INTERNATIONAL LAW IN SOUTH AFRICAN MUNICIPAL LAW: HUMAN RIGHTS PROCEDURE, POLICY AND PRACTICE

by

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Submitted in accordance with the requirements for the degree of

Doctor of Laws

at the

University of South Africa

Promoter: Prof NJ Botha

January 2002

ACKNOWLEDGEMENTS

I wish to thank my promoter, Professor Neville Botha for his inspiration and guidance in the preparation of this thesis. His endless patience, meticulous attention to detail, combined with a critical and creative approach to the subject made him an ideal promoter.

A special word of thanks to friends, family and my colleagues in the Faculty of Law at the University of Pretoria for their support and encouragement.

I dedicate this thesis in memory of my beloved Ferdinand.

Michèle Olivier
Pretoria: January 2002

SUMMARY

The object of this thesis is to investigate the application of international law in municipal law, and more specifically to focus on international human rights law. A determination of the sources of international human rights law constitutes the point of departure. Treaties are the primary source of international human rights law, followed by customary law. Recent authority indicates that the formation of customary human rights law differs from that of customary international law in general. There are, however, also international documents on human rights not falling within the scope of the traditional sources as embodied in section 38 of the Statute of the International Court of Justice. Non-binding sources of law, or soft law - most notably the Universal Declaration of Human Rights - are shown to play an important role in the formation of both treaties and custom and directly influence state practice.

Theoretical explanations expounding the application of international law in the domestic law of states are examined, assessing their suitability for effective implementation of international human rights instruments. Since the application of international law in municipal law depends on, and is regulated by rules of domestic law, the relevant rules of legal systems which may, due to historical factors or regional proximity, impact on South Africa, are examined. State practice points to two primary methods of dealing with international law obligations in domestic law, namely transformation (associated with the dualist theory) or direct application (associated with the monist theory). The specific method of incorporation adopted by a state is often closely related to that state's constitutional system. The advantages and disadvantages associated with each particular method are related to the intricacies of individual legal systems. From an internationalist perspective the often misunderstood *doctrine of direct application*, has the advantage of making the intended protection afforded by human rights treaties to individuals directly enforceable by domestic courts with a minimum of state intervention.

The position of international law in South Africa is assessed against this background. South Africa's constitutional history under British rule followed British law requiring legislative transformation of treaty obligations, but permitting customary law to be

directly incorporated into common law. The position of international law became constitutionally regulated in South Africa with the introduction of a constitutional democracy. Drafting errors and practical difficulties experienced with the 1993 Constitution, were largely ironed out by the 1996 Constitution. The post-apartheid Constitutions introduced changes and new dimensions compared to the pre-1993 position of international law, including: the consideration of international law when interpreting the constitutionally protected human rights; the involvement of the legislature in the treaty-making process; and provisions for both transformation and direct application of treaties subject to the provisions of the Constitution. Customary international law is confirmed as forming part of South African law, and courts are obliged to interpret legislation in accordance with international law.

An analysis of court decisions after 1993 reveals the following broad trends:

(i) The impact of international law as part of South African law is still largely overlooked.

(ii) The majority of references to international law by the courts are to international human rights agreements and decisions by international tribunals under section 39 of the Bill of Rights.

(iii) The distinction between international law and comparable foreign case law, as directed by section 39, is often blurred.

(iv) No distinction is made between international hard and soft law when deciding on human rights matters.

(v) Courts have refrained from applying international human rights obligations which form part of South African law because they are self-executing or form part of customary international law.

(vi) Binding international human rights obligations are only referred to for comparative purposes.

(vii) The term "treaty" is interpreted in accordance with the definition of the Vienna Convention on the Law of Treaties. The intention to create legally binding obligations is therefore implicit.

It has been the policy of the post-apartheid South African government to ratify or accede to the major international human rights agreements as swiftly as possible.

The execution of this policy has, however, met with numerous problems. As a result, South Africa has to date not become party to the International Covenant on Economic Social and Cultural Rights. Many treaties to which South Africa is a party have not yet been incorporated into South African law and compulsory reports on the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women and the International Covenant on Civil and Political Rights are overdue.

Despite the post-apartheid euphoria about the creation of a human rights culture in South Africa and the formal commitment by government to give effect to international human rights instruments, much remains to be done before South Africa can be regarded as formally complying with international human rights standards.

Key Words

international law

human rights law

treaties

custom

soft law

application

domestic law

direct application

self-execution

apartheid legal system

INDEX

ACKNOWLEDGEMENTS

SUMMARY i

CHAPTER 1

INTRODUCTION

1. Context of the Research 1

2. Purpose of the Research 3

3. Research Methodology 4

CHAPTER 2

SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

1. Introduction 8

2. Sources of International Law 8

3. The Legal Status of Resolution of International Organisations 10

3.1 The Universal Declaration of Human Rights 20

3.1.1 The Universal Declaration as Customary International Law 24

3.1.2 General principles of Law 30

3.2 Conclusion 31

4. Treaties 32

4.1 International Covenants on Human Rights 35

4.1.1 International Covenant on Civil and Political Rights (ICCPR) 35

4.1.1.1 Optional Protocol to the International Covenant on Civil and Political Rights 36

4.1.1.2 Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty 37

4.1.2 International Covenant on Economic, Social and Cultural Rights (ICESCR) 37

4.1.3 Table of Rights 40

4.2 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 42

4.3 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 43

4.4 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 45

4.5 The Convention on the Rights of the Child (CRC) 47

5. Customary International Law 49

6. Conclusion 52

CHAPTER 3

INTERNATIONAL HUMAN RIGHTS LAW IN MUNICIPAL LAW

1. Introduction 55

2. Theories on the Relationship between International Law and Domestic Law 56

2.1 Dualism 56

2.2 Monism 57

2.3 Inverted Monism 59

2.4 Transformation and Incorporation Theories 60

2.5 Theories of Co-ordination and Harmonisation 62

3. Duty of States to Honour International Law Obligations 65

4. Domestic Application of International Human Rights 67

4.1 Direct Application Defined 68

4.2 Determination of Directly Applicable Provisions 72

4.3 Direct Application of Human Rights Agreements 81

5. International Law in Municipal Law 84

5.1 The United Kingdom 86

5.1.1 Customary International Law 86

5.1.2 Treaties 90

5.2 The United States of America 94

5.2.1 Customary International Law 94

5.2.2 Treaties 94

5.3 Germany 99

5.3.1 Customary International Law 99

5.3.2 Treaties 101

5.4 The Republic of Namibia 104

5.5 Contemporary Practice in Other Countries 109

6. Conclusion 111

CHAPTER 4

THE APPLICATION OF INTERNATIONAL LAW IN SOUTH AFRICA BEFORE APRIL 1994

1. Introduction 114

2. The Application of International Law in South African Law before April 1994 115

2.1 Treaties 115

2.2 Customary International Law 123

2.2.1 Exceptions to the Rule that International Customary Law will Automatically be Applied by South African Courts 132

2.3 Other Sources of International Law 134

2.4 Concluding Remarks 134

3. International Law and Apartheid 135

3.1 Breaches of the United Nations Charter 136

3.2 Treaties 138

3.3 United Nations Resolutions 140

3.4 Exclusion of South Africa from International Organisations 146

3.5 Domestic Jurisdiction 147

3.6 International Human Rights 149

3.7 International Humanitarian Law 151

3.8 Separate Development 155

3.9 The South African Judiciary and International Law 159

4. Conclusion 162

CHAPTER 5

INTERNATIONAL LAW IN A POST-APARTHEID SOUTH AFRICA

1. Introduction 166

2. The South African Constitution, Act 200 of 1993 167

2.1 Negotiating the 1993 Constitution 168

3. International Human Rights and the 1993 Constitution 169

4. The Constitutional Provisions Relating to International Law 175

4.1 Background 175

4.2 The Human Rights Commission 177

4.3 Humanitarian Law 178

4.4 The Interpretation Clause 178

4.5 The Status of International Law 180

4.5.1 Continuation of International Agreements 180

4.5.2 Conclusion or Entry into International Agreements 182

4.5.3 Incorporation of International Law into South African Law 185

4.5.4 Customary International Law 187

5. Judicial Decisions and the Application of International Law 189

5.1 Decisions by the Constitutional Court 189

5.2 Other South African Decisions 207

6. Conclusion 215

CHAPTER 6

INTERNATIONAL LAW AND THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 108 OF 1996

1. Introduction 220

2. Drafting History and Background 220

2.1 Drafting of International Law Provisions 222

3. Constitutional Provisions Relating to International Law 228

3.1 The Bill of Rights 228

3.2 Security Services 232

3.3 International Law 233

4. An Analysis of Sections 231, 232 and 233 and Suggestions for Interpretation and Application 237

4.1 Defining the Term "International Agreement" 237

4.2 Interpretation of International Agreements by South African Courts: The Harksen Cases 240

4.2.1 Cape High Court Application 241

4.2.2 The Constitutional Court Application 244

4.3 Who may Enter into International Agreements? 248

4.3.1 The Legal Competence of Provinces to Enter into International Agreements 248

4.3.2 The Legal Status of Inter-Departmental Agreements 250

4.4 Different Categories of International Agreements Provided for by Section 231 251

4.4.1 Agreements Requiring Executive Approval 252

4.4.2 Agreements Requiring Parliamentary Approval 255

4.4.2.1 Procedure to Obtain Parliamentary Approval 255

4.5 Incorporation into South African Law 257

4.6 Customary International Law 260

4.7 Interpretation of Legislation 262

4.8 The Status of Other Sources of International Law 263

5. Court Decisions 264

5.1 High and Appeal Court Decisions 264

5.1.1 Interpretation of the Bill of Rights 265

5.1.2 Immunity from Jurisdiction 266

5.1.3 The Hague Conventions 269

5.1.4 International Human Rights Treaties 271

5.1.5 Incorporated Treaties 272

5.1.6 Extradition 274

5.1.7 Other 274

5.2 Constitutional Court Decisions 276

6. Conclusion 281

CHAPTER 7

SOUTH AFRICA'S PARTICIPATION IN INTERNATIONAL HUMAN RIGHTS AGREEMENTS

1. Introduction 284

2. Signature and Ratification and Accession to Human Rights Agreements 284

2.1 International Convention on the Elimination of All Forms of Racial Discrimination 290

2.2 Convention on the Elimination of All Forms of Discrimination Against Women 294

2.3 Convention on the Rights of the Child 296

2.4 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights 299

2.5 Convention Against Torture and Other Cruel, Inhuman or Degrading Forms of Treatment or Punishment 303

3. Problems Hampering the Process 304

4. Reporting Obligations 305

5. Conclusion 307

CHAPTER 8

CONCLUDING OBSERVATIONS 309

ANNEXURE A 318

ANNEXURE B 322

ABBREVIATIONS 325

BIBLIOGRAPHY 328

CHAPTER 1

INTRODUCTION

1. Context of the Research

The problem of the application of international law in domestic legal systems goes to the heart of the international legal system, and has occupied international law theorists and practitioners since the early days of formalised international interaction.[1] The conflicting claims of state sovereignty on the one hand, and the need for international governance on the other, are closely associated with this debate.[2] From an international law perspective it is argued that international law can only be successful if effectively implemented by states in their respective domestic jurisdictions. Enforced international cooperation, on the other hand, however limits the sovereignty of governments by restricting them to the confines of their international obligations.

The era of regional integration and globalisation has led to an erosion of state sovereignty. According to Goodwin[3] the capacity of modern states to exercise the rights that derive from their sovereignty has been so circumscribed by the increasing pressures of the modern world, and the growing inter-dependence and inter-penetration of states, that in practice sovereignty itself has become something of an anachronism. As a result, there is increased pressure on international law to facilitate international cooperation. International law is looked to, to regulate phenomena affecting all mankind such as environmental degradation and particularly the protection of human rights. These issues fall outside the scope of traditional

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1 The predominant theoretical perspective advanced in the first issue of the *American Journal of International Law* which was published in 1907 (and was the first English journal in the world, exclusively devoted to the study of international law), was based on the principles of international legal positivism underlining the binding nature of international law. See Schmidt (1998) 103.

2 Lansing (1907) 298.

3 Goodwin (1974) 45. Goodwin describes external sovereignty as the equality of status between states. Internally it connotes the exercise of supreme authority by states within their territorial boundaries.

international law and as a result have steered the development of international law into new directions in order to cater for developing sub-disciplines.

The development of international human rights law has attracted considerable attention since its inception at the end of World War II, and has in recent decades developed into a fully-fledged branch of international law. After the Second World War several factors contributed towards bringing the plight of nationals of a sovereign state under the focus of international law. Firstly, there was an unprecedented proliferation of newly independent states, a phenomenon that had a profound impact on the composition and role of international organisations such as the United Nations, the Specialised Agencies and the British Commonwealth. Fired by resistance against colonialism, imperialism and racism, and exploiting their numerical strength in international organisations, these states succeeded in creating a favourable international climate for dealing with human rights in a more systematic and global manner than before the war. A second factor was the increasing interdependence amongst states which resulted in the progressive blurring of the traditional division lines between domestic and foreign politics. A third factor was the increased national and international regulation of human rights.

International regulation of the treatment of individuals by states within their domestic jurisdictions, however, challenged the traditional theoretical roots of international law, initially designed to regulate relations between states. In accordance with the consensual nature of international law, it remains up to states to commit themselves to conventional human rights law or openly disassociate themselves from customary provisions. Moreover, the domestic enforcement of a state's international (human rights) obligations, is determined by the domestic legal system of that state and is subject to the whims of policymakers and politicians. Reluctance of states to adhere to basic international human rights standards, be it through non-participation in international instruments or through inadequate enforcement, inhibit the rule of international law, and defy effective international regulation. However, as long as they associate themselves with the basic principles of human rights, albeit for propaganda purposes, they are to some extent redeemed in the eyes of the international community. The importance of openly supporting the principles of human rights, was never heeded by the apartheid government in South Africa with

the result that it made itself extremely vulnerable in the post-war, post-colonial world, with its uncreasing awareness of the role of morality in foreign relations.

South Africa's formal non-adherence to and open defiance of international human rights law (treaties and custom), combined with the absence of moral legitimacy in its foreign and domestic policy, eventually rendered the policy based on racial segregation unsustainable. International law, critisised for the weakness of its enforcement mechanisms, contributed significantly to the demise of apartheid.

In response, the post-apartheid constitutions, modelled by South Africans who had led the struggle against apartheid together with members of the out-going regime, many finding themselves at the receiving end of a disregard for human rights similar to their own, pledged support for international law by reflecting its influences in various constitutional provisions. These constitutional provisions, however, merely created an enabling environment. The effective implementation of international law by the post-apartheid government through law, policy and practice remains the final test.

2. *Purpose of the Research*

The purpose of the present thesis is to research the legal basis, principles and problems of and solutions to the application of international law in municipal legal systems with specific reference to international human rights law. More particularly, the aim of the thesis is to establish both a theoretical and a practical framework within which the hitherto relatively minimal impact of international human rights in South Africa may be enhanced and developed. The classical question whether international law and municipal law belong to two different legal orders, or are concomitant parts of a single order, forms the backdrop to the debate on the process and method to be followed in order to subscribe to and implement international obligations in municipal law. The historical neglect human rights suffered at the hands of the apartheid government is contrasted with the impact of the potentially international law friendly provisions of the South African Constitutions of 1993 and 1996. In conclusion, the approach followed by South African courts and the policy

and practice of government as implemented by government law advisers *vis-à-vis* international human rights instruments are analysed.

3. Research Methodology

Chapters 2 and 3 lay the theoretical foundation of the research. The method employed to establish such theoretical foundation is to identify and discuss the primary sources of law and expound their application by referring to authoritative commentators and state practice.

Chapter 2 identifies and analyses the sources of international human rights law. The feasibility of using article 38(1)(b) of the Statute of the International Court of Justice in pinpointing the sources of international human rights is examined. As in the case of international law in general, treaties and customary international law are established as the major sources of international law on human rights. The principal conventional sources of international human rights law are identified and analysed according to content. The role of human rights treaties in the formation of customary international human rights law is singled out to illustrate the development of current practice. Important expressions of international human rights such as the Universal Declaration of Human Rights, however, fall outside the scope of the traditional sources. Chapter 2 proceeds to examine the status and legal relevance of non-article 38 sources.

Chapter 3 investigates the relationship between international law and municipal law. The various traditional theories explaining the interplay between the two legal systems are examined. The discussion includes criticism questioning the practical relevance of such theories. Transformation (associated with dualism) and direct application (associated with monism) are identified as the alternative methods utilised to implement international law obligations in the domestic legal systems of states. Specific focus is lent to the "doctrine of direct application" as a possible way of facilitating effective implementation of treaty obligations in particular. An attempt is made to establish current trends concerning the application of international human rights obligations.

The role of international law in the English, American, German and Namibian legal systems is researched in order to identify the status accorded by the particular system of municipal law to international law. The relevant constitutional or legal provisions as well as their interpretation by the courts, are identified.[4] Contemporary practice in other countries is also considered.

The historical development of the municipal application and implementation of international law in the South African legal system during the following three periods are traced by chapters 4, 5, and 6:

(i) Prior to April 1993;
(ii) In terms of the Republic of South Africa Constitution Act,[5] and
(iii) In terms of the Constitution of the Republic of South Africa.[6]

These practices are set off against the theoretical framework provided in chapters 2 and 3 with the focus falling primarily on the position of international human rights law.

The method of research followed with regard to chapter 4, is based on a study of historical literature, legal analysis and reported case law.

The chapter is primarily concerned with the position of international law in South Africa under British rule, followed by the apartheid legal order. The status accorded to international law, particularly treaties and custom, as developed through case law, is expounded. The chapter also addresses the relationship between apartheid and international law, by referring to various fields of international law influenced by apartheid, as well as the impact of international law in the final abolition of apartheid. The status and role of international law under South Africa's two post-apartheid constitutions form the subject of discussion in chapters 5 and 6. The method of research employed is to focus on the interpretation of the relevant constitutional

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4 References in the text and footnotes reflect the available and obtainable foreign case law and published literature until 2001.
5 Act 200 of 1993.
6 Act 108 of 1996.

provisions. Research material consulted consists of academic discourse, government legal opinions and records, and case law.

Chapter 5 deals with South Africa's transition to democracy by means of a negotiated constitution. The drafting history and content of the constitutional provisions dealing with the role and status of international law, are considered. International law was regarded as having come of age in South Africa: Finally customary international law was constitutionally acknowledged as being part of South African law and the pre-constitutional dualist approach regarding the transformation of treaties became entrenched. Treaty-making power was no longer an exclusively legislative function and international law was to be considered by courts for interpretative purposes.

Some difficulties relating to the international-law-related constitutional provisions, which were exposed in efforts to translate the constitutional requirements into practice, are identified and discussed. An assessment is made of international-law-related decisions of both the Constitutional Court and other courts, in an effort to identify emerging trends.

Chapter 6 focusses on international law and the present South African Constitution. The various constitutional provisions referring to international law are analysed and compared with similar provisions of the preceding Constitution, adopted in 1993. Suggestions are also made for interpretation of terminology and the practical application of those provisions dealing with the interpretation of the Bill of Rights, stipulating how the state may become party to international agreements and the enforcement of South Africa's treaty provisions. In this regard guidance is sought from case law and the practice adopted by the state's international law advisors. Constitutional and High Court decisions until 2001 are referred to in order to establish the judicial approach to international law.

The policy and practice adopted by the South African government since 1994 regarding each of the major international human agreements are traced in Chapter 7. This includes the signature and ratification of or accession to each of the identified instruments, implementation of the treaty obligations, and the submission of mandatory reports. Special attention is given to the role of and interaction between

various participating government departments. The work closes with an assessment of this process and of problems hampering progress.

CHAPTER 2

SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

1. Introduction

International human rights are embodied in a wide-ranging variety of instruments. The status these instruments enjoy under international law differ. Some fall within the formally recognised sources of international law, others are not recognised as a source of law, but none the less bear international law consequences. This chapter sets out to determine the sources of international human rights law and to establish the status the various international human rights instruments enjoy under international law.

2. Sources of International Law

The term "sources of law" is open to a variety of interpretations. Akehurst points out that binding law should be distinguished from legally non-binding norms which exist at a social or moral level: "In this sense the term 'source' has a technical meaning related to law-making process and must not be confused with information sources, research sources or bibliographies of international law."[1]

The concept of a "sources of law" is important since it enables rules of law to be identified and distinguished from other rules.[2] Starke[3] defines the sources of international law as the actual materials from which an international lawyer determines the rules applicable to a given situation. Under article 38(1) of the Statute of the International Court of Justice[4] (hereafter the ICJ Statute), the court is directed to apply the following in resolving an international law dispute:

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1 Malanzuk (1997) 35.
2 Jennings & Watts (1992) 23. See also Wallace (1977) 7.
3 Shearer (1994) 28. See too Parry (1965); Schwarzenberger & Brown (1976) 21; Malanzuk (1997) 35; Jennings & Watts Vol 1 (1992) 22.
4 Brownlie (1991) 397.

(i) International treaties.

(ii) International custom, as evidence of general practice accepted as law.

(iii) The general principles of law recognised by civilised nations.

(iv) Judicial decisions and the teachings of the most highly qualified publicists of the various countries as subsidiary means for the determination of rules of law.

The sources listed in article 38(1) are regarded as the "traditional" sources of international law.[5] Their adequacy for modern-day international law is a highly debated issue.[6] In the words of Jennings:[7]

> "I doubt whether anybody is going to dissent from the proposition that there has never been a time when there has been so much confusion and doubt about the test of the validity-or sources- of international law, than the present."

In van Hoof's opinion article 38(1) of the ICJ Statute is, however, still a good starting point, though not the final word, as far as the doctrine of sources of international law is concerned.[8] As is pointed out below,[9] the interpretation accorded to the sources is, however, not identical.

International law dealing with human rights shares its sources with international law in general. The sources listed in article 38(1) will therefore be regarded as the point of departure for purposes of the present discussion. No provision is made by article 38(1) for a hierarchy of sources. Treaties and customary international law can, however, be singled out as the principal sources of international law[10] and therefore

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5 Malanzuk (1997) 36.

6 Van Hoof (1993) 82; Shaw (1986) 39.

7 Jennings (1981) 59 at 60.

8 Van Hoof (1993) 179.

9 See discussion under par 3 below.

10 ILA London Conference (2000) Final Report of the Committee on the Formation of Customary International Law *Statement of Principles Applicable of General Customary International Law* par 2 at 116, see http:/www.und.ac.za/und/sabila/. See also Schwarzenberger and Brown (1976) at 23: "Treaties and rules of international customary law constitute the two primary law-creating

also of international human rights law. Both treaties and custom are founded on the consent of states. The normative superiority of these two sources according to Dugard, emphasises the consensual basis of international law.[11]

The full spectrum of international human rights, and arguably international human rights law, is not fully covered under treaties and customary international law. Resolutions of international organisations, in particular the Universal Declaration of Human Rights, are important sources of international human rights not referred to in article 38(1), and are often categorised as "soft law". Specifically in the field of international human rights, such resolutions play a profound role in the creation of both treaties and custom. Proponents of the soft law approach even regard resolutions as a separate, independent source of international law.[12] Since the Universal Declaration of Human Rights, as the most influential of this type of resolution, has played so important a role in kick-starting the development of international human rights and continues to influence international law, the question as to the legal nature of resolutions will be discussed first.

3. *The Legal Status of Resolutions of International Organisations*

The United Nations has adopted numerous resolutions and declarations impacting directly or indirectly on human rights.[13] Since resolutions and declarations are a relatively recent phenomenon in international law, the determination of their status is problematic.

In his book *Rethinking the Sources of International Law,* Van Hoof discusses the capacity of the traditional sources, especially treaties and custom, to explain the status of recently developed expressions of international law, for example, resolutions of international organisations. It appears from Van Hoof's analysis of the

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processes of international law." Rosenne (1984) at 14 goes so far as to say that rules of international law are either conventional or customary.

11 Dugard (2000) 26. See also Malanzuk (1997) at 56 on the hierarchy of sources.

12 See discussion under par 3 below.

13 For a list of such declarations see Annexure A.

traditional sources, that the already limited usefulness of the sources other than treaties and custom listed in article 38(1), has further dwindled due to the changes in the structure of international society during recent decades. Although custom and treaties have adapted to these changes, they have not adapted far enough to accommodate new developments in international law such as resolutions of international organisations. Van Hoof attributes the inability of custom and treaties to further adapt, to the fact that sources must be strictly defined to meet the demands of clarity and certainty required of law.[14] The requirements of clarity and certainty limit the elasticity of these sources.[15]

In an analysis of the sources of international human rights law, Henkin points out that the consent-based nature of treaties and customary law presents an obstacle to international regulation or governance.[16] Traditionally, custom was considered the primary source of international law. By the second half of the twentieth century the focus had shifted to multilateral treaties. Such treaties were mostly regarded as a codification of custom. He argues that the development of human rights law has shaken the traditional views on sources of international law. It has been established largely by treaty "without any foundation or content of custom". In the light of the limitations the consent-based nature of treaties have placed on the international protection of human rights, pressure developed to achieve recognition of a non-conventional law of human rights. Given the modern origin of human rights law, which was consciously created, it could not be regarded as custom-based.[17]

D'Amato criticises Henkin's invention of a new source namely "non-conventional law". In his view the problems experienced by Henkin in categorising human rights law in terms of the sources can be eliminated if treaties are recognised as a source of custom.[18]

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14 Van Hoof (1993) 179.

15 Jennings (1981) 59, on the importance of certainty of the law: "although lawyers know that the quality of certainly of law is one on which there must be much compromise ... it is a *desideratum* of any strong law that there is reasonable certainty about where one should look to find it."

16 Henkin (1995/96) 25 at 35.

17 *Id* at 37.

18 D'Amato (1995/96) 25 at 47.

Henkin draws several parallels between "non-conventional law" and *ius cogens. Ius cogens* too, is non-conventional but not customary in the sense that it does not reflect ancient custom or traditional natural law: it has also not been built on unanimity; it binds the exceptional "eccentric" dissenter; the "persistent objector" principle does not apply; it is not the result of practice but the product of common consensus from which few dare dissent. He suggests that non-conventional human rights are either *ius cogens* or are like *ius cogens.*[19] Henkin regards the universal reaction to apartheid in South Africa as the principal catalyst for this radical derogation from sovereignty. In order to outlaw apartheid, the rules of law-making were changed. Under this changed perception of the sources of human rights law, the lack of practice and persistent objection by South Africa were not of any relevance. Resolutions of international organisations, particularly those of the United Nations General Assembly, are the most pertinent example of expressions of international law which cannot be explained in terms of traditional sources.[20]

The Charter of the United Nations contains a strong presumption against the legally binding character of United Nations General Assembly (hereafter UNGA) resolutions by designating them as recommendations.[21] Despite their non-binding character, it would, according to Van Hoof, be wrong to classify resolutions as non-law.[22] Attempts have been made to classify UNGA resolutions as either international agreements or customary international law. Both scenarios are problematic. Even if unanimously adopted, resolutions can usually not be considered as agreements.[23] The reason why states vote in favour of resolutions may often be precisely because they are only recommendations and therefore legally non-binding. It also proves problematic to link resolutions to customary international law. It is, according to Van

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19 Henkin (1995/96) 38-39.

20 *Id* at 39.

21 See Chapter IV of the United Nations Charter 1945. Mac Gibbon (1982) at 10: " ...the General Assembly is not, and was not intended to be a legislature; and ..., General Assembly resolutions possess the legal force of recommendations only; they neither make law, for, nor operate with binding effect upon, any State."

22 Van Hoof (1993) 181.

23 Certain resolutions may be considered as informal international agreements which have been described variously as "gentleman's agreements", "non-binding agreements", "*de facto* agreements" and "non-legal agreements". For a discussion in this regard see Aust (1986) 35; Baxter (1980) 549-566; Roessler (1978) 27-59; Schacter (1977) 296-306.

Hoof,[24] fairly uncontested that resolutions may be the starting point of a rule of customary international law or may provide evidence of an existing custom. The difficulty, however, arises when resolutions are regarded as constituting one or both of the constituting elements of customary international law. Resolutions can normally not be considered as *usus* as they do not represent real state-practice "on the ground" but merely reflect what states do or have done in the UNGA. In the light of the non-binding nature of resolutions, the expression of *opinio iuris* should not be lightly assumed. The adoption of a resolution remains the adoption of a recommendation and cannot as such lead to the acceptance of its provisions as law hence constituting *opinio iuris*. Van Hoof[25] finally dismisses efforts to link resolutions to the procedural source of generally accepted principles as artificial, because states adopting the resolution were not relying on article 38(1)(c) of the ICJ Statute.

The question as to the role of resolutions in the formation of customary international law, was also considered by the International Law Association's Committee on the Formation of Customary International Law.[26] Section 28 of the Statement of Principles Applicable to the Formation of General Customary International Law of the International Law Association's Committee on the Formation of Customary International Law provides that "United Nations resolutions may in some instances constitute evidence of the existence of customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law. As a general rule, however, and subject to section 32, they do not *ipso facto* create new rules of customary law." It is only when a resolution claims to enunciate binding rules that the question of customary law arises.[27] This is in accordance with Van Hoof's thinking expounded above.

The Statement indicates that it is common for states to vote in favour of a resolution, thereby indicating their approval that the resolution will be transformed into law.[28] The

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24 Van Hoof (1993) 182.
25 Van Hoof (1993) 147-148, 183.
26 See note 10 chapter 2.
27 Commentary to sec 28.
28 *Ibid.*

Committee recognises the possibility that states may consent to be bound to a rule by voting in favour of a resolution.[29] Section 31 states that UNGA resolutions can themselves in appropriate cases constitute part of the process of formation of new rules of customary international law. Resolutions can, in other words, be regarded as building blocks, contributing in the creation of new custom. Voting in favour of a resolution can supply the subjective element (*opinio iuris*) as well as state practice (*usus*). As far as the *usus* requirement is concerned, it is stated that:

> "Indeed, for States without the material means for concrete activity in the field in question, ... verbal acts may be the only form of practice open to them. However, when considering whether the requirements for the formation of a customary rule have been met, it should be realized that one is not dealing with a large quantity of practice *plus* a large number of expressions of consent or belief, but simply a large number of expressions of consent or belief, the true significance of which will depend on the circumstances."

