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Choga, Fidelis Shepherd

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UNIVERSITY OF THE WITSWATERSRAND, JOHANNESBURG

SCHOOL OF LAW

AN ANALYSIS OF THE APPLICATION OF INTERNATIONAL LAW UNDER THE 2013 ZIMBABWEAN CONSTITUTION: OPPORTUNITIES AND CHALLENGES

Submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) (Research Report) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg.

By

Fidelis Shepherd Choga

Student No. 750092

Supervisor: Doctor Khulekani Moyo

Date: 27 March 2018

DECLARATION

I, **Fidelis Shepherd Choga,** declare that this Research Report is my own, unaided work. It is submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) (Dissertation) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Fidelis Shepherd Choga Date

Word Count: 9 752

ABSTRACT

Applying international law in the past has been a challenge for Zimbabwe because of the uncertainty as to the legal status and applicability of international norms under Zimbabwe's 1979 Independence Constitution. However, the position appears to have been largely settled if regard is had to the 2013 Constitution of Zimbabwe which contains generous provisions on the position of international law at the municipal level, as this research report attempts to show. This research report investigates and critiques the relevant provisions of the 2013 Constitution that relates to the application of international law with a view to ascertain the extent to which such provisions facilitate or impede the application of international law in Zimbabwe's municipal law. The report interrogates the provisions relating to the process of ratification of international treaties, the domestication of international treaties, the status and applicability of customary international law as well as the interpretation of the Declaration of Rights. This research report argues that the 2013 Constitution marks a significant shift on the extent to which the country is receptive to international law. The challenge is now incumbent of the political actors and adjudicators such as the courts to ensure that norms generated at the international level become part and parcel of Zimbabwe's domestic norms.

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CAT	United Nations Convention against Torture
CRC	United Nations Convention on the Rights of the Child
FAO	Food and Agriculture Organisation of the United Nations
HRC	Human Rights Commission
ICCPR	International Convention on Civil and Political Rights Convention
ICESCR	International Covenant on Economic, Social and Cultural Rights
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UN	The United Nations

TABLE OF CONTENTS

DECLARATION 1

ABSTRACT 2

LIST OF ABBREVIATIONS 3

TABLE OF CONTENTS 4

I. INTRODUCTION

a) Background 6

b) Statement of Problem 6

c) Objectives of the Study 7

d) Significance of the Study 7

e) Research Questions 7

f) Research Methodology 8

g) Limitations of the Study 8

h) Outline of the Research Report 8

II. THE INCORPORATION OF INTERNATIONAL LAW INTO A DOMESTIC LEGAL FRAMEWORK

a) Introduction 9

b) A Brief Overview of the Nature and History of International Law 9

c) Sources of International Law 10

d) Theories 10

i. The Monist Approach 10

ii. The Dualist Approach 12

e) Incorporating International law at Domestic Level 13

f) The Application of International Law in Zimbabwe under the 1979 Constitution **14**

III. OPPORTUNITIES AND CHALLENGES OF APPLYING INTERNATIONAL LAW IN ZIMBABWE

a) International Law under the 2013 Constitution **17**

b) Customary International Law **19**

c) The Status of Treaties **24**

d) The Role of the Judiciary **29**

IV. CONCLUSION AND RECOMMENDATIONS 32

BIBLIOGRAPHY 35

I. INTRODUCTION

a) Background of the Study

Over the years international law has developed into a specialised body of law.[1] Since 1949 the concept of international law has been viewed to extend to specialised agencies and international organisations such as the United Nations (UN).[2] The importance of this law to the individual was emphasised by the treaties signed after the Second World War which extended protection to regular people. An often-asked question is whether international law is binding on a world that lacks international governance.

In the 1920's the theory that international law was completely dependent on consent was prevalent.[3] This hypothesis was that implied or express consent by states bound only the individual state to international provisions.[4] The hypothesis neglected to account for the importance of international law to the individual. As expected, the theory fell out of favour with the progression and expansion of international law. The establishment of: international organisations where members had treaty-making powers; permanent bodies for dispute resolution and; prohibition of the use of force by states, indicated a global faith in international law that protects the individual.[5] By acknowledging the individual international law became part of the domestic legal framework of most states. Universal membership in international organisations implied the world had reached an understanding on the binding nature of this form of law. The 2013 Constitution appears to move away from this archaic approach to international law, creating a basis on which customary international law and treaty law can be applied domestically.

b) Statement of Problem

Most states have laws that allow for the integration of international law into the domestic legal order. The mechanisms of national application of international law include legislative implementation and dissemination and training (during armed conflict), but the most important is

[1] Crawford J *Brownlie's Principles of Public International Law* 8 ed (2012) Oxford University Press, 4.

[2] Dugard J International Law: A South African Perspective 4 ed (2011) Juta, 1.

[3] Crawford (Note 1 above), 5.

[4] Ibid.

[5] Ibid.

establishing and applying international law in national courts.[6] The paper will investigate the relevant norms under the 2013 Constitution that provide for the application of international law and the methodology of applying such norms into the domestic legal framework.

c) Objective of the Study

The objectives of the study are:

(i) Systematically study the application of international law in Zimbabwe under the new/2013 Constitution, both at the international and domestic levels.
(ii) To assess the opportunities and challenges of applying international law in the domestic legal framework of Zimbabwe.
(iii) To give recommendations on the proper interpretation and application of international law under Zimbabwe's constitutional framework.

d) Significance of the Study

Zimbabwe has a plural legal system which combines Roman Dutch Law and English Law with the customary law of the indigenous people of Zimbabwe.[7] This paper seeks to analyse the application of international law in Zimbabwe under the 2013 Constitution. Historically the judicial system of the concerned country has been reluctant to apply international law at a domestic level. This study seeks to interrogate the opportunities and challenges of the application of international law in Zimbabwe. With the introduction of a new Constitution in 2013, it is important to consider whether its approach to international law will change the country's approach in the future.

e) Research Questions

This paper aims to answer the following questions:

i. To what extent does the 2013 Constitution provide for the role of international law?

[6] Crawford (Note 1 above), 57. Also see Toni Pfanner 'Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims' (2009) *91 International Review of the Redcross* 274 ,280 -282.

[7]Global Ethics Observatory (GEObs) 'Zimbabwean Legal System' *Database 4: Legislation and Guidelines* <http://www.unesco.org/shs/ethics/geo/user/?action=Geo4Country&db=GEO4&id=34&lng=en>.

ii. What are the opportunities and challenges in the application of international law under Zimbabwe's 2013 Constitution?

f) Research Methodology

This paper will use a qualitative approach through desktop and library research to gather the relevant information. An exploration of primary sources such as the 1979 and 2013 Constitutions, international and regional treaties and secondary sources such as academic literature and commentaries to generate a significant understanding of the relevant issues will be undertaken. This will all relate to the topic in the context of international law, with reference to customary international law, treaties, general principles of international law and academic teachings indicative of approaches to integration of international law into municipal law.

