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The place of international law under Zimbabwe's 2013 Constitution

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Summary: *The interplay between international law and national legal systems presents a dynamic relationship where states attempt to strike a delicate balance between sovereign imperatives and global cooperation. Zimbabwe's 2013 Constitution contains generous provisions entrenching a place for the reception of international law norms in the domestic legal order. The article explores the legal principles relating to states' duties to implement, at the domestic level, their international normative obligations, and this includes a brief engagement with the main theoretical approaches that seek to explain the interplay between international law and national law. The article proceeds to provide a comprehensive analysis of the normative framework for the domestication of treaties in the Zimbabwean legal order. The article reveals some of the key challenges impeding the implementation of international law. The article further analyses the reception of customary international law under the Zimbabwean legal order, and thereafter evaluates the constitutional provisions relating to international law as an interpretative guide in the interpretation of the Declaration of Rights and legislation. What is clear from the article is that the interaction between the international and national legal regimes often raises tensions and anxieties as states attempt to balance their international obligations and national interests, highlighting the complex interaction between the two legal orders.*

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1 Introduction

Zimbabwe's 2013 Constitution introduces what could be regarded as a mixed approach with regard to the relationship between national law and international law, containing elements of both monism and dualism in the reception of international law. In a watershed moment for the country, Zimbabwe adopted a new Constitution on 22 May 2013.[1] The Constitution replaced the 1980 Independence Constitution negotiated at Lancaster House, London in 1979 (Independence Constitution).[2] What is remarkable about the Constitution is that, unlike the Independence Constitution whose only explicit reference to international law in relation to national law was only inserted in a 1993 constitutional amendment,[3] the former contains generous provisions entrenching international law under the constitutional framework.[4] The openness of the Constitution to international law can be identified in Chapter 2 which provides for National Objectives, in particular sections 12 and 34. Section

1 Constitution of Zimbabwe Amendment Act 20 of 2013 (Constitution).

2 See Lancaster House Agreement 21 December 1979, Southern Rhodesia Constitutional Conference held at Lancaster House, London September-December 1979 Report. The 1979 Constitution is attached as Annex C to the Conference Report. See https://sas-space.sas.ac.uk/5847/5/1979_Agreement.pdf (accessed 15 May 2024). The Independence Constitution came into effect on 18 December 1980.

3 Sec 111B was inserted as an amendment to the Independence Constitution through sec 12(1) of Act 4 of 1993 – Amendment 12. Sec 111B explicitly introduced for the first time, in the Zimbabwean Constitution, that treaties would not bind Zimbabwe at the international level unless approved by parliament, and that parliamentary incorporation is required for treaties to have domestic effect at the national level. Remarkably, Sec 12(2) of Act 4 of 1993 provided that the new sec 111B shall not have the effect of requiring parliamentary approval of any convention, treaty or agreement that was acceded to, concluded or executed by or under the authority of the President before 1 November 1993 and which, immediately before that date, did not require parliamentary approval or ratification. A discussion on whether treaties concluded by Zimbabwe before 1 November 1993 were directly applicable (self-executing) is beyond the scope of this article.

4 Sec 12(1) of the Constitution states that the foreign policy of Zimbabwe must be based on respect for international law as one of the principles underlying the country's international relations; sec 46(1)(c) prescribes the role of international law in the interpretation of the Declaration of Rights contained in Ch 4; sec 165(7) enjoins members of the judiciary to keep themselves abreast of developments in international law; sec 326 provides for the incorporation of customary international law in the domestic legal order; sec 327 addresses the ratification and incorporation of treaties and international agreements into the Zimbabwean municipal order; sec 34 enjoins the state to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law; and sec 244 provides that the Zimbabwe Human Rights Commission may require any person or entity to provide it with information it needs to prepare any report required to be submitted to any regional or international body under any human rights treaty binding on Zimbabwe.

12 provides that Zimbabwe's foreign policy must be based on the respect for international law and peaceful co-existence with other nations.[5] In addition, section 34 provides, as one of the country's national objectives, that '[t]he state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'.

The impetus for incorporating international law norms in the domestic legal orders, especially those of most post-colonial African countries, has been largely motivated by the need to entrench human rights and democratic governance, under pressure from domestic constituencies. Shelton is of the view that countries that have experienced dictatorships or foreign colonial subjugation tend to be largely receptive to international legal norms.[6] An argument could be made that the failures of national municipal legal orders and, in some cases, their complicity, during colonial times, in the dehumanisation of the oppressed peoples may have inspired formerly colonised countries and oppressed peoples to resort to international law as a safety net.[7]

In drafting the Constitution, Zimbabwe followed the recent trend of borrowing from international and comparative normative frameworks in order to benefit from the lessons learned by others.[8] Also noteworthy is that the Declaration of Rights contained in Chapter 4 of the Constitution includes a comprehensive catalogue of economic, social and cultural rights, alongside civil and political rights, which is a fundamental departure from the Independence Constitution.[9] In that regard, the Constitution follows the approach of the South African[10] and Kenyan Constitutions,[11] which have

5 Secs 12(1)(b) & (c) of the Constitution.
6 D Shelton 'Introduction' in D Shelton (ed) *International law and domestic legal systems: Incorporation, transformation, and persuasion* (2011) 2.
7 As above. Sarkin has noted that the trend towards borrowing from international and comparative norms is particularly prevalent where new democracies emerging from years of domination and repression seek to entrench democracy and provide protection from human rights abuses. See J Sarkin 'The effect of constitutional borrowings on the drafting of South Africa's Bill of Rights and interpretation of human rights provisions' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 177.
8 The Zimbabwean Constitution in so many respects is largely similar to the 1996 South African Constitution and the 2010 Kenyan Constitution on the reception of international law. See Sarkin (n 7) 177 discussing the South African Constitution.
9 The Independence Constitution only enshrined civil and political rights in secs 11-23 with no provision for economic and social rights.
10 For a discussion of socio-economic rights under the 1996 Constitution of South Africa, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010).
11 See J Biegon & GM Musila (eds) *Judicial enforcement of socio-economic rights under the new Constitution*: *Challenges and opportunities for Kenya* (2011) for a comprehensive analysis of the rights contained in the 2010 Kenyan Constitution.

incorporated a litany of socio-economic rights alongside civil and political rights.[12] Significantly, Zimbabwean courts are endowed with the power to judicially enforce the protected rights, including a broad discretion to make any order that is just and equitable in the event of a rights infringement.[13]

The interplay between international law and national legal systems presents a dynamic relationship where states attempt to strike a balance between sovereign imperatives and global cooperation. This interaction often raises tensions and anxieties as states attempt to balance their international obligations and national interests, highlighting the complex interaction between the two legal orders. This tension is often illustrated in the way in which national legal orders relate to one normative source of international law – treaty law. The question of the municipal application of international treaties is particularly pertinent for a country such as Zimbabwe, which has ratified a considerable number of treaties, especially in the area of human rights and humanitarian law, but in various instances has failed to translate these international obligations into justiciable norms in the municipal legal order.