Section 32 deals with the controversial question whether UNGA resolutions can ever of themselves and *ipso facto* create law. It provides that resolutions accepted unanimously or almost unanimously, with a clear intention on the part of their supporters to lay down a rule of international law are, under exceptional circumstances capable of creating general customary law by the mere fact of their adoption. It is stated in the comments to this provision that the phrase "lay down" can mean either declaring existing law or creating a new rule of law. Unanimity in itself does not establish a binding rule: "on the contrary, the price of obtaining unanimity or absence of objection may be that the 'obligation' becomes so watered down as not to constitute a *legal* one, or so ambiguous that it means such different things to different States that it is devoid, or almost devoid, of legally definable content."[30] Since UNGA resolutions are not in principle binding, something more than a mere affirmative vote is needed to establish consent to create a legally binding rule.[31] The Universal Declaration of Human Rights is cited as an example where the title of the resolution

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29 Commentary to sec 31.
30 Commentary to sec 32.
31 *Ibid*.

may be considered as an indication of the intention of those voting for it. The title is, however, only one factor to be taken into consideration. All depends on the context.

The Committee's view that the adoption of resolutions may under exceptional circumstances create a new rule of customary international law, is preferred to van Hoof's cautious approach expressed seven years earlier, that the mere adoption of a resolution cannot express either *usus* or *opinio iuris*. Despite the possibility that resolutions may create law, it remains the exception to the rule that resolutions are generally non-binding. Generally speaking, the conclusion remains valid that efforts to fit resolutions into the traditional sources would stretch these sources beyond the clarity and certainty they were intended to provide. Should one, however, succeed in describing a certain resolution in terms of the traditional sources, the question of the exact legal nature of other resolutions remains unanswered.

Some authors suggest that resolutions may have become a separate, independent source thus constituting binding law.[32] Van Hoof suggests that the so-called "soft-law" approach presents a way to deal with phenomena such as resolutions.[33]

Soft-law can be described as a transitional stage in the development of norms where their content is vague and their scope imprecise.[34] In terms of this approach no clear distinction is made between law and non-law. Soft law refers to instruments, which do not comply with all the traditional criteria for the establishment of rules of international law (*usus* and *opinio iuris* in the case of custom, or expressed consent to be bound in the case of treaties). However, as they do comply with certain of the criteria, as will be discussed, they cannot be regarded as non-law. Soft law could therefore be seen as the grey area between law and non-law. It supplements the rigidly formulated doctrine of the traditional sources in order to explain phenomena which the traditional sources cannot accommodate.[35]

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32 Bothe (1980) 76; Elias (1972) 34-69; and van Hoof (1993) 186.

33 On soft law see also Simma (1988) 377; Chinkin (1989) 850; and Dupuy (1991) 420; Bothe (1980) 11; Elias & Chin (1997) 45.

34 Van Hoof (1993) 187.

35 Van Hoof (1993) 189.

Chinkin warns that the wide variety of instruments of so-called "soft law" makes the generic term a misleading simplification. She identifies instruments of soft law which range from treaties with soft obligations (legal soft law), to non-binding resolutions and codes of conduct formulated and accepted by international and regional organisations (non-legal soft law), to statements prepared by individuals in a non-governmental capacity which purport to lay down international principles.[36] The basic commonality shared by the above examples is a non-legal character, which sets them apart from hard law or legally binding instruments. Soft law can only obtain legal force through transformation into hard law or if it is asserted that the traditional sources of international law have changed. Claims that principles contained in soft law have transformed into hard law are based on the assertion that subsequent state practice has changed the status of the principles. Such state practice may either be through including soft law principles in treaties aimed at creating hard obligations, or alternatively, if state practice were consistent and were coupled with *opinio iuris,* to transform soft law into customary law.[37] In addition, the suggestion made by the Committee introduces the possibility that resolutions may under exceptional circumstances create general customary law by the mere fact of their adoption. At a national level soft law will became hard law and thus domestically applicable through transformation or adoption of such rules into domestic law.[38]

It is important to note that legal and non-legal instruments may deal with exactly the same subject matter. The distinction lies in the nature of the obligation created. According to Bothe the value of soft law, being non-binding in terms of international law, lies on a moral and political level. He identifies non-legal agreements and resolutions of international organisations as pertinent examples where expectations are created in international relations by non-legal instruments.[39] Baxter states that such instruments "deliberately do not create legal obligations but ... are intended to

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36 Chinkin (1989) 850-851. See also Baxter (1980) 550 and Schachter (1977) 296.

37 Chinkin (1989) 857. In the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United State)* (Merits) (1986) ICJ Reports 14 the court held that *opinio iuris* of states with respect to the prohibition on the use of force could be deduced from their attitude towards the relevant General Assembly resolutions. This decision appears to represent a willingness by the court to accept the transformation of soft law into hard law.

38 Roodt (1990) 337.

39 Bothe (1980) 67-95; see also Aust (1986) 807.

create pressure and to influence the conduct of states and to set the development of international law in new courses."[40]

Not all resolutions of international organisations, however, fall into this category. There are resolutions which are clearly legally binding, such as Security Council decisions under article 25 of the United Nations Charter. As far as General Assembly resolutions are concerned, the following categories can, *inter alia,* be identified:[41]

- Declarations purporting to state existing principles of international law.[42] These resolutions are binding in so far as the claim to formulate existing legal rules holds true. If such resolutions do not correspond to existing international law rules they will still formulate shared expectations in a non-legal form.
- Declarations purporting to create new principles of international law.[43] In Bothe's view, a resolution which expresses the instant general consensus of the international community, should be regarded as a source of international law which is not mentioned in art 38 of the ICJ Statute.[44] The view held by the Committee, however, suggests that such resolutions may in appropriate cases constitute custom.
- Declarations promoting specific programmes, for example the Universal Declaration of Human Rights,[45] which proclaims the rights therein as goals rather than rights already recognised under international law. (As will be indicated in a more detailed discussion of the legal status of the Universal

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40 Baxter (1980) 657.

41 Bothe (1980) 68, 75, 76.

42 For example, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, res 2625 (XXV) and the Declaration on the Strengthening of International Security, res 2734 (XXV).

43 Examples are the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, res 1962 (XVIII) and the Declaration on Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof beyond the limits of National Jurisdiction, res 2749 (XXV).

44 Bothe (1980) 76.

45 Res 217 (111). Another example is the Declaration on the Granting of Independence to Colonial Countries and Peoples, res 1514 (XV).

Declaration of Human Rights, most of the rights it contains have obtained legal status through incorporation in subsequent treaties, and at least some are recognised as part of customary international law.) Such resolutions can only be regarded as moral authority, and constitute non-legal programmes of action.[46] This class of resolution can be distinguished from the previous categories in that it does not purport to create or state existing international law. At the time of adoption the intended impact of such resolutions is political and moral, and not binding as a matter of law. The potential authority of such resolutions and their ability to generate obligations should not be underestimated; resolutions exert pressure, even on objecting states; they formulate shared expectations and mobilise public opinion. Even though a resolution may not be legally binding, it is reasonable to expect that states which accept a resolution without reservation, are prepared to comply with its terms.[47] As in the case of non-binding agreements, there is none the less an expectation of, and reliance on, compliance by states.[48] The potential of a resolution to create obligations on the political plane is determined by various factors, such as the circumstances that led to its adoption, the degree of agreement on which it is based, content of the document, and implementation procedures.[49] According to Bothe it is "clear that resolutions do shape international practice, and practice as in the cases of usages, shapes law. Thus, political obligations deriving from resolutions may finally grow into legal obligations."[50]

Despite the fact that a particular instrument may not be binding in international law, it is not inconceivable that legal rights and obligations can be derived from it.[51] Governments may, for example, in conformity with a non-legal instrument follow a course of conduct resulting in a new situation which, depending on the circumstances, may have legal implications. Would a government party to the

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46 Bothe (1980) 77.
47 Van Hoof (1993) 188-191.
48 Schacter (1977) 299.
49 Bothe (1980) 78; Chinkin (1989) 862.
50 Bothe (1980) 79.
51 Aust (1986) 807.

instrument be precluded from challenging the legality of the course of conduct or the validity of the situation created by it? It appears that non-legal obligations may become legally relevant by virtue of legal principles, in particular the principle of *estoppel*, the principle of good faith, or subsequent reference by way of a treaty.[52]

The importance of non-legal obligations flowing from a non-legal document is underlined by the fact that they share significant similarities with legal obligations:[53]

- Non-legal instruments, as in the case of legal instruments, create a shared expectation of state behaviour, depending on the wording of the particular instrument. However, in the case of breach of a non-legal instrument, there is a good chance that condemnation will be less severe.
- Implementation procedures, essentially monitoring devices for observing compliance with both legal and non-legal obligations, are used without significant distinction. Non-legal instruments can by their nature not provide for settlement of disputes. In practice, measures of compliance depend largely on political circumstances rather than the nature of the instrument. Generally speaking, a state will refrain from entering into a legal obligation and rather opt for a non-legal obligation if it envisages difficulties with compliance.
- It is dangerous to generalise that the termination of non-legal instruments is easier than the termination of legal instruments. There are legal instruments which may be denounced at any time, while certain non-legal instruments embody a clear expectation that they will not be declared politically irrelevant overnight.

The distinction between legal and non-legal international instruments is most clearly established in the field of national law.[54] Generally speaking, the conduct of foreign

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52 Schachter (1977) 301.
53 Bothe (1980) 85-90.
54 Chinkin (1989) 856-859.

relations falls within the powers of the executive. Under many constitutions approval of the legislature is required before a state can commit itself in terms of international law (treaties/legal instruments). Entering into non-legal commitments is therefore a matter of policy to be determined by the executive.[55] The lengthy and cumbersome procedure states have to go through to obtain legislative approval for entry into an international agreement, explains why they often opt to achieve the same goal by way of a non-legal instrument, by which sovereignty is compromised to a lesser degree.

In conclusion, it appears that legal and non-legal instruments essentially have the same goal namely to regulate states' behaviour in international relations by providing some stability and making state behaviour more predictable. Non-legal rules, however, do so to a lesser extent. In the words of Bothe "the advantage of non-legal rules is that they provide some stability in cases where a legal rule, with all its rigidity, would not be acceptable to states, would serve no useful purpose or would be too difficult to create".[56]

3.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (hereafter the Universal Declaration) is arguably the most prominent human rights resolution and is a prime example of the capacity of a non-binding, soft law instrument to influence both hard law (treaties and custom) and practice. It was adopted on 10 December 1948 by the UNGA.[57] The voting was forty-eight for and none against. Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, USSR, Yugoslavia and the Union of South Africa abstained.

The Universal Declaration represented the first in a three-stage process aimed at establishing an "International Bill of Rights". Chronologically the three stages were: i) a declaration defining the various human rights which ought to be respected; ii) a

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55 Bothe (1980) 90.
56 *Id* at 94.
57 Doc A/81 1.

series of binding covenants in which states undertook to respect the rights defined in the declaration; and iii) measures and machinery for implementation.[58] Thus it was intended when the Universal Declaration was drafted that international human rights law would be primarily, perhaps even exclusively, conventional law.[59]

The preamble to the Universal Declaration provides that "the recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Reference is made to the United Nations Charter which reaffirms the faith in fundamental human rights, the dignity and worth of the human person, and the equal rights of men and women.[60] The UNGA proceeded to proclaim the Universal Declaration "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...".[61]

The Universal Declaration proclaims a list of civil, political, economic, social and cultural rights, which ought to be recognised.[62] The Universal Declaration is reflected in the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, which were adopted to give the provisions of the Universal Declaration the force of law at an international level.

The Universal Declaration was not drafted with the intention of creating a legally binding document as such.[63] It was adopted by the UNGA as a resolution having no

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58 The International Bill of Rights, Fact Sheet 2, Centre for Human Rights, United Nations Office, Geneva, 1989, 29.

59 Lillich (1995/96) 1.

60 Preamble.

61 *Ibid.*

62 For a table of the rights contained in the Universal Declaration, see 43.

63 Buergental (1995) 33. The non-binding nature is reflected in the oft-cited words of Eleanor Roosevelt, Chairman of the UN Commission on Human Rights during the drafting of the Declaration and a United States representative to the General Assembly when the Declaration was adopted: "In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal

force of law. It did not purport to be more than a manifesto, a statement of ideas and a path-setting instrument. The pioneering contribution of the Universal Declaration lies in the fact that it was the first document in which the organised community of nations formulated the principal human rights and fundamental freedoms that ought to be recognised.[64] Originally adopted only as a "common standard of achievement for all peoples and all nations", the Universal Declaration today exerts a moral, political and legal influence, far exceeding the intention of its drafters. The Universal Declaration is the foundation of much of the post-1945 codification of human rights, both nationally and internationally. At the national level it has served as a model and inspiration for many constitutions, laws and policies aimed at the protection of human rights. These domestic manifestations include direct constitutional reference to the Universal Declaration, or incorporation of its provisions and reflection of its substantive articles in national legislation and judicial interpretation of domestic laws with reference to the Universal Declaration. At the international level, most human rights treaties, both global and regional, are based on the rights originally set forth in the Universal Declaration, or at least contain a preambular reference to the Universal Declaration.[65]

In terms of the final report of the International Law Association's Committee on the Enforcement of Human Rights, on the status of the Universal Declaration in national and international law, the Universal Declaration remains the primary source of global human rights standards.[66] Most states are today bound by one or more multilateral human rights convention. The existence of such conventional obligations does not necessarily diminish the importance of the Universal Declaration. Human rights treaties may often not be relied on by individuals in domestic courts because they have not been incorporated in domestic law. Furthermore, many states are either not party to the most important conventions, namely the International Covenant on Civil

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obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations". As quoted in Whiteman (1965) 243.

64 Starke (1989) 364.

65 Committee on the Enforcement of Human Rights Law, Final Report on the Status of the Universal Declaration of Human Rights in National and International Law in Report of the Sixty-Sixth Conference, Buenos Aires, Argentina (1994) 526.

66 *Ibid*.

and Political Rights, and the International Covenant on Economic Social or Cultural Rights, or have entered substantial reservations, watering down their obligations.

At the 1993 United Nations World Conference on Human Rights, the 171 participating states reaffirmed their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration. They further stated that the Universal Declaration "is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments".[67]

Despite the original designation of the Universal Declaration as a non-binding instrument, it may be argued that certain of its provisions have become legally binding. The debate on whether the Universal Declaration as a whole can be regarded as binding international law has been long-standing.[68]

At least three different grounds for this contention can be identified:[69]

It is firstly argued that rights recognised in the Universal Declaration have obtained the status of customary international law.[70] Alternatively, it is argued that the Universal Declaration is binding because it constitutes general principles of law.[71] The third view relies on the fact that the United Nations' consistent reliance on the Universal Declaration when applying the human rights provisions of the United

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67 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, UN Doc A/CONF.157/23 (1993), reprinted in (1993) 32 *International Legal Materials* 1661 (1993), Preamble, para 3.8.

68 Buergental (1995) 35 argues that the process leading to the transformation of the Universal Declaration from a non-binding document to an instrument of which at least certain parts constitute binding international law, was partly set in motion because the efforts to finalise the second stage of the process to establish an International Bill of Rights by way of the adoption of Covenants to enforce the provisions of the Declaration stalled in the United Nations for almost two decades. Thus, it is argued that the Universal Declaration as a whole took over the Bill of Rights.

69 *Ibid.*

70 Lillich (1995) 25. D'Amato (1995) 45.

71 Simma & Alston (1992) 82; Henkin (1995/96) 31.

Nations Charter, compels the conclusion that the Declaration has become accepted as an authoritative interpretation of these provisions.[72]

The grounds for regarding the Universal Declaration as a binding instrument are sometimes interwoven and require further discussion.

3.1.1 The Universal Declaration as Customary International Law

Although the Universal Declaration did not impose legal obligations on states at the time of its adoption, it is theoretically possible that the goals and aspirations it contains can develop into binding norms over time if it becomes accepted as customary international law.[73] As early as 1965 Judge Waldock remarked that the constant and widespread recognition of the principles of the Universal Declaration, clothes it in the character of customary international law.[74] In 1968 the International Conference on Human Rights convened to commemorate the twentieth anniversary of the Universal Declaration, adopted the Proclamation of Teheran which declared that the Universal Declaration constitutes an obligation for members of the international community.[75] These contentions may have been premature, but are never the less indications of an evolving international consensus that the Universal Declaration reflects customary international law.[76]

The International Court of Justice has addressed the status of the Universal Declaration either directly or indirectly in several opinions. The court established in the *Genocide* case that the principles underlying the Genocide Convention are recognised by civilised nations as binding on states even without any conventional obligation.[77] In the *Barcelona Traction* case the court distinguished between obligations of states *vis-à-vis* one another, and obligations of states towards the

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72 Buergental (1995) 35.
73 For a discussion of the requirements with which customary international law must comply see par 5 at 51 below.
74 Waldock (1965) 15.
75 UN GAOR, 23rd Sess, UN Doc A/Conf. 32/41 (1968).
76 Lillich (1995) 2.
77 *Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide,* Advisory Opinion 1951 ICJ Reports 15 at 23.

international community as a whole. All states have a legal interest in the protection of the latter which the court regarded as obligations *erga omnes.* In the words of the court:

> "such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[78]

In a separate opinion in the *Namibia* case,[79] Judge Amman remarked:

> "Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Article 38, paragraph 1(a), of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1(b) of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b), of the Statute."

Humphrey, who as Director of the United Nations Secretariat's Division for Human Rights, played an active role in the drafting of the Declaration, remarked in 1976 that:

> "the Universal Declaration has been invoked so may times both within and without the United Nations that lawyers are now saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and is therefore binding on all states. The Declaration has become what some nations wished it to be in 1948: the universally accepted interpretation and definition of human rights left undefined by the Charter."[80]

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78 *Barcelona Traction, Light and Power Company, Limited,* Second Phase, Judgment, (1970) ICJ Reports at 3,32.

79 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, (1971) ICJ Reports 16, 57 (Advisory Opinion of June 21).

80 Humphrey (1976) 527.

McDougal, Lasswell and Chen endorse the view that the Universal Declaration constitutes binding international law, concluding:

> "in the nearly three decades subsequent to its adoption, however, the Universal Declaration has been affirmed and reaffirmed by numerous resolutions of the United Nations entities and related agencies; invoked and reinvoked by a broad range of decision makers, national and transnational judicial and other; and incorporated into many international agreements and national constitutions. The result is that the Universal Declaration is now widely acclaimed as a *Magna Carta* of human kind to be complied with by all actors in the world arena. What began as a mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the United Nations Charter and as established customary law, having the attributes of *jus cogens* and constituting the heart of the global bill of rights."[81]

Lillich refers to two significant cases which provide evidence of state practice that at least some of the provisions contained in the Universal Declaration, have become customary international law.[82] In the case concerning *United States Diplomatic and Consular Staff in Tehran*[83] the court held that it is wrongful to deprive human beings of their freedom and to subject them to physical constraints that are incompatible with the principles of the United Nations as well as with the fundamental principles enumerated in the Universal Declaration. The second is a case emanating from the United States of America, namely *Filartiga v Pena Irala*.[84] The Court of Appeals unanimously held that the prohibition against torture has became part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights.[85]

After this decision a sizeable body of United States case law affirmed that a number of the norms found in the Universal Declaration have achieved customary international law status. These include, in addition to the prohibition of torture,

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81 McDougal, Lasswell & Chen (1980) 274.
82 Lillich (1995/96) 3.
83 (1980) 3 ICJ Reports 42.
84 630 F 2"d 876 (2d Cir. 1980).
85 *Id* at 882.

prohibitions against arbitrary detention, summary execution or murder, causing the disappearance of individuals, cruel or inhuman treatment, and genocide.[86]

The American Law Institute's Third Restatement of Foreign Relations Law of the United States[87] purports to state the generally accepted Customary International Law of Human Rights as of 1987. The list includes, in addition to the rights listed above, the prohibition of slavery or slave trade, systematic racial discrimination and a consistent pattern of gross violations of internationally recognised human rights.

Lillich endorses the approach adopted by the authors of the Restatement namely that "the practice of states that is accepted as building customary international law of human rights includes some forms of state practice and *opinio iuris* different from those that build customary international law generally". While not rejecting the established formal criteria for custom, greater emphasis falls in particular on widely accepted multilateral treaties and United Nations General Assembly resolutions like the Universal Declaration.[88] Henkin argues in support that the criteria of traditional customary law, namely state practice with a sense of legal obligation are invoked to support the non-conventional human rights law it restates, even through it is accepted that such state practice looks and is different. Henkin points out that such law radically diverges from the axiom of sovereignty since it is not based on consent but on honouring or accepting dissent, and binding states despite their objections.[89]

Meron concludes from his examination of the International Court of Justice's opinions on the customary law status of human rights over the years, that the inquiry into state

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86 Lillich (1995/96) 6.

87 Restatement (Third) of the Foreign Relations Law of the United States (1987) sec 702.

88 Lillich (1995/96) 8. This approach was criticised by Simma & Alston (1992) 106, in what they refer to as the "customary-law-of-human rights school", generally referred to as the "Simma Alston critique". The Simma Alston critique rests on a preference for a pre-*Nicaragua,* possibly pre-*Norh Sea Continental Shelf* case, approach to the formation of customary international law. An approach that looks "into the past to identify customary patterns of State practice" and then turns "this empirical result into a normative projection for the future." See Simma & Alston (1992) note 55 at 89. D'Amato (1995/96) 97-98 regards treaties as the most obvious evidence of state practice in customary international human rights law.

89 Henkin (1995/96) 35-39. See also Restatement 701 11.2.

practice and *opinio iuris* has varied in degrees of detail ranging from the specific to the brief and conclusionary.[90]

According to Meron, the court's more recent approach accords limited value to state practice, especially to inconsistent state practice, and attributes central normative significance to resolutions both of the United Nations General Assembly and of other international organisations. The court has found evidence of *opinio iuris* and/or practice in such resolutions and in their verbal acceptance by states. The burden of proof to be discharged in establishing custom in the field of human and humanitarian rights is thus less onerous than that in other fields of international law.[91]

The *Nicaragua* case is a clear example of where the International Court of Justice attaches significant value to at least some UNGA resolutions. The court states with regard to resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" that *opinio iuris* may, though with all due caution, be deduced from *inter alia* the attitudes of states, and the attitude of states towards certain UNGA resolutions and particularly resolution 2625. The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may in itself be understood as an acceptance of the validity of the rule or set of rules declared by the resolution.[92] The *Nicaragua* judgment de-emphasises the importance of practice as one of the two elements necessary for the transformation of resolutions into customary international law.[93]

In the Montreal Statement of the Assembly of Human Rights made at the twentieth anniversary of the adoption of the Universal Declaration, it was claimed that the

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90 Meron (1989) 107.
91 *Id* at 113.
92 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (Merits) (1986) ICJ Reports 14 at 99-100.
93 Meron (1989) 107.

Universal Declaration constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become part of customary international law.[94]

In 1990 the International Law Association's Committee on the Enforcement of Human Rights Law embarked on a study on the status of the Universal Declaration in national and international law. Based on its research, a final report was submitted at the Sixty-Sixth Conference of the International Law Association in Buenos Aires in 1994.[95] It was agreed that the question whether human rights obligations have became customary law could not readily be answered on the basis of the usual process of customary law formation.[96] After a thorough examination of state practice, the Committee concludes that there would seem to be little argument against the fact that many provisions of the Universal Declaration reflect customary international law.[97] It is interesting to note that in 1989, the latter part of the apartheid era, a South African court opined that although the ideals which inspired the Universal Declaration are laudable, they do not form part of customary international law.[98]

Despite the fact that an increasingly large body of the provisions of the Universal Declaration is gaining recognition as customary international law, it remains premature to describe that the Declaration *in toto* as customary international law.[99]

Hannum suggests tentatively, after a careful analysis of state practice, that the following provisions of Universal Declaration may be regarded as customary international law:[100]

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94 Montreal Statement of the [non-governmental] Assembly for Human Rights (1968) reprinted in 1968 *International Commission of Jurists Review* 94.

95 Note 65 chapter 2 at 2.

96 *Id* at 538.

97 *Id* at 539-544. The Report also contains views that the Declaration has no legal effect at 543.

98 *S v Rudman, S v Johanson, S v Xaso, Xaso v Van Wyk* 1989 (3) SA 368 at 376. See also *S v Petane* 1988 (3) SA 51 (C) at 58G-J where the court cites inconsistent state practice to cast doubt on the suggestion that certain provisions of the Universal Declaration have became customary international law.

99 Hannum (1995/96) 1 & 2 340.

100 *Id* at 342.

The fundamental right of equal treatment and non-discrimination[101]; the prohibition against slavery[102]; the prohibition against torture or cruel inhuman or degrading treatment or punishment[103]; the prohibition against arbitrary detention[104]; certain of the rights relating to criminal justice[105]; the right to property subject to certain caveats[106]; the right to free choice of employment, the right to form and join trade unions and the right to free primary education, subject to a state's available resources.[107]

3.1.2 General principles of law

Meron remarks as follows regarding the recognition of the Universal Declaration as general principles of law:

> "it is surprising that 'the general principles of law recognized by civilized nations' mentioned in Article 38(I)(c) [of the Statute of the International Court of Justice] have not received greater attention as a method for obtaining greater legal recognition for the principles of the Universal Declaration and other human rights instruments. As human rights norms stated in international instruments come to be reflected in national laws ... Article 38(I)(c) will [or might] increasingly become one of the principal methods for the maturation of such standards into the mainstream of international law." [108]

In the Restatement (Third) of the Foreign Relations Law of the United States it is remarked that there is a willingness to conclude that prohibitions [against human rights violations] common to the constitutions or laws of many states are general

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101 Articles 1, 2, 6 and 7.
102 Art 4.
103 Art 5.
104 Art 9.
105 Articles I0 and 11.
106 Art 1.
107 Articles 22 to 27.
108 Meron (1989) 88.

principles that have been absorbed into international law.[109] Hannum[110] remarks that national courts do not always distinguish clearly between custom and general principles. References to general principles in municipal law cannot necessarily be taken as equivalent to the general principles in art 38(1)(c) of the Statute of the International Court of Justice.

In their critique of customary law as a source of human rights, Simma and Alston[111] suggest that general principles of law recognised by civilised nations should form an alternative basis for a non-conventional legal obligation in human rights that would bind all states. Such general principles should not be limited to legal principles developed in *foro domestico,* but should include such internationally accepted principles, for example those expressly articulated in General Assembly declarations. They contend that reliance upon general principles side steps the problems associated with proving customary international law. Lillich criticises Simma and Alston's belief that general principle forms an independent source of international law binding states even without their consent. He in turn suggests that general principles may play a role in "promoting the passage of human rights law into customary law but do not constitute an independent source of international law".[112]

3.2 Conclusion

Although at the time of its inception the Universal Declaration was not intended to constitute a legally binding instrument of international law, convincing authority exists that substantial parts have developed into law. It is argued that substantial parts of the Universal Declaration have been effectively transformed from soft to hard law. Different avenues were pursued in order to explain the current international law status of the Universal Declaration. It has been accepted by eminent international law writers and courts of law that many provisions contained in the Universal Declaration have become customary international law. Although such customary status is built on

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109 Restatement (1987) 154.
110 Hannum (1995/96) 352.
111 Simma & Alston (1992) 102.
112 Lillich (1995/96) 15, 16.

the traditional criteria required to create custom, it is suggested by Lillich, Meron and Henkin that the state practice and *opinio iuris* may be different from those that build customary law generally. Lillich and Meron's thinking on the role of UNGA resolutions in transforming human rights into binding custom is in line with the final report adopted at the sixty-sixth Conference of the International Law Association in 1994 and section 32 of the Committee's Statement of Principles Applicable to the Formation of General Customary International Law in 2000 that resolutions as such can contribute to the creation of custom. Evidence of both state practice and *opinio iuris* may be found in resolutions and their adoption by states.

It is suggested that international state practice supports the relaxed and adapted criteria for the transformation of human rights soft law into a source of law recognised by the ICJ Statute.

4. Treaties

Treaties in various forms constitute the most prominent source of international human rights law. The term "treaty" refers to various types of international agreements which would fall under the definition provided by the Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), namely a written agreement between states or states and international organisations, governed by international law.

The modern multilateral treaty-making process is initiated by the adoption of a decision, resolution or declaration by an international organisation.[113] This process shows how soft law or non-binding instruments form building blocks in a process ultimately resulting in law.

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[113] Both bilateral and multilateral treaties deal with human rights. The major treaties in this regard are, however, multilateral. The present study will focus exclusively on multilateral treaties.

The United Nations and other international organisations such as the European Community and the Organisation for African Unity, have adopted numerous international agreements aimed at the clarification and codification of international human rights law.[114]

The Charter of the United Nations, which is a multilateral treaty, lays the legal and conceptual foundation for the development of contemporary international human rights law.[115] Article 1(3) proclaims as one of the purposes of the United Nations:

> "To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

Articles 55 and 56 set out the basic obligations of the United Nations and its member states in achieving these purposes.

Article 55:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
> b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

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[114] A list of these agreements is attached as "Annexure B".
[115] Buergental (1995) 23.

Article 56:

> "All Members pledge themselves to joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

The references to human rights in the Charter of the United Nations (see preamble, articles 1,55, 56, 62, 68 and 70) have laid the foundation for the elaboration of the content of standards and machinery for implementing the protection of human rights.[116]

This study will focus on United Nations agreements, as opposed to those of regional organisations such as the Organisation for African Unity and the European Union. United Nations agreements are aimed at universal participation and are standard-setting in the field of international human rights.

The following human rights instruments are regarded as the most important and their content will be briefly discussed:

(i) International Covenant on Civil and Political Rights (ICCPR) and the two optional protocols thereto
(ii) International Covenant on Economic Social and Cultural Rights (ICESCR)
(iii) International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
(iv) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
(v) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)
(vi) Convention on the Rights of the Child (CRC)

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[116] Brownlie (1991) 21.

4.1 International Covenants on Human Rights

It was against the background of the inability of the Universal Declaration to impose legally binding obligations that the United Nations Commission on Human Rights embarked on the drafting of two covenants on human rights, designed to transform the provisions of the Universal Declaration into treaty form.[117]

The Covenants on Civil and Political Rights and on Economic Social and Cultural Rights were adopted by the UNGA in 1966, and entered into force in 1976. The two Covenants lay the basis for various multilateral human rights treaties dealing with specific topics. The drafting history leading to the adoption of the Covenants, and why two Covenants were necessary instead of one, is not relevant to a discussion of treaties as a source of international human rights law.