This study will therefore attempt to answer the indicated research questions only, in order produce a coherent body of work. A number of cases relating to the incorporation of international law into the domestic legal framework will also be considered, primarily from Zimbabwe as well as relevant comparative texts in order to establish and ascertain any comparative approaches in the application of international norms at the domestic level.

g) Limitations of the Study

The scarcity of Zimbabwean legal texts and case law relevant to the implementation of international law into the domestic law limit this study. Hence, some of the scholars and legislation that will be discussed are from similarly situated comparative jurisdictions such as South Africa whose constitutional provisions on international law are similar to those in the Zimbabwean Constitution. A distinction of the relevant South African provisions considered will be distinguished from the Zimbabwean legal regulations where necessary.

h) Outline of the Research Report

The report comprises of four sections. The first section serves as an introduction of the study and general indication of the issues to be considered. The second section will focus on the general aspects of international law and a discussion and evaluation of the foundations of international law in Zimbabwe. This will be an exploration of the different mechanisms of international law incorporation into a domestic legal system. The third section will analyse the opportunities and challenges of applying international law in Zimbabwe under the 2013 Constitution. Essentially,

this section will consider the opportunities created by the new Constitution in the domestication of international law. The fourth section will provide recommendations on the proper application of international law domestically in the context of Zimbabwe and conclude the paper.

II. THE INCORPORATION OF INTERNATIONAL LAW INTO A DOMESTIC LEGAL FRAMEWORK

a) Introduction

In order to understand the importance of international law integration into a domestic legal system an expansive understanding of what international law encompasses is required. This section will explore the sources of international law and determine who the true subjects of international law are. The section will also briefly discuss the application of international law in Zimbabwe prior to the adoption of the new Constitution.

b) A Brief Overview of the Nature and History of International Law

International law is often defined as a 'body of rules and principles which are binding upon states in their relations with one another'.[8] These rules and principles were developed by influential writers such as Vitoria, Grotius, Wolff and Vattel who inspired the view that these rules governed relations between rulers in regard to custom and treaty making.[9] History indicates that international law originated in Europe and was spread to the Americas, Asia and Africa through colonisation.[10]

International law moved away from a state only enterprise in 1949 with the recognition of international organisations such as the United Nations (UN) enjoying legal personality.[11] This development continued resulting in the recognition of individuals as subjects of international law.[12]

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https://repository.up.ac.za/bitstream/handle/2263/18622/Rubagumya_Application%282011%29.pdf?sequence=1> 8-9.

[8] Ibid, 1.

[9] Crawford (Note 1 above), 3 - 4.

[10] Ibid, 4.

[11] Dugard (Note 2 above), 1.

[12] Jean Chrysostome Rubagumya 'Application of International Human Rights Instruments (IHRIS) by Domestic Courts: A Comparative Study of Rwanda and Ghana' LLM Degree Thesis, University of Pretoria < https://repository.up.ac.za/bitstream/handle/2263/18622/Rubagumya_Application%282011%29.pdf?sequence=1> 8-9.

Apartheid South Africa's isolation from international organisations and exclusion from conferences as a protest to the inhumanity of the National Party's administration catalysed regime change in that country.[13] This is proof that humanity is the foundation of international law, which materialises in the principle of freedom and the sovereignty of the state.[14]

c) Sources of International Law

Article 38(1) of the Statute of the International Court of Justice provides for the sources of international law.[15] These include:

i. International Conventions (treaties), whether general or particular;

ii. international custom, as evidence of general practice accepted as law;

iii. the general principles of law recognised by civilised nations; and

iv. judicial decisions and the teachings of the most highly qualified.[16]

This paper will focus primarily on the first two sources, namely treaties and customs. The issue of implementation and application of international law domestically mostly focuses on these two sources.[17]

d) Theories

i. The Monist Approach

Dugard has pointed out that 'the monist school, whose leading exponents are Kelsen, Vedros, and Scelle, maintain that international and municipal law, are far from being essentially different and must be regarded as manifestations of a single conception of law'.[18] This approach indicates that international and domestic law must be viewed and applied as one formulation of law. Domestic

[13] Dugard (Note 2 above), 19.

[14] Ibid, 9.

[15] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6 Article 38(1) - establishes the sources of international law.

[16] Ibid.

[17] Rubagumya (Note 12 above) 10.

[18] Dugard (Note 2 above) 42.

adjudicators would therefore be obligated to apply international regulations without any express adoption by the court or act of incorporation by the legislature.[19]

Crawford further explained that monism stems from the reasoning that international and domestic law are of a single order or multiple interconnected orders which are presumed to be cogent and rational.[20] The basis of this hypothesis is that the subject matter or origins of domestic and international law cross paths at certain points therefore making it logical for international regulations to be applied by municipal courts directly.

Crawford's perspective is:

> Individuals are the ultimate subjects of international law; representing both the justification and moral limit of the legal order. The state is disliked as an abstraction and distrusted as a vehicle for maintaining human rights. International law is seen as the best available moderator of human rights, and also as a coalition of the legal existence of states and therefore of the national legal systems'.[21]

Given the international law shift in the late 19th to early 20th century from a state centric establishment to a platform that considers individual rights this approach encourages domestication as a form of serving the people. Crawford considered Kelsen who had more of a logical driven approach to the theory.[22] Kelsen believed that international norms predetermine the basic national norms, implying that the existence of national law is validated by international law.[23] This therefore means that in terms of the monist approach, national law is subservient to international law.[24] Starke however points out that this direct implementation of international law

[19] Dugard (Note 2 above) 42.

[20] Crawford (Note 1 above) 48.

[21] Ibid, 48 - 49.

[22] Ibid, 49.

[23] Ibid.

[24] Sunil Kumar Agarwal Implementation of International Law in India: Role of the Judiciary (Faculty of Law, McGill University) < http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf>.

Also look at Treaty Event 2011 *Towards Universal Participation an Implementation* (2011) <https://treaties.un.org/doc/source/events/2011/press_kit/fact_sheet_1_english.pdf>.

results in domestic courts taking on the responsibilities of international tribunals as they apply international instruments domestically.[25]

ii. The Dualist Approach

The dualist theorists approach international law differently from the monist theorists. The Dualist theory views domestic and international law as substantively different in every way, therefore international law can only be applied domestically after being adopted by the courts or incorporated in to local legislations.[26] Lauterpacht stated the distinction between international and domestic law is 'radical' and that the domestication of international law can only be achieved through the express or implied consent of the state.[27]

As noted by Argawal:

> An unincorporated treaty has no formal standing in domestic law. Also, if international law conflicts with the domestic law, then domestic law will prevail. However, this does not necessarily mean that most states would disregard international law'.[28]

The theory therefore does not represent a neglect of established international law. Its purpose is to give domestic law primary consideration to ensure that the regulations are in the interest of the public and do not disrupt an established legal order. International law is not treated as binding regulations but more like guidelines grounded only in consent.