The challenges encountered in implementing international law in Zimbabwe are revealed, for example, by the fact that a number of key treaties that Zimbabwe has ratified have remained unincorporated in the domestic legal order. There may be various reasons for this, including a lack of capacity or expertise in the relevant state departments that are responsible for spearheading the domestication of treaties.[14] In some cases, it could be the result of suspicion that international norms are curtailing the country's sovereign imperatives, in addition to concerns about the incompatibility of certain international law norms and the municipal legal order. Such factors are likely to inhibit the effective domestication of international norms. This, in turn, creates doubts on Zimbabwe's compliance with its international obligations at the domestic level. It also raises

12 Constitution of the Republic of South Africa, 1996. See Ch 2 for the Bill of Rights under the South African Constitution. Ch 4 of the Constitution of Kenya, 2010 also enshrines a comprehensive Bill of Rights spanning civil and political and economic, social and cultural rights.

13 Sec 175(6) of the Constitution. See also sec 86 on the power of courts to grant any appropriate remedy. For an analysis of the constitutionalisation of socio-economic rights under the Zimbabwean Constitution, see K Moyo 'Socio-economic rights under the 2013 Zimbabwean Constitution' in A Moyo (ed) *Selected aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2022) 319-346.

14 W Scholtz 'A few thoughts on section 231 of the South African Constitution, Act 108 of 1996: Notes and comments' (2004) *South African Yearbook of International Law* 212.

questions as to whether the country's municipal laws are aligned to its international legal imperatives.

This article is structured as follows. It starts by providing an overview of the international law principles on the domestication of international law norms in national law. This is followed by a brief description of the main theoretical approaches that seek to explain the interplay between international law and national law. The article proceeds to explore the legal principles relating to states' duties to implement, at the domestic level, their international normative obligations. This is followed by an analysis of the normative framework for the domestication of treaties in the Zimbabwean legal order. The article proceeds to discuss the reception of customary international law under the Zimbabwean legal order, and thereafter evaluates the constitutional provisions relating to international law as an interpretative guide in the interpretation of the Declaration of Rights and legislation, followed by the conclusion.

2 General principles on domestication of international law norms

The reception of international law norms in the national legal order is a dynamic process shaped by the interaction of municipal legal systems with international legal principles, norms and institutions. The reception of international legal norms entails a number of approaches, ranging from direct incorporation of international law norms, translation of international law through legislation and indirect incorporation through judicial interpretation. It follows that, as a general rule, international law is not prescriptive on how states are to implement their international obligations at the municipal level. Rather, the methodological framework for the domestication of international law norms is largely a question of and determined by domestic law.[15]

In most domestic systems, the applicable national legislation or judicial practice often determines the approach towards the relationship between national law and international law.[16] Although the particularities of the legal systems of each state must be taken into account, from an international law perspective, it is important

15 IM Kysel 'Domesticating human rights norms in the United States: Considering the role and obligations of the federal government as litigant' (2015) 46 *Georgetown Journal of International Law* 1015.

16 R Wolfrum, H Hestermeyer & S Vöneky 'The reception of international law in the German legal order: An introduction' in E *de* Wet & H Hestermeyer *The implementation of international law in Germany and South Africa* (2015) 3.

that the means adopted must be adequate and effective to enable compliance with a state's international obligations.[17] In light of these complexities around the reception of international legal commitments in the domestic legal system, it is particularly important to briefly describe the main theoretical approaches that seek to explain the interplay between international law and national law.

A distinct theoretical divide, though waning, is still discernible in the international legal scholarship on the relationship between international law and national law. The divide is encapsulated through two main theories, namely, the monist approach, whose protagonists submit that international and domestic legal orders constitute a single system of law. On the other end of the spectrum is the dualist approach, which views the domestic legal order as autonomous, self-contained and separate from the international legal order.[18] These two main theoretical approaches are discussed below.

2.1 Monist approach

The legal theorist Hans Kelsen is considered the architect of the monist approach.[19] Kelsen argued that the international and domestic legal orders are part of the same systems of norms generated through an intellectual operation of a single basic norm, the *grundnorm*.[20] In this regard, the two systems derive their validity from the same source.[21] Monism assumes that there is only one body of law and, accordingly, international law is regarded as part of the state's municipal law and the two should be presumed to be coherent and consistent.[22] Under a monist approach to international law, treaties are incorporated into a nation's legal framework without the need for domestic law making,

17 L Chenwi 'Using international human rights law to promote constitutional rights: The (potential) role of the South African Parliament' (2011) 15 *Law, Democracy and Development* 10.

18 J Nijman & A Nollkaemper (eds) *Introduction: New perspectives on the divide between national and international law* (2007) 1. See also J Dugard and others *Dugard's international law: A South African perspective* (2018) 42. Shelton, however, argues that both monists and dualists may accept the concept that some international law (peremptory norms/*jus cogens*) is automatically binding, irrespective of a state's consent or domestic legal order – creating a sub-category of monist norms even for dualist systems. A second possibility is that domestic systems may consider themselves monist for one source of international law (eg custom) and dualist for another (treaty law). See Shelton (n 6) 2.

19 See discussion in J Crawford *Brownlie's principles of international law* (2019) 46 citing H Kelsen *General theory of law and state* (1966) 562.

20 As above.

21 As above.

22 Dugard and others (n 18) 42. See also Crawford (n 19) 45. Lauterpacht is regarded as one of the earliest leading proponents of a monist approach in explaining the relationship between international law and domestic law. See H Lauterpacht *International law and human rights* (1950) 70.

and such international norms can supersede existing domestic law.[23] Consequently, no formal change is therefore required when international law is applied at the domestic level.[24] It follows that international law can be directly incorporated and applied within the municipal legal order.[25]

2.2 Dualist approach

A dualist explanation of the differences between the two normative systems considers international law and national law as entirely separate branches of law.[26] Dualists argue that the fundamental principle of sovereign equality of states dictates dualism as a starting point in elucidating the intercourse between international law and the domestic legal order.[27] The dualist approach postulates that it is for each state to organise its legal system and determine the process for giving its consent to be bound by international law norms.[28] A dualist perspective places emphasis on the distinct nature of the international and municipal legal regimes in terms of substance of the law, sources and its subjects.[29] The philosophy behind this dualist approach is that international law is primarily applicable between states only.[30] The dualist position was eloquently captured by the South African Constitutional Court in *Zuma*, as follows:[31]

> The architecture of international law is constructed around the recognition of state sovereignty. That is why it is a cardinal tenet of international law, that to be given force and effect on the domestic plane of a dualist state, international treaties must be incorporated into a state's body of domestic law by way of an implementing provision enacted by that state's legislature.

