THE RELEVANCE OF INTERNATIONAL LAW IN JUDICIAL DECISION-MAKING IN MALAWI[1]

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Introduction

One of the most important principles that govern international law is that of state sovereignty. State sovereignty can generally be understood as the notion that "there is a province of state conduct that should remain within the exclusive decisional domain of the state, interference with which is prohibited by international law".[3] One of the core features of state sovereignty, which is also a reflection of the right of self-determination, is the exclusive power of the state, through its democratic institutions and processes, to make laws that are applicable and enforceable within that state.

It is largely because of this fact that many states around the world remain cautious and guarded in adopting and applying either foreign law or international law within their domestic settings.[4] This guarded approach is most evident in those states that are commonly referred to as dualist jurisdictions. These are jurisdictions that require that, in order for an international agreement to be enforceable as law domestically, in addition to the formal act of ratification or accession that binds the state to the agreement on the international plane, a further domestic legislative act that domesticates the international agreement is required.[5] Malawi is among the states that are classified as dualist.[6] Dualism is distinguished from monism, which refers to a system whereby an international agreement automatically forms part of domestic law the moment it comes into force through the formal act of ratification or accession.[7]

Since the emergence of international human rights law as a substantive part of international law after the end of the Second World War, the principle of state sovereignty, as traditionally understood in the Westphalian sense,[8] has come under challenge.[9] A new understanding of

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3 RE Kapindu "Towards a More Effective Guarantee of Socio-Economic Rights for Refugees in Southern Africa" *PhD Thesis*, University of the Witwatersrand, Johannesburg (unpublished) (2014) 63.

4 See E Benvenisti "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) 102 *Am J Int'l L* 241, 241.

5 See G Slyz "International Law in National Courts" (1995-1996) 28 *NYU J Int'l L & Pol* 65, 67; JG Starke "Monism and Dualism in the Theory of International Law" (1936) 17 *Brit YB Int'l L* 66, 70-74.

6 See Constitution of Malawi, 1994, section 211(1).

7 See G Slyz "International Law in National Courts" (1995-1996) 28 *NYU J Int'l L & Pol* 65, 67; JG Starke "Monism and Dualism in the Theory of International Law" (1936) 17 *Brit YB Int'l L* 66, 74-75.

8 The Westphalian sense refers to the Treaty of Westphalia concluded by western European states, whereby they agreed that sovereign states should not interfere in the domestic affairs of other states. This understanding remained dominant until the adoption of the Charter of the United Nations in 1945.

9 J Humphrey "The International Law of Human Rights" in *The Present State of International Law and Other Essays* (1973), quoted in P Sieghart *The International Law of Human Rights* (1983) 11. See also RE Kapindu "From the Global to the Local: The Role of International Law in the Enforcement of Socio-Economic Rights in South Africa" (2009) *Research Report Series*

"sovereignty as responsibility" has emerged, which subjects the internal treatment of people by the state to international legal scrutiny and supervision.[10] Even the International Court of Justice has emphatically stated that how a state treats its own citizens is no longer a matter within the exclusive domestic concern of the state, and that it is now a matter of international concern.[11] This is the legal paradigm within which international human rights law has grown.

The upshot of the challenge presented to the orthodox Westphalian understanding of sovereignty, is that the notion of dualism, as this paper will demonstrate, has also come under intense interrogation and challenge. Other scholars are now arguing that monism has gradually but surely been creeping in as the conceptually dominant and logical understanding of the consequence of entering into binding international commitments, especially in the field of human rights.[12]

In 1994, Malawi adopted a new and transformative Constitution that was the culmination of its change from an authoritarian regime to a constitutional democracy. This Constitution accorded a prominent role for the use of international law in judicial decisions.[13] Concerning the place occupied by international law in the development of Malawian human rights jurisprudence, Hansen[14] observed that:

> [Tiyanjana] Maluwa wrote "The new Constitution provides Malawian Courts with an opportunity to develop a constitutional jurisprudence in which international law and comparative law will play a major part"; and he continued, "[t]he challenge here falls principally upon both the judiciary and the legal profession as a whole". Today, the fact is that although the judiciary and the legal profession as a whole are being exposed to human rights law more frequently following the introduction of the 1994 Constitution, international human rights law is still not playing any important role in the courts of Malawi despite the constitutional recommendation hereof. The reasons are multiple, but it is fair to say that lack of training, material and literature are the fundamental reasons. Judges and legal practitioners are not being exposed to international human rights law. Consequently, the decisions made by the judges will not reflect the fact that Chapter Four of the Malawi Constitution to a large extent is an adoption of international human rights law. In the end, such an approach may endanger the protection of human rights in Malawi.[15]