4.1.1 International Covenant on Civil and Political Rights (ICCPR)

The obligations which state parties assume are set out in article 2(1):

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This provision is supplemented by article 2(2) which requires the state parties to adopt such legislative or other measures as may be necessary to give effect to the rights "recognised in the Covenant" whenever such provisions do not already exist in their domestic law. Unlike the ICESCR, which calls for progressive implementation tied to available resources, the ICCPR imposes an immediate obligation to respect

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[117] There are provisions in the Covenants which go beyond the content of the Universal Declaration, eg the rights of peoples to self-determination (art 1(1)), to sovereignty over their resources (art 1(2)), and to members of ethnic religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion, and to use their own language (art 27 of the ICCPR). The

and ensure the rights it contains. Article 2(3) guarantees the right to a remedy to a person whose rights and freedoms recognised by the Covenant are violated.

Article 4 contains a "derogation clause" which permits the state parties in times of public emergency which threaten the life of the nation to suspend all but the seven articles dealing with the most fundamental rights.[118] The Covenant also permits state parties to limit the exercise of certain of the rights it proclaims. Specific limitations or "clawback" clauses[119] are contained in articles 12(3), 14(1) and 18(3).

The ICCPR establishes a Human Rights Committee[120] and confers on it the function of examining and commenting on reports submitted by state parties[121] designed to ensure that they comply with the obligations they have assumed by becoming party to the Covenant. Article 40(1) provides that state parties undertake to submit reports on the measures they have adopted which give effect to the rights recognised in the Covenant and on progress made in the enjoyment of those rights. The Covenant also provides for optional interstate complaint machinery that enables one state party to charge another with violation of the Covenant.[122]

4.1.1.1 Optional Protocol to the International Covenant on Civil and Political Rights

This agreement, which was adopted in 1966 and entered into force in 1976, supplements the measures of implementation of the ICCPR. It recognises the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of a violation of the Covenant. Such complaints may only be brought against state parties.[123] The Human Rights Committee may only consider complaints from individuals who have exhausted all

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Universal Declaration proclaims some rights which do not appear in the Covenants including the right to own property, to seek and enjoy asylum and the right to a nationality.

118 Arts 6, 7, 8 (1) & (2), 11, 15, 16 and 18.

119 The phrase was coined by Higgens (1976-77) 283.

120 Art 28.

121 Art 40 .

122 Art 41. A table of the rights contained in the ICCPR appears at 43 below. Humphrey (1985) 171 contains a detailed comparison between the provisions of the UDHR and the ICCPR.

123 Art 1.

available domestic remedies.[124] Once a complaint has been regarded as admissible, the Human Rights Committee brings it to the attention of the state involved, which has six months within which to respond to the charges.[125] The communications of both the individual and the state are then examined and the Committee's findings forwarded to the parties.[126]

4.1.1.2 Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at Abolition of the Death Penalty

This protocol, aimed at the abolition of the death penalty, was adopted in 1989 and entered into force on 11 July 1991. The Protocol is additional to article 8 of the ICCPR that strongly suggests that abolition is desirable.

Article 1 provides that no one within the jurisdiction of a state party shall be executed and secondly, that all state parties shall take the necessary measures to abolish the death penalty. The only reservation permissible would allow for application of the death penalty in time of war pursuant to a conviction for a more serious crime of a military nature committed during wartime.[127]

4.1.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR adopts a different approach to the ICCPR on the question of implementation. Under the ICESCR, state parties do not assume the obligation of immediate implementation as found in ICCPR, but undertake merely to take steps to the *maximum of their available resources to achieve progressively the full realisation of rights.*[128]

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124 Articles 2, 3 and 5 deal with admissibility of the communication.
125 Art 4.
126 Art 5.
127 Art 2.
128 Art 2(1) provides in this regard that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively

The different approach hinges on the fact that other than in the case of economic and social rights, the protection of civil and political rights is not directly dependent on the availability of economic resources. In the case of civil and political rights, little more than legislation and decision by government not to engage in certain illegal practices is required. The enjoyment of economic, social and cultural rights, on the other hand, cannot be ensured without economic and technical resources, education and planning, the gradual reordering of social priorities, and often international co-operation. These considerations are reflected in the progressive obligations which states party to the ICESCR have assumed.[129]

Accordingly, the methods to measure compliance with the ICESCR also differ from those provided for by the ICCPR. Since the availability of resources and other problems faced by state parties will differ, different criteria will have to be applied to different states in order to measure their compliance.[130] This is not to say that none of the rights contained in the ICESCR can be enforced.[131] Under article 16 state parties undertake to submit reports on the measures they have adopted and the progress made in achieving the observance of the rights contained in the ICESCR to the Economic and Social Council of the United Nations (ECOSOC). The ICESCR does not, as in the case of the ICCPR, establish a separate committee to consider reports. The Committee on Economic, Social and Cultural Rights was established by

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the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".
General Comment No 3 (1990) adopted by the Committee on Economic Social and Cultural Rights at its fifth session, 14 December 1990 par 8 states: "The Committee notes that the undertaking 'to take steps ... by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral".
And at par 9: "The concept of progressive realization constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content."

129 Buergental (1995) 54. Trubek (1985) 211.

130 Buergental (1995) 55.

131 See discussion in chapter 3 on the self-executing nature of the ICESCR.

resolutions of ECOSOC to deal with the reviewing of reports and to supervise the implementation of the treaty.[132]

In its 1991 report,[133] the Committee points out, with reference to article 2(1), that while the Covenant provides for progressive realisation, and acknowledges the constraints due to limits of available resources, it imposes various obligations which are of immediate effect. The Committee singles out the guarantee of non-discrimination and the obligation "to take steps" in article 2(1) as examples of such obligations. Legislation and judicial remedies can deal appropriately with the question of non-discrimination, whilst steps towards progressive realisation must be taken within a reasonably short time of the Covenant's entry into force for the states concerned. Article 2(2) contains a provision similar to article 2 of the ICCPR, namely an undertaking by state parties that the rights contained in the Covenant will be exercised without discrimination of any kind.[134]

Under article 4 state parties recognise that those rights guaranteed by the state may be subjected only to such limitations as are determined by law, only in so far as this may be compatible with the nature of these rights, and solely for the purpose of promoting the general welfare in a democratic society. No derogation from any of the rights recognised or existing in any country is permitted under article 3 to a greater extent than provided in the Covenant.

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132 Buergental (1995) 56.

133 Report of the Committee on Economic, Social and Cultural Rights, fifth session, UN Doc E/199123 E/C. 12/1990/8 (1991) 83.

134 General Comment (1990) par 1: While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect .... One of these ... is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination ...". Par 2: The other is the undertaking in article 2(1) "to take steps", which in itself, is not qualified or limited by other consideration. .... while the full realization of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. In addition there are a number of other provisions in the International Covenant in Economic, Social and Cultural Rights, including articles 3, 7(a) (i), 8, 10(3), 13(2) (a), 3 and (4) and 15(3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated an inherently non-self-executing character would seem difficult to sustain."

As far as rights are concerned, the ICESCR provides a far more comprehensive list of economic, social and cultural rights than that contained in the UDHR.

4.1.3 *Table of Rights*

The following comparative table lists the rights (by referring to the respective articles) contained in the Universal Declaration (UDHR), the ICCPR and ICESCR:

	UDHR	CCPR	CESCR
Equality	2	2	2
Equality between men and women		3	3
Right to life	3	6	
Liberty	3	9	
Security	3	9	
Treatment of persons deprived of liberty		10	
Prohibition of imprisonment because of inability to fulfil contractual obligation		11	
Prohibition of slavery	4	8	
Prohibition of torture	5	7	
Recognition as person before the law	6	16	
Equality before the law	7	14, 26	
Effective remedy	8		
Arbitrary arrest, detention or exile	9		
Fair, public hearing by independent impartial tribunal	10	14	
Presumption of innocence	11	14	
Right not to held guilty of retroactive penal offence	11	15	
Arbitrary interference with privacy, family, home, correspondence or attacks on honour and reputation	12	17	
Freedom of movement	13	12	
Right to leave any country, return to own country	13	12	
Asylum	14		
Nationality	15	24	
Right to marry and found family	16	23	
Consent of spouses	16	23	10
Property	17		

Freedom of thought, conscience, religion	18	18	
Freedom of opinion and expression	19	19	
Freedom of assembly and association	20	21, 22	
Access to public service			
Participation in government	21	25	
Universal, equal suffrage	21		
Social security	22		9
Right to work	23		6
Equal pay for equal work	23		7
Just and favourite remuneration	23		7
Form and join trade unions	23	22	8
Right to strike			8
Rest and leisure	24		
Adequate standard of living	25		11
Highest standard of physical and metal health	25		12
Protection of motherhood and childhood	25	24	10
Child labour			10
Education	26		13, 14
Right of persons belonging to minorities to enjoy own culture, profess own religion and use own language		27	
Right to free participation in culture life, enjoy arts and to share in scientific advancement	27		15
Protection of authors interest in scientific, literacy or artistic production	28		
Duties to community	29		
Limitation to rights and freedoms	29		
Self-determination		1	1
Expulsion of an alien		13	
Minimum guarantees in determination of criminal charge		14	
Prohibition of propaganda of war, advocacy of national, racial or religious hatred		20	

4.2 *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*

This treaty was adopted by the UNGA in 1965 and entered into force in 1969. CERD is the most important international instrument to develop the fundamental norm of the United Nations Charter requiring respect for and observance of human rights and fundamental freedoms for all, without distinction as to race.[135] The Convention defines the term "racial discrimination" in article 1 as:

> "any distinction, exclusion, restriction or preference based on race, colour, decent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

The Convention suggests in article 1(2) that special measures aimed at the advancement of certain racial or ethnic groups or individuals requiring such protection in order for them to enjoy equal enjoyment of human rights and fundamental freedoms, shall not be regarded as racial discrimination provided that such measures do not lead to the maintenance of separate rights for different racial groups and shall not be continued after the objectives have been achieved.

The states party to CERD are obliged, in terms of article 2, to eliminate racial discrimination in their territories by all appropriate means, including legislation, to ensure non-discrimination in the enjoyment of all human rights. State parties are further obliged to declare activities such as dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and all acts of violence or incitement thereto against any race, a punishable offence. Article 5 of CERD contains a long list of basic civil, political, economic, social and cultural rights to which this obligation applies. In terms of article 6, state parties shall provide effective protection

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[135] Meron (1986) 7.

and remedies against acts of racial discrimination, which violate human rights and fundamental freedoms.

CERD is enforced through a Committee on the Elimination of Racial Discrimination (the Committee). The functions of this Committee include the review of compulsory periodic reports the state parties are obliged to prepare on the legislative, judicial, administrative or other measures adopted to give effect to the provisions of the Convention.[136] The Committee is also empowered to deal with interstate and individual communications.[137]

By becoming party to CERD, states automatically submit themselves to the jurisdiction of the Committee to deal with interstate communications directed against them by other parties.[138] If the Committee regards a complaint as admissible, an *ad hoc* Conciliation Commission is established and charged with the task of preparing a report on the dispute and making appropriate recommendations to the states concerned.[139] The individual petition system is, however, optional and requires a declaration recognising the jurisdiction of the Committee to deal with such complaints. In terms of article 22 of CERD jurisdiction is also conferred on the International Court of Justice to deal with disputes between state parties.

4.3 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention was adopted by the UNGA on 18 December 1979 and entered into force on 3 December 1981. CEDAW is the first convention to focus on the prohibition of discrimination against women. CEDAW defines discrimination as:

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136 Art 9.
137 Arts 11 and 14.
138 Art 11.
139 Arts 12 and 13.

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

The obligations imposed by the Convention are twofold: firstly state parties agree to eliminate discrimination against women, and secondly, they agree to ensure equality by way of, *inter alia,* their national constitutions or other legislation and to impose sanctions where appropriate.[140] Article 4 provides that temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered as discrimination, but shall be discontinued when the objective of equality has been achieved. State parties undertake to take appropriate measures to: modify social and cultural patterns of conduct[141]; to suppress traffic in women and exploitation of prostitution of women[142]; to eliminate discrimination against women in the political and public life[143]; to ensure that women, on equal terms with men, have the opportunity to represent their governments internationally[144]; to grant women equal rights with men in matters regarding their nationality[145]; to eliminate discrimination to ensure equal rights in education and related matters[146]; to eliminate discrimination in employment[147]; health care[148]; economic and social life[149]; marriage and family relations; ensure application of the Convention to rural women[150]; and ensure women equality with men before the law .[151]

CEDAW imposes an obligation on state parties to submit periodic reports on the legislative, judicial, administrative or other measure adopted to give effect to the

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140 Arts 2 and 3.
141 Art 5.
142 Art 6.
143 Art 7.
144 Art 8.
145 Art 9.
146 Art 10.
147 Art 11.
148 Art 12.
149 Art 13.
150 Art 14.
151 Art 15.

provisions of the Convention and progress made in this respect.[152] These reports are reviewed by the Committee on the Elimination of Discrimination against Women.[153] CEDAW does not set up an inter-state or individual complaint mechanism. Under article 29(1), disputes between state parties relating to the interpretation or application of the Convention, may be submitted to the International Court of Justice by the parties. However, state parties may at the time of becoming party declare that they do not consider themselves bound by this provision. The effectiveness of CEDAW has been undermined by the significant number of reservations[154] made by states at the time of becoming party. These reservations seek to preserve various national or religious institutions that conflict with the Convention.[155] Some of them are clearly in conflict with the "compatible with the object and purpose-test" imposed by article 28. Libyan Arab Jamahiriya, Iraq, Maldives, Egypt, Bangladesh and Kuwait, for example, entered reservations exempting the provisions of CEDAW which are in conflict with the Islamic Sharia. Reservations of this nature were objected to by European state parties.[156]

4.4 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

This Convention was adopted by the UNGA on 10 December 1984 and entered into force on 28 June 1987 after the twentieth instrument of ratification required to bring it into force, was deposited. The aim of CAT is to prevent and punish torture inflicted by a person acting in his official capacity or a person acting with the consent or acquiescence of a public official. Torture is defined in article 1 of CAT as:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has

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152 Art 18.
153 Art 17.
154 UN Multilateral Treaty Series (1995) 167 records a number of 117 reservations or declarations.
155 Buergetal (1995) 71.
156 Austria, Denmark, Finland, Germany, Netherlands, Norway, Portugal and Sweden.

committed or is suspected of having committed, or intimidating or concerning him or a third person, for any reason based on discrimination of any kind".

State parties are obliged to take effective legislative, administrative, judicial or other measures to prevent torture in the territories under their jurisdiction[157] and shall make torture a punishable offence under their criminal law.[158] CAT does not recognise any exceptional circumstances whatsoever, and an order from a superior officer or a public authority, does not justify torture.[159] No state party shall extradite a person to state where he would be in danger of being subjected to torture.[160] Under art 8 state parties are required to treat torture as an extraditable offence.

CAT further contains a number or provisions indicating steps state parties should take in the prohibition of torture and dealing with persons guilty of such offence.[161]

The measures of implementation consist of compulsory reporting by state parties on measures taken to give effect to their undertakings under the Convention[162] to be considered by the Committee against Torture, which is established by article 17, as well as an optional inter-state[163] and individual complaint mechanism.[164] The latter two mechanisms are similar to those provided for by ICCPR and its first Optional Protocol. The Committee further has the power to initiate an inquiry when it receives reliable information of practices of torture.[165] A state party may, however, at the time of becoming party, indicate that it does not recognize the competence of the Committee under article 21.[166] State parties further have the option to submit

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157 Art 2(1).
158 Art 4(1).
159 Art 2(2) and (3).
160 Art 3(1).
161 Arts 7, 9, 10, 11, 12, 13, 14 and 15.
162 Art 19.
163 Art 21.
164 Art 22.
165 Art 20. Buergental (1995) 75.
166 Art 28.

disputes between them concerning interpretation or application of the Convention to arbitration or to the International Court of Justice.[167]

4.5 The Convention on the Rights of the Child (CRC)

This Convention was adopted by the UNGA on 20 November 1989 and entered into force on 2 September 1990. The Convention is the first of its kind to single out children as exclusive subjects of international human rights. The guiding principle of the Convention is the best interest of the child, which should be the primary consideration in all actions concerning children in all spheres including private, public, community or family.[168]

A child is defined by the Convention as every human being below the age of 18 unless majority is attained earlier under the applicable law (article 1). Article 2 provides that:

> "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability birth or other status."

Under article 4 state parties are obliged to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRC. With regard to economic, social and cultural rights, state parties are obliged to undertake such measures to the maximum extent of their available resources and where needed, within the framework of international co-operation.

The responsibilities, rights and duties of parents, or person responsible for the child, shall be respected by state parties to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by

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[167] Art 30.
[168] Art 3(1).

the child of the rights recognised in the Convention.[169] The Convention contains an extensive list of civil, political, economic, social and cultural rights which state parties undertake to accord to children including: the right to life[170]; the right to be registered and to a name and to acquire nationality[171]; the right to preserve his or her identity[172]; the right not to be separated from his or her parents against their will unless necessary in the best interests of the child[173]; freedom of expression[174]; thought, conscience and religion[175]; association and of peaceful assembly[176]; protection from arbitrary or unlawful interference with a child's privacy[177]; access to information[178]; protection against violence, injury, abuse or exploitation[179]; the rights pertaining to refugee status[180]; right to the highest attainable standard of living and access to health care services[181]; the right to be protected from economic exploitation[182]; and protection against torture[183].

The Convention seeks to protect children against a large number of potentially dangerous and exploitative practices.

A Committee is established by the Convention with the function of examining the compulsory reports made by state parties in achieving the realisation of the obligations undertaken in terms of the Convention.[184] The Committee has no power to receive complaints, be they of an individual or inter-state nature.

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169 Art 5.
170 Art 6.
171 Art 7.
172 Art 8.
173 Art 9.
174 Art 12.
175 Art 14.
176 Art 15.
177 Art 16.
178 Art 17.
179 Art 18.
180 Art 22.
181 Art 24.
182 Art 32.
183 Art 37.
184 Arts 43 (1) and 44 (1).

5. *Customary International Law*

Much has already been said about human rights as customary international law under the discussion of the Universal Declaration of Human Rights as customary international law. In looking at custom as source of human rights in general, the following may be added to the discussion:

Custom and international agreements together constitute the most important sources of international law. Section 38(1)(b) of the ICJ Statute mentions international custom, as evidence of general practice accepted as law, as one of the sources the court should apply.[185]

The International Court of Justice has described the requirements for the establishment of custom as follows in the *North Sea Continental Shelf* cases:[186]

> "Not only must the acts concerned amount to a settled practice but must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, eg in the fields of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."

Two main requirements for the existence of customary rule can be identified from the above passage, namely a settled practice *(usus)* and the acceptance of an obligation to be bound *(opinion iuris sive necessitatis).*[187] Judicial and academic opinion support

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185 For a general discussion of custom see Starke (1989) 35-41; Akehurst (1988) 25-34; Van Hoof (1983) 85-113; Brownlie (1990) 4-11.

186 1969 ICJ Reports 3 par 77 at 44.

187 Oppenheim (1965) 27.

the fact that states that do not meet the above requirements by persistently objecting to a particular practice will not be bound to such a customary rule.[188]

Despite the fact that some may prefer to stress either of the elements, both are necessary for the formation, shaping and continued validity of customary human rights law.[189] The importance of custom as source of international human rights law is clear from the degree to which it is utilised to enforce the provisions of the Universal Declaration of Human Rights. It is also suggested that there is a clear connection or interdependence between customary human rights law on the one hand, and soft law, treaties and provisions of *ius cogens* relating to human rights on the other. The nature of the interdependence is, however, the subject of much discussion.[190]

The International Law Association's Committee on the Formation of Customary International Law[191] took a fresh look at the formation of customary international law in its Statement of Principles Applicable to the Formation of General Customary International Law. It is argued with reference to the above statements taken from the *North Sea Continental Shelf* cases, that it is not in all cases necessary to separate the existence of a subjective element. The element of *opinio iuris* is often not present during the formation of a rule. Only once a custom has become established, will states have a belief in its existence.[192] It is further pointed out, that the same conduct can manifest both *usus* and *opinio iuris*. [193] There is, for example, no reason why only physical acts, and not verbal acts should count as practice.[194] Verbal acts are in fact more common forms of state practice than physical conduct. Diplomatic

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188 *Anglo-Norwegian Fisheries Case* (1951) ICJ Reports 115 at 131; *North Sea Continental Shelf Case* (1969) ICJ Report at 26-7, 131 (separate opinion of Judge Ammoun); *Asylum Case* (1950) ICJ Reports 227-8; *Nicaragua Case* 1986 ICJ Reports at 107, as quoted by Dugard (1994) 28 note 23. Bridge (1971) 744.

189 Paust (1995/96) 148.

190 Lillich (1995/96) 1; D'Amato (1995/96) 47; Paust (1995/(6) 147; Hannum (1995/96) 25; Weisburd (1995/96).

191 Note 10 chapter 2.

192 Final Report of the Committee, Introduction par 10(b).

193 *Id* at par 10(c).

194 International tribunals often treat verbal acts as examples of state practice. See the *Lotus* Case (1927) PCIJ Reports series A No 10 at 23, 26-30; *Nottebaum* Case (2nd phase) (1955) ICJ

statements, policy statements, official manuals, statements in and resolutions adopted by international organisations are known as speech-act, which is frequently regarded as examples of state practice.[195] The Committee remarks that the question of the subjective element in customary law, is highly controversial. The Committee summarises its views in this regard as follows:

> "If it can be shown that States generally *believe* that a pattern of conduct fulfilling the conditions set out in part II [state practice] is permitted or (as the case may be) required by law, this is *sufficient* for it to be law; but it is not *necessary* to prove the existence of such a belief. Indeed, it is only in a case of a practice which has already achieved an appropriate level of generality that such a belief is likely to exist...".[196]

However, *opinio iuris* remains relevant as not all conduct gives rise to legal obligations. If a state expresses the belief that certain conduct cannot, or does not give rise to legal obligations, it will prevent that conduct from contributing to a rule of customary law.[197]

It appears that according to a general comment on reservations of the Human Rights Committee, the body responsible for monitoring compliance with the ICCPR, the list of human rights enjoying customary status has expanded considerably since the section 702 Restatement was published.[198] The Committee reached the conclusion that state parties to that Covenant may not make reservations to the following provisions that represent customary international law.[199] The right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person

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Reports 4 at 21-23; *Fisheries Jurisdiction* (Merits) (1974) ICJ Reports 3 at 24-26; *Nuclear Weapons* Case (1996) ICJ Reports 226 at 259-61.

195 Final Report of the Committee Part II section 4 reads that: "Verbal acts, and not only physical acts, of States count as State Practice."

196 Final Report Part III par 4.

197 *Id* at par 17.

198 Human Rights Committee, General Comment No 24 (52) UN Doc CCPR/C/21/Rev 1Add. 6, (1994).

199 *Ibid.*

guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny persons of marriageable age the right to marry or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.

6. *Conclusion*

An accurate determination of the sources of international human rights law is essential in order to establish its legal consequences. It appears that the traditional sources of international law in the form of treaties and custom are to a large extent adequate to accommodate international human rights law. Viewed from the opposite angle, the greater part of international human rights law is either treaty or custom. Under such a classification the question remains how to deal with those internationally acknowledged expressions of international human rights falling short of the requirements set for treaties and custom, for example United Nations resolutions, notably the Universal Declaration of Human Rights.

It is suggested that soft law provides a useful approach to account for such important expressions of international human rights falling outside the traditional sources. The term soft law should, however, be used with circumspection. It is difficult to make sense of often confusing and inconsistent terminology used by the various authors on soft law. In van Hoof's opinion soft law should not be regarded as non-law. Chinkin, on the other hand, reminds us that soft law bears a non-legal character and therefore cannot be regarded as legally binding. Baxter emphasises the ability of soft law, as non-law, to influence and shape hard law.

Flowing from an analysis of soft law as dealt with by various authors, it is suggested that since soft law as such is not legally binding (the consent to create binding law, be it expressed by way of the required *usus* and *opinio iuris* or in the form of a treaty, is lacking), it cannot be regarded as a new and separate source of international law. Bothe's view is supported that the value of soft law lies on the moral and political levels, and further plays an important role in the creation of "binding" international law by facilitating and mobilising the consent required to establish international law. This is especially true as far as international human rights are concerned. Soft law, though

not a source of law, remains legally relevant and is therefore a matter governed by international law. Expressions of international human rights, not yet law, should be viewed against this background. Henkin's non-conventional sources of human rights, which cannot be accommodated as either treaty or custom, should be seen as soft law - international human rights in the process of maturing into international human rights law. Because the establishment of the element of consent is often problematic when dealing with international human rights, soft law provides an avenue to at least attach some legal value to otherwise non-binding law.

For those exceptional circumstances where there is a clear consent to be bound to a legal rule, but such consent is not expressed by way of treaty or does not comply with the requirements of custom, the legal nature of such a rule remains problematic. It may either be regarded as a general principle of law under article 38(1)(c) of the International Court of Justice Statute, or in the alternative, as an additional source of law not falling under article 38. Resolutions expressing instant general consensus should be regarded with caution, as instant general consensus can seldom derive from states conduct when dealing with a recommendation.

The legal relevance of the Universal Declaration as founding source of international human rights should be decoded against the above background: Its content can apply either in the form of treaty, custom, general principles of law or soft law. The value of custom in this respect is particularly important since it binds states not party to the various treaties, for example South Africa under the apartheid legal system.

As far as customary international human rights law is concerned, it appears from the authority consulted that, the traditional requirements of customary international law are not rigorously applied, which in itself presents a new angle to the debate on sources. The question remains, how far one can deviate from the traditional requirements of custom without custom losing its character as a recognised source of law. There is adequate authority that the transformation of human rights resolutions into custom is based on non-traditional state practice, and *opinio iuris* and may even be evidenced in the adoption of the resolution itself binding both tacit and dissenting states. The premise that the burden of proof required to establish customary human

rights is less onerous is especially true where the right in question coincides with existing treaties.

CHAPTER 3

INTERNATIONAL HUMAN RIGHTS LAW IN MUNICIPAL LAW

1. Introduction

The status international human rights law enjoys *vis-à-vis* the sources of international law was established in chapter 2. The present chapter will focus on the status of international human rights law in the domestic legal systems of states. The different theories explaining the relationship between (or hierarchy of) international law and municipal law form the point of departure in this discussion.[1] The two principal schools of though are known as monism and dualism (or pluralism). The debate turns on whether international law and municipal law are two separate legal systems as favoured by the dualists, or, as held by the monist view, different but concomitant aspects of a single system.[2] The duty on states to apply international law in the domestic sphere and the conditions for such application are subsequently examined. Direct application of treaty obligations (which is associated with the monist perspective) versus transformation of treaties into domestic law (which accords with the dualist perspective) are identified as methods to give domestic effect to treaty obligations. The domestic application of international law in a selected number of states is finally examined in order to illustrate the application of the identified theories in practice.

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1 The terms municipal law, domestic or state law are used interchangeably throughout the thesis to denote the internal legal systems of sovereign states.

2 Starke (1989) 71; Dugard (2000) 43; Jacobs (1987) xxiii.

2. *Theories on the Relationship between International Law and Domestic Law*

2.1 *Dualism*

A strong trend towards dualism developed during the nineteenth and twentieth centuries.[3] The rise of dualism is associated with the Hegelian philosophy emphasising the sovereignty of the will of states, and with the positivist writers Triepel[4] and Anzilotti.[5] Triepel and Anzilotti, treat the two systems of municipal law and international law as entirely distinct in nature. Municipal law is regarded as an act of sovereign will to be applied within a state and regulates the relations of its subjects with each other and with the executive.[6] International law, on the other hand, derives from the common will of sovereign states and places obligations on the sovereign states themselves. This results in a dualism of legal origin, subjects and subject matters.[7] In terms of this view neither the municipal nor the international legal order is competent to create or change each other's rules. The application of international law within the jurisdiction of a sovereign state is preconditioned by the rules of the municipal law of that state. International law can therefore only be applied in municipal legal systems through an adoption or transformation of its rules by municipal law.

In the case of a conflict between municipal law and international law, a municipal court should apply municipal law.[8] There are, however, dualists such as Anzilotti who maintain that the two systems are so distinct that no conflict between them is possible.[9]

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3 Starke (1989) 71.
4 Triepel (1958) *Völkerecht und Landesrecht.*
5 Starke (1989) 72. The works of Anzilotti have not been published or translated in English. The third edition of his textbook – *Lectures on International Law (Corso di diritto internazionale)* 1926, reprinted in 1955 – was published in French, German, Spanish, Japanese and Russian. An overview of his writings concerning the foundation of international law, its sources and the relations between international law and municipal law can be found in Gaja (1992) 123. On the theory of dualism see also Rudolf (1987) 24.
6 Brownlie (1990) 33.
7 O'Connell (1965) 41; Teson (1979) 108 – 116.
8 Brownlie (1990) 33.
9 Starke (1989) 73.

2.2 *Monism*

Writers who favour the monist position base their views on a unitary conception of law.[10] All law is regarded as a single unity consisting of legally binding rules whether intended to bind individuals or states. According to Kelsen and other exponents of monism, rejection of the monist character of all law amounts to a denial of the legal character of international law. Once it has been decided that international law is true law, it is inevitable that is should form part of the unity of legal science, which deals with all binding norms.[11]

Kelsen explains the relationship between municipal and international law in terms of the doctrine of "hierarchy of norms". Legal norms derive their existence and binding force from other norms. A rule of law determines how another rule will be laid down, making the latter dependant on the former. These bonds of dependence link up different elements of a single unified legal order.[12]

A legal norm can only be regarded as valid if the legal norms which it derives from, are valid. If this method of construction is used whereby each legal norm could be referred to a superior norm, legal analyses eventually reach one supreme norm which is the source and foundation of all law. The basic norm is an hypothesis of juristic thinking, the fundamental condition under which our juristic propositions are possible. Kelsen formulates the basic norm as follows:[13] "The states ought to behave as they have customarily behaved".

According to Kelsen this fundamental postulate could belong either to international or to municipal law. He does not support the primacy of international law over municipal law. Each system might stand in a relationship of equality to the other as its norm making derives from the same basic norm, or alternatively, one system might be normatively superior if it holds a higher position in the hierarchical scale dictated by

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10 O'Connell (1965) 38.
11 Starke (1936) 74.
12 Starke (1936) 74; Kelsen (1967) 556-562; Armas Barea (1979) 129.
13 Kelsen (1967) 562; Starke (1936) 75.

the basic norm. Primacy can only be determined by considerations which are not strictly legal.