Consequently, there must be a mechanism through which international law may be invoked and applied at the municipal level. Where a treaty enshrines rights and duties for the benefit of the

23 CA Bradley '*Breard*, our dualist constitution, and the internationalist conception' (1999) 51 *Stanford Law Review* 530.
24 Scholtz (n 14) 205.
25 Crawford (n 19) 45.
26 Dugard and others (n 18) 42. See also G Ferreira & A Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *Potchefstroom Electronic Law Journal* 1471-1472 for a discussion on the dichotomy between the monist and dualist approaches.
27 G Arangio-Ruiz 'International law and interindividual law' in J Nijman & A Nollkaemper (eds) *New perspectives on the divide between national and international law* (2007) 15.
28 As Above.
29 Crawford (n 19) 45.
30 Scholtz (n 14) 205.
31 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* [2021] ZACC 28 para 108.

subjects of a state, the state must take steps to make these provisions enforceable by its subjects in the municipal legal order.[32] In a dualist system, the legislature must enact incorporating legislation in order to give treaties legal effect at the domestic level.[33]

It must, however, be noted that there are several variations to the above two approaches.[34] It has further been pointed out that neither theory offers an adequate account of the practice of international and national courts, whose role in articulating the practice of the various legal systems is crucial.[35] As a result, the practical relevance of these theories 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.[36] While the debate between the two theoretical approaches remains relevant, other approaches are becoming prominent. Theories of incorporation and harmonisation are particularly gaining traction as they are increasingly being invoked to explain the relationship between international and municipal law.[37]

Regardless of a state's theoretical posture as reflected in its domestic law, a state cannot justify non-compliance with its international law obligations by using deficiencies in its national law, a principle well established in international law and codified by the Vienna Convention on the Law of Treaties (VCLT).[38] In *Gramara*[39] the Harare High Court, citing articles 26 and 27 of the VCLT, emphasised the point that 'a state cannot invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defence to its failure to comply with those obligations'.[40] The Court further explained

32 Scholtz (n 14) 205.
33 Bradley (n 23) 530.
34 Crawford (n 19) 48.
35 Crawford (n 19) 47.
36 Wolfrum and others (n 16) 3. See also Ferreira & Ferreira-Snyman (n 26) 1472 who point out that '[a] complicating factor is that not all egal systems are clearly and distinctly either monist or dualist. Some legal systems display elements of both.'
37 Scholtz (n 14) 205.
38 See art 27 of the Vienna Convention on the Law of Treaties 23 May 1969 1155 UNTS 331. This principle is also encapsulated in art 3 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Ats which provides that '[t]he characterisation of an act of state as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law.' See Articles on Responsibility of States for Internationally Wrongful Acts UN Doc A/RES/56/83 (2001), 53 UN GAOR Supp (No 10) 43, Supp (No 10) A/56/10 (IV.E.1).
39 *Gramara (Pvt) Ltd & Another v Government of Zimbabwe & Others* HH 169/2009 5.
40 As above. In the case of *Mike Campbell (Pvt) Ltd & Others v Republic of Zimbabwe* Case SADC (T) 2/07, 13 December 2007 25, the Southern African Development Community tribunal was clear that Zimbabwe cannot rely on its national law to avoid its legal obligations under the Southern African Development Treaty. In a commentary on the *Campbell* decision, Moyo noted that '[t]he Tribunal's

that *pacta sunt servanda* is a fundamental tenet of international law,[41] and a corollary to such an obligation is that a party may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations.[42] It follows that there is a general duty incumbent on states to bring national law into conformity with their international law obligations. The following part discusses the legal principles relating to states' general duty, under international law, to implement their international law obligations at the domestic level.

3 The duty to implement international law obligations at the national level

Even though international law enjoins states to implement their international obligations at the national level where required, the processes used by states to transform international legal norms to domesticate legal norms often vary as reflected by the practice of states.[43] In the area of treaty law, many treaties in the area of human rights and international criminal law include specific obligations that enjoin particular actions at the domestic level in order to ensure state compliance.[44] Such provisions impose specific duties on ratifying states to implement the instruments at the domestic level. In addition to the specific textual obligations enshrined in some human rights treaty provisions, there is a growing view that human rights law generally carries certain positive duties enjoining states to take affirmative actions to implement such treaty obligations at the domestic level.[45]

The African Charter on Human and Peoples' Rights (African Charter), for example, imposes an obligation on state parties to 'recognise the rights, duties and freedoms' guaranteed in the Charter, including the duty to 'adopt legislative or other measures to give effect to them'.[46]

willingness to deny Zimbabwe the opportunity to invoke its national laws to evade international treaty obligations brings our regional jurisprudence in conformity with settled principles of public international law'. See A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond' (2009) 9 *African Human Rights Law Journal* 600.

41 *Gramara* (n 39) 5.

42 As above.

43 See generally Shelton (n 6).

44 Art 1 of the African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/rev.5 obliges states to 'recognise the rights, duties and freedoms' guaranteed in the Charter and 'adopt legislative or other measures to give effect to them'.

45 See sec 4(1)(a) of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2006) UN Doc A/61/49 which obliges state parties '[t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention'.

46 See art 1 of the African Charter (n 44).

The International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, contains provisions that impose specific obligations on state parties regarding the domestic implementation of this instrument.[47] The position is buttressed by the Committee on Economic, Social and Cultural Rights (ESCR Committee)'s General Comments 3[48] and 9[49] and various theme-specific General Comments. Article 2(1) of ICESCR, for instance, requires a state to use any appropriate means, including the adoption of legislation, when domesticating that international instrument.[50] The ESCR Committee in its General Comment 9 elaborated as follows:[51]

> The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each state party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the state party. The means chosen are also subject to review as part of the Committee's examination of the state party's compliance with its obligations under the Covenant.

The United Nations (UN) High Commissioner for Human Rights has also explained domestication at the national level in the context of international human rights law as entailing 'a legal commitment, that is, acceptance of an international human rights obligation, to realisation by the adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligations'.[52]

Although some treaties may provide for particular exceptions, as a rule, international law does not prescribe how states are to implement their international obligations at the municipal level. In some states, for example, treaties automatically become part of national law upon ratification, signalling a monist approach to the reception of treaty law into the municipal legal order. Under such legal regimes, treaties are considered to be self-executing. In other

47 See art 2(1) of the International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316 (ICESCR).
48 See Committee on Economic, Social and Cultural Rights General Comment 3: The nature of state parties' obligations (1990) UN Doc E/1991/23.
49 See Committee on Economic, Social and Cultural Rights General Comment No 9: The domestic application of the Covenant (Nineteenth session, 1998), UN Doc E/C.12/1998/24 (1998).
50 See art 2(1) ICESCR (n 47).
51 ESCR Committee General Comment 9 (n 49) para 5.
52 United Nations Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/90 8 June 2009 para 3.

jurisdictions, treaties do not automatically form part of the municipal law of the ratifying state. In such jurisdictions, ratified treaties are not self-executing, that is, they do not have the force of law without the passage of incorporating national legislation, thereby signalling a dualist approach to the reception of treaty law. The doctrinal view, as observed by Kysel, does not oblige states to prefer any specific domestic measures, to the exclusion of others, in order to comply with their treaty obligations.[53] States enjoy a margin of appreciation in how they translate their international obligations into the national legal sphere.[54] A margin of appreciation is thus granted to states, the conduits through which international treaties are given effect, in recognition of the fact that national institutions are better situated and equipped to implement international law norms at the domestic level.[55] The following part discusses and evaluates the reception of international treaties in the Zimbabwean legal order.