My assessment is that, while Hansen's comment was fair when it was made in 2002, the judiciary and legal profession in Malawi have made significant strides since then towards infusing international human rights law norms into local jurisprudence. Admittedly, however, this infusion has not been as extensive and as profound as would be ideal. In the light of this background and challenges, this article explores the relevance of international law in judicial decision-making in Malawi. The paper provides a blend of descriptive, analytical, and critical approaches, as it briefly demonstrates the locus of international law in the Malawian judicial system.

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10 F Deng *et al Sovereignty as Responsibility: Conflict Management in Africa* (1996) xviii.

11 *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment ICJ Reports 1970, 32 at paras. 33-34.

12 See for example MA Waters "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties" (2007) 107(3) *Colum L Rev* 628.

13 See Constitution of Malawi, 1994, sections 11(2)(c), 44(1), 45(4)(a), 135(a), 211.

14 TT Hansen "Implementation of International Human Rights Standards through the National Courts in Malawi" (2002) 46(1) *J Afr L* 31.

15 *Id* 42.

Overview of provisions relating to international law in the Constitution

As observed by Maluwa,[16] the design of the Constitution of Malawi accords international law a major and important role in constitutional adjudication. Numerous provisions under the Constitution provide room for the relevance and applicability of international law in Malawi. Indeed, the very first declaration that the Constitution makes, in section 1, is that: "The Republic of Malawi is a sovereign state with rights and obligations under the Law of Nations." Further to the declaration made under section 1, the Constitution also states, in section 13(k), as a directive principle of national policy, that the state shall "govern in accordance with the law of nations and the rule of law and actively support the further development thereof in regional and international affairs". These two provisions in particular signify the central place that international law assumed in the minds of the framers of the Constitution, in the broad realm of state governance.

Section 211 of the Constitution, which will be further explored below, makes provision for the direct application of international law as part of domestic law. It provides for the instances in which treaty law can be applied as part of Malawian law, and also instances where customary international law may or may not be applied as domestic law.

Section 11(2)(c) of the Constitution provides that, "[i]n interpreting the provisions of this Constitution, a court of law shall, where applicable, have regard to current norms of public international law". The language of the Constitution gives discretion to the courts on whether or not to apply international law under these provisions; but, at the same time, where international law is applicable, the Constitution makes the consideration thereof peremptory.

Another provision that is central in human rights discourse is the clause on limitation of rights under section 44(1) of the Constitution. The Constitution stipulates that one of the essential conditions for a limitation on a right guaranteed under the Bill of Rights to be valid, is that it must be "recognised by international human rights standards". This therefore requires the courts to examine the prevailing position in international law in deciding whether or not to uphold the limitation.

International law again assumes an important role in the case of a state of emergency. Under section 45 of the Constitution, where rights are derogated from pursuant to the declaration of a state of emergency, section 45(4)(a) provides that, except in respect of a few rights listed under section 45(2) of the Constitution, the derogation from the rights under the Constitution can only be permissible to the extent that such derogation is "consistent with the obligations of Malawi under international law."

Under section 135(a) of the Constitution, the Law Commission is mandated to review laws and make any recommendations to ensure that laws comply with the Constitution and "applicable international law". Law Commission reports are important documents in any state where such a commission exists, and courts often revert to the recommendations of the Law Commission to assist in interpreting laws in appropriate cases.

16 T Maluwa "The Role of International Law in the Protection of Human Rights under the Malawian Constitution of 1995" (1995) 3 *Afr YB Int'l L* 53, 77-79.

Section 169 of the Constitution establishes the Prisons Inspectorate. Among other functions, under section 169(3)(a), the Prisons Inspectorate is charged with monitoring the conditions, administration, and general functioning of penal institutions, taking due account of "applicable international standards". This therefore clearly suggests that the treatment of prisoners, which is a key human rights issue in Malawi, must be informed by considerations of international law.