Starke argues that:

> The truth is that the whole dualistic position raises grave objections in principle. It seems to deny the juridical nature of international law by treating it as a kind of morality governing the relations between states and grounded only in their consent'.[29]

Both the dualist and monist theories fall short of expectations as neither theory convincingly discusses the practice of international and national courts, who have an important role in

[25] J. G. Starke 'Monism and Dualism in Theory of International Law' (1936) 17 *British Year Book of International Law* 66, 71.

[26] Dugard (Note 2 above) 42.

[27] Ibid.

[28] Agarwal (Note 26 above).

[29] Ibid.

establishing the structures and approaches of various legal systems.[30] Crawford further points out that a conflict of obligations could potentially lead to a state failing domestically to act in the manner expected by the international community, of which the consequences will not invalidate municipal law but will create international accountability of the state.[31] Both approaches establish domestic approaches to international law but fail to consider potential international and domestic consequences.

e) Incorporating International Law at Domestic Level

International law is developed at an international level and reaches the individual through domestic integration. This could be through legislative and administrative reform, the judicial system or even constitutional reform.

Zimbabwe's constitutional reform shifts obligations under treaties from aspirations to a basic law of the country ensuring accountability to the beneficiaries of the rights (citizens).[32] Such incorporation gives the courts a larger role through enforcement by applying the international obligations.[33] This is preferable in a dualist legal system where courts usually adopt a conservative approach to the application of international law.[34] Due to the constant spotlight on a nation's government, legislative and domestic reform sheds light on the social impact of infringed international mandates and leads to institutional changes at a domestic level.[35] Such change will also manifest in judicial application.

[30] Crawford (Note 1 above) 50.

[31] Ibid.

[32] Savitri Goonesekere 'National Implementation of International Human Rights, Social Inclusion and the Empowerment of People' <http://www.un.org/esa/socdev/egms/docs/2013/EmpowermentPolicies/National%20Implementation%20of%20International%20Human%20Rights.pdf >.

[33] Ibid, 5.

[34] Ibid.

[35] Ibid, 7.

States must ensure the fulfilment of international law obligations in the most effective manner and avoid domestication problems by incorporating the provisions directly into their legal framework.[36]

f) The Application of International Law in Zimbabwe under the 1979 Constitution

On the 21'st of December 1979 the Lancaster House Agreement was signed by the British government, Zimbabwe Rhodesia government and the Patriotic Front.[37] The agreement accepted the Republic of Zimbabwe as a sovereign state, replacing the illegitimate state of Rhodesia.[38] The agreement included the negotiation of the 'Independence Constitution', commonly known as the 1979 Constitution. To understand the importance of this report a brief exploration into the observance and application of international law in Zimbabwe under this document must be conducted.

It is common knowledge the present government of Zimbabwe has committed several human rights violations over the years. Such actions were encouraged by a Constitution that lacked any customary international law guidelines. Some scholars argue Chapter III – The Declaration of Rights was drafted in terms of customary international law since its provisions are primarily motivated by the Universal Declaration of Human Rights (UDHR).[39] Hunnam pointed out that intergovernmental and political discussions, judicial tribunal arguments, actions of international organisations, and legal writing by scholars indicate the provisions of the UDHR have been incorporated into customary international law.[40] This implies the UDHR is binding on all states.[41]

However, the Declaration of Rights was constantly undermined by the Zimbabwean administration through amendments to the constitution. Mude believes the ideological differences

[36] Rubagumya (Note 12 above) 15.

[37] Southern Rhodesia Constitutional Conference Held at Lancaster House, London September - December 1979 Report.

[38] Ibid

[39] Torque Mude 'The History of International Human Rights Law in Zimbabwe' (2014) *2 Journal of Social Welfare and Human Rights* 53, 64. Also see UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[40] Hurst Hunnam 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International and Comparative Law* 287, 289.

[41] Ibid.

between the developed and less developed countries negates the notion of a universal form of law.[42] Zimbabwe has often argued that the perception of human rights is a Western narrative constructed in favour of Western ideals.[43] Such an approach to international law has resulted in the country justifying its lack of adherence to customary international law as a tool to protect its citizens best interests.[44] In the *Mike Campbell (Pvt) Ltd v Zimbabwe* case the applicants were farmers whose land had been compulsorily acquired by the Zimbabwean government as part of a land reform program.[45] Section 16B of Amendment 17 of the 1980 Constitution (17) gave the state full ownership of the land without any compensation to the previous owner.[46] Amendment 17 barred possible challenges of acquisitions in court and the courts were expressly forbidden from entertaining such a challenge.[47]

The *Campbell* case dealt directly with the governments controversial repossession measures.[48] The Southern African Development Community (SADC) Tribunal had to decide whether the government's actions perpetuated racial discrimination.[49] When considering whether the land reform program was motivated by racial discrimination Ndlovu points out that the program would have been legitimate if the government had taken reasonable steps to create some criteria that identifies land, provides acceptable compensation for land acquired and proof the land was distributed to the poor or landless.[50] The SADC Tribunal held that the challenges as a result of the program were only felt by farmers which amounted to indirect discrimination or substantive

[42] Mude (Note 41 above) 65.

[43] Ibid.

[44] Ibid.

[45] *Mike Campbell (Pvt) Ltd v Zimbabwe* (2008) SADCT 2, 4 – 12.

[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] Dugard (Note 2 above) 442.

[50] Precious. N. Ndlovu 'Campbell v Republic of Zimbabwe: A Moment of Truth for the SADC Tribunal' (2011) 1 *SADC Law Journal* 63.

inequality' which is contrary to the provisions of Article 6 (2) of the Treaty of the Southern African Development Community.[51] The applicants were therefore afforded compensation.[52]

Two applicants of this case applied to the Harare High Court seeking to register and enforce the decision to no avail.[53] Judge Bharat Patel of the High Court acknowledged the decisions of the tribunal as binding and enforceable on member states.[54] However, he went on to say foreign decisions do not apply domestically if inconsistent with municipal law.[55] Given that Amendment 17 was still in force at the time this case was brought before the SADC Tribunal, the decision contradicted public policy set out in the 1979 Constitution.[56] Due to Zimbabwe's limited international law cases, the assumption is Patel's decision was the judiciaries attitude towards international law. This approach denied the applicants compensation for the violation of their human rights.