Verdross differs from Kelsen in this regard by stating that the supremacy of international law is the only scientifically tenable hypothesis. Some problems arise in instances where international law is not the higher legal order. Where a norm of international law derives its validity from a constitutional norm, it will no longer be in force once the constitution ceases to exist. According to Verdross, international law cannot be dependent on the operation of constitutions which can be changed or even terminated at any time. It is certain that international law continues to operate despite changes in the constitutional order.[14] The coming into existence of new states creates further problems. According to Starke it is well established that international law binds new states without their consent. He takes the view that there is a duty on every state to bring its laws and constitution into harmony with international law.[15] Another difficulty with Kelsen's view is that there are many different and conflicting systems of municipal law. International anarchy would result if supremacy were granted to municipal law under such circumstances.

Lauterpacht, another leading adherent of monism, endorses the view that international law should be regarded as supreme. According to him both municipal law and international law are ultimately concerned with the conduct and welfare of individuals and therefore primarily responsible for the maintenance of human rights. The individual is regarded as a subject of international law.[16] He regards international law as a logical condition of the legal existence of states and therefore also of municipal systems of law.[17]

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14 Starke (1936) 75, 76; Rudolf (1987) 25.
15 Starke (1936) 76.
16 Lauterpacht (1950) 61.
17 Brownlie (1990) 33.

The main criticism against the monist construction by advocates of dualism, focuses on the insignificant role accorded to state sovereignty.[18] According to the monist argument, state sovereignty represents no more that the competence states enjoy within the limits of international law. Monists compare state sovereignty with the position of member states of a federation. Such states enjoy a wide degree of autonomy subject to the limits of the federal constitution in which the legal primacy resides.

Starke shares the views of Verdross, Kunz and Lauterpacht on the primacy of international law.[19] He does concede, however, that only certain rules of international law enjoy primacy. He uses the federal analogy to deduce that there is an international constitutional law which forms the condition for state law and the remaining body of international law, in the same way as the federal constitution conditions both state and federal law. He concludes that "the primacy in the monistic order pertains solely to the founding norms of international law and it is there alone that Kelsen's initial hypothesis, his 'Grundnorm', is to be found."[20]

2.3 Inverted Monism

Inverted monism, of which Bergbohm is the chief exponent, represents the view that municipal law is in its nature superior to international law. Great emphasis is placed on the state's will. The existence of international law is acknowledged but is regarded as a product of the limitation the sovereign will places on itself (auto-limitation doctrine). Bergbohm recognises only the internally manifested state will in the form of municipal law. In terms of this argument international law is regarded as a derivative of municipal law.[21]

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18 O'Connell (1965) 42, 43; Brownlie (1990) 33; Harris (1979) 62; Fitzmaurice (1957) 68-94.
19 Starke (1989) 75.
20 Starke (1936) 80.
21 O'Connel (1965) 42.

2.4 Transformation and Incorporation Theories

These theories ensue from the dualist approach and are closely associated with legal positivism. They concern the application of international law in the municipal sphere. It is held that because international law belongs to a completely different legal order from municipal law, it cannot be applied in municipal courts. Municipal courts can only apply municipal law. In order for municipal courts to apply international law rules, these rules must be specifically adopted or incorporated into municipal law. The provisions of a treaty to which a state is party can be applied to individuals within its jurisdiction once it has undergone a process of transformation into state law. Transformation is both a formal and a substantive requirement for domestic application of a specific treaty.[22]

Starke criticises the transformation theory from a monist perspective. He feels these theories rest on the supposedly consensual character of international law as opposed to the non-consensual nature of state law. In terms of the transformation theory the provisions of treaties are classified as promises, as opposed to municipal statutes which are seen as commands. The difference in nature makes it indispensable to transform law from one system to the other. The distinction between promise and command should, according to critics of the transformation theory, only be relevant to form and procedure but not the true legal character of these instruments. Transformation should therefore not be regarded as a material requirement.[23]

Critics of the transformation theory instead propose a **delegation theory** to deal with the above-mentioned difficulties. Under this theory, the right to determine when a treaty provision will come into force and the manner in which it will be embodied in state law, is delegated to the constitutions of states by, what is referred to by Starke, as the *constitutional rules of international law*. An act of transformation is therefore not required. The procedure and methods used by states to incorporate and enforce treaty law are rather a mere continuation of the process which started when the

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22 Starke (1989) 76.
23 Starke (1989) 76; Beyleveld (1995) 577.

treaty was concluded. One should therefore regard the conclusion of a treaty and its application in municipal law as part of a single process necessary for the creation of law.[24]

Recent contributors to the debate in the United Kingdom suggest that dualism is not defensible when it comes to human rights agreements.[25] It is argued that the provisions of human rights agreements to which the United Kingdom is party should, by virtue of the non-discriminatory nature of human rights, be applied without the necessity of transformation or incorporation in domestic law (theory of implied incorporation). European Community (EU) law was incorporated into the law of the United Kingdom by the European Communities Act 1972. It is suggested that the United Kingdom accepts the jurisdiction of the European Court of Justice (ECJ) in terms of section 3 of the above Act. In terms of ECJ decisions EC law overrides conflicting municipal law. The English courts have acknowledged this fact as a matter of general principle.[26] Indeed, the referral to the ECJ by the English court in the *Factortame* case,[27] resulted in a declaration that provisions of an Act of parliament, the Merchant Shipping Act, 1988, were "ineffective" on the ground that they transgressed EC law against discriminating on the ground of nationality.[28] The ECJ holds that the European Convention on Human Rights and Fundamental Freedoms (ECHR), although not wholly part of EU law, must be taken into account when interpreting EC law[29] and be applied to EC legislative and administrative action[30] and restrict the activities of national authorities.[31] Beyleveld submits that through the jurisprudence of the ECJ and the European Communities Act, the ECHR has been **indirectly incorporated** into English law, although the scope of incorporation is still uncertain.[32] This approach will be further explored when dealing with the practical implementation of international law in municipal legal systems.

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24 Starke (1989) 76-77.
25 For a general discussion see Beyleveld (1989) 595-598.
26 See eg *Macarthys Ltd v Smith* [1979] 3 All ER 325 and [1981] 1 All ER 111.
27 *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85.
28 *R v Secretary of State for Transport, ex p Factortame Ltd* [1991] All ER 769.
29 See eg *Case 222/84, Johnson v Chief Constable of the RUC* [1986] ECR 1651 at 1682.
30 See eg *Case C-331/88, R v Ministry of Agriculture, Fisheries and Food ex parte Federation Europeene de la Sante Animale* [1991] 1 CMLR 507.
31 See eg *Case 249/86 EC Commission v Germany* [1987] ECR 1263.
32 Beyleveld (1995) 595-597.

2.5 *Theories of Co-ordination and Harmonisation*

An increasing number of jurists adopt a pragmatic approach to the monist-dualist controversy. They argue that international and municipal law do not have a common field of operation. Conflict between the two systems is not possible because they apply in different spheres. An apparent conflict in the domestic sphere should be resolved by rules of domestic law. Should a conflict arise in the international field, international law should apply. Each system of law enjoys supremacy in its own exclusive field of application, and does not govern the same set of relations. Neither system enjoys inherent supremacy over the other, because supremacy is not linked to context, but to the field of operation.[33] This compromise position leans heavily on the notion of separate legal orders and thus appears to have significant similarities with dualism.

According to Harris, Anzilotti supports this approach and has been mistakenly classified a dualist. The following passage from Anzilotti is quoted as authority for this statement:

> "It follows from the same principle that there cannot be conflict between rules belonging to different juridical orders, and consequently, in particular between international and internal law. To speak of conflict between international law and internal law is as inaccurate as to speak of conflict between the laws of different States: in reality the existence of a conflict between norms belonging to different juridical orders cannot be affirmed except from a standpoint outside both the one and the other."[34]

Harris contends that the presumption of a common field of operation forms the basis of any discussion on the relations between the two legal orders. He uses the monist argument as advocated by Starke, namely that two normative systems with binding force in the same field must form part of the same order, to support the contention that the monist-dualist debate depends on a shared field of operation.[35] It is exactly

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33 Harris (1979) 60-62; Brownlie (1990) 34-35; Fitzmaurice (1957) 68-94.
34 Harris (1979) 61.
35 *Ibid*; Starke (1936) 74; Kelsen (1952) 404.

this fact, which is contested, namely that two legal systems could be valid for the same space at the same time. In the light of this contention the monist-dualist debate appears artificial and its relevance could well be questioned. In order to conduct the debate, protagonists of this controversy seem to be driven to create the necessary common field, according to Harris. In an effort to create such a common field, the existence of state sovereignty is watered down and states are often reduced to the sum total of the individuals comprising them. In this regard Kelsen states that the behaviour of states may be reduced to the behaviour of individuals representing the state. He concludes that the alleged difference in subject matter between international and municipal law cannot be a difference between the kinds of subjects whose behaviour they regulate.[36]

As each system is supreme in its own field, the two can never conflict. A conflict of obligations is, however, possible when states are unable to act domestically in the manner required by international law. Such a scenario does not imply that either municipal or international law is invalid, but only that the state has committed a breach of obligations on the international plane, for which it will be internationally responsible. The conflicting provisions of domestic law do not provide a legitimate defence when a breach occurs.[37]

O'Connell[38] proposes a different solution to the conflict between practice and theory. According to him monists and dualists attempt to provide an answer to two quite different questions, which derive from a single theoretical premise. The question asked from a monist perspective is whether international law is law in the same sense as municipal law. The question forming the basis of the dualist approach is whether a given tribunal is required by its constitution to apply a rule of international law or municipal law; or authorised to accord primacy to the one over the other. These questions bear no relation to one another. He rejects the monist solution, which, by treating one system as a derivation of the other, ignores the physical, meta-physical, and social realities, which detach them. The dualist solution also fails

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36 Harris (1979) 61, 62.
37 Brownlie (1990) 35; Fitzmaurice (1957) 68-76.
38 O'Connell (1965) 41-42.

because it ignores the all-pervading reality of the universum of human experience. All law has the same goal, namely the regulation of human behaviour.

O'Connell uses the comparison of a federal system to address this anomaly. The correct position is, as in federal systems, that the two systems of law are concordant bodies of doctrine, each autonomous in the sense that it is directed to a specific, and to some extent an exclusive, area of human conduct, but harmonious in that in their totality the several rules aim at a basic human good. The gist of his argument is that since the purpose of law is to regulate human conflict it should be harmonious and should not allow for contradictory rules of behaviour[39].

No system should be treated as superior in normative value as advocated by the monists, neither should international law form part of municipal law on the latter's initiative as held by the dualists. Contradictory rules should not lead to one of the rules being void. Harmonising the points of collision should eliminate such contradiction. There should be fundamental unity of all law though it may originate from different sources.

O'Connell disagrees with the theory of co-ordination by accepting that international and municipal law overlap in operation. As he puts it:

> "The theory of harmonisation assumes that international law, as a rule of human behaviour forms part of municipal law and hence is available to a municipal judge; but in the rare instance of conflict between the two systems, this theory acknowledges that he is obliged by his jurisdictional rules. Such jurisdictional rules may require a judge to apply international law to the exclusion of municipal law, or vice versa."[40]

The above discussion on how international and national law interact with one another endeavours to bring theory and practice together and in the process discredits strict monism or dualism. The attempts at reconciliation differ substantially and lean either to the monist or dualist views. These diversions of opinion clearly illustrate the

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39 O'Connel (1965) 43.
40 *Ibid.*

complexity of the matter. It would be side-stepping the issue to argue that the different theoretical approaches are merely of academic interest as the theory ultimately attempts to explain practice. The concept "monism" and "dualism" are further firmly rooted in a longstanding academic discourse on various topics of international law, especially international human rights law.

3. Duty of States to Honour International Law Obligations

The municipal law of the state regulates the manner in which international law is applied within a state. International law imposes obligations upon and grants rights to states. As far as rights are concerned, states may choose not to exercise their rights in full. States are, however, responsible to fulfil their international obligations. International law is not concerned with the theoretical approach adopted by a state to give effect to its international obligations, only with the outcome. Should a state neglect to enforce its international obligations on the domestic plane, it will be held accountable in terms of international law. A state in breach of an international obligation cannot hide behind provisions of its own law to justify its actions.[41] The requisite changes to domestic law should therefore be made on, or prior to, becoming party to a treaty. Under the principle of *pacta sunt servanda* state parties are under a legal obligation to perform their treaty obligations in good faith.[42] The Draft Declaration on Rights and Duties of States, which was prepared by the International Law Commission in 1949, provides as follows in article 13:

> "Every state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

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[41] Art 27 of the Vienna Convention on the Law of Treaties states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". According to Brownlie (1990) 35: "The law is this respect is well settled. A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law."

[42] Art 26 of the Vienna Convention on the Law of Treaties; Oppenheim (1993) 82-86.

There is consistent judicial and arbitral authority for the international law rule that a state cannot rely on its municipal law to side step its international obligations. In the *Alabama Claims Arbitration*,[43] Great Britain claimed it had not violated its obligations as a neutral in the United States Civil War by allowing the fitting out of commerce raiders in British ports and their journey to join the confederate forces, because its constitutional law did not provide for such power. The Tribunal rejected the British argument and awarded damages to the United States.

In the *Exchange of Greek and Turkish Populations* case,[44] the court refers to Article 18 of the Treaty of Luasanne 1923, by which the parties undertook to introduce in their respective laws such modifications as may be necessary with a view to ensuring the execution of the present convention as expressing a self-evident principle of international law.

In the *Free Zones* case,[45] the court stated that France could not rely on its own legislation to limit the scope of international obligations, while in the *Polish Nationals in Danzig* Case,[46] the court stated that a state cannot rely on its own constitution to evade obligations incumbent upon it under international law or treaties in force.

In the *Greek and Bulgarian Communities* case the court stated that "it is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of a treaty."[47] Also in the *Advisory Opinion on the Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* of 26 June 1947, the International Court of Justice recalled the fundamental principle of international law that international law prevails over domestic law.[48]

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43 *Alabama Claims Arbitration* (1872) Moore Arbitrations 653-656.
44 *Advisory Opinion* (1925) 10 PCIJ Reports series B 20.
45 (1932) 46 PCIJ Reports series A/B 167.
46 (1931) 44 PCIJ Reports series A/B 24.
47 (1930) 17 PCIJ Reports series B 32.
48 (1988) ICJ Reports 121-34: For further authority in this regard see: *Jurisdiction of the Courts of Danzig* (1928) 15 PCIJ Reports series B 26-27; *Wollenborg Claim* ILR 24 (1957) 654, 661-2;

4. *Domestic Application of International Human Rights*

Although the debate on monism and dualism appears to be somewhat dated and open to criticism, it still proves a valuable basis for analysis of the relationship between international human rights law and domestic legal systems.

As pointed out earlier, the enforcement of international human rights law depends largely on domestic law. International human rights law is a field of international law where it is very apparent that international and municipal law have a common field of operation, namely the rights of individuals within the domestic jurisdiction of states. The interdependent relationship of these two legal orders is governed by rules existing in both.

Harrison identifies the following, often overlapping, ways that international human rights can be enforced in domestic law:[49]

(i) Through direct application or self-execution.
(ii) Through enforcement of overriding constitutional bills of rights.
(iii) Through enforcement bills of rights contained in legislation, lacking overriding constitutional status.
(iv) Through ordinary legislation providing for enforcement of specified human rights.
(v) Through recognition or enforcement of rights arising from treaty or common law.
(vi) Through recognition and enforcement of fundamental constitutional principles.

The methods allowing for direct application or automatic incorporation of an international treaty in a domestic legal system, while maintaining its international character without the necessity of an act of incorporation, can be associated with the

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Droutzkoy Claim (no 2) (1965) ILR 40 442, 447 and *Re Revere Copper and Breas Inc and Overseas Private Investment Corporation* (1978) ILR 56 258, 282-4, 285-6.

49 Harrison (1995) 256.

monist theory which regards all law as a single unity including both domestic and international law.[50]

The other methods making application of international human rights dependent on a government incorporating or transforming them into domestic law are based on a dualist view of legal origin.[51] Such incorporated or transformed treaty provisions are applied as national law. In cases of incorporation the treaty provisions become part of domestic law as they stand, by being appended in the text of an Act, or in its accompanying schedule while in cases of transformation treaty provisions are translated into terms of domestic law. Amending or supplementing existing legislation without any specific reference to the relevant treaty provision[52] may do this.

The way in which an international human rights instrument will be applied in municipal law is determined by both law and policy considerations.[53] Policy considerations are increasingly important where the legal status of an international instrument in the domestic legal system is unclear. Under such circumstances, courts and other interested bodies may influence this status in differing directions,[54] by arguing the pros and cons of direct application and the hierarchical status of directly applied treaty provisions when these clash with other provisions in a domestic legal system. Jackson argues that the allocation of treaty-making power among national government institutions and the procedure prescribed for entering into a treaty are closely related to policies concerning direct application.[55]

4.1 Direct Application Defined

The definition of directly applicable treaty provisions has been debated by both academics and courts.[56] The following discussion will consider the origins of the

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50 This is the case in France, Spain, Belgium, the Netherlands and USA.
51 Such practice is followed in the UK, Denmark and Canada.
52 Craven (1993) XL 372.
53 Jackson (1992) 310.
54 Jackson (1992) 312; Frowin United Nations Congress on Public International Law 13/03/1995.
55 See Jackson (1992) 313.
56 On self-executing treaties see Craven (1993) 378; Evans (1953) 178 at 193; Dickenson (1926) 444; Wright (1951) 62; Henkin (1956) 1151; Jackson (1968) 250; Henry (1929) 776; Preuss

doctrine, the merits of self-execution as a method of enforcement from a legal and policy perspective, identify useful pointers to establish whether a treaty is capable of self-execution, and assess the role of self-execution in enforcing human rights treaties.

Treaties capable of *direct application* are regarded as synonymous with *self-executing* treaties for purposes of this discussion. According to Burke, Oliver, De la Veg & Rosenbaum, these terms refer to treaties or provisions thereof with 'statute-like' effect which lend themselves to judicial or administrative application without further legislative implementation. Such treaty provisions specify duties to state parties to directly confer rights.[57] The main question is therefore whether or not legislation is required to put a treaty obligation into effect.[58] Henry describes a self-executing treaty as a treaty which of its own force constitutes a rule of municipal law, which municipal courts must apply in deciding cases involving the rights of individuals.[59]

Evans suggests that it is possible to define the characteristics of self-executing treaties as being, narrowly, those which by their own terms can be carried into effect by administrative authorities or which create a rule for the courts, or more broadly, those which can be implemented by the executive branch itself without recourse to congressional action.[60] The narrow definition refers to the enabling nature of the international agreement itself, while the broad definition deals with how such treaty provisions are being dealt with by the American legal system. The details of the broader definition would thus depend on the nature of the particular legal system at hand.

The direct application of treaties must be understood within historical context. [61] The concept of the self-executing and non-self-executing treaty was first developed in the

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(1953) 1117; Iwasawa (1986) 627; Riesenfeld (1980) 892; Riesenfeld (1971) 548; Riesenfeld (1973) 504; Cohen (1975) 137; Dearborn (1979) 233; Schachter (1951) 643 and Vazquez (1995) *695.*

57 Burke, Oliver, De la Veg & Rosenbaum (1983) 301.

58 Craven (1993) 378.

59 Henry (1929) 776.

60 Evans (1953) 178 at 139.

61 See Iwasawa (1986) 628 for a detailed discussion in this regard.

United States in *Foster and Elam v Neilson* in 1829.[62] While ruling on a property claim, the court interpreted the Treaty of Amity, Settlement and Limits between the United States and Spain as non-self-executing. European scholars first took notice of the American doctrine of self-executing treaties, when the California District Court of Appeals decided *Sei Fujii v State.*[63] The court declared the California Alien Land Law, prohibiting aliens, ineligible for citizenship, from acquiring land within the state, unenforceable because it conflicted with the Charter of the United Nations.

Today the doctrine of self-executing treaties is recognised and debated by international lawyers throughout the world. Iwasawa argues that the doctrine underwent a conceptual transformation when introduced in Europe in the early 1950s, where it was explained by referring to the *Jurisdiction of the Court of Danzig,*[64] an advisory opinion of the Permanent Court of International Justice. A Danzig railway official instituted a claim against the Polish State Railway Administration for monetary claims arising under a Danzig-Polish agreement. It was held by the court that the agreement provided a right of action for Danzig officials and declared that "the very object of an international agreement, according to the intention of the Contracting Parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts."[65] As a result of this opinion a category of treaties, referred to as self-executing treaties, were accepted in Europe creating individual rights enforceable in national courts. This conception was again considered in the 1960s when the Court of Justice of the European Communities dealt with the direct applicability of European community law. In *Van Gend en Loos v Netherlands Inland Revenue Administration*[66] the court held that article 12 of the European Economic Community Treaty produced direct effects and created individual rights, which national courts must protect. The judgment was regarded as reinforcing the doctrine of self-executing treaties in European Community law. Iwasawa argues that as a result, the

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62 27 US (2 Pet) 253 (1829).
63 217 P 2d 481 (Cal Dist Ct App 1950).
64 (1928) 15 PCIJ Reports series B.
65 See above at 17-18.
66 (1963) European Communities Court of Justice Report 1.

doctrine of self-executing treaties has been substantially developed outside the United States.[67]

Self-execution is usually associated with treaties. The debate is, however, equally apposite when dealing with customary provisions of international law.[68] The question was debated the German-Soviet Colloque on International Law at the Institut für Internationales Recht an der Universität Kiel in 1987. The existance of self-executing customary international law was not questioned by the many contributing speakers. The minority view, held by Berhardt and Danilenko, questioned the practical usefulness of the notion since few customary rules are capable of direct application. The majority, consisting of Rudolf, Simma and Tunkin, however, pointed out that there are numerous customary norms operating in a self-executing fashion, in other words without the need for supplementary norms of national law, for instance those on state immunity and expropriation.

Evans wrote in 1953 that self-executing provisions must be assessed against the background of the following factors: the municipal law of a given state, constitutional history of that state, the organisation of its government and indeed of the political currents of a given period. Given such contextualised approach, one should be wary of drawing general positive or negative conclusions from the experiences of particular states.[69] He remarks, with regard to the experience of the United States of America in this regard, that the effect of self-executing treaties in American law had on occasions been a highly controversial matter as it involved the distribution of powers within the Federal Government, and between the Federal Government and the States.[70] Iwasawa writes that, unfortunately, many United States lawyers have failed to absorb the useful distinctions and definitional clarifications adopted abroad.[71]

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67 Iwasawa (1986) 630.

68 The proceedings of the Colloque were published in Tunkin & Wolfrum (1987) 41-57.

69 Evans (1953) 193.

70 Since then the United States has developed a considerable body of jurisprudence. See also Riesenfeld (1973) 504 on the status of the doctrine on self-executing treaties in the United States.

71 Iwasawa (1986) 631.

4.2 Determination of Directly Applicable Provisions

The critical issue that must be considered, is the identification of self-executing provisions of a treaty. Since it is ultimately for national courts to decide whether a treaty enjoys direct application, no single commonly accepted criterion for doing so exists.

Craven[72] has identified a number of criteria used to determine whether a treaty has direct applicability, from practice of states including the United States, the Netherlands, Belgium, Italy, Switzerland, Germany and the EU. It appears that, generally speaking, courts focus primarily on the intention of the drafters.[73] It is however, very rare that treaties contain explicit provisions in this regard, as it would be very unusual for traditionally dualist states to agree that the treaties' texts provide for direct application. In the absence of such indication, the United States courts generally attempt to identify objective indications in the text itself by focussing on the purpose of the agreements and the language used. The latter method is criticised by Craven[74] in that it gives the false impression that the direct application of the treaty is to be determined by the objective construction of international agreements rather than subjective application of national law. He prefers the approach of the Dutch Supreme Court[75] in *Nederlandse Spoorwegen (NS) (Netherlands Railways) v Vervoersbond FNV (Transport Union of Federation of Netherlands Trade Unions,*[76] where intent is considered only where there is manifest agreement in either the text or preparatory documentation. Here the court stated that "whether or not the contracting states intended Article 6(4) of the European Social Charter to have direct effect is not important since it cannot be inferred either from the text or from the history of the Charter that they agreed that Article 6(4) could not have direct effect."

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72 Craven (1993) 384.
73 *Id* at 386. See also Burke, Oliver, De la Veg & Rosenbaum (1983) 302.
74 Craven (1993) 385.
75 *Id* at 386. *Netherlands Spoorwegen v Vervoersbond* Supreme Court, 30 May 1986, *R v d W* (1986) No 120 (1987) 389; *The State of the Netherlands v LSVB* [The National Union of Students], Supreme Court, 14 April (1989), AB (1989) 207, (1990) 369.
76 *Ibid*.

In the absence of any manifest negative intention, the court proceeds to analyse the contents of the provision to determine its effect. Sometimes courts also look at the intention of the government in ratifying the treaty concerned. It is generally accepted that a treaty provision will not be directly applicable if the authority concerned requires further implementing legislation.[77]

In *The State of the Netherlands v De Landelijke Studenten Vak Bond (LSVB) [the National Union of Students] and S E J Kruisbrink,*[78] the facts before the court were as follows: An Act ("the Harmonisation Act") was introduced by the Minister of Education in 1988 altering statutory provisions governing the financial facilities to which students who had started a second course of study were entitled. Seven students who were following a second year course in 1987/1988, and who would as a result of the Act cease to receive a grant for 1988/1989, issued a writ together with the Landelijke Studente Vak Bond against the State of the Netherlands for an interim injunction restraining the state from applying the new measures to them. They argued that application of the Act without adequate transitional measures, would *inter alia* be contrary to the principle of equality and the principle that authorities may not act arbitrarily laid down in the ICCPR and ICESCR. The president of the District Court granted the injunction. The state appealed against the judgment to the Supreme Court. On appeal, the court considered the obligations imposed by the ICESCR on parties. The court found that the provisions of the ICESC in question "involve the performance of acts by the authorities in relation to individuals; since such provisions can generally not operate in the legal order without further elaboration, it is not logical that they should have direct effect." In addition, the court makes reference to the explanatory memorandum accompanying the Act approving the ICESCR and in particular the passage stating that the provisions of this Covenant do not "in general" have direct effect.

In the case of *Bestuur van de Nieuwe Algemene Bedrijsvereniging [Industrial Insurance Board] v LASK, Central Appeals Court for Public Service and Social*

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77 Burke, Oliver, De la Veg & Rosenbaum (1983) 302.
78 Supreme Court, 14 April (1989), AB (1989) 207.

Security Matters[79] the court dealt with discontinuation of a disability benefit to a disabled women after her marriage. In considering the nature of the obligation imposed by article 26 of the ICCPR (providing for equality before the law), the court concluded that;

> "Although Article 26 of the International Covenant on Civil and Political Rights does not entail an obligation to give effect in national law to the rights recognised as such in the International Covenant on Economic, Social and Cultural Rights, it does impose an obligation to ensure that any existing legislation or other implemental measures according such rights should be in accordance with that Article."

The court concludes that it "sees no reason to refrain from according direct application" to article 26 of the ICCPR. The court observes that article 26 is sufficiently specific to be invoked before the national courts by private individuals in cases such as the present one in order to prevent the application of any provision that is contrary to that article, in the sense that women are entitled to the same treatment as men.

The intent of the contracting parties is regarded as of crucial importance by the German court in the judgment of the Tax Court of Hamburg,[80] where the court held that intent can be deduced from the language and character of the treaty as well as other relevant materials.[81]

A further consideration taken into account is the precision and detail of the language employed. In the *Sei Fujii*[82] case the court considered whether articles 55 and 56 of the United Nations Charter are self-executing. Judge Gibsen commented as follows:[83]

> ".... in order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the

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79 5 January 1988 *NJCM-Bullitin* (1988) 98 AB (1988) No 252 RSV (1988) no 104.
80 29 Oct 1969 (Iva 353/66) 16 *Aussenwirtshaftsdienst des BetriebsBeraters* 93 (1970).
81 See Riesenfeld (1971) 548.
82 *Sei Fujii v California*, Supreme Court of California 38 Cal 2d 71, 242 P2d 617 (1952).
83 *Id* at 617 as quoted by Craven (1993) 385.

framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts."

The court found that the Charter provisions lack the mandatory quality and definiteness, which would indicate an intention to vest justiciable rights in private persons immediately upon ratification. This statement was, however, *obiter* and is regarded as of dubious precedential value.[84]

The International Court of Justice's *Namibia Opinion*[85] implies the contrary. The court ruled that South Africa's apartheid policy in Namibia violated the pledge contained in article 56 of the United Nations Charter. The court reached this conclusion despite the fact that South Africa had taken no steps to incorporate the pledge into its domestic law. Nothing in the opinion suggests that legislative action is required to give effect to this provision. Although international law does not contain a self-executing doctrine, the court's opinion may be cited as authority that the obligations imposed by articles 55 and 56 are binding without further action.[86]

The broad and general nature of provisions have similarly barred direct application in Swiss, Italian and Dutch cases.[87] The Swiss case of *Banque de Credit Internationale v Conseil D'etat du Canton de Geneve* the court stated that direct effect would be given if a treaty provision "is sufficiently precise to be applied as such in a particular case and to provide the basis for a concrete decision ... this is not the case with a treaty provision which announces a programme or lays down general priciples which should guide the legislation of contracting parties."[88] In the Italian case of *Re Laglietti*, the court stated "... the norms of the European Convention on Human Rights – apart obviously from those provisions the content of which, after the use of the habitual method of interpretation, is to be considered so general that it does not express

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84 Burke, Oliver, De la Veg & Rosenbaum (1983) 303, 304; Finch (1954) 57, 72; Wright (1951) 62-82.

85 Advisory Opinion on Namibia 1971 ICJ Rep 16.

86 Burke, Oliver, De la Veg & Rosenbaum (1983) 303.

87 In the *Netherlands v LSVB* the court rejected the claim that sec 2(1) of the ICESCR had direct effect because it was *inter alia* too general. (See note 75 above at 69).

88 See *Banque de Credit Internationale v Conseil D'etat du Canton de Geneve*, Chambre de Droit Administratif, 13 October 1972, ATF 98 I b 385 cited by Craven (1993) 388.

sufficiently specific rules - are directly applicable in Italy."[89] In *The Netherlands v LSVB* the court likewise rejected the claim that article 2(1) of the ICESCR had direct effect, *inter alia,* because it was too general.[90]

Craven is of the opinion that generality should not impede judicial decision-making *per se* where courts are willing to indulge in a certain amount of judicial creativity. This construction may prove problematic in that it would lead to the judiciary attempting to usurp the function of the legislature by applying provisions which would normally require further legislative implementation.

The subject matter of a treaty may play a crucial role in courts attempting to classify it as self-executing or not.[91] In the United States, a treaty dealing with a topic falling within the exclusive powers of Congress, will not be considered directly applicable, neither will a treaty concerning a subject where legislation is required. Riesenfeld has developed a three-step inquiry for ascertaining whether a treaty should be regarded as self-executing in the law of the United States: [92]

(i) Whether rights and obligations of individuals are involved;
(ii) Whether the United States and other parties retain discretion to determine whether and when to fulfil the obligation to give the treaty domestic effect, and
(iii) Whether congressional action is required to fulfil the treaty obligations.

