which govern the reception of international law in domestic legal systems. The former takes a monist stance by stipulating that international law has direct legal effect at the domestic level whilst the latter reflects an 'extreme' dualist position by emphasising that rules of international law have no legal force unless they are consciously transformed into the domestic legal system by a legislative act. It has been shown that this binary divide between monism and dualism or incorporation and transformation does not reflect the reality on the ground as many legal systems equivocate between these divides, depending on a number of factors such as the type of international law at issue, the legislative language used to explain the role of international law in the domestic legal system and whether or not the treaty is self-executing.

Under the Zimbabwean legal system, international law directly influences the interpretation or content of domestic law in two respects. First, the Constitution provides that customary international law forms part of Zimbabwean law unless it is inconsistent with the Constitution or an Act of Parliament. Accordingly, customary international law needs not be incorporated into domestic law by legislation for it to be binding on all agencies of government. Even if legislation stipulates otherwise, domestic courts are mandated to interpret such legislation in a manner that is consistent with customary international law. Second, international treaties are another direct source of law at the domestic level provided that they have been ratified and domesticated. Unfortunately, Zimbabwe is generally not good when it comes to the domestication of international treaties, and this is perhaps the most unlikely root for international law to become part of our legal system. To this end, it is recommended that the government take all necessary steps to domesticate all treaties to which it is a state party. This will enhance accountability for violations of human rights at the domestic level.

International human rights law can also influence the development of international law in a number of indirect ways. Firstly, the Constitution imposes on courts the peremptory obligation to take international law into account when interpreting the provisions of the Declaration of Rights. The duty to 'take into account' does not, however, mean that the court is required to interpret the right in exactly the same way it has been interpreted by international courts, treaty-monitoring bodies and other forums. It simply means that an examination must be made into the relevant provisions of international law; but these provisions need not necessarily be applied

to the particular facts of the case if there are other overriding considerations arising out of alternative rules of interpretation.

Secondly, the principle of consistent interpretation requires decision-makers to interpret domestic law in a manner that is consistent with customary international law, general principles of international law and international treaties as opposed to any other alternative interpretation that is not so consistent. Combined with the rise of 'worldly' judges who have an inclination to rely on international and regional instruments to enrich domestic judicial decision-making, the principle of consistent interpretation encourages considerable reliance on international law regardless of whether or not international treaties have been signed by the states involved in the dispute in question. It is recommended that courts warm up to the task of ensuring 'internationalised' decision-making in human rights related disputes and avoid being bound by strict rules of signature, ratification and domestication.

Finally, this chapter demonstrated that the idea of self-executing treaties plays a pivotal function in distinguishing between international treaties that require an act of the legislature to become judicially enforceable and those that require an act of the legislature to take away or modify the court's duty to enforce such treaties. The Constitution confers on Parliament the power to adopt legislation to facilitate the inclusion of some, not all, international treaties into the laws of Zimbabwe without courts having to follow the formalities relating to the domestication of international treaties. As shown above, there are two forms of self-executing treaties envisaged in the supreme law of the land: First, self-executing treaties expressly declared to be so by a piece of legislation and, second, self-executing treaties declared to be so by a resolution of the legislature provided that such treaty neither requires the appropriation of funds from the Consolidated Revenue Fund nor modifies the law of Zimbabwe. Treaties protecting fundamental rights rarely fall into any of these categories and it is uncommon for Parliament to rely on any of these powers to ensure the direct application of human rights obligations without the signing, ratification and domestication of the relevant treaties by the executive organ of the state.