4 Treaties

The Constitution provides for two types of international agreements, namely, international treaties (simply referred to as treaties in this article) and a certain species of agreements that do not meet the criteria of treaties.[56] The Constitution defines a treaty 'as a treaty between one or more foreign states or in which two or more independent states are represented'.[57] The above definition provides neither for the recognition of oral agreements nor for unilateral acts of a state. The definition, however, substantially aligns with the one provided under VCLT.[58] VCLT defines a treaty as an international agreement concluded between states in written form and governed by international law, whatever its particular designation.[59] The second category of agreements provided for are not really treaties in the technical sense and encompasses those agreements entered into

53 Kysel (n 15) 1021.
54 Wolfrum and others (n 16) 3. For different approaches, see, eg, art 144 of the Constitution of the Republic of Namibia which appears to adopt a monist approach to the domestication of international law and states 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'. See also secs 2(5) & 6 of the 2010 Constitution of Kenya which provides that '[t]he general rules of international law shall form part of the law of Kenya' and that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'.
55 *Zuma* (n 31) para 119.
56 See sec 327(3) of the Constitution in relation to agreements that are not international treaties.
57 Sec 327(1) of the Constitution.
58 Art 2(1) VCLT (n 38).
59 As above.

by Zimbabwe with foreign organisations or entities.[60] Unlike a treaty, an agreement does not require parliamentary approval for it to bind the country unless it imposes financial obligations on Zimbabwe, in which case such parliamentary approval is required.[61] This provision was presumably inserted to cater for those circumstances where the state may enter into investment, technical or executive agreements with non-state actors, which would not require Parliament's focused attention. Such agreements do not qualify as treaties and would not require parliamentary approval to be binding on Zimbabwe, with the exception that such approval is still required where such agreements impose financial obligations on Zimbabwe, hence the need for heightened parliamentary scrutiny.

The use of these types of agreements, if not properly managed, may result in issues with major policy and foreign relations implications being immunised from the necessary parliamentary oversight process. It is also disturbing that there is no constitutional requirement for such agreements to be placed before Parliament for scrutiny after their conclusion. Although the expedited procedures in respect of these agreements may be necessary for the expeditious conduct of economic and foreign relations, it can be problematic from a democratic accountability perspective if parliamentary oversight and scrutiny in respect of this category of agreements is completely absent.

The constitutional scheme of section 327 is deeply rooted in the separation of powers doctrine, in particular the checks and balances between the executive and the legislative arms of government. Under the Constitution, the negotiation of treaties is primarily the domain of the executive branch. Section 327(2)(a) of the Constitution confers on the President the constitutional authority to negotiate or authorise the negotiation and execution of treaties. The above is further buttressed by section 6(1) of the International Treaties Act which provides that 'every international treaty shall be concluded or executed by or under the authority of the President'.[62] Sections 6 and 7 of the International Treaties Act, however, are clear that

60 See secs 327(3)(a) & (b) of the Constitution. This would include Bilateral Agreement for the Promotion and Reciprocal Protection of Investments (BIPPAs) which Zimbabwe has signed with a number of states to facilitate investment flows into Zimbabwe from foreign corporations and individuals. For a list of BIPPAs that Zimbabwe has signed or ratified, see https://www.zimfa.gov.zw/index.php/bippas/list-of-ratified-bippas# (accessed 29 April 2024).

61 See secs 327(3)(a) & (b) of the Constitution.

62 See sec 6 of the International Treaties Act [Chapter 3:05]. See also sec 110(4) of the Constitution which stipulates that '[s]ubject to this Constitution, the President may conclude or execute conventions, treaties and agreements with foreign states and governments and international organisations'.

treaties must be approved by cabinet before approval by Parliament and ratified by the President, which denotes a collaborative approach in the formulation of the country's foreign policy as well as the negotiation and conclusion of treaties.[63] Under the Constitution, the President alone has the power to conclude treaties. The International Treaties Act, however, departs from this constitutional framework by vesting the authority to negotiate and conclude treaties in the cabinet, a model that better reflects principles of collaborative decision making. To concretise this collaborative approach, the Constitution should have explicitly designated the cabinet, rather than the President, as the body responsible for treaty negotiation and conclusion.[64] The constitutional entrenchment of such a framework would to institutionalise shared accountability. By relegating the requirement for a collaborative process to an Act of Parliament, the current model risks inconsistency. Statutory provisions, unlike constitutional provisions, remain vulnerable to amendment at the whim of politicians, potentially undermining the integrity of a collaborative treaty-negotiation process. The International Treaties Act, thus, should thus be read with section 327 of the Constitution, and the former should be regarded as the implementing legislation that operationalises section 327 of the Constitution. This is clear from the statute's long title, which states that the Act seeks to 'provide a uniform procedure for the consideration, approval, ratification and publication of international treaties'.[65] What is clear, however, is that Parliament does not have a role in the negotiation or signing of treaties. Given the significance of treaties as an important policy tool in a world where many problems and solutions transcend territorial boundaries, there is a need for Parliament's participation in the negotiation of treaties beyond simply approving treaties negotiated and signed by the executive. Although there may be discussions in Parliament during the approval and incorporation stages, the current

63 Sec 7(1) of the International Treaties Act envisages the approval of a treaty by cabinet before its approval by Parliament. See also sec 6(3)(c) of the International Treaties Act which provides that 'the negotiating Ministry shall, as soon as practicable thereafter, take all the necessary steps (i) to secure the approval of the treaty by Cabinet; and (ii) if the treaty is approved in terms of subparagraph (i), to secure its approval by Parliament in accordance with the Constitution; and (iii) if the treaty is approved in terms of subparagraph (ii), to secure the ratification of or accession to the treaty by the President'. The collaborative approach is further emphasised in sec 110(6) of the Constitution which provides that '[i]n the exercise of his or her executive functions, the President must act on the advice of the Cabinet'.

64 For a similar provision, see sec 231(1) of the Constitution of the Republic of South Africa, 1996 which states that '[t]he negotiating and signing of all international agreements is the responsibility of the national executive'.

65 See long title of the International Treaties Act. Sec 5 of the International Treaties Act also provides for the appointment and functions of a Public Agreements Advisory Committee whose remit includes the power to scrutinise all international treaties, recommend or decline to recommend approval of any treaty, as well as maintain and keep up to date a list of ratified treaties.

constitutional architecture is designed in such a way that Parliament only considers a treaty at the very end of the process – after the treaty has been negotiated, concluded and signed by the executive. There is a clear democratic deficit inherent in making these types of policy decisions that may have significant implications for a country's foreign relations without parliamentary involvement.

Section 327(2)(a) recognises the key role of Parliament in fulfilling domestic conditions for Zimbabwe to assume binding treaty obligations under international law. It established parliamentary approval as a mandatory precondition, compelling the executive to obtain parliamentary consent before it can deposit the instrument of ratification. Once Parliament provides its approval in terms of section 327(2)(a), the treaty is returned to the President, who ratifies it by executing an instrument of ratification. As a matter of terminology, although the role of Parliament is sometimes referred to as ratification, under the Zimbabwean constitutional framework, it is the President who formally ratifies treaties. Nonetheless, the approval of a treaty by Parliament is a condition precedent to the President's act of ratification.