The 1979 Constitution therefore encouraged the establishment of an authoritarian because it lacked tolerance and inclusivity.[57] It is a Constitution that perpetuated injustices by allowing the resurfacing of crimes that characterised colonisation. The *Campbell* case is proof that the lack of customary international law guidelines in a domestic legal framework can encourage human rights violations.

International law depends on the good faith of humanity, specifically national administrations. However, these norms are constantly undermined. Although much has been written internationally and nationally on the limitations and exceptions of applying international norms domestically, the discussion above reveals a gap in the literature with regard to the effects of failure to apply international law domestically. There is a general hiatus between conception and practice within

[51] Dugard (Note 2 above) 442. Also see Treaty of the Southern Development Community (1993) Article 16 (2).

[52] Ibid.

[53] *Garamara (Pvt) Ltd v Republic of Zimbabwe (*2010) ZWHHC 1 < http://www.veritaszim.net/node/327>.

[54] Ibid.

[55] Ibid.

[56] Dugard (Note 2 above) 442.

[57] D Tladi 'Interpretation of treaties in an international law-friendly framework: The case of South Africa' in HP Aust & G Nolte *The interpretation of international law by domestic courts: Uniformity, diversity, convergence* (2016), 1.

this stream of research, which provides the background and stimulus for this report. By addressing the research questions and set objectives, this report expands the area of research and provides new knowledge pertaining to Zimbabwe's approach to international law.

III. OPPORTUNITIES AND CHALLENGES OF APPLYING INTERNATIONAL LAW IN ZIMBABWE

Under the Zimbabwean Constitution, legislation and judiciary play complementary roles in the reception of international law in the country. The regulation of relationships between states reaches the national level through the country's Constitution, which allows international obligations to form part of the domestic legal framework through integration.[58] This is fully explained below.

a) International Law under the 2013 Constitution

In 2013 the new Zimbabwean Constitution came into force.[59] The formulation of a new Constitution had been a topic of debate since 1997.[60] Various organisations including churches, political parties, and human rights groups criticised the accumulation of presidential power and the infringement of human rights.[61] The intention of a reformulated Constitution was to codify the growth of law in the country, expand upon rules that were previously unclear and introduce norms that represent the nation's values.[62] Unlike the 1979 Lancaster Constitution this document gives in-depth codification of Zimbabwe's recognition of international law and the role domestic law has in achieving the recognition.

Unlike the 1979 Constitution, the status and interpretive role of customary international law in Zimbabwe is established in the 2013 Constitution. Section 327 of the new Constitution regulates the signing, ratification, and implementation of international law. The section provides that:

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[58] Rubagumya (Note 12 above) 23.

[59] Constitution of Zimbabwe Amendment (No. 20) Act, 2013 [Zimbabwe], 22 May 2013, <http://www.refworld.org/docid/51ed090f4.html>

[60] John Hatchard 'Some Lessons on Constitution-Making from Zimbabwe' (2001) 2 *Journal of African Law* 210, 210.

[61] Ibid.

[62] Wendy Zeldin 'Zimbabwe: Draft New Constitution Approved in Referendum' Library of Congress <http://www.loc.gov/law/foreign-news/article/zimbabwe-draft-new-constitution-approved-in-referendum/ last accessed>

> An international treaty which has been concluded or executed by the President or under the President's authority 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.[63]

The new Constitution adopts a dualistic approach to integration since the parliament determines the international treaties and agreements that will impose obligations.[64] A convention signed by the President will only bind the country after parliamentary approval.[65]

Section 213 regulates the deployment of defence forces stating only the President as Commander in Chief has the authority to deploy armed forces for operational use whether it be internally or against outside forces.[66] This section clearly indicates that deployment of these forces will be in instances of defending the territorial integrity and internal peace of the country, and in complying with international obligations such as peace keeping missions.[67] The relevance of this to the research report is that, the codification of customary international law that governs the use of force by states is a clear indication of Zimbabwe's acknowledgement of international norms.

Section 34 holds the state responsible for ensuring that all international conventions, treaties, and agreements to which Zimbabwe is a party are integrated into the domestic legal framework.[68] The executive function to execute and conclude international agreements implies a respect for international law and undertaking to observe the provisions of public international law.[69] The state also undertakes to establish appropriate laws to ensure the right to the effective enjoyment, protection and promotion of all other basic human rights and freedoms.[70]

Generally, the Constitution provides for two provisions of international law. Section 326 and 327 are law making provisions on customary international law and treaties respectively.[71] Section 326

[63] Constitution of Zimbabwe 2013 (Note 59 above) section 237.

[64] Ibid.

[65] Ibid.

[66] Ibid, section 213.

[67] Ibid.

[68] Ibid, section 34.

[69] Ibid, section 110(4) & Rubagumya (Note 12 above) 26.

[70] Ibid, Chapter 4.

[71] Constitution of Zimbabwe 2013 (Note 59 above), Section 326 - 327.

is also an interpretive provision of customary international law.[72] These provisions will be discussed comprehensively below.

b) Customary International Law

Article 38 of the U.N Charter defines international custom as 'evidence of a general practice'.[73] Crawford points out that, because a custom exists does not guarantee it to be law, as there are requirements in that regard.[74] The requirements are whether it is a general practice and it must be generally accepted as law.[75] Crawford draws this conclusion from the *North Sea Continental cases*, which held the formation of a new customary rule is substantiated by 'settled practice' and must be accompanied by evidence of '*opinio juris sive necessitatis*'.[76] In the *Nduli v Minister of Justice* case Rumpff CJ stated that, regarding customary international law as part of international law depends on whether it is 'universally' recognised.[77] The authority of customary international law therefore hinges on the global reception of the provision. Recognition of a norm as authority substantiates its position in the law.[78] However, customary international law does not need to be accepted by all states, but there must be a "general" or "widespread" acceptance of the relevant norm.[79]

Generally, the international community's approach to customary international law is that of incorporation, where customary norms are considered to be part of the local law as long as they are not contrary to Acts of Parliament.[80] Section 326 of the Constitution indicates the role of customary international law in the country, by considering it a part of municipal law except for instances in which it is contrary to the Constitution or an Act of Parliament.[81] Courts and tribunals are encouraged to adopt any reasonable interpretation of the domestic norms that are consistent

[72] Constitution of Zimbabwe 2013 (Note 59 above), Section 326.

[73] Crawford (Note 1 above) 23.

[74] Ibid.

[75] Crawford (Note 1 above) 23.

[76] Ibid, 27.

[77] Dugard (Note 2 above) 51.

[78] Ibid.

[79] Ibid, 29.

[80] Crawford (Note 1 above) 67.