Justification for dualism

Traditionally, common law jurisdictions around the world, including Malawi, have adopted the dualist rather than the monist approach in the domestic application of international law.[17] In *Gondwe v Attorney General*,[18] Nyirenda J, as he then was, sought to express the underlying philosophy behind dualism. He said:

> The doctrines of State sovereignty and supremacy of Parliament in legislating are the basis, I believe, upon which, in common law jurisdictions, international law must be incorporated in municipal law for it to be enforceable. It logically follows therefore that sovereign States have the authority to determine the extent and limit to which they wish to incorporate international law.[19]

The parliamentary supremacy argument, however, was superseded by Constitutional supremacy upon the adoption of the 1994 Constitution. Another justification is said to lie in democracy and separation of powers. The power to make law, lies with the representatives of the people in parliament.[20]

However, I have already pointed out the challenge that the state sovereignty argument, as advanced by Nyirenda J, encounters in contemporary international law. The democracy argument sounds the most potent justification for dualism. However, when viewed closely, that argument must still be rooted in the broader state sovereignty argument in order for it to be invoked as a push-back shield against the percolation of undomesticated international law into the body of applicable domestic law.

Manner of application of international law

International law is applied in domestic courts directly or indirectly. Direct application refers to situations where international law is applied as part of domestic law. Indirect application, by contrast, refers to situations in which international law only serves an interpretive or inspirational function when interpreting the Constitution, legislation, or any other law. The Constitution also directs the state to follow international law when making and implementing national policies.[21]

17 See MA Waters "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties" (2007) 107(3) *Colum L Rev* 628, 635.

18 [1996] MLR 492 (HC).

19 *Id* 495-96.

20 See *In Re Adoption of Chifundo James (a female infant)* MSCA Adoption Appeal No. 28 of 2009.

21 See Constitution of Malawi, 1994, section 13(k).

Provisions on Direct Application in Malawi

In Malawi, the direct application scheme falls under section 211 of the Constitution. In terms of section 211(1) of the Constitution, international agreements entered into after the coming into force of the Constitution form part of the law of Malawi if an act of parliament so provides. Section 211(2) provides that "[b]inding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament." Customary international law forms part of Malawian law, unless contrary to the Constitution or an act of parliament, in terms of section 211(3).

Direct Application under Section 211(1)

Section 211(1) is a typical dualist clause that requires domestication of a treaty before it can be considered to form part of domestic law in Malawi. The apparent clarity and lack of ambiguity in section 211(1) notwithstanding, it is arguable that the section might possibly be interpreted according to the principle of self-execution discussed below.

The Principle of Self-Execution in Malawi

There is a significant school of thought in international law that holds that even in dualist states, a domesticating act of parliament is unnecessary where the provisions of the international agreement are self-executing, unless this principle is expressly excluded.[22] In South Africa, the self-executing exception is expressly provided for in section 231(4) of the Constitution. Ngolele[23] astutely describes the principle in the following terms:

> Self-execution refers to treaties or provisions thereof with 'statute like effect' which lend themselves to judicial and administrative application without a need for legislative implementation. Legislative transformation of self-executing treaty obligations is thus superfluous, the treaty being, by definition, directly applicable and therefore part of municipal law.[24]

The UN Committee on Economic, Social and Cultural Rights has stated that, in most countries, "the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature", and that "[i]t is especially important to avoid any *a priori* assumption that the norms should be considered to be non-self-executing".[25]

I argue that the principle of self-execution is embedded in the Treaties and Conventions Publication Act (TCPA).[26] Section 4 of the TCPA provides that:

> Where the whole or part of an international treaty, convention or agreement or any article, term, covenant or provision thereof either expressly or by reason of its subject matter impliedly requires for the purpose of its implementation or the giving to it of force or effect in Malawi, the enactment

22 See MA Waters "Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties" (2007) 107(3) *Colum L Rev* 628, 638.

23 EM Ngolele "The Content of the Doctrine of Self-Execution and Its Limited Effect in South African Law" (2006) 31 *S Afr YB Int'l L* 141.

24 *Id* 141.

25 See Committee on Economic, Social and Cultural Rights, General Comment No. 9 at para. 11.

26 Cap 16:02 of the Laws of Malawi.

> of an Act of Parliament or any subsidiary legislation, the publication thereof pursuant to section 2 shall not be deemed to be a sufficient substitute for that requirement or for such Act of Parliament or subsidiary legislation.