4.1 Binding nature of treaties at international level

The first role of Parliament in the constitutional scheme is to approve a treaty before the executive can submit an instrument of ratification with the treaty depository. Section 327(2)(a) of the Constitution regulates the conditions under which Zimbabwe would be bound by international treaties at the international level. Section 327(2)(a) is clear that a treaty that has been concluded or executed by the President or under the President's authority must be approved by Parliament for it to be binding on Zimbabwe at the international level. The only exception is provided under sections 327(4) and (5). Section 327(4)(a) provides that an Act of Parliament may dispense with the need for parliamentary approval before a treaty concluded by the President or under the President's authority can be binding on Zimbabwe at the international level. In addition, section 327(5) states that a parliamentary resolution may dispense with the need for parliamentary approval before a treaty concluded by the President or under the President's authority can be binding on Zimbabwe. The provisions dispensing with the need for parliamentary approval will probably encompass routine treaties of a technical and administrative nature that do not have major political significance, as well as agreements that do not impact domestic law in any material way. Such a waiver, however, does not apply to treaties whose application or operation requires the withdrawal or appropriation of funds from

the Consolidated Revenue Fund, or any modification of the law of Zimbabwe.[66]

Although Zimbabwe's ratification of treaties does not render them enforceable and, therefore, sources of rights in domestic courts and tribunals, at the international level these instruments are nevertheless binding and enforceable against Zimbabwe. The approval of a treaty under section 327(2)(a) of the Constitution conveys Zimbabwe's intention to be bound, at the international level, by the provisions of the treaty. Additionally, such approval constitutes an undertaking at the international level, as between Zimbabwe and other state parties to the treaty, to take steps to comply with the substance of the treaty. This undertaking will be given effect to by either incorporating the agreement into Zimbabwean law or taking other steps to bring the domestic law in line with the treaty. It follows that failure to observe the provisions of the treaty may result in Zimbabwe incurring responsibility towards other state parties to the treaty. Significantly, the consequence of Zimbabwe being bound at international law is that other state parties to a treaty may seek to hold the country responsible for any breaches of treaty obligations in an international forum having relevant jurisdiction in the matter. This means that where domestic players such as courts construe the Zimbabwean domestic law in a manner that is not aligned to Zimbabwe's treaty obligations, Zimbabwe may incur international responsibility at the international level despite the fact that it would have acted in compliance with its domestic law.[67] Therefore, it is incumbent on domestic courts to interpret domestic law in a way that aligns with a country's international obligations. In the following part the article discusses and evaluates the normative framework for

66 See secs 327(5)(a) and (b) of the Constitution.

67 See the case of *Vincencio Scarano Spisso v Bolivarian Republic of Venezuela* CCPR/119/D/2481/2014 where the Supreme Court of Venezuela had convicted the complainant for contempt of court and sentenced him to 10 months and 15 days' imprisonment for failing to obey a court order. The complainant took the matter to the Human Rights Committee where he argued, among others, that the Court had violated his rights under arts 9, 10, 14 and 25 of ICCPR. The Human Rights Committee found that Venezuela had violated the relevant provisions of ICCPR and ordered Venezuela to compensate the complainant and take steps to prevent similar violations in the future. In the case of *Dissanayake v Sri Lanka* CCPR/C/93/D/1373/2005 the complainant was convicted by the Supreme Court of Sri Lanka for contempt of court pursuant to which he was sentenced to a two-year jail term. The complainant approached the Human Rights Committee alleging violations of his rights under arts 9, 14, 15, 19 and 25 of ICCPR. The Human Rights Committee found that Sri Lanka had violated the complainant's protected rights and imposed a compensation order against Sri Lanka, including an order for Sri Lanka to amend its laws to foreclose any recurrence of such convictions. What is clear from both cases is that the impugned actions were taken in accordance with the domestic laws. It was clear, however, that such domestic laws could not be a shield to protect a state party where it violates its obligations under international law and, in this instance, its obligations under ICCPR.

the domestication of international treaties in the Zimbabwean legal order.

4.2 Domestic application of treaties

Parliament's second key role in the scheme under section 327 is its constitutional mandate relating to the incorporation of treaties into domestic legislation. The ratification of international treaties, under the current constitutional architecture, as noted above, does not render them enforceable at the domestic level, but rather binds Zimbabwe at the international level. In order for treaties to apply at the domestic level, section 327(2)(b) of the Constitution prescribes that treaties must first be enacted into domestic law by means of legislation. The domestication of a treaty refers to making a treaty part of national law either by way of incorporation or transformation.[68] Domestication, thus, entails that the provisions of national laws and regulations are harmonised with the norms and standards contained in international instruments with a view to their full implementation.

Section 327(2)(b) is clear that a treaty 'does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament'. The position was judicially affirmed by the Supreme Court in of *Magodora & Others v Care International Zimbabwe*, where the court reiterated that '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'.[69] Once enacted into domestic law, the treaty will function as any other Act of Parliament and, consequently, will prevail over the provisions of any prior treaty in the event of any inconsistency.[70] In this regard, Zimbabwe follows a dualist system regarding the reception of treaties, requiring ratified treaties to be enacted into law by national legislation before they acquire binding force in domestic law. The only exception is provided in section 327(4) of the Constitution and section 5 of the International Treaties Act with regard to self-executing treaties and partially self-executing treaties.

Section 327(4) envisages an Act of Parliament dispensing with the need for legislative incorporation before a ratified treaty can be binding at the domestic level. Through section 327(4), the Constitution introduces the possibility of ratified treaties becoming

68 F Viljoen *International human rights law in Africa* (2012) 22.
69 SC 24/14 6.
70 See *IRC v Collco Dealings Limited* [1962] AC 1.

self-executing where there is permissive legislation. The concept of self-executing treaties under the Zimbabwean legal framework is fully discussed below. Barring the invocation of section 327(4), it follows that unimplemented treaties cannot be a source of rights or obligations under the national legal order, and a failure by Zimbabwe to comply with such treaties is without effect under the municipal legal order. The country may, however, breach its international legal obligations at the international level, as discussed in the preceding part.