[81] Constitution of Zimbabwe 2013 (Note 59 above), Section 326.

with customary international law applicable in Zimbabwe, instead of an alternative interpretation inconsistent with domestic law.[82] De Wet refers to this approach as 'international law friendly' in that it affords customary international law domestic authority as long as the limitations indicated are not violated.[83]

Section 326 (2) of the Constitution provides that 'every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe.'[84] In Tladi's view 'the meaning of international law requires its interpretation through the application of the rules of interpretation' meaning including such a provision creates a reasonable expectation that international law will be interpreted.[85] It is interesting to note that this section establishes a compulsory obligation to apply and not one to choose to apply. The wording 'must adopt' emphasises that treaties, subsequent practices and relevant rules of international law should be considered. This implies that the judiciary is obligated to consider international law in the execution of its adjudicative mandate.

Since international law is continuously changing, Crawford contends that, the application of these changes in a domestic court without any Act of Parliament indicates that customary international law forms part of the domestic legal order from time to time.[86] However, courts tend to 'avoid commitment' to such an approach favouring the view that customary international law does not form part of domestic law but is a source which the courts can consult when required as its use is only occasionally decisive.[87] This explains why customary international law did feature heavily in Zimbabwe's legal framework in the past. However, a two-step inquisition simplifies the complications of incorporation. The first question is whether this is 'a subject matter on which international law has something to say, and which it allows (or even requires) national courts to

[82] Constitution of Zimbabwe 2013 (Note 61 above), Section 326.

[83] Erika de Wet *The Implementation of International Law in Germany and South Africa* (2015) Pretoria University Law Press, 4.

[84] Ibid.

[85] Tladi (Note 57 above), 138.

[86] Ibid.

[87] Crawford (note 1 above) 68.

say'.[88] If the answer is answered in the affirmative the court must ask itself whether it has law-making power in that specific area of law.[89]

Under the new constitutional regime, the *Minister of Foreign Affairs v Michael Jenrich (2) Standard Chartered Bank Zimbabwe Limited*

(3) The Sheriff of Zimbabwe case dealt with customary international law and the court came to its decision by applying the abovementioned two-fold enquiry. In the *Jenrich* case the Harare High Court heard a case between the Minister of Home Affairs (acting for the Food and Agriculture Organisation of the United Nations (FAO)) and Michael Jenrich (a former FAO employee).[90] Jenrich initiated proceedings in the Labour Court where he successfully sued FAO and was granted salary arears and damages.[91] In response the Minister of Home Affairs applied for a provisional order in the High Court to block Jenrich from claiming what he was awarded in the Labour Court.[92] The Minister claimed FAO had absolute immunity from legal process and/or execution because of the agreements between the UN and Zimbabwe.[93] These partnership agreements include funding and programmes established to enhance Zimbabwe's agricultural sector.[94] The applicant stated that the Minister of Home Affairs had *locus standi* because 'customary international law compels him to act on behalf of FAO with which Zimbabwe entered into Agreements granting it immunity from the jurisdiction of Zimbabwean courts'.[95]

In considering the first part of the enquiry, the High Court considered whether the immunity of a foreign entity can in fact establish *locus standi*. The court found the question of immunity is *in limine*, stating that the applicant should have brought fourth its position to the court prior to the

[88] Crawford (note 1 above) 68.

[89] Ibid.

[90] *Minister of Foreign Affairs v Michael Jenrich (2) Standard Chartered Bank Zimbabwe Limited*

(3) The Sheriff of Zimbabwe (2015) ZWHHC 232.

[91]Ibid.

[92] Ibid.

[93] Ibid.

[94] Food and Agriculture Organisation of the United Nations Official Website - Background <http://www.fao.org/partnerships/background/en/>.

[95] Jenrich Case (Note 90 above), 3.

trial.[96] However, the court acknowledged customary international law makes provision for 'exceptional circumstances' that allow a state's involvement in legal proceedings as a representative of a sovereign state or international organisation.[97] The court purported 'the State may be left with no option besides having to litigate to ensure that the courts determine… the scope of the foreign sovereign's immunity'.[98] Uchena J held in certain instances a sovereign state or an international organisation has the right to stand in court to enforce its immunity under customary international law.[99] Despite finding that the Minister of Foreign Affairs had *locus standi*, the court stated even if *locus standi* was absent, in terms of customary international law the court is still obligated to *mero motu* decide on the question immunity *in limine litis* in terms of the *Barker McCormac Ogilvy &Mather (Pvt) Ltd v Government of Kenya* case.[100] Therefore, the court found customary international law to be relevant when considering the subject matter of immunity.

In attempting to the answer the second enquiry of the test, which is whether the court retains law-making power over this area of law, the judge admitted the whole basis of the case is the question of FAO's immunity.[101] Uchena J went on to state the answer would be found by analysing customary international law as provided for in terms of section 326 (1) of the Constitution.[102] Crawford notes that whether international customary law is applicable in a domestic legal framework depends on whether the decision affects the rights of private parties or is interstate in nature.[103] The latter is 'difficult to restructure as a norm within a domestic legal system', whilst a case regarding individual rights would fit the general judicial approach to trial.[104] Since this case dealt with Jenrich's individual rights the court was not opposed to applying customary international law in this case.

[96] Jenrich Case (Note 90 above), 8.

[97] Ibid, 3.

[98] Ibid, 9.

[99] Ibid, 10.

[100] Ibid.

[101] Ibid, 12.

[102] Ibid.

[103] Crawford (Note 1 above) 69.

[104] Ibid.

Determining the type of immunity applicable in the case obligated the court to enquire into the nature of absolute immunity and restrictive immunity. Absolute immunity, as implied by the name, grants immunity to all external sovereigns and their administrations, for example armies and vessels owned by the state.[105] This doctrine would have protected FAO from all suits before a Zimbabwean court.[106] In terms of restricted or qualified immunity exemption is granted with respect to governmental public activities (*jure imperii*) and not in respect of commercial activities (*jure gestionis*).[107] The principle is founded on the perspective that a foreign government or international organisation that enters into a transaction agreement in which services, goods or some form of valuables are exchanged for remuneration 'must honour its obligations like other traders' or face the same punishment any other trader would for failure to meet its obligations.[108] The court considered the *Barker McComarc* and *ICRC v Sibanda & Anor* cases which both indicated the international community's move away from absolute immunity in favour of restrictive immunity.[109] In *Shiping Corporation of India Ltd v Evdomon Corporation & Anor*, another case considered by Uchena J, the court 'decided to follow the world- wide trend and to apply the restrictive doctrine'.[110] The High Court was persuaded that a labour dispute between an international organisation and an employee falls under the ambit of *jure gestionis*, since an employment contract is an agreement to render service in exchange for remuneration.[111] The application for the provisional order was not granted as the application was found to be an erroneous assumption of FAO's absolute immunity.[112]

The complexity of applying such a test is likely to further discourage the judiciary from applying customary international law in domestic proceedings. However, the *Jenrich* case sets an important precedent of how section 326 of the Constitution can be applied in an actual case.