The import of this section seems to be that where the whole or part of an international treaty, convention or agreement or any article, term, covenant, or provision thereof either expressly, or by reason of its subject matter, does not require, for the purpose of its implementation or the giving to it of force or effect in Malawi, the enactment of an act of parliament or any subsidiary legislation, the publication thereof pursuant to section 2 may be deemed to be a sufficient substitute for that requirement or for such act of parliament or subsidiary legislation. It is a contentious argument, but it appears to flow logically from the tenor of section 4 of the TCPA.

Treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and others have been published under the TCPA.

Direct Application under Section 211(2)

Courts in Malawi have held that the import of section 211(2) of the Constitution is that agreements entered into by Malawi prior to 1994 are part of Malawian law.[27] This approach however, in my view, is not in line with the language used in section 211(2). My position is that section 211(2) is unnecessary in the Constitution. That section, according to my understanding, simply restates the obvious. It reads: "Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament." Stating that Malawi would continue to be bound by agreements that were binding on the previous constitutional regime is simply restating a pre-existing position in international law. For instance, in *Krishna Achuthan (on behalf of Aleke Banda)*,[28] *Amnesty International (on behalf of Orton and Vera Chirwa)*,[29] and *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*,[30] the African Commission on Human and Peoples' Rights found the new Malawian government, under the new Constitution (the present one) liable for abuses committed under the previous government operating under the previous Constitution. It held that: "Principles of international law stipulate ... that a new government inherits the previous government's international obligations".[31] In other words, obligations that were binding on Malawi under the old Constitution and government, continued to bind the Republic after the change.

The approach adopted in *Kalinda v Limbe Leaf Tobacco Ltd*[32] and *Malawi Telecommunications Ltd v Makande & Omar*[33] suggests that Malawi was monist before 1994, which is clearly not correct. It suggests that once a treaty became binding on Malawi, it became part of Malawian law. The position

27 See *Kalinda v Limbe Leaf Tobacco Ltd* MWHC Civil Cause No. 542 of 1995; *Malawi Telecommunications Ltd v Makande & Omar* MSCA No.2 of 2006.

28 Comm. No. 64/92.

29 Comm. No. 68/92.

30 Comm. No. 78/92.

31 *Id* at para. 12.

32 *Kalinda v Limbe Leaf Tobacco Ltd* MWHC Civil Cause No. 542 of 1995.

33 *Malawi Telecommunications Ltd v Makande & Omar* MSCA No. 2 of 2006.

obtaining must, in my considered view, have been the common law position which was dualist.

The second limb to section 211(2), which suggests that treaties binding on Malawi would stop being binding on the Republic if an act of parliament was passed to that effect, is again an incorrect proposition in terms of international law. In order for Malawi to cease to be bound by an otherwise binding international agreement, it has to formally renounce such an agreement on the international plane, following the processes laid down for that particular treaty or in terms of the general international law on treaties. An act of parliament purporting to relieve the state from a binding international agreement, as suggested in section 211(2), would be otiose and ineffectual.

Indirect Application - Interpretive Approach (Malawi)

All the various provisions discussed above, apart from section 211 of the Constitution, require the indirect application of international law in interpreting the Constitution. In the case of *Kafantayeni and Others v Attorney General*,[34] the High Court affirmed the essence of section 11(2)(c) of the Constitution. It stated that:

> We accept and recognise that the [International Covenant on Civil and Political Rights, to which Malawi is a State Party] forms part of the body of current norms of public international law and, in terms of section 11(2) of the Malawi Constitution courts in Malawi are required to have regard to its provisions in interpreting the Constitution.[35]

In *In Re David Banda*,[36] the High Court held that courts must interpret the Constitution, statutes, and all other laws in a manner that, as far as possible, avoids conflict with international law. This is a well-known principle in most jurisdictions around the world.

In *In Re Chifundo James*,[37] the Malawi Supreme Court of Appeal re-affirmed the principle of avoiding conflict between domestic law and international law. It held that:

> In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution.[38]

In *Mwakawanga v Republic*,[39] Southworth CJ cited with approval the position in Craies on Statute Law,[40] which stated that "a statute cannot be pronounced void as offending against international law, though judges will endeavour if possible to incline to a construction which will avoid a breach of it." [41] In *Gondwe v Attorney General,*[42] Nyirenda J clarified the effect of dualism in the following

34 [2007] MWHC 1. This case is also discussed in KT Manda "Overcrowding and its Effects on the Health of Prisoners in Malawi: A Role for the Malawian Courts?" in this publication.