Craven argues that treaties should not be dealt with in such broad terms, but that each provision should be considered separately, irrespective of the general terms or nature of the treaty. Provisions establishing negative obligations or prohibitions are generally regarded as directly applicable, as no further measure for implementation is

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89 69 Revista di diritto Internazionale (1986) 143 at 149 as cited by Craven (1993) 388 note 121.
90 See note 78 at 272.
91 Craven (1993) 391.
92 See Riesenfeld (1971) 548, 580; Riesenfeld (1980) 892; Riensenfeld (1973) 503.

required.[93] A final factor which is relied on by courts in ascertaining direct applicability is whether a provision is of such a nature that an individual may benefit from it. Generally speaking, where rules create private rights they will *prima facie* be directly applicable. Article 39 of the Dutch Constitution[94] provides that provisions of treaties "the contents of which may be binding on everyone" have direct effect. Human rights treaties such as the ICESCR are usually worded in such a way that they lay down obligations on states and their legislators rather than addressing the position of individuals. The ICCPR, on the other hand, refers directly to the rights of individuals. The Dutch Supreme Court has found in this regard that the wording of articles 8(1)(d) and 13(1) of the ICESCR clearly indicate that they are not directly applicable.[95] Article 8(1) provides that state parties shall ensure the right to strike, provided that it is in conformity with the laws of the particular country, and article 13(1) recognises the right of everyone to an education. Craven[96] criticises this approach by stating that it is the object and purpose of the ICESCR to provide for individual rights. He holds the opinion that the fact that the rights contained in the ICESCR are framed as state obligations does not deprive them of their central attribute. He concludes that the greatest obstacle to the direct application of the provisions of the ICESCR is the excessively strict manner in which the above-mentioned criteria have been applied. Instead he advocates a more sophisticated relativist approach recognising the degree to which such rights are capable of direct application.

There are various theoretical and practical reasons why states should adopt policies favouring direct application.[97] Arguing from the monist theoretical perspective, it is suggested that since all law belongs to one system, international law automatically forms part of all national systems. There are also significant practical reasons why states may favour direct application. It is suggested that direct application:

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93 Burke, Oliver, De la Veg & Rosenbaum (1983) 302.

94 As quoted by Craven (1993) 393.

95 Craven (1993) 394. *W d K v Public Prosecutor*, Supreme Court 6 December 1983, NJ (1984) no 557, cited in (1985) 16 *NYIL* 526 at 528.

96 Craven (1993) 395.

97 Jackson (1992) 322-323. These arguments are only applicable to those treaties where the subject matter is of such a nature that it possible to be applied directly in domestic legal systems,

(i) enhances the effectiveness of international law as it decreases the possibility that states will refuse or neglect to transform treaties into domestic law.

(ii) increases the effectiveness of a treaty in that individuals may rely on such treaty in domestic legal institutions. Without the need for transformation, there is no reason for a government to depart from the precise provisions of a treaty during the act of transformation. This argument is especially pertinent in human rights treaties. Jackson notes it in the context of international human rights law that a process of transformation is used to hide existing disparities between international and domestic law instead of amending incompatible legislation. Craven criticises the process of transformation in that it may render international guarantees meaningless.[98]

(iii) gives an assurance that all parties will honour their obligations in terms of the treaty. Express provision in a treaty to apply its provisions directly will oblige states that are usually reluctant to follow such practice, to do so.

A dualist perspective to the application of international instruments raises arguments opposing direct application and favouring transformation.

(i) The basic theoretical argument suggests that since international and domestic law belong to separate legal orders, there is no *a priori* reason why an international instrument should automatically form part of a national legal system. States where no provision is made for democratic participation in the treaty-making process, for example by way by

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eg provisions of human rights treaties which provide for the protection of human rights by domestic legal systems.

98 Craven (1993) notes as follows at 374: "Moreover, transformation may, in effect, render international guarantees negligible through distorting the nature and purpose of the treaty provisions, and by leaving the implementation to the vicissitudes of domestic rules that may, or may not, give the individual the exact legal position which the treaty intended to grant him or her. It has been noted, in the context of international human rights law, that domestic implementation assumes importance principally when a disparity exists between international law and municipal law. As such, the process of transformation seems to render international guarantees powerless precisely when they are needed most." See also Jackson (1992) 322; Brudner (1985) 35 notes

parliamentary approval, are often opposed to direct application.[99] In terms of this view, the act of transformation by parliament to incorporate the treaty into domestic law serves as a democratic check and can in part make up for the lack of direct participation of parliament in treaty making as it occurs under different constitutional systems.[100]

(ii) Legislators may regard it necessary to tailor the treaty, through an act of transformation, to match domestic circumstances. The legal language used in a treaty may not be compatible with the language used in the legal system of an implementing state. The provisions of the treaty may further require elaboration or other adjustment to make treaty provisions enforceable within the legal system of an implementing state. Where treaty provisions are ambiguous or leave room for interpretation, the legislator in an implementing state may wish to impose the interpretation it favours for application in domestic law through an act of transformation. According to Jackson, such an act and its implementation will constitute "practice" of a treaty party and may be relevant for purposes of international interpretation of the treaty.[101]

(iii) Legislators may further wish to limit direct application to certain provisions of a treaty. The reason may be that the state does not intend to comply with its international obligation to implement the treaty as a whole, or that it wishes to delay the implementation of certain parts of the treaty. A related consideration is that states may be apprehensive that direct application may result in their national courts finding that the government is in breach of an international agreement. Such a finding not only embarrasses the government internationally, but also would seriously undermine its credibility as party to such a treaty.

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that domestic implementation of international human rights assumes importance especially when there are disparities between international law and municipal law.

99 England and certain Commonwealth countries follow such a dualist system were treaties never have direct statute-like application.

100 Such democratic participation in treaty making was first introduced into the South African constitutional law through sec 231(3) of the South African Constitution, Act 200 of 1993. Jackson (1992) 316.

101 Jackson (1992) 325.

(iv) Another argument is based on the question of interpretation. Where a treaty is directly applicable, it can be argued that the interpretation of such treaty in terms of international law is definitive in domestic law as well, and is therefore binding on domestic courts.

The fact that some states favour direct application, whilst others do not, leads to an asymmetrical situation which may be perceived as unfair by citizens of both groups of states. Craven points out that despite the state-specific nature of the implementation system, states may commit themselves to a particular method with respect to a specific treaty or system of international law.[102]

Should international agreements be regarded as directly applicable or self-executing in terms of the domestic law and policy of particular state, it is important to consider the hierarchical position of such a treaty in relation to the other laws of the country. Jackson[103] points out that in cases where a directly applied treaty enjoys a higher hierarchical status than most other laws, many of the above policy considerations are accentuated. In cases where a directly applied treaty provision will trump all other law except the constitution, the legislature's legislative powers will be seriously curtailed. Under such circumstances a treaty would be given a constitutional status almost equivalent to the nation's own constitution. The lack of adequate democratic participation in the process of entry into treaties may undermine the credibility of such provisions. Should it become necessary to deviate from the provisions of a treaty, it would either be necessary to renegotiate the treaty or to denounce it internationally. Should a treaty not trump all other legislation, many of the problems associated with direct application could be addressed by way of subsequent legislation in accordance with the principle of *lex posterior derogat priori*. In the absence of an obligation on the state not to legislate in contravention of its international obligations, treaties thus adopted may only have transient effect. It follows that a government where treaties

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[102] Craven (1993) 373. In the case of the EU the relationship between community law and the legal system of member states is deemed to be monist in nature, irrespective of existing domestic legal traditions.

[103] Jackson (1992) 330.

are directly applicable and enjoy higher status would need to be very restrained in accepting treaty obligations. The inadequacy of international institutions that engage in treaty-making to change, update and improve treaties may leave states where treaties enjoy direct application and higher status, with outdated rules.

In analysing the pros and cons of direct application, Jackson suggests that states be cautious in introducing direct application, especially when linked to higher status, in a national legal system. Where the constitution calls for the approval of the legislature for the acceptance of a treaty, Jackson considers it advisable that the enactment of approval also provide for an act of transformation of the treaty itself by incorporating it into a statute in order to preserve future legislative checks.[104] The problems associated with such direct application may be offset when national officials or citizens deem it desirable to impose some kind of limitation on their national government. This scenario may be specifically true in the case of international human rights instruments where international efforts to protect such rights may be more effective and credible than national efforts.

4.3 Direct Application of Human Rights Agreements

From the point of view of the individual who stands to benefit under international human rights instruments, the primary consideration will be the extent to which the instruments have effect within a domestic legal system.[105] The success of enforcement of international human rights is conditioned by their implementation under national law.[106] Craven[107] is of the opinion that to enhance effectiveness, it would be most appropriate for the provisions of the ICESCR to have a direct rule effect in domestic law enabling individuals to assert those rights themselves through domestic legal procedures. Where an act of transformation is required by the national legislature, it often limits the degree to which individuals may rely on international human rights treaties to which a state is party in domestic courts.

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104 *Id* at 336.
105 Brudner (1985) 219 at 220; Opsahl (1979) 153.
106 Craven (1993) 367 at 368.
107 *Id* at 369.

Craven points out that the possibility of applying the provisions of a treaty directly will depend on its self-executing character. If a treaty is considered to be non-self-executing, implementing legislation will be essential, even in monist systems.[108] It should further be perceived by states that a policy of direct application of treaties does not guarantee effective national enforcement. Additional steps need to be taken to sensitise both courts and individuals to the legislative status of treaties to which the state is party.[109]

Craven examines the question of direct application and self-execution of human rights treaties with specific reference to the ICESCR. There is nothing in the provisions of either the ICESCR or the ICCPR providing that they should be considered either self-executing or non-self-executing. The negotiating parties accepted that the question of domestic application should be left to domestic law subject to the requirement that parties shall be bound to fulfil their obligations.[110] The absence of an explicit provision has led to mixed reactions from different state parties. In states such as Sweden, Canada and the United Kingdom, the provisions of the ICESCR were adopted by way of transformation by amending and supplementing existing legislation prior to ratification. In states such as Afghanistan, Costa Rico, Ecuador, Luxembourg, Argentina, Colombia, Mexico, Cyprus and Zaire, the CESCR was automatically incorporated into domestic law.[111]

Tomuschat[112] argues that as the ICESCR confines itself to stating promotional obligations which are not intended to confer subjective rights, it is not suited to incorporation. Craven[113] differs by arguing that the question whether a treaty is suited to incorporation depends on the approach of the domestic courts in distinguishing self-executing and non-self-executing provisions, rather than on the nature of the obligations themselves. States where treaties are automatically incorporated will as a

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108 *Id* at 373; Riesenfeld (1980) 892 at 901 note 46.
109 Craven (1993) 374.
110 According to Schacter (1982) 314 the prevalent view is that the question of incorporation *vel non* should be left to national law subject only to the requirement that parties should fulfil their obligations under the Covenant.
111 Craven (1993) 375.
112 Tomuschat (1984/5) 31 at 40.
113 Craven (1993) 376.

rule set strict standards in deciding whether treaty provisions could be considered self-executing in order to preserve legislative integrity. He further argues that it would be contradictory to maintain that a human rights treaty is not intended to confer subjective rights, and that it is superficial to describe obligations arising from these treaties as purely promotional.

Craven warns that while direct application appears to be the most beneficial method of implementing human rights treaties, there is no guarantee that the interpretation adopted by a domestic court will coincide with either that of the treaty supervisory body, or with those of courts in other states.[114] This may undermine the universal nature of the norm and serve to weaken its content. The positive side to this interpretation is that national courts would appear to be in the best position to apply provisions of a treaty in the domestic context, and in so doing may generate a more realistic and suitable interpretation of the norms themselves. This construed benefit of direct application appears to coincide with the reason behind the dualist system of transformation where international law obligations are tailored by way of domestic law to suit the needs of a particular state party and its legal system.

The debate over whether the ICESCR, or certain of its provisions, are suited to direct application has prompted the Committee on Economic, Social and Cultural Rights to assert in its General Comment No 3 (1990)[115] that articles 3, 7(a), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3) are capable of immediate application.[116] It concludes that any

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114 *Id* at 378.

115 The Committee has been responsible for supervision of the ICESCR since 1986 through its considerations of states' reports. General Comment No 3, E/1991/23/Annex 111, UN ESCORT, Supp. (No) (1991).

116 Art 3: "The States Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".
Art 7(a)(1): "The State Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work, fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work".
Art 8 provides *inter alia*: "The States Parties to the present Covenant undertake to ensure ... the right of everyone to form trade unions and join the trade union of his choice ... ."
Art 10(3): 'special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their normal development should be punishable by law. States should also set age

suggestion that the provisions indicated are inherently non-self-executing would seem hard to sustain.[117] The Committee's interpretation does not bind national courts, as in the absence of an explicit provision in the Covenant itself, it is for national authorities to decide whether or not a provision is directly applicable.[118] As the Committee is an international body designated to oversee implementation of the treaty, its interpretation should nevertheless enjoy considerable authority.

5. *International Law in Municipal Law*

The following discussion regarding domestic application of international law will focus on the practice in a selected number of states. The United Kingdom, the United States of America, Germany and Namibia have been singled out of the following reasons:

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limits below which the paid employment of child labour should be prohibited and punishable by law."
Art 13(2)(a): "Primary education should be compulsory and available free to all".
Art 13(3): "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions."
Art 13(4): "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."
Art 15(3): "The States Parties to the present Covenant undertake to respect the freedom *indispensable for scientific research and creative activity.*"

117 General Comment No 3 (1991) 84 par 5.

118 Craven (1993) 383 states that in so far as those national courts have to examine the provisions of the Covenant in the exercise of their discretion on the self-executing nature thereof, the Committee may provide its own interpretation of the provisions as a means of assisting and influencing the national courts. Although the finding of human rights treaty monitoring bodies such as the Committee are not legally binding in terms of both international or domestic law, they can be regarded as a source of soft law. The importance of their comments is reflected in the work of the International Law Commission on treaties where it is recognised that human rights treaty monitoring bodies are competent to comment upon and express recommendations with regard to the permissibility of reservations by states. Official Records of the General Assembly Fifty-second Session, Supplement No 10 (A/52/10), paragraph 157 paragraph 5 of the preliminary conclusions. The legal relevance of sources outside the text with regard to the interpretation thereof is apparent in the decision of *Thompson v Thompson*, Canada Supreme Court (1995) 34 *ILM* 1159 R 1171. In this case the court made use of *traveaux preparatoire* in order to interpret the provisions of the Hague Convention on Civil Aspects of International Child Abduction in the manner in which the State Parties must have intended. See in this regard Botha (1996) 181-189.

- The applicable law of the United Kingdom is of particular relevance to South Africa as a former British colony and now member of the Commonwealth. Prior to the coming into operation of the 1993 South African Constitution, the status of international law in South Africa law was not regulated constitutionally but rather based on the British common law principles. The law of the United Kingdom is, however, also interesting as an example of how the dualist approach is implemented in practice. Since the British approach was taken over by many Commonwealth countries,[119] it can be regarded as one of the dominant international trends.
- The German law is often referred to by South African courts and in scholarly discussions since South Africa became a constitutional state and contains elements of both monism and dualism, although it is more inclined towards monism.
- The position of the United States as worldwide promoter of human rights is particularly interesting. Although the legal system of the United States contains many monist elements and can therefore be regarded as international law friendly, recent treaty practice favoured by the United States Senate has been increasingly restrictive.[120]
- Namibia has been identified for the obvious reason that it shares many similarities with South Africa being a southern African state with a modern democratically negotiated constitution after sharing the South African legal system up until 1990. The Namibian Constitution's provisions regarding international law served as an authoritative example during the drafting of the 1993 South African Constitution.

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[119] Buergenthal (1997) 36 at 213.
[120] Buergenthal (1997) 212.

5.1 The United Kingdom

5.1.1 Customary International Law

The courts first discussed the relationship between customary international law and municipal law in the eighteenth century in cases relating to diplomatic immunity. The following cases are seen to follow the theory of incorporation.[121]

In *Buvot v Barbuit*[122] a motion was before the court to discharge the defendant (who was in execution for not performing a decree) because he was an agent of commence, commissioned by the King of Prussia, and received in England as such. Lord Talbot declared that the law of nations, in its full extent, was part of the law of England.

In the case of *Triquet v Bath*[123] the defendant, a domestic servant of the Bavarian Minister to Great Britain, successfully claimed diplomatic immunity. Lord Mansfield stated that the privilege of foreign ministers and their domestic servants depend upon the law of nations. The Act of parliament 7 Ann. C. 12, is declaratory of this. Lord Mansfield stated that he had a clear recollection that the rule that international law forms part of English law went back at least as far as Lord Chief Justice Halt upon the occasion of the arrest of the Russian ambassador (which had led to the Act of Ann).

Blackstone endorses this principle by stating that the law of nations is adopted to its full extent by the common law, and is held to be part of the law of the land. Those Acts of parliament which enforce this universal law, or facilitate the execution of its decisions, are not to be considered as introducing of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must

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121 Referred to by Lord Hailsham of St Marylebon (ed) (1977) par 1403-1405 at 718-719, confirmed by the 2001 edition; Brownlie (1990) 43; Harris (1997) 66.

122 (1737) Cases talbot 281.

123 (1764) 3 Burr 1478 6 BILC.

cease to be part of the civilised world.[124] The doctrine to which Blackstone gave expression has been acted on by courts, and can be regarded as an established rule of English law.

Holdsworth describes the incorporation approach, which is supported originally in *Triquet v Bath* and *Buvot v Barbuit*, as follows:[125]

> "It would, I think, have been admitted that, if a statute or a rule of the common law conflicted with a rule of international law, an English judge must decide in accordance with the statute or the rule of the common law. But, if English law was silent, it was the opinion of both Lord Mansfield and Blackstone that a settled rule of international law must be considered to be part of English law, and enforced as such."

According to Brownlie, the support by the courts for the doctrine of incorporation represents a practical rather than a theoretical approach.[126] Courts must make a choice of law depending on the nature of the subject-matter. In cases where it is appropriate to apply international law, the courts will take judicial notice thereof once they have ascertained the existence of the rules of international law and their effect within the municipal sphere. The application of such a rule is generally regarded as subject to the existence of a conflicting statute and the principle of *stare decisis*. It has, however, been argued that there is an exception to the principle of *stare decisis*.[127] The Court of Appeal could, for example, apply a new rule of international law even though there were Court of Appeal decisions to the contrary based on the rule's predecessor. This exception is not unanimously accepted.[128]

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124 Oppenheim (1992) 56.

125 As quoted by Harris (1979) at 66.
This approach is also supported by the following authority: *Dodler v Lord Huntingfield* (1805), II Ves 283; *Viveash v Becker* (1814) 3 M and S 284, 292, 298; *Wolff v Oxholm* (1817) 6 M 85 92, 100-6; *Novello v Toogood* (1823) I B & C 554; *De Wütz v Hendricks* (1824) 2 Bing 314, 315; *Emperor of Austria v Day* (1861) 30 LJ ch 690, 702 (reversed on appeal on another point); *Trendtex Trading Corporation v Central Bank of Nigeria* (1977) I QB 529 (CA); *R v Secretary of State, ex p Thakrar* (1974) I QB 694, CA; *International Tin Council Appeals* (1989) 3 WLR 969 (HL).

126 Brownlie (1990) 43.

127 Lords Denning MR and Shaw LJ in *Trendex Trading Corporation v Central Bank of Nigeria* (1977) I QB 273.

128 *Thai-Europe Tapioca Service Ltd v Court of Pakistan* (1975) WLR 1485; Stephenson LJ and Scarman LJ stated: "...a rule of international law, once incorporated into our law by decisions of a

According to the same authorities, the court replaced the doctrine of incorporation with the doctrine of transformation in the case of *R v Keyn*.[129] In terms of this theory customary international law forms part of English law only in so far as the rules have been clearly adopted and made part of the law of the land by legislation, judicial decision, or established usage.[130]

Rules of international law which prescribe a certain course of conduct, must be distinguished from rules merely permissive of municipal action, where the English law making authorities can exercise the discretion not to act.[131] Such a "permissive rule" of international law was before the court in *R v Keyn*. It was held that there was no jurisdiction to prosecute an alien for an offence committed in the territorial sea. This flows from the failure of Great Britain to act to assert jurisdiction. Cockburn CJ states in this regard that the littoral sea where the accident took place is not part of British territory in terms of English law, because Britain has not assented to international law rules to the contrary.

Brownlie, however, argues that the elements of "transformation" are entirely compatible with the doctrine of incorporation as far as the proof of rules of international law is concerned: "if the evidence is inconclusive and the issue affects the liberty of persons, the assent by the legislature of the forum is needed to supplement the evidence." Yet as a general condition he does not require express assent or a functional transformation by Act of parliament.[132]

The issue of incorporation was argued in *West Rand Central Gold Mining Co v R*[133] Alverstone CJ states:

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competent court, is not an inference of fact but rule of law. It therefore becomes part of our municipal law and the doctrine of *stare decisis* applies as much to that as to a rule of law with a strictly municipal provenance."

129 (1876) 2 ExD 63.

130 Brownlie (1990) 44. The following decisions *inter alia* are commonly understood to support the transformation doctrine: *Mortensen v Peters* (1906) 8 F (J) 93, *Thakrar v Secretary of State for the Home Office* (1976) [1974] 1, 415 QBD 432, *Commercial and Estates Co of Egypt v Board of Trade* (1925) 1 KB 271 295.

131 Oppenheim (1992) 57.

132 Brownlie (1990) 45. See also Oppenheim (1992) 57 who endorses Brownlie's view as a true reflection of English law.

133 (1905) 2 KB 391.

"But any doctrine [of international law] so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anyhing else, be proven by *satisfactory evidence*, which must show either that the particular proposition put forward has been *recognised and acted upon by our own country*, or that it is of such a nature, and has been widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it." (own emphasis)

In *Commercial and Estates CO of Egypt v Board of Trade*[134] Atkin LJ stated that rules of international law can only be allowed to give rise to rights and obligations in municipal courts, if they are recognised as included in the rules of municipal law. This is generally taken as support for transformation.

In *Chung Chi Cheung v The King*[135] Lord Atkin stated:

> "It must always be remembered that, so far, at any rate as far as the Courts of this Country are concerned, international law has no validity save in so far as *its principles are accepted and adopted* by our own domestic law. There is no external power that imposes its rule upon our own code of substantive law or procedure.
>
> The Courts acknowledge the existence of a body of rules which nations accept amongst them. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals." (own emphasis).

Taken as a whole it appears that the above authorities support the doctrine of incorporation.[136]

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134 (1925) 1 KB 271 295.
135 (1939) AC 160 167-168.
136 See also Qureshi (2001) 787.

5.1.2 Treaties

The entry into treaties is historically regarded as a prerogative function of the Crown without internal effect. Treaties do not directly affect the Crown's subjects due to the asserted incapacity of the executive to legislate for its subjects by treaty. The provisions of a treaty can only obtain internal effect through intervention of parliament.[137] An unenacted treaty is, in the words of Lord Oliver:

> "not part of English law ... it is *res inter alios acta* from which [individuals] cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations it is irrelevant."[138]

Consequently, treaties can only be applied in English law if an enabling Act of parliament has been passed. This dualist approach applies to treaties which affect private rights or liabilities, require modification of the common law or statute for their enforcement in the courts, or result in a charge on public funds. The rule does not apply to treaties falling outside these categories. [139]

As failure to apply obligations arising from a treaty internally would result in a breach of the treaty under international law, it is normal practice for parliament to approve

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137 Cases as *per Halsbury's Laws of England* 1977 updated in 2001: See *The Parliament Belge* (1879) PD 219,3 BILC 305 on appeal (1880) 5 PD 197 3 ILC 322 CA; *Blackburn v AG* [1971] 2 All ER 1380 at 1382 [1971] WLR 1037 at 1039; *Pan American Airways Inc v Department of Trade* [1976] I Lloyd's Rep 257 CA; *Laker Airways Ltd v Department of Trade* [1976] 3 WLR 537; *Att Gen for Canada v Att Gen for Ontario* (1937) AC 326 Judicial Committee of the Privy Council. See also O'Connell (1965) 60.

138 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* (1990) AC 500.

139 Brownlie (1990) 48. See also *The Parliament Belge* (1978-79) 4 PD 219 Probate, Divorce and Admiralty Division, Court of Appeal, where Blackstone is quoted on the prerogative power to enter into treaties. *Salomon v Customs and Excise Commission* (1966) 6 All ER 871; *R v Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi* (1976) 3 All ER 843; *Maclaine Watson and Co Ltd v Department of Trade and Industry* (1989) 3 All ER 523.

treaties prior to ratification and pass the necessary legislation, if required, to give internal effect to provisions of the treaty.[140]

Despite the fact that English courts are bound to apply English statutory law even where this conflicts with international law, there is a presumption that parliament does not intend to act in a manner contrary to the international obligations of the United Kingdom.[141] This presumption is applied when there is ambiguity in the statute or where it has been expressly enacted to give effect to a treaty.[142]

It is possible to identify five situations in which English courts have had regard to unincorporated human rights treaties and other instruments, although the categories are not hard and fast:[143] first, in resolving ambiguity in statutory language[144]; second, in reviewing the exercise of executive discretion[145]; third, in resolving uncertainty in equity and the common law[146]; fourth, in the exercise of judicial discretion[147]; and fifth, in developing concepts of public policy.[148] Mention should also be made of the increased reference by English courts to the decisions of international tribunals.[149]

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140 *The Parliament Belge* quoting Chancellor Kent (Kent's Commission (1873) Vol i 166: "The treaty is morally obligatory upon the legislator to pass law, and to refuse it would be a breach of public faith".

141 *IRC v Collco Dealings Ltd* (1962) ACI House of Lords; *R v Chief Immigration Officer, ex p Salamat Bibi* (1976) I WLR 979 Court of Appeal.

142 Oppenheim (1992) 62.

143 See Cunningham (1994) 553.

144 See *R v Secretary of State for Home Affairs, ex parte Phansopkar* [1976] QB 606 626 (*per* Scarman LJ) were it is suggested that with regard to the European Convention, at least, the courts might be prepared to adopt an approach seekng to interpret English legislation in order to advance compliance with the convention.

145 See *Rahman v Secretary of State for the Home Department* [1989] Imm A R 325 at 332-335 (IAT); *R v Secretary of State for Forreign Affairs Commonwealth Affairs, Ex parte Everett* [1989] QB 811 at 820 (*per* Taylor LJ).

146 In *McGovern v A-G* [1982] Ch 321 at 349 (*per* Slade J) the court considered the Universal Declarationin construing the meaning of the phrase "inhuman or degrading treatment or punishment" contained in a clause in a trust deed.

147 See *Derbyshire County Council v Times Newspaper Ltd* [1992] 1 QB 770 at 810, 812 (*per* Balcombe). In *R v Lemon* [1979] AC 617 at 664-665 (*per* Lord Scarman) the court recognised that it is appropriate to have regard to human rights treaties as influences on legal policy.

148 In *Oppenheim v Cattermole* [1976] AC 249 at 278 Lord Cross stated that: "it is part of the public policy of this country that our courts should give effect to clearly established rules of international law."

149 Cunningham (1994) 553.

Provisions of European law, including Community treaties such the European Convention on Human Rights and Fundamental Freedoms (ECHR), constitute another exceptional case. The ECHR has not been enacted as part of English law by way of statute. It is argued that provisions of community treaties such as the ECHR have been indirectly incorporated by virtue of the European Communities Act 1972, and that special characteristics of Community law provide for direct application.[150]

In terms of article 13 of the ECHR to which it is party, the United Kingdom has undertaken to provide an effective remedy in its courts to individuals who claim that the rights granted to them under the ECHR have been violated. Beyleveld argues that a violation of the ECHR therefore signifies the illegality of that violation in English domestic law.[151] Such direct application runs contrary to the orthodox English constitutional doctrine that international treaties only become part of domestic law once they have been given legislative effect.

This approach is, however, tempered by the abovementioned presumption that parliament does not wish to legislate contrary to the United Kingdom's international obligations. In applying common law, domestic courts may rely on the ECHR to choose between conflicting common law precedents, or to settle a point not previously addressed in the case law and possibly even to overrule clear precedent. Judges are further permitted to take the ECHR into account, when exercising discretionary powers.[152]

Beyleveld argues that the above dualist approach is untenable when dealing with human rights instruments to which the United Kingdom is party, as human rights are by nature universal. Consequently, the ECHR should, by virtue of the legal validity of

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150 Oppenheim (1992) 6d. See also the discussion above under transformation and incorporation theories.
151 Beyleveld (1995) 579.
152 *Id* at 580.

the United Kingdom's undertaking, be regarded as a Bill of Rights for the United Kingdom, against which all actions should be measured/tested/evaluated.[153]

He bases his critique of the orthodox dualist approach on the contention that the Crown is a source of domestic law, as its assent is required for an Act of parliament to become law. The Executive enters into international treaties by and on behalf of the Crown, while the Crown through parliament enacts domestic statutes, on the other hand. It should therefore not be possible for parliament to derogate from obligations the Crown has undertaken by treaty. Should this occur, it would in the case of human rights treaties, lead to granting, yet at the same time denying the subjects certain rights. In order to avoid this contradiction is should be accepted that treaties entered into under royal prerogative are part of the same body of law as Acts of parliament, and therefore form part of domestic law.

It must be assumed, in terms of to Beyleveld's theoretical construction, that parliament has implicitly assented to the ECHR. If this is the case, it is natural to infer that the reason why parliament has not given legislative effect to the ECHR is that it has recognised that it is unnecessary to do so as through its implied assent, the ECHR is already part of the law of England.[154] He holds that argument for implied incorporation does not deny parliament's sovereignty. Although it renders parliamentary derogation from the ECHR impermissible, the limitation on parliamentary power is conditional on the United Kingdom remaining party to the ECHR.

The ECHR can also be construed as part of English law by way of customary law. Cunningham[155] argues that at least some of the more fundamental provisions contained in human rights treaties, such as the ECHR, may now be a part of customary international law and will therefore automatically be part of English common law.

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153 Referred to as the theory of implied incorporation. Beyleveld (1995) 581.
154 *Id* at 585.
155 Cunningham (1994) 542.