A significant, albeit uncertain, position regarding the incorporation of treaties is the Zimbabwean legal framework's embrace of the concept of self-executing treaties. Zimbabwean courts will have to deal with the issue to determine the circumstances under which a treaty could be regarded as self-executing.[71] The International Treaties Act defines a self-executing treaty as a treaty requiring no alteration of the domestic law or no additional legislation in order to domesticate it.[72] From that perspective, a self-executing treaty thus is a treaty that by its terms is capable of being incorporated into the domestic law of Zimbabwe in the absence of implementing legislation. The International Treaties Act further defines a 'partially self-executing' treaty as a treaty in respect of which some provisions are self-executing within the domestic law of Zimbabwe and severable from the other provisions of the treaty that require legislative incorporation.[73] Section 7(3) of the International Treaties Act states that every ratified treaty shall be published through a statutory instrument.[74] In addition, such publication of a treaty shall be accompanied by a general notice in the *Gazette* specifying whether the treaty is wholly or partially self-executing and, accordingly, domesticated, or requires to be domesticated by altering or incorporating the treaty into the domestic law of Zimbabwe.[75] To date, no court in Zimbabwe has

71 The issue has been debated in the United States (US) particularly after the US Supreme Court decision in *Medellin v Texas* 552 US 491 (2008) which concerned the domestic effect in the US of the decision of the International Court of Justice in *Avena and Other Mexican Nationals, Mexico v United States* [2004] ICJ Rep 12. In 2007 the US Supreme Court stated in *Medellín v Texas* 552 US 505 (2008) that a treaty was to be considered self-executing only if it includes 'stipulations [which] require no legislation to make them operative'. The majority opinion held that art 94 of the UN Charter, which provides that each UN member state 'undertakes to comply with the decision of the [ICJ] in any case in which it is a party' was not self-executing. US courts' jurisprudence has considered a multiplicity of factors to determine the self-executing status of a treaty, and these include the purposes of the treaty, and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, among others. See *US v Postal* 589 F2d 862, 877 (5th Circ 1979).

72 See sec 2(1) of the International Treaties Act.

73 As above.

74 Sec 7(3) of the International Treaties Act.

75 See secs 7(5)(a)(i) & (ii) of the International Treaties Act.

had the opportunity to explore the concept of self-executing treaties in the context of Zimbabwean law.

The question of what constitutes a self-executing treaty has been notoriously difficult to define. The concept of self-executing treaties was imported from American law and, as noted by Hollis and Vazquez, remains a complex and difficult issue even in American law.[76] It is mainly understood to refer to provisions of a treaty that can be directly applied in municipal law without the need for legislative incorporation.[77] This would mean that the nature and content of the relevant treaty provision is such that it is capable of judicial enforcement in the absence of any further measures of implementation.[78]

Academic literature in South Africa has also engaged with the concept of self-executing treaties in light of the recognition of such category of treaties in South African law. Section 231(4) of the South African Constitution provides that 'a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. South African courts have thus far neither adequately engaged with nor elaborated on the meaning and import of self-executing treaties.[79] This has prompted South African academic commentators to point out that although the issue of self-executing treaties is provided for in the country's Constitution adopted close to three decades ago, the 'concept has thus far remained a dead letter in the practice of South African courts'.[80] There is, however, consensus that a self-executing provision in a treaty implies that the nature and content of the relevant treaty provision is sufficiently precise and not requiring a further implementing act and, therefore,

76 DB Holllis & CM Vazquez 'Treaty self-execution as "foreign" foreign relations law?' Temple University Legal Studies Research 2018-25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212910 (accessed 18 May 2024).

77 Liebenberg (n 10) 103.

78 E de Wet 'The reception of international law in the South African legal order: An introduction' in E de Wet, H Hestermeyer & R Wolfrum (eds*) The implementation of international law in Germany and South Africa* (2015) 34.

79 In the case of *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) para 26, the South African Constitutional Court noted in passing that where a relevant principle of international law binds South Africa, it may be directly applicable. In the case of *Claassen v Minister of Justice and Constitutional Development & Another* 2010 (2) SACR 451, the High Court dismissed the applicant's direct invocation of the liberty and security of the person rights protected under art 9(5) of ICCPR. The High Court stated in para 36 that '[t]he ICCPR is not a self-executing legal instrument in the sense that this country's formal adoption of its provisions did not, without more, amend our established domestic law'.

80 De Wet (n 78)16.

capable of judicial enforcement in the absence of any additional implementation measures.[81]

In General Comment 9 the ESCR Committee counselled that it is especially important 'to avoid any *a priori* assumption' that the norms in ICESCR should be considered non-self-executing.[82] The ESCR Committee further observed that many of these norms 'are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing'.[83] For the concept of self-executing treaties to have any relevance in the Zimbabwean constitutional and legislative architecture, it would be important for Zimbabwean courts to, first, elaborate on the meaning and import of self-executing treaties, including the development of objective criteria for the identification of such category of treaties in the Zimbabwean context. Most of the rights found in the International Covenant on Civil and political Rights (ICCPR) and ICESCR have been incorporated into the Declaration of Rights, albeit sometimes in somewhat different formulations, hence the importance of utilising the concept of self-execution in the absence of incorporation of treaties. The next PART discusses and evaluates the reception of customary international law under the Zimbabwean legal framework.

5 Customary international law

Section 326 of the Constitution is the clearest expression of Zimbabwe's receptiveness to international law under the 2013 Constitution. Section 326(1) of the Constitution explicitly provides that customary international law is part of Zimbabwean law in so far as it is consistent with the Constitution or an Act of Parliament.[84] In addition, section 326(2) enjoins courts and tribunals, when interpreting legislation, 'to adopt any reasonable interpretation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law'. Zimbabwean common law has always treated customary international law as part of Zimbabwean law. This was judicially affirmed as early as 1983 in the Supreme Court decision of *Barker McCormac Pvt Ltd v Government of Kenya*.[85] In this case the

81 De Wet (n 78) 34.
82 General Comment 9 (n 49) para 11.
83 As above.
84 The position was judicially affirmed by the Supreme Court in *Magodora* (n 69) 6 where it reiterated that 'international customary law is not internally cognisable where it is inconsistent with [the Constitution or] an Act of Parliament'.
85 1983 (2) ZLR 72 (SC) 77.

Supreme Court confirmed that customary international law is part of Zimbabwean law and would be applied when the rules founded under it were consistent with statute or judicial precedent.[86] Since then, various court judgments have endorsed the direct incorporation of customary international law principles into the Zimbabwean legal order. In the case of *Gramara* the Court emphasised that customary international law is generally regarded as having been internally incorporated insofar as it is not inconsistent with statute law and judicial precedent.[87] The difference with the post-2013 position is that customary international law is no longer subject to conflicting case law but will only give way to superior constitutional and statutory provisions in the event of a conflict, as confirmed by the Supreme Court in *Minister of Foreign Affairs v Michael Jenrich & Others*.[88] This means that Zimbabwe adopts a monist approach towards customary international law, which eliminates the need for legislative translation of customary law into domestic law. This is in contrast with dualist regimes that require domestic legislation to incorporate international law into domestic law. Once a court or tribunal ascertains that there is no conflict between a customary international law norm with any constitutional or statutory provision, the customary international law rule must be accepted as a rule of law applicable and enforceable in the domestic legal order. There is no requirement to establish the validity of such rules by evidence as will be the case with matters relating to facts or foreign law.