35 *Id.*

36 [2008] MWHC 243. See discussion on this case in ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" in this publication.

37 MSCA Adoption Appeal No. 28 of 2009.

38 *Id.*

39 (1968-1970) 5 ALR (Mal) 14 (SCA).

40 Sixth Edition (1963) 461-462.

41 *Mwakawanga v Republic* (1968-1970) 5 ALR (Mal) 14 (SCA) 38.

42 [1996] MLR 492 (HC).

terms:

> It is a trite observation ... that municipal law within a sovereign territory is supreme to international law, [but] if a conflict can be avoided by construction let the courts do so. Let me once more allow logic its course and say if it is apparent from the ordinary and clear interpretation of a statute that the conflict was intentional in order to give effect to a law intended for a purpose, international law cannot be relied upon.[43]

Indirect Application: South Africa

Section 39(1)(b) of the Constitution of South Africa provides that, "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law". Chaskalson J held in *S v Makwanyane and Another*[44] that international law, within the meaning of section 39(1)(b) of the Constitution, includes both binding and non-binding law. Considering its similarity in language, this is also the position in Malawi under section 11(2)(c).[45]

Indirect Application: Botswana

In Botswana, the approach adopted has been broadly similar to that of Malawi. Thus, in *Attorney General v Dow*,[46] the plaintiff challenged the constitutionality of sections 4 and 5 of the Citizenship Act 1982.[47] The issue related to citizenship laws discriminating against women in respect of their children acquiring citizenship by descent. The Attorney General contended that the High Court had erred in relying on undomesticated international instruments in arriving at a decision declaring the law in this respect unconstitutional.[48] The Court of Appeal held that relevant international instruments to which Botswana was a party, such as the African Charter on Human and Peoples' Rights (African Charter), were applicable as an aid in interpreting relevant legislation.[49] It held that domestic legislation had to be read in a manner that did not conflict with Botswana's obligations under the African Charter.[50]

Indirect Application: Ghana

In Ghana, courts have also emphasised the importance of paying due regard to the country's international obligations in the interpretation and application of domestic law. In the case of *New Patriotic Party v Inspector General of Police, Accra*,[51] the Supreme Court of Appeal of Ghana emphasised that non-domestication of international instruments does not mean that duly ratified international law treaties cannot be applied. Archer CJ said that: "I do not think the fact that Ghana has not passed specific legislation to give effect to the [African] Charter, [entails that]

43 *Id* 496.

44 *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at para. 35. This case is also cited in OBK Dingake "The Role of the Judiciary and the Legal Profession in Protecting the Rights of Vulnerable Groups in Botswana" in this publication.

45 See also D Chirwa *Human Rights under the Malawian Constitution* First Edition (2011) 27.

46 (2001) AHRLR 99. This case is also cited in L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" and SB Nkonde and W Ngwira "Accused's Rights and Access to Prosecution Information in Subordinate Courts in Zambia" in this publication.

47 Act No. 25 of 1982 as amended by Citizenship (Amendment) Act 1984 (Act No. 17 of 1984).

48 *Id* at para. 100.

49 *Id* at para. 109.

50 *Id*.

51 [2004] 2 HRLRA 1.

the [African] Charter cannot be relied upon" in domestic courts. He stressed that Ghana was "expected to recognise the rights, duties and freedoms enshrined in the [African] Charter and to adopt legislative and other measures to give effect to the rights and duties."[52]

Indirect Application: Canada

Courts in Canada have stressed that international law, once ratified, still has room for application, even in the absence of domestication. Thus, in *Baker v Canada (Ministry of Citizenship and Immigration)*,[53] the Supreme Court held: "The principle that an international convention ratified by [Canada] is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation."[54]

Indirect Application: Australia

Finally, we consider Australia, another common law-based jurisdiction, where courts have considered the issue of the application of international law in domestic courts extensively. In the case of *Director-General, Department of Community Services: Re Thomas*,[55] the Federal Supreme Court stated, in relation to the Convention on the Rights of the Child (CRC), that: "Australia is a signatory to CRC, and although this does not incorporate the Convention into our domestic law, it has relevance to decisions made in respect of children by administrative and judicial decision-makers."[56] The Court then eloquently outlined the various ways in which international law is relevant to judicial decision-making. The Court stated, firstly, that ratification of a treaty such as the CRC creates a legitimate expectation that decisions will be made having regard to the principles espoused therein.[57] Secondly, the Court held that the existence of a treaty obligation alone (that is, without legislation implementing it locally) allows a court to take such a treaty into account in the development of the common law.[58] Thirdly, the Court held that where a convention has been ratified by a state, but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic legislation.[59]