5.2 The United States of America

5.2.1 Customary International Law

International law has been accepted as forming part of the law of the land in accordance with the Blackstonian doctrine.[156] A tendency to favour the adoption theory has, however, taken root in some decisions.[157] It is nevertheless clear from court decisions that customary international law, universally recognised or which has received the assent of the United States, is binding upon the American courts.[158]

The United States court in *Filartiga v Pena-Irala*[159] has further recognised the process whereby international human rights treaties may generate customary international law.

5.2.2 Treaties

The law of the United States regarding the application of treaties in domestic law is remarkably complicated since it contains both monist and dualist elements and distinguishes between various kinds of international agreement at a domestic level.

Article VI, clause 2 of the United States Constitution provides:

> "This Constitution, the laws of the United States, which shall be made in pursuance thereof; and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land, and judges in every state shall be bound thereby, anything to the contrary in state constitutions or laws notwithstanding."

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156 O'Connell (1965) 67; Burke, Oliver, De la Veg & Rosenbaum (1983) 315.

157 *Cook v United States* 288 US 102 (1933). *Santovincenzo v Egan* 284 US 30 (1931). *The Paquete Habana* 175 US 677 (1900).

158 Oppenheim (1992) 75.

159 630 F 2nd 876 (2nd Cir 1980). Burke, Oliver, De la Veg & Rosenbaum (1983) 315-322.

This clause can be interpreted to lead to the following propositions:[160]

(i) The law of the United States is constituted of both treaties[161] and congressional statutes.

(ii) In the case of conflict between legislation and a treaty, preference depends on whether federal or state legislation is involved. State legislation is subject to treaties, whether prior or subsequent, in conflict with it. A federal statute however, is binding on the courts even if it is in conflict with existing customary international law or treaty, while the statute will give way to a subsequent self-executing treaty.[162] In doubtful cases, statutes will be interpreted in the light of the presumption that the legislature did not intend to overrule international law.[163]

Difficulty has been experienced in distinguishing self-executing from non-self-executing treaties for the purpose of determining whether a treaty is automatically operative in a particular state.[164] The doctrine of self-executing treaties was established in *Foster v Neilson.*[165] It was argued in terms of Article VI clause 2 that a treaty has the same status as legislation "whenever it operates of itself, without the aid of any legislative provision". The latter category should be distinguished from treaties which require further action before they can become a rule for the court.

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160 O'Connell (1965) 68-69.

161 In terms of Article II of sec 2 clause (2) of the Constitution the President shall have the power, by and with advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.

162 See chapter 2 note 65 above. See *Edye v Robertson* 112 US 580 (1884) US Supreme Court; *Foster v Neilson* 27 US (2 Pet) 253 (1829); *Sei Fujii v California* 32 Cal 2d 71, 242 P 2d 617 (1952) Supreme Court of California; *United States v Postal* 589 F 2d 862 at 876 (1979) on self-executing treaties. For a further discussion of direct enforcement of international human rights treaty law see Burke, Oliver, De la Veg & Rosenbaum (1983) 295-313.

163 O'Connell (1965) 81. See also Jackson (1987) 159-164 on the hierarchy of norms.

164 See Riesenfeld above at note 92 on the determination of self-executing treaties in USA law.

165 2 Pet 253 (US 1829). See also *Head Money* Cases 112 US 580 (1884); *United States v Postal* 589 F 2d 862 (1979).

The approach adopted by courts in this regard is based on a classification of subject matter, rather than on any international law distinction, which places a duty on signatories to take further action (in the case of non-self-executing treaties). As far as the direct application of human rights treaties is concerned, Jackson points out that courts are obliged to enforce treaty-based individual rights when such rules are of a nature which can be enforced by a court, for example self-executing.[166]

(iii) Treaties, which violate constitutional provisions,[167] are not valid as the law of the United States.

(iv) The "reserved powers" of the States under the tenth amendment do not affect the treaty power.

(v) Executive agreements,[168] which are treaties in the international sense, are internally operative to the same extent in the constitutional sense when they are made pursuant to prior authorisation of Congress, or within the framework of congressional action, or ratified by subsequent congressional action. Executive agreements, which are self-executing by nature, are internally operative to the derogation of State law when made within the Executive's inherent power with or without antecedent or subsequent congressional action. They are not internally operative so as to override earlier federal legislation.

Despite the fact that promoting respect for human rights is recognised as an important goal in the foreign policy of the United States, it did not ratify any major human rights treaty until 1988.[169] Cunningham[170] feels that the reason for this

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166 O'Connell (1965) 71. See also the discussion by Jackson (1987) 146 who also argues that a distinction could be made between direct application on the one hand, and the question whether a particular party before the court has the right to invoke a treaty provision on his own or another's behalf (invocability).

167 Jackson (1987) 150-151.

168 Jackson (1987) 143-144 divides "executive agreements" under United States law into four categories: Congressional Previously Authorised Executive Agreement; Congressional Subsequently Approved Executive Agreement; Presidential Executive Agreement; Treaty Authorised Executive Agreement.

169 Buergenthal (1995) 276.

170 Cunningham (1994) 543.

contradiction is to be found primarily in United States constitutional law. As indicated above, treaties ratified in accordance with the Constitution have equivalent status to federal legislation. Although treaties will not prevail over the Constitution or over subsequent conflicting federal legislation, they will take precedence over inconsistent State law, whether prior or subsequent.

A treaty, ratified by the United States, is only judicially enforceable when self-executing or enacted in legislation.[171] The United States courts have generally held that the human rights provisions of the United Nations Charter and human rights treaties ratified by the United States are not self-executing.[172] Individuals are therefore prevented from relying on those rights in court.

The United States is party to the following major human rights treaties: the CAT,[173] the CERD[174] and the ICCPR.[175] It is however argued that the practice adopted by the United States with regard to the domestic implementation of human rights treaties has been unnecessarily restrictive.[176] The numerous reservations, understandings and declarations (RUD's) the United States of America has attached to each of its ratifications, not only seriously impede international efforts to promote human rights internationally, but also limit the possibility for individuals to rely on the treaties in United States courts.[177]

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171 Courts may, however, refer to international law in determing the intended content of federal and state laws in the same way that they refer to legislative history. Burke, Oliver, De la Veg & Rosenbaum (1983) 295.

172 *Sei Fujii v California* note 260 above. Cunningham (1994) 543.

173 Ratified on 20 Oct 1994.

174 *Ibid.*

175 Ratified on 7 June 1992. The ICESCR, CRC and CEDAW have only been signed but not ratified by the USA.

176 Buergenthal (1997) 211; Henkin (1995) 341.

177 See for example the following reservations made by the USA to the Covenant on Civil and Political Rights:
"(1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.
(2) That the United States reserves the right, subject to its Constitutional contraints, to impose capital punishment on any person (other than a pregnant woman) duly convited under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes by persons below eighteen years of age.
(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment

Henkin identifies the following somewhat cynical "principles" which appear to guide the RUD's made by the United States of America:[178]

"1. The United States will not undertake any treaty obligation that it will not be able to carry out because it is inconsistent with the United States Constitution.
2. United States adherence to an international human rights treaty should not effect - or promise - change in existing US law or practice.
3. The United States will not submit to the jurisdiction of the International Court of Justice to decide disputes as to the interpretation or application of human rights conventions.
4. Every human rights treaty to which the United States adheres should be subject to a "federalism clause" so that the United States could leave implementation of the convention largely to the states.
5. Every international human rights agreement should be "non-self-executing."

Since RUD's proclaim the rights contained in a treaty to be non-self-executing, they are intended to prevent individuals from enforcing these rights in American courts. Buergenthal seriously doubts whether non-self-executing declarations are constitutional in the light of the fact that they prevent United States judges from applying article III section 2 of the United States Constitution which declares that "the judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Law of the United States, and *Treaties made or which shall be made under their Authority*; ..." (emphasis added). Buergenthal argues that the non-self-executing declaration read together with the "federalism understanding" as

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prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.
(4) That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.
(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United State reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18." As cited in Multilateral Treaties deposited with the Secretary-General 1996 130. The US made the following declaration to the Covenant on Civil and Political Rights: "That the United States declare that the provisions of article 1 through 27 of the Covenant are not self-executing." Multilateral Treaties deposited with the Secretary-General 130.

178 Henkin (1995) 341.

contained in Henkin's fourth principle cited above, may in certain cases enable judges to give direct effect to treaties.[179] The federalism understanding usually reads as follows (the specific example relates to the ICCPR):

> "That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments, to the extent that state and local governments exercise jurisdiction over such matter, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state and local governments may take appropriate measures for the fulfilment of the Covenant."[180]

In litigation relating to matters falling within the jurisdiction of a state, Buergenthal is of the opinion that state courts are free to consider the ICCPR self-executing and therefore to apply it directly, since it is up to states to take appropriate measures for the fulfilment of the Covenant.

5.3 Germany

5.3.1 Customary International Law

When dealing with the application of customary international law, three periods in Germany history should be distinguished, namely the Empire, the Weimar Republic, and the Federal Republic.

During the period of the Empire the relationship between international and municipal law was explained in terms of the "transformation theory", where municipal law transforms rules of international law into municipal law, and the "*verweisungs* theory", under which municipal law refers to international law where municipal law is silent on a point, or where it is found to be in conflict with international law. No rule of municipal law existed requiring application of international law by the courts.

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179 Buergenthal (1997) 221.
180 Multilateral Treaties Deposited with the Secretary-General 130.

International law, especially that relating to sovereign immunity, was, however, applied by the courts.[181]

Article 4 of the Weimar Constitution provided for integration of international and municipal law. This provision was interpreted to require proof of consent of the state to a rule of international law. If such consent indeed existed, a legislative act would override international law according to the principle of *lex posterior legi priori*.[182]

Article 25 of the Basic Law of the Federal Republic of Germany[183] states that:

> "The general rules of international law are an integral part of the federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."

General rules of international law comprise those customary rules which are universally valid for all states and whose reciprocal provisions are binding on them. Treaties do not enjoy precedence over municipal law, unless they constitute a codification of general rules of international law.[184]

Much academic discussion has been devoted to the theoretical primacy of international law, the meaning of general rules, the process of transformation and whether the principle of *lex posterior derogat legi priori* applies to a conflict between international law and a later act of federal or state legislation.[185] O'Connell points out

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181 O'Connell (1965) 79.

182 *Id* at 80.

183 The Basic Law (Grundgesetz) was promulgated on 23 May 1949 as the constitution for West-Germany. It was subsequently ammended. After the unification of East and West Germany on 3 October 1990, the Basic Law became the constitution for the whole Germany. The most recent amendment took place in 1993. See http://www.iuscomp.org/gla/statutes/GG.htm.

184 Judgment of 25 November 1955, Münster Higher Administrative Court, (1958-1959) 2 *Yearbook ECHR* 572.

185 Rudolf (1987) 35-36 describes the hierarchical order of German law as follows: At the top the unchangeable constitutional principles, followed in turn by the 'normal' constitutional law, laws derived from the Constitution and executive orders. There is a divergence of opinion where general customary international law fits into the hierarchy. Rudolf argues that it should at best hold the rank of the Federal Constitution supported on his own authority by Doehring and Partsch. Bernhardt, Mosler, Scheuner and Seidl-Hohenveldern favour an intermediate rank between the Constitution and normal laws. Hilf (1987) at 178, argues that general rules of public international law take precedence over any law, and directly create rights and duties for all

that German writers consciously adopt words like "transformation" or "incorporation" to describe the interaction of international and municipal law under article 25, words that have specific meaning in the monist-dualist debate.[186]

5.3.2 Treaties

Under the Empire, the Emperor had the power to enter into treaties. Assent of the Bundesrat and acceptance by the Reichstag were required when treaties dealt with subjects falling under the sphere of federal legislation. Publication of a treaty was regarded as an act of transformation into municipal law.[187]

Article 45 of the Weimar Constitution contained similar provisions with respect to the entry into treaties, the only difference being the substitution of the Emperor with the President. Legislation and treaties had equal status. Conflicts between them were resolved on the basis of the *lex posterior derogat legi priori* rule.[188]

In terms of article 32(1) of the Basic Law of the Federal Republic of Germany, the conclusion of treaties falls within the jurisdiction of the Federal Government.[189] Länder may, however, with the consent of Federal Government, conclude treaties with foreign states.[190]

The procedure governing treaty making of the Federal Government is regulated by Article 59 of the Basic Law of the Federal Republic,[191] which provides that:

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inhabitants of the federal territory – they are in other words directly applicable. The Federal Constitutional Court in its decision on the internal operation of the Concordat with the Vatican, took the position that rules of international law are automatically part of municipal law, without the necessity of any act of transformation, but are not part of constitutional law. For a discussion see O'Connell (1965) 81.

186 O'Connell (1965) 80-81.

187 Article 11 of Imperial Constitution. See O'Connell (1965) 82.

188 O'Connell (1965) 83.

189 Frowein (1987) 63. According to art 32(3) of the Constitution the Länder's treaty-making power is limited to matters in which they have the competence to legislate. This power is exceptional and would not include conclusion of human rights agreements. See also Randelzhover (1979) 148.

190 Art 32(3).

191 Peaslee (1968).

(i) The Federal President shall represent the Federation in terms of international law. He shall conclude treaties with foreign states on behalf of the Federation.

(ii) Treaties that regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In cases of executive agreements the provision concerning the federal administration shall apply *mutatis mutandis*.

In terms of the 1949 Constitution, the incorporation of treaty provisions into German law in most cases occurs by way of federal legislation in terms of Article 59(2) (*Transformationstheorie*).[192] Hence such incorporated or transformed treaties would have a status similar to that of federal legislation.[193] Federal statutes, including incorporated treaties, prevail over laws of the Länder. A later federal statute will, however, override an earlier one (incorporating treaty provisions).[194] It should be noted that in terms of article 25 only general rules of public international law form part of federal law and rank higher than a normal statute. Section 59(2) was not included in the 1993 constitutional amendment. Instead article 100(2) provides that:

> "If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (article 25), the court shall obtain a decision from the Federal Constitutional Court."

Article 24(1) included for the first time in the amended Constitution, authorises the Federation to transfer sovereign powers to international organisations. Moreover, article 24(2) permits the Federation to further limit is sovereignty by entering into a

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192 Treaties adopted by the federal legislature should necessarily fall within the legislative competence of the federal government. See also Randelzhofer (1979) 154; Hilf (1987) 186.

193 Frowein (1987) 66. Such federal legislation simultaneously enables the Federal President to formally ratify the treaty at an international level.

194 The present position can be described as moderate dualism according to Hilf (1987) 180.

system of mutual collective security as will bring about a secure and lasting peace in Europe and among the nations of the world.[195]

In 1959 the Münster Higher Administrative Court[196] dealt with the question whether article 6(1) of the European Convention for the Protection of Human Rights, 1950, ratified by a federal law in accordance with article 59(2) of the Basic Law, which provided for the public pronouncement of a judgment, would invalidate a judgment of an administrative tribunal not pronounced publicly. The European Convention post-dated the Ordinance under which the court had acted and which imposed no such requirement. In its judgment the court dealt with a number of questions relating to the interpretation of articles 25 and 59 of the Basic Law. On whether the substantive clauses of the Convention are directly binding on the courts, or whether they simply place an obligation on Germany to bring its municipal law into line, the court stated that there is no longer a sharp distinction in contemporary jurisprudence and practice between ratification of international conventions and their incorporation into municipal law. It is stated that ratification by the legislator not only confers on the Federal President the power to conclude an international agreement, but also constitutes a legislative action in the strict sense provided that the Ratification Act deals with matters within the province of Federal legislation, and that the treaty goes through the requisite legislative process appropriate to its subject. The court concludes that the Convention has become part of municipal law and is therefore directly enforceable.[197] This interpretation is consistent with that of the Federal Constitutional Court which ruled that the wording used in a Ratification Act was sufficient to effect the transformation from international law into municipal law. Since treaties derive their force in German law from a federal law, they have no higher status than other federal laws. The later law will therefore prevail over a prior treaty.[198] Treaties will only take precedence over other German laws by virtue of article 25 of the Basic Law, if such treaties are considered a codification of the general rules of international law.

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195 For comments, see Kommers (1997) 157.
196 Note 184. See also Riedel (1987) 206.
197 Harris (1979) 85.
198 Oppenheim (1922) 65.

5.4 The Republic of Namibia

Before Namibia became independent on 21 March 1990 the South African legal system applied in the territory. The position with respect to the municipal application of international law was therefore similar to that applied in South Africa at a specific point.[199] The position international law enjoyed in South Africa before the 1993 Constitution came into operation will be discussed in the next Chapter.

The Namibian Constitution, which was adopted by the Constituent Assembly on 9 February 1990, makes specific provision for the application of international law:[200]

Article 32(3)(e) empowers the President to negotiate and sign international agreements and to delegate such powers.

In terms of article 40(i) Cabinet is obliged to assist the President in determining what international agreements are to be concluded and to report to the National Assembly thereon. The National Assembly is required by article 63(2)(e) to "agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of article 32(3)(e)."

A positive regard for international law is reflected by article 144, which states that unless otherwise provided by the Constitution or Act of parliament, general rules of public international law and international agreements[201] binding on Namibia under the Constitution shall form part of Namibian law. Article 96(d) reflects a commitment by the state to foster respect for international law and treaty obligations. International agreements binding Namibia dating from the pre-independence era will remain in force subject to decision by the National Assembly whether or not to succeed in terms of article 143.[202]

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199 Erasmus (1989/90) 85. For more details on the legal history of Namibia see McDougal (1986) 443-470.

200 See in this regard Erasmus (1990) 315-317; Erasmus (1989/90) 85; Mtopa (1990/91) 104; Abi-Saab (1993) 3; and Szasz (1991).

201 For a discussion on the use of the term "international agreement" see Mtopa (1990/91) 105.

202 See also Szasz (1991).

Article 145 limits obligations of the Namibian government to other states to those existing under international law. Obligations to individuals arising of acts or contracts of "prior administrations" will only be bind the Namibian government if they are recognised by international law as binding upon Namibia.

Article 144 is of particular importance for the present analysis on the relationship between international law and Namibian law. This provision implies, according to Erasmus,[203] that public international law automatically forms part of Namibian law and that no act of transformation or incorporation is required. Once treaties come into force for Namibia, they become part of Namibian law. Such treaties can be divided into two categories: self-executing treaties, which do not require additional implementing legislation, and treaties where new implementing legislation is required.[204] An Act of parliament may, however, exclude municipal application of international law. Should a rule of international law originating from the constitutionally recognised sources, namely general rules of public international law and international law binding on Namibia, conflict with the Constitution, the Constitution will prevail at a municipal law level. Erasmus notes that determination, interpretation and application are a judicial function. Hence it is for courts to rule on possible inconsistency between a rule of international law and the Constitution or national legislation.[205]

Since general rules of public international law, and international agreements binding on Namibia form part of Namibia law, it follows that courts will take judicial notice of the contents of these sources.

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203 Erasmus (1989/90) 94.

204 *Id* at 105 makes the interesting observation that treaties can be considered as self-executing where existing legislation is adequete to enable the Namibian authorities to honour their obligations. In the light of earlier discussion such a construction appears not to amount to self-execution of the treaty but to incorporation by way of existing legislation containing similar provisions.

205 *Id* at 95.

The term "general rules of public international law" coincides with the phraseology used by article 25 of the Basic Law of the Federal Republic of Germany. Divorced from its German constitutional roots, jurisprudence and academic commentaries, the term may be open to different interpretations. It is not known in literature dealing with the sources of international law, nor does it appear among the sources of international law listed in article 38 of the Statute of the ICJ. According to Erasmus, the term must obviously include customary international law, and more specifically, general rules of customary international law. Such rules would connote support and acceptance by a large, representative number of states.[206] He argues that regional customary international law should be included under article 144 as long as it is compatible with the Constitution and municipal legislation. The reasoning behind such inclusion is not clear since such rules could not be regarded as generally accepted or of a general nature.[207] He proceeds to argue that such regional customary international law should be applied by virtue of Namibia's consent evidenced by its practices and conduct. This reasoning accords with orthodox international law on the binding force of custom. The non-application of such internationally recognised regional rules under Namibian constitutional law, which requires general acceptance, will according to Erasmus, amount to a strict and literal approach.[208]

Few cases dealing with the application of international law by the Namibian court, have been reported. In the case of *Mwandingi v Minister of Defence*[209] the applicant had sustained serious injuries as a result of being shot by members of forces under control of the South African Minister of Defence prior to Namibian independence. The court dealt with the right to claim damages from the new government, arising out of a delict committed by its predecessor government. The court was referred to a rule of

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206 *Id* at 98.

207 See discussion in Erasmus (1989/90) 98-99.

208 It could be argued that general principles of international law reach much wider than customary international law and should include all generally accepted international law for example *ius cogens*. According to Erasmus's argument, however, such rules require only local or regional acceptance to form part of Namibian law.

209 1991 (1) SA 851 (NM).

international law that a new state does not succeed to delicts committed by its predecessor. As a consequence of this rule, it was suggested that the Minister of Defence of Namibia is not liable for the wrongs committed by his predecessor. The court ruled that when article 145(I)(b) referred to acts or contracts which would not otherwise bind Namibia in terms of international law, it could not have been meant to refer to the recognition accorded by international law of the non-liability of a new state for delicts committed by its predecessor: such matter would be dealt with in terms of the Namibian Constitution explicitly accepting such liability. The court further ruled that, since there was in any event, no principle whereby international law could undo such acceptance of liability by a state, it could not be argued that such acceptance would not be recognised by international law as binding upon Namibia.

In *S v Martinez,*[210] the captain of a Spanish ship was accused of unlawful fishing activities within Namibia's exclusive economic zone. The court had to consider the whether imprisonment could be imposed as penalty. The Convention on the Law of the Sea of 1982 prohibited imprisonment. Although Namibia had signed and ratified the Convention, the Convention however lacked the required thirteen signatures for entry into force. The court held that in terms of the Vienna Convention on the Law of Treaties, parties to a convention that has not reached binding status, should nevertheless be obliged to adhere to the terms of such convention. Strangely, the court was not able to ascertain whether Namibia was a signatory (or party?) to the Vienna Convention. Thus, Namibia would only be bound to the Convention on the Law of the Sea if it was also party to the Vienna Convention. The court refrained from considering the customary status of the Vienna Convention, in order to establish whether it would qualify as a general rule of public international law in terms of article 144 of the Constitution. The court however found that the Namibian legislature had intended the provisions of the Convention dealing with imprisonment to be applicable, by spesifically referring to them in the Territorial Sea and Exclusive Economic Zone of Namibia Act.[211]

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210 1991 (4) SA 741 (NM).
211 3 of 1990.

The law of the sea was again considered by the court in *S v Carracelas and Others*[212] where the accused faced charges of contravening section 22A (4)(b) of the Sea Fisheries Act as amended and read with the Territorial Sea and Exclusive Economic Zone of Namibia Act.[213] The accused contended that that the court did not have jurisdiction to hear the matter, amongst others, as the alleged location of the offence the state relied on fall outside Namibia's exclusive economic zone. The court found, with reference to the Law of the Sea Convention, that there was an overlapping or infringement between the exclusive economic zone of Namibia and the fishing zone claimed by Angola.

References to international human rights law in constitutional law litigation are few and far between. In *Muller v President of the Republic of Namibia and Another,*[214] the court was approached by a husband wishing to adopt his wife's surname. The Aliens Act[215] required that certain formalities be complied with, whereas for a wife to adopt her husband's surname was automatic. The appellant averred that the formalities imposed discriminated against him on the ground of sex as prohibited in terms of article 10 of the Namibian Constitution. In deciding the matter, the court made ample reference to case law of Canada, India and South Africa, and referred in passing to the European Court of Human Rights. The court dismissed reference to international agreements, to which Namibia was a party, such as CERD: "Such Conventions are of course subject to the Constitution and cannot change the situation."[216] Reference was also made to international human rights agreements to which Namibia was party in *Ex parte Attorney–General: In re corporal Punishment by Organs of State*[217] concerning the constitutionality of corporal punishment by organs of state, and in *Namunjepo v Commanding Officer, Windhoek Prison*[218] were the practice of placing prisoners in chains was regarded as unconstitutional. In *Kauesa v Minister of Home Affairs and Others,*[219] the court relied heavily on foreign case law, dealing with the

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212 1992 NR 336.
213 See note 211.
214 1999 NR 1990.
215 1 of 1937.
216 At 205.
217 1991 NR 178 (SC); 1991 (3) SA 76.
218 1999 NR 271.
219 1995 NR 175.

right of freedom of speech. Reference was made to the European Convention on Human Rights without drawing any theoretical distinction as to the role of this instrument in Namibian law, compared to decisions and provisions of domestic law.

These cases bear out the conclusion that despite the liberal provisions of the Constitution, and especially article 144, regarding the status of international law in Namibian law, courts are not receptive to international law influences. A similar tendency to that currently experienced in South Africa appears, namely that far greater weight is attached to comparable foreign case law than to applicable international law.

5.5 Contemporary Practice in Other Countries

In his critique on the American practice, Buergenthal identifies a number of countries that have taken an increasingly internationalist attitude towards the implementation of international agreements in general, and international human rights in particular. There is evidence of a trend towards direct application of treaties in general and human rights treaties in particular in a growing number of democratic countries.[220]

Many legal regimes are even granting a higher normative status to human rights treaties than to other treaties and ordinary national legislation,[221] or provide that the human rights and liberties contained in the constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and ratified international human rights agreements.[222] This provision gives constitutional status to such

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[220] The Netherlands is one example where self-executing treaties are not only ranked above national laws, but also above the constitution. See constitutional amendments adopted in 1953, 1956 and 1983.

[221] Buergenthal (1997) 212-216. The following are examples of countries that accord a higher normative rank to treaties in general than statute law: France, Belgium, Switzerland and Costa Rica.

[222] Buergenthal (1997) 217. Article 10(2) of the Spanish Constitution of 1978 provides that the human rights and liberties contained in the constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and international human rights agreements ratified by Spain. This provision gives constitutional status to such agreements according to Buergenthal. Art 10(2) of the Spanish Constitution has influenced Latin American countries for example Costa Rica, Argentina and Chile to adopt similar provisions. See 1989 amendment to the Constitution

agreements according to Buergenthal. Article 10(2) of the Spanish Constitution has influenced Latin American countries to adopt similar provisions, for example Costa Rica, Argentina and Chile.

The main factors identified as driving forces behind this international trend are:

- The institutional needs of supranational organisations that establish their own legislative and judicial systems. The decisions of these institutions depend on direct application for successful implementation. This is difficult to achieve within the framework of the traditional methods of transformation and incorporation.
- Many human rights treaties create international bodies and tribunals with jurisdiction to interpret and enforce such agreements. Some enable individuals to complain against alleged violations of their obligations by state parties. To keep domestic legal systems in line with the rulings of these tribunals, states adhering to the systems of transformation and incorporation must go through the cumbersome process of continuously passing new legislation. A much easier method for honouring international human rights obligations is to grant the latter supremacy over national legislation either prior or later in time and to enable national courts to follow precedents established by international tribunals. This has led to the adoption of constitutional mechanisms at a domestic level granting power to an independent judiciary to enforce international human rights in conflict with national law. The adoption of such international law friendly mechanisms in domestic constitutions is often found in countries with a history marked by repressive regimes and human rights abuses.[223]

The internationalist attitude described above shares the same essential characteristics with the traditional monist theory, especially the view advanced by Verdross favouring the supremacy of international law over domestic law.[224]

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of Costa Rica, 1994 amendment to the Argentinian Constitution (art 75(22)), and Constitution of Chile, article 5.

223 Buergenthal (1997) 214.

224 See the discussion of monist theory see par 2.2 chapter 3 below.

6. *Conclusion*

The application of international law in municipal law depends on and is regulated by rules of domestic law. Domestic legal systems provide different answers when dealing with the status of international law in municipal law. The domestic application of international law should not be confused with the responsibility of states to honour their international obligations in terms of international law. International law is only interested in whether international obligations are adhered to, not with the process by which this result is achieved.

In analysing the relationship between international law and municipal law, this chapter firstly identifies monism and dualism as the two basic theoretical modes explaining how international law relates to municipal law. The monism/dualism debate elucidates the two extreme opposite alternatives in explaining the relationship between international law and municipal law. As such it lays the basis for general analysis of state practice. Practice more often than not presents a unique mixture of monist and dualist elements exposing a strict theoretical approach as an artificial over simplification. The question to be answered remains whether and when international law can be invoked in domestic courts?

As far as treaties are concerned, the monist approach, seeing international and municipal law as part of the same system, is usually associated with direct application or self-execution of international law in domestic courts. The dualist approach, which regards international law and municipal law are two distinctly different systems, on the other hand, depends on transforming or incorporating international law into domestic law. States falling in the latter category can further be divided into states that apply the incorporated treaty as a rule of domestic law and states where the treaty, once incorporated, is applied as such. It is suggested that the concepts of transformation as opposed to self-execution, instead of the monism/dualism discourse should be the preferred criteria for a broad classification of state practice.

The body of literature on the above concepts suggests arguments of both law and policy favouring the various options. The requirement for parliamentary transformation is usually justified on democratic grounds in political systems where the legislature is not involved in the treaty making process. From an international human rights perspective, transformation of treaties capable of direct application must be viewed with caution as parliamentary involvement may distort the terms of the treaty through the process of incorporation.

The direct application of treaties is a complex issue partly due to the fact that terminology such as *direct effect and self-execution* is not always used consistently, nor is it applied in a consistent manner by the different domestic legal systems of states. Despite these difficulties, direct application of treaties is of particular importance when dealing with international human rights law, since it implies that the treaty itself will confer rights on individuals before domestic courts. Hence the domestic courts of state parties are obliged to apply treaties in their original form. The establishment of a directly applicable provision depends on a two-tier test: Firstly the treaty/treaty provision should lend itself to direct application. If the first requirement is met, a treaty/treaty provision may be directly applied where the domestic legal system of individual state parties provides for direct application of directly applicable treaty provisions.

Over and above the required international and domestic enabling provisions, the final test remains - how do domestic courts apply international law? It may happen that in states adhering to a monist system courts, for various reasons, apply only national law, or that such states are reluctant to become party to treaties capable of direct application. Courts in dualist states, on the other hand, may be adequately sensitised to use international law as a tool for interpretation giving effect to the presumption that parliament did not intend to promulgate legislation in conflict with an international obligation. Such states are often also less hesitant to take on international obligations.

Once a treaty is established in domestic law, be it by way of transformation or through direct incorporation, its status in domestic law will be determined in accordance with the hierarchical position international law is awarded *vis-à-vis* the

other norms applied by domestic courts. The hierarchy of norms is especially relevant where there is possible conflict between international law and domestic law. Legal systems differ on the question whether international law yields to or prevails over domestic law. Treaties may, for example, have the same rank as a statute and thus prevail over subordinate norms but not over a conflicting subsequent statute. From a domestic law perspective, states where parliament is excluded from the treaty making process may be guarded in their approach to direct application of international law linked to a higher status than domestic legislation.