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[105] Dugard (Note 2 above) 241.

[106] Jenrich Case (Note 90 above), 12.

[107] Dugard (Note 2 above) 241.

[108] Ibid.

[109] Jenrich Case (Note 90 above), 12.

[110] Ibid, 13.

[111] Ibid.

[112] Ibid, 13.

c) The Status of Treaties

It is generally accepted that the executive is responsible for a country's foreign relations, allowing it to frequently make deliberations that fall under the ambit of international law.[113] Article 2(c) of the Vienna Convention on the Law of Treaties gives the executive of a state authority to represent the persons of the state by negotiating, adopting, or authenticating an agreement before expressing the consent of a state.[114] Even though Zimbabwe practises dualism the state is obligated to refrain, in good faith from activity that would undermine that would undermine the objective of the treaty during the period between signing and ratification.[115]

However, formal procedures will require a legislative action that domesticates the international provisions, binding the state internationally.[116] The judicial system in a strict dualist state applies international instruments domestically after the legislative body has incorporated the international provisions domestically. In a monist system the judiciary is not required to wait for the legislature, as it can apply international law directly.[117] Generally, incorporation in a dualist system flows from the executive to the legislature and ends with the judiciary.

The new Constitution confers the power to express the state's intention to be bound to international conventions on the executive.[118] When performing this function, the executive is subject only to the Constitution and is not required to notify or consult the legislature.[119] This power is administrative in nature as it is afforded to the President and the Vice President or Minister performing the role of acting President.[120]

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[113] Dugard (Note 2 above) 69.

[114] Vienna Convention on the Law of Treaties (1969) Section 2.

[115] Rubagumya (Note 12 above) 30 & Treaty Event 2011 *Towards Universal Participation an Implementation* (2011) <https://treaties.un.org/doc/source/events/2011/press_kit/fact_sheet_1_english.pdf>.

[116] Rubagumya (Note 12 above) 30

[117] Ibid.

[118] Constitution of Zimbabwe 2013 (Note 59 above), Section 110.

[119] Ibid.

[120] Ibid, Section 100.

Ratification consists of two procedural acts.[121] The first is a parliamentary act of approval of the international instrument; and the second is an international process which consist of a formal exchange of instruments of ratification that indicates consent to be bound. [122] Zimbabwe's legislature performs the latter, which is the scrutinising of the international obligation to determine whether the instrument is in contradiction of the Constitution or/and domestic law.[123]

Section 327 (2) of the Constitution states that international law does not bind Zimbabwe until it has been incorporated into domestic law.[124] This creates problems for the domestic lawyers who argue based on international treaties and conventions.[125] This is due to the government historically refusing to be bound by international laws as they do not form part of the domestic legal framework.[126] In the past the judiciary continuously dismissed cases because of this provision.[127] The dualist approach therefore systematically discourages the application of international law. Since the judiciary is the last section in the implementation cycle, this creates the possibility that international law that never reaches its intended beneficiaries, the individuals.

This brings up the debate of whether the obligation on the state to act in good faith and abstain from activities contrary to the purpose of an instrument it has signed implies that these rights apply domestically.[128] These provisions do in fact apply domestically. The legislature's purpose as part of the ratification process should not be undermined.[129] However, the parliament's failure to incorporate international rights domestically does not eradicate their existence.[130] Furthermore, the legislature's decision should not outweigh the viewpoints of both the judiciary and executive.

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[121] Crawford (Note 1 above) 372.

[122] Ibid 372 – 373.

[123] Ibid & Rubagumya (Note 12 above).

[124] Constitution of Zimbabwe 2013 (Note 58 above), section 327(2).

[125] Otto Saki and Tatenda Chiware 'The Law in Zimbabwe' (2007) *Global Lex* <http://www.nyulawglobal.org/globalex/Zimbabwe.html#_International_Law_and_Its Application>.

[126] Ibid.

[127] Ibid.

[128] Treaty Event 2011 *Towards Universal Participation an Implementation* (2011). <https://treaties.un.org/doc/source/events/2011/press_kit/fact_sheet_1_english.pdf>.

[129] Rubagumya (Note 12 above) 34.

[130] Ibid.

Since the executive would have signed the treaty the assumption is that the administration believed the international provisions would benefit the general citizenry, therefore, a court's decision to implement this instrument results in two of the three branches of a state agreeing on the importance of the provision. This relaxation of ratification would encourage application of international law domestically.

Section 327(5) states that the parliament can declare an approval as unnecessary to any particular international treaty as long as the operation does not require withdrawal or appropriation of funds or modification of municipal law.[131] This section is similar to section 231(b) of the South African Constitution which deals with technical, administrative and executive agreements.[132] The Constitution specifically fits the 'technical' glove which are 'agreements that do not have major political significance; do not require additional budgetary allocation from Parliament over and above the budget provided by particular government department; and agreements that do not impact domestic law'.[133] De Wet points out that these are usually bilateral agreements which require a single government department to implement.[134] On average these agreements take three months to conclude.[135]

As of 2017 Zimbabwe has signed 35 bilateral investment treaties and 10 are in force.[136] The frequency of undertaking technical international agreements results in swift and simple fulfilment of international obligations, however this means a clear majority of concluded treaties do not go through the verification process.[137] This is potentially problematic as the accountability that democracy represents is insignificant when considering bilateral treaties.[138] However, in

[131] Constitution of Zimbabwe 2013 (Note 58 above), section 327 (5).

[132] Erika De Wet (Note 83 above), 29. Also see Constitution of the Republic of South Africa 1996, section 231.

[133] Ibid.

[134] Ibid.

[135] Ibid.

[136] Investment Policy Hub *Zimbabwe – Bilateral Investment Treaties* (2017) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233>. Of the 35 signed treaties the 10 that are in force are with China, Denmark, Germany, Islamic Republic of Iran, Kuwait, Netherlands, Russia, Serbia, Switzerland, and South Africa. These entered into force between 1998 and 2015.

[137] Erika De Wet (Note 83 above), 29 – 30.

[138] Ibid.

developing countries such treaties are vital to socio-economic development, therefore timeous agreement proceedings could discourage other states from undertaking these kind of agreements.

It should be noted that a domesticated treaty has the same status in domestic law as the Act it is incorporated through.[139] The treaty will not only rank below the Constitution, but in some instances below Parliamentary Acts depending on the nature of incorporation, for example, if a treaty is incorporated through subordinate legislature it will have a legal status on par with other subordinate legislation.[140]

The termination of treaties is a concept neither the Constitution nor legislation addresses. This implies that the regulations that govern incorporation of treaties must be interpreted to also regulate termination.[141] Therefore, the authority to terminate a treaty would rest with the executive, however it is reasonable to assume that the parliament would be inclined to contribute to the discontinuation of the treaty.[142] Consequently, where an international obligation has been domesticated by an Act of Parliament the presumption is that the repealing of the Act will be by the legislature.[143] Therefore technical treaties such as bilateral agreements will be repealed solely by the executive seeing as implementation is conducted wholly by the authority of the President.