There can be little doubt that the constitutionalisation of customary international law gives it additional weight under the Zimbabwean legal framework, although it is clear that a constitutional provision or an Act of Parliament that is clearly inconsistent with customary international law will prevail over it.[89] From a practical perspective, section 326(1) enjoins adjudicative mechanisms such as courts or tribunals to undertake a two-stage inquiry. First, the adjudicator must determine what the relevant customary international law norm is in relation to the issue before the adjudicator. The second leg of the inquiry is for the adjudicator to determine whether the relevant customary international law norm is consistent with the Constitution

86 As above.
87 *Gramara* (n 39) 15. The Court also referred to the High Court decision in the case of *Route Toute BV & Others v Minister of National Security Responsible for Land, Land Reform and Resettlement & Others* HH 128-2009.
88 In the case of *Minister of Foreign Affairs v Michael Jenrich & Others* SC 03/163 the Supreme Court explained that before May 2013 (effective date of the 2013 Constitution), '[i]nternational custom enjoyed even less cognisance and could only be domestically applied to the extent that it was not inconsistent with statute or judicial precedent'.
89 See sec 326(1) of the Constitution. This provision is modelled on sec 232 of the 1996 South African Constitution, which is similarly worded.

and statute.[90] A constitutional or legislative provision will prevail over a conflicting customary international law norm. Significantly, Zimbabwean courts and tribunals, in their determination of the applicable customary international law rules on a particular issue, do not have the power to develop customary international law norms. Additionally, domestic courts do not have the authority to include any stringent requirements than those accepted through the practice of states as extant customary international law. This principle was eloquently captured by the South African Supreme Court of Appeal in *Minister of Justice v Southern Africa Litigation Centre*, where the court stated:[91]

> Development of customary international law occurs in international courts and tribunals, in the contents of international agreements and treaties and by general acceptance by the international community of nations in their relations with one another as to the laws that govern that community. However tempting it may be to a domestic court to seek to expand the boundaries of customary international law by domestic judicial decision, it is not in my view permissible for it to do so.

Case law from both the pre- and post-2013 constitutional dispensations demonstrates that Zimbabwean courts have always taken judicial notice of customary international law as if it is part of the country's common law.[92] The constitutionalisation of customary international law gives it added mettle and entrenches is as a veritable source of Zimbabwean law. It follows that Zimbabwean courts and tribunals must of necessity turn to decisions of international courts and tribunals, multilateral treaties, national court decisions, both domestic and comparative, for guidance on whether a particular principle is a rule of customary international law.[93] The significance of customary international law rules is that, unlike treaties, they

90 For detailed discussion, see Dugard and others (n 18) 67-68.

91 2016 (3) SA 317 (SCA) at para 74.

92 However, it must be noted that the role of domestic courts, when it comes to customary international law, is only limited to ascertaining the customary international law position on an issue and not to develop it. This must be contrasted with common law or customary law where Zimbabwean superior courts have the power to develop common law or customary law; see secs 176 & 46 of the Constitution. On this score, see also the South African Supreme Court decision in the case of *Minister of Justice and Constitutional Development & Others v Southern Africa Litigation Centre* (n 91) para 74, relying on the English decision in the case of *Jones v Ministry of the Interior (Saudi Arabia)* [2006] UKHL 26 para 63.

93 See, eg, *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* (n 91) para 70 where the South African Supreme Court of Appeal was considering the issue of immunity for heads of state under customary international law in connection with international crimes. The Court stated that 'in the absence of a binding treaty or other international instrument creating such an exception, or an established universal practice, one looks at the decisions of international courts for guidance as to the existence of such an exception'.

have general application in all states, whether or not the states in question participated in their formulation, unless there is evidence that a state has persistently objected to the emergence of such a customary international law rule.[94] Noteworthy is the fact that the failure to react over time to a practice may serve as evidence of acceptance as law, provided a state was in a position to react and the circumstances called for some reaction.[95] Importantly, international and comparative jurisprudence is clear that general acceptance as opposed to universal acceptance is sufficient for proof of customary international law.[96]

However, it must be noted that a certain category of customary international law rules that have attained peremptory status[97] are universally binding on all states and are not subject to objection. Articles 53 and 64 of VCLT reinforce the supremacy of peremptory norms over all other norms, making it clear that these norms prevail over any other rule of international law, whether conventional or customary, in the event of a conflict. Obvious examples of peremptory norms would include the prohibition against genocide, the prohibition against torture, denial of the right to self-determination and crimes against humanity. In the case of *Belgium v Senegal* the International Court of Justice (ICJ) was clear that 'the prohibition against torture is part of customary international law and has become a peremptory norm of international law, sometimes referred to as *jus cogens*'.[98] In a decision by the South African Constitutional Court in *National Commissioner of Police v Southern Africa Litigation Centre,* a case relating to South Africa's obligation to investigate torture allegations committed in Zimbabwe by Zimbabwean government officials, the Court held that the prohibition against torture was not only an international crime under customary international law but also a peremptory norm under the international legal regime.[99] It

94 See *Anglo American Fisheries Case (United Kingdom v Norway)* ICJ 1951.
95 *ICJ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246.
96 See *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Moçambique* 1980 (2) SA 111(T) 125 A-B.
97 See VCLT (n 38) art 53 which explains that 'a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.
98 See *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ GL No 144 (Official Case No) ICGJ 437 (ICJ 2012) para 99.
99 2015 (1) SA 315 (CC). In *Armed Activities on the Territory of the Congo* (*Democratic Republic of the v Rwanda*) [2006] ICJ General List No 126, the International Court of Justice recognised the prohibition against genocide and racial discrimination as peremptory norms of international law. In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* [1951] ICJ Rep 15, the ICJ held that the prohibition against genocide is a *jus cogens* norm that cannot be reserved nor derogated from.

follows that such norms are part of Zimbabwean law and the fact that Zimbabwe has still not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[100] for instance, does not make much difference. In that case, such superior customary international law norms will prevail not only against conflicting constitutional or statutory provisions but will also prevail against conflicting treaty provisions, whether or not such a treaty was concluded before or after the emergence of such peremptory norms.[101] The next part focuses on the constitutional provisions that provide for recourse to international law as an interpretative guide in the interpretation of the Declaration of Rights and legislation.

6 Interpretation of legislation in accordance with international law

The Constitution enjoins an international law-friendly interpretation of legislation. 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'. Additionally, section 327(6) of the Constitution enjoins courts and tribunals, when interpreting legislation, to 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'.[102] The cardinal interpretative role of customary

100 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 [1989] ATS 21 (CAT).

101 See VCLT (n 38) arts 53 & 64. Art 53 stipulates that 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. In addition, art 64 provides that '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. Arts 53 and 64 of the VCLT make it clear that these norms prevail over any other rule of international law, whether conventional or customary, in the event of a conflict. As to a conflict between peremptory norms and customary international law, see *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening* ICGJ 434 (ICJ 2012) 140. A *jus cogens* norm rises to that level when the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris* by most states. This should be read with the concept of obligations *erga omnes*. Recognised by the ICJ in the *Barcelona Traction, Light and Power Company, Limited, (Belgium v Spain)* [1961] ICJ Rep 9 case in 1970, obligations *erga omnes* flow from obligations that have a *jus cogens* character. In *East Timor, Portugal v Australia, Jurisdiction, Judgment* [1995] ICJ Rep 90, the ICJ held that the right to self-determination has an *erga omnes* character.