Lessons from Comparative Foreign Case Law

These selected decisions from comparable foreign jurisdictions give us a good picture of the approach that courts in other dualist jurisdictions have taken in instances where a treaty has been ratified, but not yet domesticated. In general, we see that the Malawian approach greatly mirrors these approaches. The approach is clear, that notwithstanding the absence of a domesticating legislative act, courts must take serious account and give effect to the state's international law obligations. A departure from compliance with a state's international law obligations in judicial decisions is

52 *Id* 63.

53 [1999] 2 SCR 817.

54 *Id* 821.

55 [2009] NSWSC 217.

56 *Id* at para. 37.

57 The Court cited *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 183 CLR 273 (HC) as the authority for this proposition.

58 The Court cited *Mabo v Queensland [No.2]* [1992] HCA 23, 42 in support of this statement.

59 *Murray v Director Family Services, ACT* [1993] FamCA 103, 255-56 was cited in support of this point.

therefore viewed as an exception, even in dualist jurisdictions. The pointers provided in *Director-General, Department of Community Services: Re Thomas* on the importance of undomesticated international law on the domestic sphere, are particularly informative and instructive.

A Challenge to Dualism: Approach of Supra-National Tribunals

The position that gives primacy to national law, as for instance expressed in *Gondwe v Attorney General,* faces a challenge from the position adopted by various supra-national tribunals around the world. I will highlight, for reasons of space, only the approach taken by the African Commission on Human and Peoples' Rights (African Commission) in its interpretation of the domestic effect of the African Charter on Human and Peoples' Rights (African Charter), and the specific question as to which of international law and domestic law is superior when there is conflict. In *Legal Resources Foundation v Zambia*,[60] the African Commission held that:

> [T]he government of Zambia does not seek to avoid its international responsibilities in terms of the treaties it is party to (*vide* Communication 212/98 *Amnesty International/Zambia*). This is just as well because international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations (Article 27, Vienna Convention on the Law of Treaties).[61]

Further, the African Commission held, with the utmost clarity, in *Media Rights Agenda and Others v Nigeria*,[62] that:

> To allow national law to have precedent over the international law of the [African] Charter would defeat the purpose of the rights and freedoms enshrined in the [African] Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the [African] Charter must be in conformity with the provisions of the [African] Charter.[63]

It is apparent from the approach domestically adopted by our courts, and that adopted by supra-national tribunals such as the African Commission, that these approaches have created a jurisprudential tension; there is disharmony over which body of law should take precedence. Domestic courts hold that domestic law has primacy and supremacy. International tribunals, by contrast, while acknowledging that, in certain cases, legislative domestication of international agreements is required by some states before treaties can become part of domestic law, have been emphatic, nonetheless, that where the two contradict, international law must prevail - and this will certainly be so where the dispute escalates to a supra-national forum. It is evident, therefore, that with this state of affairs, dualism as a theory faces a significant practical challenge, especially for states like Malawi that are subject to numerous international individual complaint mechanisms, including access for individuals to the African Court on Human and Peoples' Rights.

60 Comm. No. 211/98.

61 *Id* at para. 59.

62 (2000) AHRLR 200 (ACHPR).

63 *Id* at para. 66.

Conclusion

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

It is worth observing that the state in Malawi is also enjoined to govern in accordance with international law, as it formulates and implements national policy. It is submitted that when courts are called upon to interpret various rights under the Constitution, especially socio-economic rights, the courts are entitled to look for, consider, and apply applicable international law. In this way, international law is of particular relevance when deciding on cases involving vulnerable groups, especially those specifically mentioned in section 13 of the Constitution.

This paper has argued that while international law is not as widely invoked in Malawian judicial decisions as would be ideal given Malawi's constitutional framework, there has been a positive and progressive trend in the use of international law. The prospective outlook is promising. With the passage of time, with greater sensitisation of the various actors in the litigation process, and with a growing jurisprudence on the matter, we are likely to see greater and more appropriate use of international law in Malawian courts in the future.