Under the 1979 Constitution, Zimbabwe signed many international human rights instruments, including International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee against Torture (CAT) and the Convention on the Rights of the Child (CRC). The Preamble of the CRC notes that the Universal Declaration of Human Rights (UDHR) proclaimed childhood as requiring special care and assistance.[144] The United Nations (UN) adopted the CRC in 1989 and Zimbabwe ratified the instrument in 1992.[145] The CRC is a human rights treaty that

[139] Erika De Wet (Note 83 above), 13.

[140] Ibid.

[141] Ibid, 36.

[142] Ibid.

[143] Ibid.

[143] Ibid.

[144] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577 <http://www.refworld.org/docid/3ae6b38f0.html>

[145] Blessing Bhaiseni 'Zimbabwe Children's Act Alignment with International and Domestic Instruments: Unravelling the Gaps' (2016) 6 *AJSW* 1, 4.

establishes the social, civil, political, health and cultural rights of children. However, despite Zimbabwe ratifying the CRC in 1992, there has been no further action by the parliament to give the convention national authority.[146] In 2016 the Committee on the Rights of the Child compelled the Zimbabwean government to provide proof of the incorporation of CRC principles and provisions into the domestic legal system.[147] The lack of detailed data indicating the implementation of Child Right Policies motivated the committee's inquisition.[148] Specifically, how Zimbabwe's Children's Act fails to establish Child Protection Committees (CPC) as indicated by article 19 of the CRC, completely abolish child labour as specified in article 32 of the CRC and acknowledge corporal punishment as a form of torture in terms of article 37 of the CRC.[149] Therefore, the CRC provisions do not apply in the domestic legal framework of Zimbabwe. [150]

Due to the motivations to draft a new Constitution which were mentioned above the new Constitution has taken an innovative and modern approach to the importance of fundamental human rights. The Declaration of Rights contained in the Constitution establishes a 'duty to respect fundamental human rights and freedoms'.[151] Sachs believes these liberties must be recognised and respected by the legislative and executive bodies.[152]

Chapter 4 of the Constitution, also known as the Declaration of Rights, emphasises the duty to respect fundamental human rights and freedoms by all citizens including juristic persons, government agencies and institution.[153] Section 46 urges courts and tribunals to give effect to the rights and freedoms contained in Chapter 4, promote the values and principles of a democratic

[146]Child Rights International Network 'Access to Justice for Children: Zimbabwe' <https://www.crin.org/en/library/publications/zimbabwe-access-justice-children>.

[147] UN Committee on the Rights of the Child (CRC), *List of issues in relation to the second periodic report of Zimbabwe*, 15 July 2015, CRC/C/ZWE/Q/2, <http://www.refworld.org/docid/56a5bf764.html>.

[148] Ibid.

[149] Bhaiseni (Note 145 above), 4 – 5. Also look at UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3, <http://www.refworld.org/docid/3ae6b38f0.html>. Also see Zimbabwe: Children's Act [Zimbabwe], Chapter 5:06, 27 October 1972.

[150] Ibid.

[151] Constitution of Zimbabwe Amendment (Note 59 above), Section 44.

[152] Albie Sachs A Bill of Rights for South Africa: Areas of Agreement and Disagreement (1989) *21 Columbia Human Rights Law Review* 13, 19.

[153] Constitution of Zimbabwe 2013 (Note 59 above), section 44.

society and encourages the courts to consider international law, and all treaties that Zimbabwe is party to.[154] International law is therefore an important tool which should be considered in domestic decision making.

The Constitution of Zimbabwe has made great strides forward regarding human rights. This is evident in section 53 which establishes the freedom from torture or inhuman treatment, which actively makes the lack of implementation of the United Nations Convention against Torture (CAT) redundant.[155] More evidence is provided by section 242 of the Constitution which establishes the Human Rights Commission (HRC).[156] The HRC functions include the promotion of awareness of and respect for human rights and freedoms for all, the protection, development and attainment of human rights and ensuring the observance of human rights and freedoms.[157]

De Wet regarded the application of human rights treaties as a guideline to interpret the Constitution of the Republic of South Africa, as a 'formal turning point in the country's approach towards international law'.[158] This statement mirrors the 2013 Constitution as the integration of international human rights into the Constitution implies acceptance of the international norms as an influence on domestic regulations. It is however important to consider what influence this new consideration of international law will have on its implementation domestically, specifically how the judiciary will contribute to this new legal era.

d) The Role of the Judiciary

As discussed above the 2013 Constitution attempts to shift Zimbabwe's approach to international law from reluctance to enthusiastic acceptance. This section of the report will discuss two cases that indicate the judiciary's keenness to apply international law domestically.

[154] Constitution of Zimbabwe 2013 (Note 59 above), section 46.

[155] Ibid, section 3.

[156] Ibid, section 242.

[157] Ibid, section 243.

[158] Erika De Wet (Note 83 above) 5.

In the *Obediah Makoni v (1) Commissioner of Prisons (2) Minister of Justice Legal & Parliamentary Affairs* case the applicant had been convicted of murder in 1995.[159] He was 19 years old.[160] The applicant had been sentenced to life without parole or possibility of judicial review.[161] Proving the unconstitutionality of the sentence was the basis of the application.[162] In 2016, the Constitutional Court of Zimbabwe was guided by section 46(1) of the Constitution when making its decision, noting the importance of considering international law, foreign law, and all the treaties Zimbabwe is a party to in the courts adjudication.[163] Furthermore the court acknowledged section 326 of the Constitution, purporting the relevant legislation must be interpreted in a manner that is consistent with customary international law.[164]

The International Covenant on Civil and Political Rights (ICCPR) read with the foreign case of *Vinter & Others* v *The United Kingdom* inspired the court to come to the conclusion that sentencing is no longer a tool of retribution, but a structure to facilitate rehabilitation.[165] Zimbabwe acceded to the ICCPR in 1991.[166] Therefore, this case indicates the country's departure from the *Campbell* approach discussed above, as the judiciary chose to apply Zimbabwe's international obligations domestically.

The court went a step further by applying the Standard Minimum Rules for the Treatment of Prisoners of 1957, which the bench accepted to hold the status of soft law. These Rules emphasise that punishment must be 'condign to the nature and gravity of the crime committed'.[167] The court admitted the Standard Minimum rules were only guidelines or codes of conduct that were not

[159] *Obediah Makoni v (1) Commissioner of Prisons (2) Minister of Justice Legal & Parliamentary Affairs* (2016) CCZ 8.

[160] Ibid.