From the analyses of the domestic application of international law in the United Kingdom, the United States of America, Germany and Namibia the following conclusions can be drawn:

(i) It appears that a more liberal approach is followed as far as customary international law is concerned. Customary international law is usually accepted as having self-executing status without engaging in the same protracted debate the notion evokes in the case of international agreements.

(ii) States are traditionally cautious in giving direct effect to international agreements, especially where human rights are concerned, and even more so where such agreements enjoy a high hierarchical status. States where the legislature is involved in the treaty-making process may be less reluctant to give treaties direct enforcement domestically, although not necessarily so (as will be seen in the case of South Africa).

Fortunately it appears that the trend towards both direct application or increased application by courts of human rights treaties is gaining momentum internationally.

CHAPTER 4

THE APPLICATION OF INTERNATIONAL LAW IN SOUTH AFRICA BEFORE APRIL 1994

1. Introduction

This chapter will firstly deal with the application of and general attitude towards international law in South African law in the period preceding the entry into force of the Republic of South Africa Constitution Act 200 of 1993 (the 1993 Constitution). This discussion will centre around the two principal sources of international law namely treaties and customary international law,[1] which are also the main sources of international human rights law. Special attention will be devoted to the theoretical bases of such practice with emphasis on international human rights-related topics. During the period preceding the 1993 Constitution, the relationship between South African municipal law and international law was largely determined by common law rules inherited from the United Kingdom due to the absence of any constitutional provision or legislation dealing with the question. The relationship between municipal and international law in the United Kingdom is therefore highly relevant to the present discussion.

A discussion on the relationship between South African municipal law and international law will not be complete without an investigation of the interaction between international law and apartheid as legal and political system. The second part of this chapter will therefore focus on the influence of international law on apartheid and vice versa.

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[1] The ILA London Conference (2000), *Statement of Principles Applicable to the Formation of General Customary International Law* at 2 recognises treaties and customary international law as the two principal sources of international law. See chapter 2 above for discussion.

2. *The Application of International Law in South African Law before April 1994*

2.1 *Treaties*[2]

For historic reasons South Africa's constitutional law was greatly influenced by British constitutional law. The entire territory of South Africa (consisting of the Cape, Natal, Orange Free State and Transvaal) was under British rule prior to the establishment of the Repulic of South Africa on 31 May 1961.[3] The Constitution of the Rebublic of South Africa remained structured in accordance with the Westminster model, inherited from Britain. The South African Constitution was amended by way of the Republic of South Africa Constitution Act 110 of 1983 (the 1983 Constitution). Neither the constitution establishing the Republic of South Africa, nor the 1983 Constitution regulated the relationship between South African law and international law. Consequently the position was governed by common law. The two constitutions above did, however, contain limited guidelines on the process to be followed for South Africa in becoming party to treaties. In terms of the 1983 Constitution the executive, namely the State President on advice of the cabinet, was empowered to conclude international agreements, treaties and conventions.[4] In practice this power was usually delegated to the Foreign Minister or other member of cabinet by way of a President's Minute.

Treaties to which South Africa was a party were not directly applicable in South African law.[5] Treaty provisions needed to be transformed through parliamentary intervention before they could be applied domestically. Not all treaties required

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2 The term "treaty" as used here includes the various types of international agreement which would fall under the definition provided by the Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), namely a written agreement between states or between states and international organisations.

3 The former colonies were unified in the Union of South Africa, established by way of the Zuid-Afrika Wet of 1909, an Act of the British parliament. The Union of South Africa of South Africa was transformed into the Republic of South Africa by way of the Constitution 32 of 1961, an Act adopted by the Union parliament. For an overview of South Africa constitutional history see Basson and Viljoen (1988) 36-38; and Wiechers (1981) 192-221.

4 Section 6(3)(e).

5 Rood (1987-1988) 85-90.

internal application. However, conventions which affected the rights of a state's subjects and required its officials to act in a certain manner, such as human rights conventions, and/or those which impacted on the existing law of the country, depended on legislative intervention for their application.[6]

In *Pan American World Airways Inc v SA Fire & Accident Insurance Co Ltd* the Appellate Division of the South African Supreme Court in the words of Steyn CJ, endorsed this position and expressed itself as follows on the relationship between South African law and treaties:

> "It is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded are not embodied in our municipal law except by the legislative process. The Universal Postal Convention and the Bilateral Air Transport Agreement are not exceptions. In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject."[7]

The approach that the executive may bind the Republic on an international level but a legislative act by the sovereign parliament is required to provide for internal application, is essentially dualist and was taken over from English law.[8] Countries in the British Commonwealth share a common constitutional rule that no treaty or international agreement can, without the aid of a statute incorporating its provisions, be applied so as to modify private rights or alter municipal law; save in the exercise of belligerent rights.[9] It seems reasonable to suppose that South Africa, as a former

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6 Sanders (1974) 365. See also Dugard (1994) 51-57 and Dugard (2000) 49-50.

7 1965 (3) SA 150 (AD) 161. This has been confirmed in subsequent cases – see below.

8 See Chapter 3 par 5.1 for discussion of the application of treaties under English law.

9 JES Fawcett as quoted by Bridge (1971) 746. See also Jennings and Watts (1992) section 622 1253, *where it is stated*: "*The binding force of a treaty concerns in principle the contracting states* only, and not their nationals ... if treaties contain provisions affecting rights and duties of persons or bodies under the jurisdiction of the contracting states, each contracting state is bound to take such steps as are necessary, according to its internal law, to ensure that their rights and duties are consistent with the requirements of the treaty." In *Pan American Worlds Airways Inc v SA Fire and Accident Ins Co Ltd* 1965 (3) SA 150 (A) 161 the Appelate Division reiterated that "... the conculsion of a treaty is ... an executive and not a legislative act."

member of the Commonwealth, would follow a similar practice as was confirmed in the *Pan American World Airways Inc* case.[10]

In conformity with the position under English law, the South Africa courts regarded the transformation requirement as absolute.[11] The dualist approach was endorsed by the Appelate Division in *S v Tuhadeleni and Others.*[12] In *Malueleke v Minister of International Affairs*[13] the Bophuthatswana Supreme Court refers to the *Pan American* decision and states: "The rights of the subjects are not affected by the treaty as such, nor does the subject derive any rights from it ... if legislation is passed to give effect to a treaty, that will be the source of the citizen's rights". In *Binga v Administrator-General SWA and others*[14] it is stated that incorporation by legislation is also required for UNGA resolutions.[15]

Dugard identifies the following limited instances in which municipal courts may have considered unincorporated treaties:[16]

- when interpreting ambiguous legislation;[17]

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10 See chapter 3 note 7 above.

11 See par 5.1.2 for exceptions to this rule under English law.

12 1969 (1) SA 153 (A) 173.

13 1981 (1) SA 707 at 712H.

14 1984 (3) 949 (SWA) at 96B-C.

15 See also *Tshwete v Minister of Home Affairs (RSA)* 1988 (4) SA 586 at 606E where it is stated that: "... in as much as this agreement was not adopted or ratified by a legislative act of our legislature it does not form part of our municipal law."

16 Dugard (1994) 53-55. In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 828 (A), the court supported the above four exceptions to the general rule as cited by Dugard. Botha argues in (2000.4) at 268 that the first three exceptions do not represent an application of a treaty but rather the use of treaty provisions as means of interpretation. See also *Mahomed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and another Intervening)* 2001 (3) SA 884 (CC).

17 *Binga v Cabinet for South West Africa and others* 1988 (3) SA 184-5. *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (B) at 712; *Mabuda v Minister of Co-operation and Development* 1984 (2) SA 49 (CK) at 54-5. In *S v Adams, S v Werner* (1981) 1 SA 187 (A) at 225B, the Appellate Division was faced with the question whether the Group Areas Act, which provided for zoning based on racial differentiation, should be interpreted in accordance with the human rights provisions of the United Nations Charter prohibiting racial discrimination, to which South Africa is a party. The court rejected this possibility. For a discussion on the testing of legislation against unincorporated treaty obligations see Rood (1987-8) 86-87.

- to challenge the validity of delegated legislation on the grounds of unreasonableness;[18]
- where an unincorporated treaty accords with a rule of customary international law, it may be applied as customary rule;[19]
- treaties entered into under executive prerogative.[20]

Incorporation took place through various forms of enabling legislation depending on prevailing circumstances and methods of legal drafting. It implemented either existing treaty obligations or anticipated obligations to a treaty to which South Africa was not yet a party or which had not yet entered into force or been drafted.[21] There are different ways in which enabling legislation is linked to the international agreement it seeks to incorporate. It can, for example, refer to the whole or part of a treaty, attach the treaty or part thereof in a schedule, or duplicate the relevant treaty provisions in the text of the Act itself.[22]

Sanders points out that enabling legislation did not need to take the form of a statute. Parliament could, due to considerations of expediency, delegate it legislative powers to the executive to issue regulations, which gave domestic effect to a treaty or arranged for its implementation.[23] Publication of a treaty for information in the Government Gazette did not in itself constitute an act of transformation.[24]

If the practice of transformation of treaties under the 1983 Constitution is examined from a theoretical perspective as put forward in chapter 3, it appears to fall within the

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18 The question was raised but left unanswered by the Appellate Division in *Winter v Minister of Defence and Others* 1940 AD 194 at 198 and *S v Tuhadeleni* 1969 (1) SA 153 (A) 176-7.

19 *S v Petane* 1988 (3) SA 51 (C).

20 *R v Werner* 1947 (2) SA 828 (A).

21 For example sec 7 of Territorial Waters Act 1963 and sec 2(4) of the Post Office Act 44 of 1958; the Extradition Act 67 of 1962; the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and the Reciprocal Enforcement of Civil Judgments Act 9 of 1966 which provide for implementation of treaties yet to be drafted as quoted by Sanders (1974) 367 note 10.

22 For examples of the various methods, see Sanders (1976) 368.

23 Sanders (1974) 369. For example the Hague Convention on Civil Aspects of International Child Abduction Act 76 of 1996 sec 5; Carriage by Air Act 1946; the Geneva Agreement on Tariffs and Trade Act 1948; the Merchant Shipping Act 1951 and the Aviation Act 1962.

24 Dugard (1994) 51. *S v Tuhadeleni* note 18 above at 173-5. An interesting example in this regard is the Charter of the United Nations and the ICJ Statute. Although South Africa is party to the

ambit of the dualist approach. As already mentioned, the transformation and incorporation theories are closely associated with legal positivism which flourished in South Africa during the apartheid years.[25] Sanders criticises the labelling of the approach favoured by South African law in terms of a particular theory in the light of the many exceptions to these theories.[26] Dugard is of the opinion that the way courts have applied rules of international law (including both treaty and customary international law), indicates clear support for the harmonisation theory, as advanced by O'Connell,[27] with a monist bias.[28] The process of transformation of treaties is, according to his thinking, aimed at achieving harmony between international law and municipal law in much the same way as harmony is reached between our common law, statutes and the prerogative power of the executive. Dugard concedes that although the place of international law in South Africa is best explained in terms of the harmonisation theory, there are South African scholars who incline to either the monist or dualist position within the framework of harmonisation.[29] It is agreed with Dugard that even if a particular practice is labelled monist, international law may still need tailoring to make it suitable for application within a particular municipal legal system. However, when such a municipal legal system requires treaties to be transformed into domestic legislation before they can be applied, it is doubtful whether such a system can still be described as monist. If transformation can be accommodated within monist theory, one can legitimately pose the question as to what act of transformation is required before a system can be described as dualist?

Booysen expresses doubt as to the practical relevance of applying theories to the relationship between international and municipal law.[30] To illustrate the potential futility of the exercise he refers to different writers who attach different theoretical

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Charter and Statute they have never been enacted into law, but merely published for general information in Government Gazette 3570 of 23 November 1945.

25 For a discussion of legal positivism in South Africa see Dugard (1978) 393-396.

26 Sanders (1974) 371.

27 Dugard (1994) 57.

28 In the words of O'Connell (1970) 45 "The theory of harmonisation assumes that international law ... forms part of municipal law and hence is available to a municipal judge; but in the rare instance of conflict between the two systems this theory acknowledges that he is obliged by his jurisdictional rules." O'Connell further holds at 79 that "The dualist explanation of the relationship between international law and municipal law has to a considerable extent been abandoned, yet the courts have not always recognised the theoretical implications of the trend."

29 Dugard (1994) 57, notes 141, 142, 143.

30 Booysen (1980) 73.

labels to the same practice: Brownlie, with reference to Fitzmaurice, concludes that English practice reflects an acceptance of dualism.[31] O'Connel,[32] on the other hand, classifies practice in Continental and Anglo-American legal systems as supporting the harmonisation theory. On the other side of the spectrum is Lauterpacht, who views English practice as supporting the monist theory. According to Lauterpacht, English law always accords with treaties binding on the United Kingdom because of the English practice of adopting new legislation or aligning existing legislation with treaty provisions before a treaty enters into force. English legislation should therefore never conflict with international law. He describes the already mentioned exceptions to the general application of international law as limitations on direct application.[33]

Booysen himself subscribes to the harmonisation theory as put forward by Dugard. [34] However, for reasons of his own, he argues that South African courts may under appropriate circumstances give effect to a rule of international law subject to the following limitations:

- unincorporated treaties may not be applied;
- courts are bound to acts of state;
- legislation enjoys precedence over international law;
- *stare decisis* excludes application of international law; and
- international law may not conflict with our Roman-Dutch common law.

He concludes that international law and South Africa law form two distinct legal systems and that international law does not enjoy a superior position.[35] This is specifically true with regard to treaties.

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31 In the words of Brownlie (1973) 36 "The two sytems {international law and municipal law} do not come into conflict as *systems* since they work in different spheres. Each is supreme in its own field."

32 O'Connell (1970) states that "... it may be suggested that the harmonisation doctrine prevails in civil law systems, as well as in Anglo-American systems".

33 Booysen (1980) 74.

34 Rood (1987-88) 13 however describes Booysen's views as strictly dualist.

35 Booysen (1980) 74-75.

Booysen points out that the harmonisation theory deals with the application of international law, and can be applied regardless of one's stance on the question whether international law forms part of the South African legal system. This theory does not concern itself with the necessity or not of transformation of international law. The harmonisation theory therefore appears not to describe the relationship between South African municipal law and international law.

Booysen's interpretation is endorsed in the case of treaties where transformation can be regarded as a mechanism of harmonisation. He describes the relationship between the two legal systems as dualist in the light of the fact that they do not form part of the same legal system and that the South African legal system cannot be deduced from international law.[36]

Such interpretation appears to be correct only as far as treaties are concerned. It is further suggested that as the treaty-making capacity fell exclusively in the hands of the executive, not involving the legislator, the relationship between the two legal orders cannot be anything but dualist, due to the fact that only the legislator can amend South African law. The executive act of accession to or ratification of a treaty can only be reflected in South African municipal law through legislative action.

The implementation of international human rights instruments in terms of the dualist approach becomes somewhat problematic as argued by Beyleveld,[37] since human rights are universal and non-discriminatory in character and should apply as such once a state has become party to a particular human rights instrument.

This problem was not very real to South Africa during the period under discussion as disassociation from, rather than participation in, international human rights instruments, formed the official policy during the 1970s up until the late 1980s. In January 1993, the dawn of political reform, the then South African government signed the following human rights instruments:[38]

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36 *Id* at 76.
37 Beyleveld (1995) 579. See also Cunningham (1994) 551.
38 All these agreements were signed on 29 January 1993.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Political Rights of Women;
- Convention on the Elimination of All Forms of Discrimination Against Women;
- Convention on the Nationality of Married Women.

Where an international agreement requires signature to be followed by ratification, as in the case of the above Conventions, states do not become party through signature alone.[39] Signature merely denotes an intention to investigate the matter with a view to future ratification.[40] Signatories are, however, prior to ratification, under an obligation to refrain from acts which would defeat the object and purpose of a treaty.[41] States will only become party to such treaties once they have been ratified. Signature by the South African government at that stage, therefore, sent a strong signal to the international community of its changed attitude towards human rights. Since signature did not make South Africa party to these agreements, it was not yet necessary to deal with the question of domestic application. On the same date the South African government became party to the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages through accession. The legal effect of accession is similar to that of signature followed by ratification namely consent to be bound by a treaty, which obliges a state party to enforce the treaty domestically.[42] The only difference between the process of signature followed by ratification and that of accession, is that the former is a two-tier process where states only become a party after ratification, whilst in the case of the latter, states become party through accession alone. In the case of the latter Convention, existing South African legislation proved compatible with its provisions. No additional Act of incorporation was therefore required.

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39 Art 12 of the Vienna Convention on the Law of Treaties.
40 Art 14 of the Vienna Convention on the Law of Treaties.
41 Art 18(a) of the Vienna Convention on the Law of Treaties. See also Starke (1989) 451-3 for a discussion in this regard.
42 Art 15 of the Vienna Convention on the Law of Treaties.

2.2 *Customary International Law*

The relationship between customary international law and South African law during the period under discussion differed substantially from the latter's relationship with international agreements and therefore merits separate analysis.

Before to the entry into force of the 1993 South African Constitution, the position of customary international law and its relationship with South African law had never been dealt with constitutionally. During this period courts resorted to Roman-Dutch and English common law when expressing themselves on the position of international law. According to Bridge, South African courts took judicial notice of customary international law before 1970 based on the assumption that international law was part of South African law. International law was applied directly by the courts in the case of *Ncumata v Matwa*[43] in which it was held that property of a subject in rebellion taken during hostilities vests on capture in the Crown. The court rejected the plaintiff's reliance of certain provisions of a Placaat of 22 April 1779 on the ground that international law, which allows a government to deprive a rebel or an enemy of his property during hostilities, had not been covered in the Placaat.[44]

During the Anglo Boer War (1899 – 1902) South African courts were confronted with several international law issues such as belligerent rights over territory[45] and capture or confiscation of enemy property[46] during war.

In all these cases the courts accepted the principles of international law and applied them when applicable to the facts.

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43 (1881-2) 2 EDC 272.

44 Schaffer (1983) 297.

45 *Lemkuhl v Kock* 1903 TS 450 at 454; *Van Deventer v Hancke and Mossop* 1903 TS 401 at 419, *Olivier v Wessels* 1904 TS 235 at 241. In these cases the courts applied international law in regard to belligerent rights as part of municipal law.

46 *Mshwakezele v Guduza* (1901) 18 SC 167; *Alexander v Pfau* 1902 TS 155; *Achterberg v Glinister* 1903 TS 326, *Du Toit v Kruger* (1905) 22 SC 234.

Subsequently rules of international customary law were examined, referred to and applied directly by South African courts on several occasions.[47] In *R v Lionda*[48] the Appeal Court linked international law to Roman-Dutch law as *per* Davis AJA:

> "In my opinion, reading the words "carrying on any business transaction", only in the light of their dictionary definition and the context, and without the background of international law ..., amounts to a limited meaning (which) is not the correct one. The regulations must not be read alone, but must be read against the background of international law as expounded by Roman-Dutch writers."

According to Schaffer,[49] *Ex parte Schumann*[50] contains the only express judicial statement prior to 1970 on the relationship between international law and South African common law in the words of Selke J that the particular principles of international law enunciated in this case in his opinion are recognised by the law of this country.

During 1970s the question whether international law forms part of South African law was raised in three cases.[51]

In *S v Ramotse*[52] one of the accused was arrested in Botswana by the Rhodesian police and subsequently transferred to South Africa. It was argued on his behalf that the court did not have jurisdiction, as his arrest and trial violated international law which forms part of South African law. Viljoen J stated that he was prepared to "assume for the purposes of this judgment that the rule of international law that one State may not exercise its police powers in the territory of another State, is part of our

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47 For example *Ex parte Bell* 1914 CPD 742 R 745-6; *Ex parte Lowen* 1938 TPD 504; *Mahomed and Minor Son v Immigrants Appeal Board* (1981) 39 NLR 7; *Marburger v The Minister of Finance* 1918 CPD 183; *R v Holm, R v Pienaar* 1948 (1) SA 925 (AD); *S v Penrose* 1966 (1) SA 5 (N); *De Howarth v The S S India* 1921 CPD 451; *Crooks and Company v Argicultural Co-operative Union Ltd* 1922 AD 423; *Ex parte Sulman* 1942 CPD 407 and *Ex parte Ebrahim*: *In re Maseko and Others* 1988 (1) SA 991 (T).

48 1944 AD 348 at 352.

49 Schaffer (1983) 303.

50 1940 WPD 251.

51 Dugard (1971) 13-15; Bridge (1971) 747-749; Schaffer (1983) 303-305.

52 Unreported judgment of TPD of 14 September 1970.

law".[53] The illegal capture and handing over does, however, not affect the jurisdiction of the court. As in *Schumann's* case the acceptance of international law was limited to a particular rule in this case.

In *Parkin v Government of the Republique Democratique du Congo and another*[54] the court was willing to broaden this approach. The applicant, a disabled ex-mercenary of the Congolese Army, domiciled in Johannesburg, applied for the attachment of funds in a Congolese government account in South Africa. In deciding the question whether the court had jurisdiction over property belonging to a foreign state, Myburgh J stated:[55] "The answer to this problem is to be found in international law to the extent that our common law recognises such international law." It was held on the basis of the applicable international customary law that the moneys, being public property of a foreign sovereign state, were immune from attachment. This decision forms a milestone in that the court was for the first time prepared to recognise that customary international law as general principle, is part of South African law.

The trend was confirmed by the Cape Provincial Division in *South Atlantic Islands Development Corporation v Buchan*.[56] The applicant company, which had been granted sole fishing rights within twelve miles of the coastline of Tristan de Cunha, applied for an order interdicting the responded from fishing within these water in violation of its rights.

The respondent challenged the legislative authority of Tristan de Cunha to extend the island's fishing rights beyond three miles. In an attempt to prove the validity of the twelve mile fishing zone under international law, the applicant filed an affidavit by an expert on international law declaring that, in his opinion, South Africa was bound by international law to recognised the twelve mile fishing zone.

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53 As qouted by Dugard (1971) 13.
54 1971 (1) SA 259 (W).
55 *Id* at 261.
56 1971 (1) SA 234 (C).

In ruling on the admissibility of the affidavit, Diemont J made the following often quoted statement:

> "Although I am surprised that there is no decision in which a South African court has expressly asserted that international law forms part of our law, I would be even more surprised if there were a decision asserting the contrary. It appears to have been accepted in both the English and American courts that international law forms part of their own law. (See *West Rand Central Gold Mining Co Ltd v The Kind* (1905) 2 KB 391 and *Banco Nacional de Cuba v Sabbatino* (1963) 376 US 398) and there are also one or two indications in decisions in our courts that judicial notice will be taken of international law. See, for example, *De Howorth v The SS "India"* 1921 CPD 451 at 457 and *Ex parte Sulman* 1942 CPD 407 and other cases referred to in (1966) 83 *South African Law Journal* at 131. In my view it is the duty of this court to ascertain and administer the appropriate rule of international law in this case. It follows that Mr Devine's affidavit is neither necessary nor admissible and must be struck out."[57]

The requirement of express incorporation of treaties had already been laid down by the Appellate Division in the *Pan American World Airways* case. It is clear that the judgments in the *Romotse, Parkin* and *South Atlantic Islands* cases refer only to rules of customary international law.

The theoretical approach followed by the court in the *South Atlantic Islands* decision is described by Dugard as follows:[58]

> "It gives support neither to the extreme dualist doctrine that to become part of municipal law each individual rule of international law must be consciously incorporated in it by legislative act (DP O'Connell *International Law* 2 ed (1970) 149) nor to the moderate dualist doctrine of adoption according to which 'international law has no validity save in so far as its principles are accepted and adopted by our own domestic law' (per Lord Atkin in *Chung Chi Cheung v R* (1939) AC 160 at 167-8) – a view which is perhaps implicit in Myburgh J's dictum in *Parkin's* case (supra). Instead, the statement that a court should 'ascertain and administer the appropriate rule of

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57 *Id* at 238.
58 Dugard (1971) 15.

international law' shows firm recognition of the intrinsic unity of international law and municipal law."

He concludes that since common law rules are subject to legislation and acts of state, the above mentioned three decisions support the theory of harmonisation.[59]

The Appellate Division was first asked to pronounce on the relationship between international and municipal law in *Nduli and Another v Minister of Justice and Others*.[60] In this case two members of the South African police, contrary to express orders from their commanding officer, crossed the border into Swaziland where they abducted the appellants and brought them to South Africa where they were arrested and charged. The court considered the question whether in terms of international law, a South African court was entitled to try an accused who was apprehended on foreign soil, but was arrested within the Republic and charged with criminal acts justiciable by a South African court.[61] In deciding the question, Rumpf CJ pronounced, as follows on the relationship between international and South African law with reference to Hahlo and Kahn:

> "English and South African legislatures and courts have always held that the law of nations exists. The courts will normally apply it (taking judicial cognizance of its rules) in appropriate cases unless it conflicts with South African legislation or common law".[62]

He continued that while it is obvious that international law is to be regarded as part of our law, it must be stressed that the *fons et origo* of this proposition must be found in Roman-Dutch law. Rumpf maintains with reference to Oppenheim (*International law* vol 1 8 ed 39-41) that according to our laws only such rules of customary

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59 *Id* at 17.

60 1978 (1) SA 893 (A).

61 1978 (1) SA 906 as summarised by Schaffer (1983) 306. Similar facts were before the Appeal Court in *S v Ebrahim* 1991 (2) SA 553 (AD). Here the court held that the effect of abduction on jurisdiction should not be determined by the relevant rules of international law but according to Roman and Roman-Dutch common law. For in-depth discussion of this judgment and comparison to the *Nduli* case see Dugard (1991) 199-203; Booysen (1990/91) 133-140 and Titus (1993) 58-63.

62 Note 60 above at 122.

international law are to be regarded as part of our law as are either universally recognised or have received the assent of this country. The relevant paragraphs of Oppenheim reads as follows:

> "As regards Great Britain, the following points must be noted: all such rules of customary International Law as are either universally recognised or have at any rate received the assent of this country are *per se* part of the law of the land. To that extent there is still valid in England the common law doctrine, to which Blackstone gave expression in the striking passage, that the Law of Nations is part of the law of the land". (At 39.)
>
> ...
>
> "The fact that International Law is part of the law of the land and is binding directly on courts and individuals does not mean that English law recognises in all circumstances the supremacy of International Law." (At 41.)

Dugard[63] is of the opinion that the court's dictum that the *fons et origo* of the proposition that international law should be regarded as part of our law, should be found in the Roman Dutch law could be interpreted in both a monist and a dualist manner. It may support dualism by referring to the Roman Dutch law as *fons et origo.* The requirement for binding, customary law namely "assent of this country", apart from universal recognition, further leans towards dualism. According to Dugard the weight of argument, however, supports the stance that "South Africa follows a monist line in respect of customary international law and that the *Nduli* case provides authority for this proposition that international law forms part of our law without the need for any act of transformation".[64]

He bases this conclusion on the fact that the Chief Justice did not say that Roman Dutch law is the source of international law (which would favour dualist interpretation), but rather that the source of the proposition that international law is

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63 Dugard (1994) 43.

64 Dugard (1994) 43. See Dugard (1994) 44 note 51 for decisions citing the *Nduli* case as authority for the monist approach.

part of our law, must be found in Roman Dutch law. "In other words, the rule favouring the incorporation of customary international law into South African law is derived from Roman Dutch law, and **not** English law, as suggested by Diemont J in *South Atlantic Islands Development Corporation Ltd v Buchan*."[65]

The requirements posed by the court for customary international law to be regarded as part of our law, namely universal recognition and assent of this country, merit further discussion. Sanders[66] points out that the two paragraphs of Oppenheim referred to by the court and cited above are based on the monist Blackstonian principle. "By giving its approval to the references to Oppenheim, the Appeal Court clearly indicates that the applicability of customary international law in South African law is subject to certain English law inspired qualifications." He concludes that the *Nduli* statement confirms that South Africa is in the traditional monist mode.

Devine[67] examines the *Nduli* decision to establish precisely what kinds of customary law may be regarded as South African law. According to *Nduli* two criteria are established in this regard, namely universal recognition or alternatively, assent of the country. He points out that the first alternative is superfluous as a rule which enjoys universal recognition will naturally enjoy the support of this country as a member of the universal community of states. He submits that the principle laid down by *Nduli* simply incorporates customary law which has received the assent of South Africa. Universally recognised rules are automatically part of South African law.

Dugard[68] agrees that the test customary law must comply with to become binding is too strictly formulated by the *Nduli* case. He approves the qualification added by Margo J in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mozambique*:[69]

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65 *Ibid*.
66 Sanders (1978) 205.
67 Devine (1987/88) 119-120.
68 Dugard (1994) 45.
69 1980 (2) SA 111 (T) at 125A.

> "The concept of universal recognition in this context is not an absolute one, despite the ordinary meaning of the word 'universal', because custom when formed binds all states who have not opposed it, whether or not they themselves played an active role in its formation."

Devine criticises the interpretation of the court in the *Inter-Science* decision which in effect implied that universal international law was to include general international law. It would have been preferable had the court literally interpreted the Appellate Division's first criterion of universal recognition as referring to universal customary law only, and had placed general international customary law within the Appellate Division's second criterion relating to rules which have received the assent of this country.[70] The reason for the proposed construction being the court's interpretation could mean that general rules of customary international law are incorporated in South African law in the absence of the country's assent or despite its persistent objection. Devine proposes that different categories of international customary law be kept separate because of the different considerations which apply to them.

The question of which customary law forms part of South African law, as first addressed in *Nduli*, was again before the court in the case of *S v Petane*.[71] The court enquired whether the provisions of Protocol 1 to the Geneva Convention 1949, were general international law. Conradie J questions whether the requirements Rumpf CJ laid down for the incorporation of customary international law, namely universal acceptance, are meant to be stricter than the requirement laid down by international law itself for the acceptance of usage by states. He supports the approach of Margo J in the *Inter-Science* case that a wide interpretation should be given to the word "universal". He accepts that where a rule of customary international law is recognised as such by international law, it will be so recognised by our law.

Devine criticises this departure from the criterion laid down in the *Nduli* case on the following grounds:[72]

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70 Devine (1987/88) 121.
71 1988 (3) SA 51C 56-7.
72 Devine (1987/88) 121 note 9.

(i) No allowance is made for the incorporation of rules of international customary law which have received the assent of this country (eg particular rules, local rules);

(ii) The possibility is created that rules of general international customary law can be incorporated into South African law even if it is clear that they have not received the assent of this country (South Africa having the status of a persistent objector).