102 The wording of this provision may have been inspired by sec 233 of the 1996 South African Constitution which provides that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation

international law and treaties was judicially affirmed by the Supreme Court in *Jenrich* where the court explained that '[i]n terms of s 326(2) of the Constitution, the courts are enjoined to interpret legislation in a manner that is consistent with international customary law. In similar vein, s 327(6) requires the adoption of an interpretation that is consistent with any treaty or convention that is binding on Zimbabwe'.[103]

The phrase 'any international convention, treaty or agreement which is binding on Zimbabwe' must be interpreted to entail all treaties that Zimbabwe has ratified or assented to since these instruments are already binding on the country regardless of whether or not they have been domesticated into the municipal legal order. Thus, legislation that impacts on people's rights should be interpreted, as far as reasonably possible, in harmony with applicable international law norms. This provides additional impetus for Zimbabwean courts to interpret legislation in ways that take into account widely accepted international law norms, both treaty and customary.[104] However, it is important to note that treating international conventions, treaties and agreements binding on Zimbabwe as guides to interpretation does not entail giving them the status of domestic law.

Sections 326(2) and 327(6) should also be read together with section 46(1)(c) which provides that when interpreting the Declaration of Rights a court, tribunal, forum or body must take into account 'international law and all treaties and conventions to which Zimbabwe is a party'.[105] In this regard, judicial and quasi-judicial

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that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

103 See *Jenrich* (n 88) 3-4.

104 See Liebenberg (n 10) 104.

105 The courts' approach has been to invoke both binding and non-binding international instruments as an interpretative guide. In *Jestina Mukoko v The Attorney-General* SC 11/12 31, decided a year before the 2013 Constitution was adopted, the Supreme Court referred to a number of international instruments as interpretative guides, both binding and non-binding, and these included the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Doc A/39/51 1984; the 2003 African Commission Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa DOC/OS(XXX)247; and the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders 1990 (DHLAUTH) 113359. The Court was clear that these instruments were relied upon as interpretative guides in interpreting the Constitution, noting that '[t]he relevance of the reference to the provisions of article 15 of the UN Convention on Torture is not in the substance of the obligation imposed on state parties. It is on the principle of interpretation involved.' See also *The State v Willard Chokuramba (Justice for Children's Trust & Zimbabwe Lawyers for Human Rights Intervening as Amicus Curiae)* CCZ 10/19, a case involving corporal punishment for a juvenile offender in which the Court invoked various international human rights treaties as an interpretative guide in terms of sec 46(1)(c) of the Constitution. The same approach was reiterated in the recent case of *Zuma* (n 31) para 185. Sec 46(1)(c) of the Constitution's formulation is similar to sec 39(1)(b) of the South African

bodies are constitutionally obligated to interpret provisions of the Declaration of Rights, to the extent that its language reasonably permits, in harmony with international law. This is the purpose of taking into account international law, treaties and conventions to which Zimbabwe is a party, which is done to ensure that domestic rights jurisprudence reflects globally recognised legal principles.

The importance of section 46(1)(c) in facilitating the invocation of international law as an interpretative guide when interpreting the Declaration of Rights was endorsed by the Supreme Court in *Zimbabwe Homeless People's Federation*, where the Court stated the following:[106]

> Both the United Nations Convention and the African Charter have been ratified by Zimbabwe, the former on 11 September 1990 and the latter on 19 January 1995. Consequently, by dint of s 46(1)(c) of the Constitution, it is incumbent upon our courts to take them into account in interpreting the Declaration of Rights entrenched in Chapter 4 of the Constitution. This is reinforced by s 327(6) of the Constitution which dictates the adoption of any reasonable interpretation of domestic legislation that is consistent with any treaty or convention which is binding on Zimbabwe, in preference to any alternative interpretation that is inconsistent with that treaty or convention.

It must be clear that sections 46(1)(c) and 327(6) do not, in and of themselves, incorporate treaties into Zimbabwean domestic law. It is therefore important that a distinction must be made between using international law as a guide to interpretation and as a source of rights and obligations.[107] As an interpretative tool, the treaty is at all times subject to the requirements of the Constitution. What this means is that, although a treaty may be binding at the international level, its provisions, unless it is a self-executing treaty, do not create domestic rights and obligations that are capable of being invoked by litigants under the domestic legal order. The treaty would need parliamentary incorporation into the domestic legal order. It follows

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Constitution which states that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law'. In the case of *S v Makwanyane* 1995 (3) SA 391 para 35, the South African Constitutional Court interpreted the predecessor to sec 39(1)(b), stating that '[i]n the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation.'

106 *Zimbabwe Homeless People's Federation & Others v Minister of Local Government and National Housing & Others* SC 94/2020 7. The Court further referenced the UN Convention on the Rights of the Child (1989) UN Doc A/44/49 and the African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49, noting that 'Zimbabwe is a party to both of these instruments and, consequently, our courts are constitutionally bound to take them into account in interpreting the Declaration of Rights'; *Zimbabwe Homeless People's Federation* 36.

107 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 96 & 108.

that using treaties as a guide to interpretation under sections 46(1)(c) and 327(6) does not entail giving them the status of domestic law.

The Constitution's emphasis on international law as an interpretative guide when interpreting the Declaration of Rights and legislation signals the Constitution's openness to the norms and values of the international community as enshrined in treaties, customary international law and general principles of international law. The openness of the Zimbabwean Constitution to international law in the interpretation of the Declaration of Rights and legislation is in sync with a dialogic relationship between international adjudicative mechanisms and domestic courts and tribunals. International law provides useful normative insights on which constitutional and human rights adjudication can draw.[108] Interpreters of the human rights contained in the Declaration of Rights, therefore, have to seek guidance from international law in understanding the scope and content of some of the rights enshrined in the Declaration of Rights and legislation. There is little doubt that such transnational normative dialogues can strengthen the rule of law and assist domestic adjudicators to arrive at the best responses to shared problems.[109]

7 Conclusion

Zimbabwe's 2013 Constitution contains generous provisions entrenching the reception of international law norms in the domestic legal order. The interplay between international law and national legal systems presents a dynamic relationship where states attempt to strike a delicate balance between sovereign imperatives and global cooperation. The reception of international law norms in the national legal order thus is a dynamic process shaped by the interaction of municipal legal systems with international legal principles, norms and institutions. Although international law is not prescriptive on how states are to implement their international obligations at the municipal level, it is important that the means adopted must be adequate and effective to enable compliance with a state's international obligations. The Constitution's emphasis on international law as both a source of rights and duties as well as an interpretative guide when interpreting the Declaration of Rights and legislation signals the Constitution's openness to the norms

108 GL Neuman 'International law as a resource in constitutional interpretation' (2006) 30 *Harvard Journal of Law and Public Policy* 177.

109 M Kirby 'Constitutional law and international law: National exceptionalism and the democratic deficit?' (2009) 98 *Georgetown Law Journal* 442.

and values of the international community as enshrined in treaties, customary international law and general principles of international law.