[161] J Sloth-Nielsen & K Hove 'Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review' (2015) 15 *African Human Rights Law Journal* 554, 560.

[162] Ibid.

[163] Obediah Makoni Case (Note 159 above) 6.

[164] Ibid, 6.

[165] Ibid, 9.

[166] Ibid.

[167] Ibid, 14.

strictly binding in nature.[168] However, the fact that the court allowed the principles of the Standard Minimum rules to contribute to the basis of the judgements shows that the judiciary is now open to the vast principles of international law, regardless of an international obligation on the country to comply.

The *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others* case is another example of the judiciary's new international law friendly approach to domestication. Also decided in 2016, the case dealt with constitutionality of child marriages.[169] The Constitutional Court judges had to determine whether allowing an individual under the age of 18 to marry amounted to 'maltreatment, neglect and abuse' contrary to section 81(3) of the Constitution.[170]

Like in the *Makoni* case, the court acknowledged the Constitution's requirements to apply international law domestically when interpreting the constitutional provisions; interpreting domestic legislation in a way that is consistent with customary international law; and the application of a treaty or convention binding on Zimbabwe.[171] The court mentioned Zimbabwe signed the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC).[172] Stating, this was indicative of the country's intention to commit to the provisions of the agreements.[173] Sloth-Nielson and Hove point out that sections 78 (marriage rights) and 81 (rights of children) of the Constitution were drafted with international law in mind, inferring these sections must be read progressively.[174]

Regarding the considerations discussed above, the court held section 78 of the Constitution could not be read without considering the international instruments that bind Zimbabwe.[175] The court

[168] Obediah Makoni (Note 159 above), 12.

[169] *Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others* (2016) CCZ 12, 6.

[170] Ibid.

[171] J Sloth-Nielsen & K Hove (Note 163 above) 8.

[172] Mudzuru (Note 169 above) 8. Also see Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child* (1990).

[173] Ibid.

[174] J Sloth-Nielsen & K Hove (Note 161 above), 8.

[175] Ibid, 9.

went on to emphasise the importance of considering the 'emerging consensus' of international law values relevant to the case.[176] Both the CRC and ACRWC impose an obligation on Zimbabwe to protect and care for minors.[177]

This case is indicative of the judiciary's newly found progressive approach to the domestication of international instruments. Sloth-Nielson and Hove commented on the court's progressiveness by stating the use of the ACRWC in domestic litigation in Zimbabwe has created a guideline of implementation for the 47 countries that are party to the agreement.[178] The *Mudzuru* and *Makoni* cases indicate a move away from Zimbabwe's boxed-off approach to domestication, and effectively ushers in a more open approach. These cases also prove the passiveness of the judiciary in the past had a large impact on the application of international law in the country. This independent perspective will undoubtedly contribute to the respect and integration of international human rights in the country.

IV. CONCLUSION AND RECOMMENDATIONS

After systematically studying the application of international law in Zimbabwe under the new 2013 Constitution it is clear the document acknowledges the failures of the past and seeks to repair the country's reputation through its general acceptance of international norms. Considering international law as part of the municipal law (except for in instances contrary to the Constitution or an Act of Parliament) encourages adjudicators to apply international law domestically thereby qualitatively improving our law and jurisprudence in line with international standards.[179] Significantly, compelling a reasonable interpretation of customary international law removes the rigidity of applying international norms domestically/

The generous provisions on international law under the 2013 Constitution discussed above, provide the judiciary with an opportunity to right the wrongs made in cases like *Campbell* and *Gramara.* A clear example would be the *Makoni* case, which recognised the International Covenant on Civil and Political Rights (ICCPR), a treaty to which Zimbabwe is a party, applies

[176] J Sloth-Nielsen & K Hove (Note 161 above) 9.

[177] Ibid.

[178] Ibid.

[179] Constitution of Zimbabwe 2013 (Note 59 above), Section 326.

domestically.[180] Given the judiciary's newly found progressive application of international norms, it no longer finds itself at the mercy of executive and legislative reform. As indicated in the *Mudzuru* and *Makoni* cases, integration of international law has an important role to play in improving the country's rights regime. This emphasises the notion that the application of international law domestically requires the acknowledgement of all treaties the country has acceded to.

Treaty law is an aspect the drafters of the 2013 Constitution chose to develop in order to address the human rights violations that have plagued Zimbabwe. Chapter 4 of the Constitution (the Declaration of Rights) encourages courts to give effect to the rights and freedoms of the citizenry.[181] The emphasis of fundamental human rights and the institution of the Human Rights Commission (HRC) is indicative of an approach that looks to prohibit recurrence of human rights violations.[182] By incorporating provisions, such as freedom from torture, the Constitution allows for treaty provisions that have become customary law (in this case the United Nations Convention against Torture).[183] The promotion of human rights and freedoms by the new Constitution symbolises the country's wish to be an influential player on the international stage that abides to global norms and standards.

However, it would be remiss to assume Zimbabwe's history of failing to domesticate ratified treaties ends with the coming into force of the 2013 Constitution. Lack of parliamentary domestication of international instruments could potentially undermine ratified treaties as in the past.[184] The importance of the 2013 Constitution is that it gives powers courts to consider even unratified treaties in the interpretation of the Declaration of Rights. That is a welcome development and will help in the generation of quality jurisprudence in line with international standards when it comes to the interpretation and enforcement of the rights protected in the Constitution.

I would also suggest the legislature walk the line the reformed Constitution has drawn and ratify the international conventions that the executive signs. Such an approach would facilitate the

[180] Obediah Makoni (Note 159 above), 9.

[181] Constitution of Zimbabwe 2013 (Note 59 above), section 44.

[182] Ibid.

[183] Ibid, Section 242.

[184] Ibid, Section 327.

domestic enforcement of such instruments in adjudication by courts and other adjudicative institutions such as the Human Rights Commission. The integration of these instruments by the legislature establishes international scrutiny when rights are infringed and encourages international intervention to protect the citizenry. Intervention could take various forms, such as personal sanctions for perpetrators and/or masterminds and international criminal liability in which the accused would be prosecuted by an international tribunal.[185]

In conclusion, the early stages of the new Constitution are encouraging. The report concludes that the reception of international law in Zimbabwe under the new Constitution appears to be conducive to the application of international norms by stakeholders such as parliament and by adjudicative bodies such as the courts. The 2013 Constitution has established a platform that facilitates the integration of international law into the domestic legal framework. The challenge is now for the executive and parliament to ensure the domestication of such norms through ratification, and for the courts and other adjudicative bodies to consider and apply such international norms in their adjudicating and enforcement activities.

[Word Count: 9 752]

[185] Robert Cryer, Harkan Friman, Daryl Robinson & Elizabeth Wilmshurts *An Introduction to International Criminal Law and Procedure* 2 ed (2010) Cambridge University Press.

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