The discussion on customary international law in South African law would not be complete without referring to the view held by Booysen.[73]

Booysen did not regard international law as part of South African law which, according to him, would imply that courts are obliged in every case where international law may be relevant to consider international law along with previous South African decisions and common law. In case of conflict between these sources, the courts must decide which one prevails. There is no evidence that the courts followed such procedure. According to Booysen, international law only played a role in comparative context. The courts took international law into account in cases where it was relevant and where the South African law was vague or uncertain, or where the South African common law was totally out of date on a particular point.[74]

Booysen further does not agree that international law forms part of Roman Dutch law despite the fact that Roman Dutch writers (e.g. de Groot and van Bynkershoek) were also authors of international law.[75]

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[73] Booysen (1975) 319; Booysen (1990/91) 133; Booysen (1989) 71-109; Titus (1993) 53.
[74] Booysen (1975) 315.
[75] Booysen (1980) 77.

2.2.1 *Exceptions to the rule that international customary law will automatically be applied by South African courts*

The principle that international customary law formed part of South African law was subject to certain qualifications which derive from English law:

(i) In terms of the British constitutional model, parliament was sovereign. The doctrine of parliamentary sovereignty implies that legislation enjoys precedence over common law which in terms of Blackstonian doctrine includes international law.[76] In the event of conflict, customary international law will have to give way to legislation. There is, however, a presumption in the rules governing statutory interpretation that the legislature does not intend to derogate from South Africa's international obligations.[77] When a court is confronted with an ambiguous statute, it will interpret the statute in a manner more favourable to established rules of international law.[78]

(ii) In terms of the principle of *stare decisis* courts are obliged to follow judicial precedent. Applying this principle with regard to a rule of customary international law will result in applying such a rule as it existed at the time of the judgment and was enunciated by the courts, even if it does not reflect the present state of international law.[79] This rule has been much criticised since international law is by nature a constantly developing branch of law. The dynamic nature of customary

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76 *Alexander v Pfau* 1902 TS 155 at 159 164, *Ex parte Ebrahim*: *In re S v Maseko* (note 47 above) at 1003-4. The following judgments contend that customary international law is not only subject to legislation, but also to common law: *Inter Science Research and Development Services (Pty) Ltd Republica Popular de Mocambique* (note 69 above at 125) at 124 H; *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 (2) SA 709(E) at 712F, 715 A; *Binga v Administrator-General, SWA* 1984 (3) SA 949 SWA at 967F.

77 Dugard (1994) 46-47; Sanders (1978) 199. Schaffer (1983) 308.

78 Schaffer (1983) 309. This position has been formalised by section 233 of the Constitution of the Republic of South Africa, Act 108 of 1996. See discussion chapter 6.

79 Sanders (1978) 200. The South African Constitution (Act 108 of 1996 art 232) amends this position by stating that custom forms part of South African law subject only to an Act of parliament or the Constitution itself. See discussion in chapter 6 below.

international law would be denied if it were dependent on the legislature or Appellate Division to effect change.[80]

The English Court of Appeal dealt with the questions whether to apply judicial precedent where a rule of customary international law expounded in such precedent has since undergone change in *Trendex Trading Corperation v Central Bank of Nigeria*.[81] The court found that international law knows no rule of *stare decisis*.[82] The South African courts followed the trend initiated by the *Trendex Trading* case by holding that they were not obliged to apply South African judicial precedent which confirms the dated absolute doctrine of sovereign immunity but should apply the current restrictive doctrine of sovereign immunity.[83]

Generally speaking South African law followed a less rigid approach to precedent than the English courts. [84]

(iii) The executive in the exercise of its prerogative to conduct foreign relations often made decisions on subjects governed by customary international law.[85] These so called "acts of state"[86] related, amongst others, to recognition of a foreign state or government,[87] persons entitled to diplomatic status,[88] and official acts of recognised foreign entities such as territorial acquisition by a foreign state.[89]

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80 Schaffer (1983) 310-311.
81 1977 2 QB 529 (CA).
82 Dugard (1994) 48.
83 Dugard (1994) 48. *Inter-Science Research and Development Service (Pty) Ltd v Republica Popular de Mozambique* 1980 (2) SA 111 (T); *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 (2) SA 709(E).
84 See authority for this proposition in Dugard (1994) 49.
85 Booysen (1989) 84-89; Dugard (1994) 49; Sanders (1971) 413-14; Sanders (1974) 216-220.
86 In *Sachs v Donges* NO 1950 (2) SA 265 (AD) at 286 the court confirms that there are certain classes of prerogative act which could be defined as acts of state. Schaffer (1983) 313, argues that this *obiter dictum* lends persuasive authority to the existence of an act of state doctrine in South African law.
87 *S v Devoy* 1971 (1) SA 359 (N) at 362; *Van Deventer v Hancke and Mossop* 1903 T 401.
88 See Dugard (1994) 49 note 84.
89 For more examples of acts of state see Booysen (1989) 85.

Since it is not desirable for the judiciary to differ from the executive, judicial policy developed that a court will give effect to acts of state even if these differ from the rules of customary international law.[90] Decisions of the executive are usually contained in an executive certificate. According to Sanders as quoted by Dugard[91] the effect of such a certificate is "to substitute the view of the government for an independent judicial investigation on the factual position."

2.3 *Other Sources of International Law*

Expressions of international law other than treaties and custom such as *ius cogens* and soft law did not enjoy any prominence in South African law and judicial decisions during the period under discussion. A number of South African writers did, however, investigate the adverse relationship between norms of *ius cogens,* such as the prohibition of racial discrimination, non-recognition of certain human rights, torture and the denial of self-determination versus the apartheid legal order.[92]

2.4 *Concluding Remarks*

The above discussion examines the status international law in the form of treaties and custom, enjoyed in South African municipal law prior to 1994. Only treaties transformed through legislation into South African law, were applied by South African courts. Treaties to which South Africa was a party, but which were not incorporated into South African law, merely served as an interpretive aid. After discussing Dugard and Booysen's theoretical understanding of the relationship between treaties and South African law, the view is maintained that practice in this regard supports the dualist approach. Dualism goes hand-in-hand with legal positivism which prevailed amongst the judiciary under the apartheid legal system.

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90 Sanders (1971) 413. *Government of the Republic of Spain v SS Arantzazu Mendi* (1939) AC 256 (HC) at 264.

91 Dugard (1994) 49. See also *S v Devoy* 1971 (1) SA 359 (N), and 1971 (3) SA 899 (A) on executive certificate.

92 Dugard (1994) 35.

Despite some uncertainty, South African courts applied the opposite approach as far as customary international law was concerned. These rules were considered as part of South African common law, and were directly applied as such by South African courts. Custom, as in the case of common law, remained subordinate to parliamentary legislation.

3. *International Law and Apartheid*

Since the 1940s hostility dominated the South African government's attitude towards international law and that of international law towards apartheid South Africa. The apparent reason for this attitude on the part of the South African government can be ascribed to the fact the severest criticism against its apartheid policy of legally entrenched racial segregation[93] was based on international law. Internationally, apartheid was condemned by states, international organisations, non-governmental organisations and individuals with a unanimity and momentum seldom experienced in international affairs.

The present discussion will measure South African law and practice against international law standards and assess the influence of apartheid on international law during the period 1948 to 1993.

Both internationally and within South Africa, international law (and especially those aspects of international law where South Africa's non-compliance was most apparent, to whit international human rights) provided strong impetus for change and a means of exerting pressure on the government.[94] Dugard, who made an enormous

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93 Dr D Malan, then leader of the Nationalist Party, first used the term "apartheid" in 1943 to describe the South African government's policy of separate development.The legal content of apartheid is discussed in Ghozali NE "Opposition to violations of human rights, with particular reference to apartheid, racism and general international law" UNESCO 1984 *Violations of human rights: possible rights of recource and forms of resistance.* Asmal K (1988) 125-128 at 128 identifies "grand apartheid" and "petty apartheid". He refers to "grand apartheid" as the pillars maintaining the policy of apartheid, most notably the Population Registration Act (1951). "Petty apartheid", on the other hand, *inter alia* refers to the ban on mixed marriages and sexual relations, segregation of public amenities and sport.

94 Dugard (1986) 1 at 2 points out that many white South Africans regarded international law as irrelevant, unfair and rigged by double standards while the black population accepted international law as the standard against which South African law should be measured.

contribution to scholarly discussion of the uncomfortable relationship between international law and apartheid, stated that "South Africa's contribution to the development of International Law during this period was enormous, although unintended. New rules of treaty and customary law to promote human rights, racial equality and decolonisation evolved as a result of international opposition to apartheid." [95]

The comparison of South African law and practice of the time with international law must take place against the background of the most important sources of international law identified earlier, namely treaties and custom, as well as emerging international law (soft law). The areas of perceived conflict include, besides the many human rights related issues, a wide-ranging list of international law topics such as the status and effect of United Nations resolutions, the prohibition of interference in domestic affairs, exclusion from international organisations, self-determination and recognition of states and prisoner-of-war status of combatants belonging to national liberation movements.

3.1 Breaches of the United Nations Charter

When the United Nations Charter came into force in 1945, the view prevailed that international law was concerned only with the relations between states. The way states treated their own citizens, thus fell outside the traditional scope of international law. This view is reflected in article 2(7) of the United Nations Charter which prohibits international interference in the domestic jurisdiction of states. The atrocities committed during World War II pointed to the inadequacy of this approach in maintaining world peace. Consequently, the promotion of human rights without distinction, was included as goal of the United Nations in its Charter. The human rights provisions of the Charter, namely articles 1, 55 and 56 in effect elevated human rights from the domestic into the international law domain.[96] Prevost describes the tension between the two concepts as follows: "While, in principle,

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95 Dugard (1993) 198.
96 Prevost (1999) 212.

national governments recognised the necessity of international human rights standards, they were not prepared to accept any fundamental encroachment on the principle of state sovereignty, on which the international order was founded."[97]

South Africa became a party to the United Nations Charter on 7 November 1945 and was thus bound to its provisions in terms of international law. The Charter was published in the South African *Government Gazette* of 23 November 1945 for general information.

Many of South Africa's perceived breaches of international law derive from contravention of the human rights provisions in the United Nations Charter. The essence of apartheid, namely the violation of human rights through institutionalised racial discrimination, lay at the heart of South Africa's discord with the international community.

The human rights provisions of the Charter of which South Africa was regarded to be in breach are the following:

Article 1 identifies as a of purpose of the United Nations, to develop international relations based on the principle of equal rights and self-determination of peoples and to encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The language of article 1 is repeated in articles 13 and 55: The General Assembly is empowered by article 13 to make recommendations for the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 55 directs the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 56 binds United Nations Charter members to take action in co-operation with the United Nations to achieve the purposes set by article 55.

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97 *Ibid.*

South Africa in turn rebutted Charter-based criticism relying on article 2(7), which prohibits the United Nations from intervening in matters which are essentially within the domestic jurisdiction of states. Such efforts by South Africa to establish an international law basis for her actions created further tension and often led to, or accelerated, the progressive development of international law.

Prompted by the provisions of the United Nations Charter and the preoccupation of the international community with apartheid, a number of multilateral treaties and United Nations resolutions condemning apartheid, followed. The mobilisation of international consensus further led to emergence of customary rules.[98]

3.2 Treaties

The United Nations increased the pressure on South Africa's apartheid government by including references to apartheid in the texts of human rights agreements. The following United Nations treaties deal with apartheid:

- The *International Convention on the Suppression and Punishment of the Crime of Apartheid* was adopted by the UNGA in 1973.[99] Article 1 declares that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of racial segregation and discrimination are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constitute a serious threat to international peace and security.[100]

  The Convention contains no specific definition of apartheid which distinguishes it from racial discrimination in general. The preamble refers to racial segregation and apartheid separately, thus creating the impression that

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98 See in this regard Dugard (1966) 44; Dugard (1986) 1; Devine (1988) 165.

99 Res 3068 (XXVIII) was adopted by 91 votes in favour, 26 abstentions and 4 against. The Convention entered into force after ratification by 20 states in 1976. The *United Nations Multilateral Treaties Series deposited with the Secretary-General* 1995 ST/LEG/SER.E/14 recorded 99 parties.

100 For a detailed analysis of the Convention and the crime of apartheid see van Wyk (1979) 60-108.

the two terms are not synonyms. Article II on the other hand, states that the "crime of apartheid" includes similar policies and practices of racial segregation and discrimination as practised in southern Africa. The crime shall apply to specific inhuman acts committed for the purpose of establishing and maintaining domination by one racial group over another and systematically oppressing them. These specific acts include:

Denial to a member or members of a racial group of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups.[101]

Van Wyk comments that most of these acts are punishable in any civilised legal system, including under South African law of the time. It is, however, important for purposes of this Convention that these acts must occur with a specific purpose in mind. She points out that this leads to the conclusion that murder of a person of another race would fail to constitute a crime if it was not committed with the purpose of dominating and oppressing. Article III, however, provides that international criminal responsibility shall apply to acts listed in article II, irrespective of the motive involved. This contradiction impinges on the principle of *nulla crimen sine lege, nulla poena sine lege.*[102]

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[101] Art II of the Convention.
[102] Van Wyk C (1979) 78.

Although this Convention tries to establish apartheid as a *sui generis* form of racial discrimination, it fails clearly to establish the legal core of apartheid under international law.[103]

- The *International Convention on the Elimination of All Forms of Racial Discrimination*[104] condemns apartheid by name and obliges parties to prevent, prohibit and eradicate such practices in their territories.[105]

- The *International Convention against Apartheid in Sports*[106] in its preamble refers to the United Nations Charter, the UDHR, CERD and the Convention on the Punishment of the Crime of Apartheid and sets as goal the prevention of sports contact with apartheid South Africa.

The condemnation of the system of apartheid through the above multilateral treaties led to the formal and explicit recognition of apartheid as a violation of human rights. Disapproval of apartheid by the international community was now elevated from the political agenda of the UNGA and incorporated in binding and enforceable international human rights law. Moreover, apartheid was accorded the status of a crime against humanity, which has *ius cogens*-like attributes. This represents a recognition by the international community that gross and systematic human rights abuses no longer fell under the excusive domestic jurisdiction of a state which would protect from international scrutiny.

3.3 United Nations Resolutions

United Nations resolutions are recommendations and therefore not legally binding on member states.[107] The influence resolutions had in inducing political change in South

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103 *Id* at 73.

104 Adopted by UNGA resolution 2106 A(XX)1965 and entered into force in 1969.

105 Art 3. The United States based its opposition to the International Convention on the Suppression and Punishment of the Crime of Apartheid on the fact that such a convention was not necessary in view of the broad, all inclusive provisions of CERD.

106 Adopted by UNGA resolution 40/64 of 1985.

107 Dugard (1966) at 48 holds that UNGA resolutions "directed at South Africa's policy of apartheid find a constitutional basis in articles 10 to 14 of the Charter and must be seen as

Africa and shaping new international law were profound. In this regard the earlier discussion on soft law where it was held that the legal and political relevance of non-binding law such as resolutions is in fact both material and concrete, bears reference.[108]

The condemnation of apartheid by way of United Nations resolutions started in 1952[109] when it became an annual item on the UNGA agenda. After the decolonisation of Africa and increased third world membership of the United Nations, this condemnation increased virtually on an annual basis. This onslaught only ended in 1993 with the abolition of apartheid.

In 1950[110] and again in 1952[111] the UNGA adopted resolutions indicating that racial segregation (apartheid) is based on doctrines of racial discrimination. A commission was established to study the racial situation in South Africa using as reference the human rights provisions of the Charter and United Nations resolutions on racial persecution and discrimination.[112] The commission concluded that South Africa's racial policies and their consequences were contrary to the Charter and the Universal Declaration of Human Rights. Three reports submitted by the commission, criticised the discriminatory practices in South Africa and pointed to the conflict between article 2(7) and the human rights provisions of the Charter, suggesting that it be reconciled by determining that the human rights provisions modified article 2(7), so that human rights issues could not be treated as essentially domestic.[113] The commission further lamented that one of the difficulties encountered by it was " the lack of co-operation from the Government of the Union of South Africa and, in particular, its refusal to permit the Commission to enter its territory".[114] The unwillingness of the South

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recommendatory and not legally binding". In the *Voting Procedure* Case 1955 ICJ Reports 67 Judge Lauterpacht at 155 and Judge Klaested in Separate Opinion at 88 shares the view that UN resolutions as recommendations do not create legal obligations.Judge Winiarski holds the same view in the *Expences* Case 1962 ICJ Reports 210. See also Schwarzenberger and Brown (1976) 233; Cassese (2001) 160; Shearer (1994) 572; Malanczuk (1997) 54.

108 Chapter 2 par 3.

109 South Africa's treatment of persons of Indian origin was considered by UNGA as early as 1946 (res 44(I) of 8 Dec 1946).

110 UNGA res 39(V) of 2 Dec 1950.

111 UNGA res 511(VI) of 12 Jan 1952.

112 UNGA res 616 A (VII) of 5 Dec 1952.

113 See in this regard Prevost (1999) 214.

114 UNGA res 721 (VIII) of 8 Dec 1953.

African government to co-operate with the Commission and the subsequent adoption of new laws incompatible with the Charter obligations was reflected in the commission's second [115] and third reports.[116] This is one of the many examples of the very hostile attitude of the South African government of the time towards the United Nations. The fact that the commission could not enter South Africa could not have affected its conclusions in any significant way in view of that the fact that the policy of apartheid was well published and documented worldwide.

The UNGA resolutions adopting these reports, however, did not treat these as violations of the Charter's human rights provisions, but rather as a threat to peaceful relations between nations.[117] The continued disregard by the South African government of General Assembly calls to revise its policies and to comply with its obligations under the United Nations Charter finally led to the involvement of the Security Council in 1960. Instigated by the Sharpville massacre and the subsequent complaint of twenty-nine member states, the Security Council seized the matter of racial discrimination and segregation in South Africa and called upon South Africa to abandon apartheid which, if continued, could endanger international peace and security.[118] This breakthrough in the United Nations anti-apartheid policy can, according to Prevost, together with the moral outrage caused by the Sharpville massacre, be attributed to the changed international power structure within the United Nations with the increase in membership of African states.[119] The Security Council became the new forum for dealing with the racial situation in South Africa. This was a significant shift, since the Security Council decisions differ significantly in status from those of the General Assembly. Decisions of the Security Council are

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115 UNGA res 820(IX) of 14 Dec 1954.
116 UNGA res 917 (X) of 8 Dec 1955.
117 UNGA res 721,820 and 917.
118 S/4300 134(1960). Adopted by 9 votes to none, with 2 abstentions (France and the United Kingdom of Great Brittain and Northern Ireland). Security Council resolutions are adopted either under Chapter VI of the Charter in dealing with pacific settlement of disputes, or under VII of the Charter which empowers the Council to take action when breaches of peace occur. Resolutions falling under the former category are generally accepted as recommendations (see Dugard (1966) 49), while under the latter category the Council is empowered by art 39 to decide on measures to maintain or restore international peace and security in accordance with articles 41 and 42 which measures members are obliged to accept and carry out as per art 15 of the Charter.
119 Prevost (1999) 215.

binding under Chapter 5 of the Charter. Article 24 of the Charter states that the maintenance of peace and security is the primary responsibility of the Security Council. In terms of article 25, the members of the United Nations agree to accept and carry out Security Council decisions.[120]

Subsequent Security Council resolutions on South Africa accused South Africa of "disturbing" international peace and security.[121] Resolution 181 of 1963, not only condemned racial discrimination in South Africa, but also called on countries to cease selling arms to South Africa. Resolution 182 of 1963 established an expert committee to consider methods for United Nations involvement in the apartheid issue. No binding enforcement action could however be taken due to the opposition of the United States, Great Britain and France, who each enjoyed veto power in the Security Council. The voluntary arms embargo called for by the 1963 resolution was largely ignored by western powers.[122]

Prompted by the unperturbed and obdurate attitude of South Africa, and widespread international opinion deploring apartheid, the UNGA intensified its action against the country by way of repetitive annual resolutions which became increasingly denunciatory. The accelerated action was evident by the early sixties when the UNGA called upon states to take separate and collective action open to them in accordance with the United Nations Charter to bring about the abandonment of apartheid, [123] and to take measures such as the breaking off of diplomatic relations, the boycott of South African goods, the refusal of landing and passage facilities to South African aircraft, and the closure of ports to South African vessels.[124] These boycott measures were strictly heeded by communist and third world countries. Western nations preferred to impose milder sanctions against South Africa, with the

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120 On the binding nature of Security Council resolutions see Cassesse (2001) 154.

121 S/5386 (181(1963)); S/5471 (182(1963)); S/5773(191(1964)). The Security Council took a stronger stance in 1976 by in addition recognising the legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination. See S/392(1976). Dugard (1966) 50 regards these resolutions as falling in the legally non-binding category.

122 Prevost (1999) 215.

123 UNGA res 1598 (XV) of 13 April 1961.

124 UNGA res 1761 (XVII) of 6 Nov 1962. Prevost (1999) 215 remarks that although this measure was not binding, it indicated the acceptance within the UNGA that international opposition to apartheid should be enforced.

result that the country was never totally isolated. A Special Committee on Apartheid tasked to review South Africa's policies, was also established by resolutions 1761 of 1962 and spearheaded the international campaign against apartheid. Prevost ascribes the success of the Special Committee to its effective mobilisation of anti-apartheid non-governmental organisations, cultural and sports boycotts and pressure on multinationals to disinvest from South Africa.[125]

In years to come, the UNGA continued to devote a disproportionate interest in the political situation in South Africa providing for more drastic measures. For example during the 1976 UNGA session some twenty out of a total number of 208 resolutions adopted had a bearing on South Africa.[126] The tendency was sustained in 1977 when twenty-one of 215 resolutions adopted by the UNGA during its session of that year focussed on South Africa.[127] By 1976, resolutions focussing on South Africa had become more diverse, covering the following topics:[128]

(i) The so-called independent Transkei and other bantustans
(ii) United Nations trust fund for South Africa
(iii) Solidarity with South African political prisoners
(iv) Arms embargo against South Africa
(v) Relations between Israel and South Africa
(vi) Apartheid in sports
(vii) Programme of work of the Special Committee against apartheid
(viii) Economic collaboration with South Africa
(ix) Situation in South Africa
(x) Programme of action against apartheid
(xi) Investment in South Africa

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125 Prevost (1999) 216.
126 Muller (1976) 244.
127 Muller (1977) 225.
128 These individual resolutions fall under the covering resolution "Policies of apartheid of the government of South Africa" UNGA res 31/6 of 26 Oct (A) and 9 Nov 1976 (B-K). For a discussion of the individual resolutions see Muller (1976) 244.

The United States, Britain and France gave their supported to the mandatory arms embargo against South Africa in 1977, after the death of Steve Biko in police custody and the banning by the South African government of eighteen anti-apartheid organisations. The legal barrier to the application of chapter VII of the Charter was at last crossed. Prevost remarks that this step demonstrates the eventual willingness of the United Nations to take enforcement action in the field of human rights in respect of domestic policies of states.[129] The escalating impact of apartheid, which reached beyond the borders of South Africa, seized the United Nations in years to come. As a consequence the Declaration on Apartheid and its Destructive Consequences in Southern Africa was adopted by consensus in 1989.[130]

The inclusion of apartheid as an item on the UNGA agenda continued until 1993 when apartheid was officially abandoned by the South African government.[131]

The sustained adoption of United Nations resolutions against South Africa over a period of fourty-one years can be regarded as an important factor leading to the eventual abolition of apartheid. Although UNGA resolutions as such do not impose any binding obligations on states and are essentially regarded as soft law, they effectively contributed in changing the focus of international law by extending its scope to include domestic human rights abuses. Prevost suggests that South Africa served as a test case for development of the United Nations policy on human rights.[132] The value of soft law is also underlined by the influence it exerted leading to eventual creation of binding law through Security Council action and the adoption of treaties and possible creation of custom.

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129 Prevost (1999) 217.

130 Res S16/1 of 14 December 1989.

131 Sanctions against South Africa were lifted per res 48/1/ of 8 October 1993. On 20 December 1993 UNGA adopted res 48/159 titled *Elimination of Apartheid and the Establishment of a United, Democratic and Non-racial South Africa Welcoming the Process of Democratic Transformation in South Africa,* without a vote.

132 Prevost (1999) 213.

3.4 *Exclusion of South Africa from International Organisations*

The right of the former South African government to represent the country at the United Nations, was first challenged by United Nations members in 1963 on the basis that it was not the legitimate representative of the people of South Africa.[133] Britain, France and the United States vetoed a decision to expel South Africa from the United Nations. South Africa's credentials to the United Nations were finally rejected in 1974, effectively barring the country from participating in debate in the UNGA.[134] South Africa responded by ending its contributions to the regular budget of the United Nations as from 1974.[135] The rejection of credentials was confirmed in 1981,[136] excluding South Africa from participating in a debate on Namibia.

This ruling was widely debated by both politicians and scholars raising the question of the legality of such a decision.[137] South Africa argued that the rejection of credentials was contra the Rules of Procedure of the UNGA and the provisions of the Charter.[138] The legality of this action was questioned on the ground that it interfered with South Africa's right of membership in the United Nations. In terms of the Charter only the Security Council and General Assembly together may suspend a state's membership rights or expel it.[139]

The General Assembly requested all specialised agencies and intergovernmental organisations to deny membership or privileges to the South African regime and instead to invite representatives of the liberation movements of the South African people to participate in their meetings.[140]

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133 In 1973, the General Assembly recognised the ANC and PAC as the authentic representatives of the South African people.

134 For a background of South Africa's 1974 exclusion see Suttner (1984) 279 at 280; 1974 (1975) 217-22.

135 See Devine (1988) 193.

136 UNGA res 102 (XXXV) adopted by 112 votes to 22 with 6 abstentions

137 Suttner (1984) 279; Erasmus (1981.1) 281; Erasmus (1981.2) 40; Devine (1988) 193; Patel (1980) 310.

138 Suttner (1984) 285.

139 Dugard (2000) 395.

140 Dugard 1973. The ANC and the PAC gained increasing international recognition as the true representatives of the majority of the South African population. See in this regard UNGA resolutions 3151(XXVIII), 3411(XX) and 37/69A of 1982.

South Africa was readmitted to the UNGA in 1994, following the first democratic elections.

3.5 Domestic Jurisdiction

The anti-apartheid treaties, many United Nations resolutions condemning apartheid, sanctions, as well as political criticism and diplomatic isolation, seemed only to harden South Africa's attitude. Initially South Africa opposed the United Nations condemnation of apartheid on the grounds that it amounted to an interference in its domestic affairs as prohibited by article 2(7) of the Charter. At the time this argument gained some initial support from colonial powers also practicing policies of institutionalised racial discrimination in territories under their control (most notably the United Kingdom and Portugal). MacBride wrote in this regard that "[t]he most damaging aspect of the foreign policies pursued by NATO countries in regard to the Third World is the condonation of the South African policy of Apartheid and on Namibia. South Africa has been systematically flouting international law and the decisions of the International Court of Justice and of the United Nations."[141] South Africa's insistence on article 2(7) focused the debate on the conflicting claims of human rights and domestic jurisdiction. The protection of individual rights is something which should primarily take place within domestic jurisdictions of states. When both human rights and state sovereignty are protected by the same treaty, the enforcement of either appears to exclude the other.

Dugard argues with reference to the *Nationality Decrees* case[142] that the concept of domestic jurisdiction, (which is an important aspect of sovereignty[143]) is a relative one with the potential of changing the climate of international law and relations.[144] An international law instrument with the significance of the United Nations Charter must be interpreted in accordance with the changing demands of ever evolving international law and be able to accommodate the needs of an international

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141 MacBride (1981) 392.
142 (1923) 4 PCIJ Reports B 23.
143 Dugard (2000) 133.
144 *Ibid*.

community frequently reinventing itself. South Africa's approach in attempting to apply an absolute meaning to article 2(7) isolates this provision from the rest of the Charter while undermining the significance of the text as a whole. The support of resolutions and treaties condemning apartheid by member states of the United Nations made it clear that the practice of institutionalised racial discrimination within a state justifies international involvement, which should not be regarded as an infringement of sovereign rights contra the Charter provisions.[145]

Dugard maintains that since the General Assembly and Security Council have the power to determine their own competence, the final decision on whether a matter falls within the domestic jurisdiction of a state lies with the organ concerned. South Africa's failure to consider the resolutions on apartheid, though not illegal, amounts to a lack of good faith.[146] It is therefore both misleading and dangerous to deny the legal effect of United Nations resolutions.[147]

Devine suggests that international intervention under article 2(7) may depend on the status of the international law rule of which a state is in breach.[148] He argues in favour of a customary norm of non-discrimination on the basis of race which is binding on states independent of international conventions to that effect.[149] The breach of such a binding international law norm should be distinguished from "an infringement of some [other] human 'right' which cannot be shown to be binding on the state either because it cannot be established as a matter of general international customary law or because it is stipulated only in a convention to which the state in question is not a party".[150] In the latter case, there is no breach of an international obligation and it could thus be argued that the conduct in question falls within the exclusive domestic jurisdiction of the state in question.[151]

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145 Dugard (1966) 53.
146 *Id* at 54.
147 *Id* at 56.
148 Devine (1988) 195.
149 *Id* at 191.
150 *Id* at 195.
151 Devine (1988) suggests at 195 that the discussion by international organisations of domestic matters and the passing of resolutions on such domestic matters do not amount to intervention.

Due to the increasing number of General Assembly resolutions against it, South Africa eventually abandoned its reliance on article 2(7) to denounce the United Nations competence to intervene in its domestic affairs, and instead argued that the policy of separate development was in line with the international law right to self-determination.[152]

3.6 International Human Rights

South Africa's racial policies, her insistence on the inviolability of domestic jurisdiction under article 2 (7) of the Charter, coupled with her perceived violations of the human rights provisions of the Charter laid the table for a hostile attitude towards multilateral human rights treaties. It was, therefore, predictable that South Africa did not become party to any of the major human rights treaties discussed in Chapter 2. It was only in 1993 after the process of democratic transformation had started that South Africa signed the CRC, CAT and CERD, which were only to be ratified under the new dispensation. A comparative study made by the Department of Foreign Affairs in the early 1990s assessing the compatibility of South African law with the major human right instruments, showed a substantial imbalance between the two sources of law,[153] which made ratification at that stage impossible.[154]

Whether South Africa stood under any international law obligation *vis-à-vis* international human rights law, remains to be established under the remaining sources of international law, most notably customary international law. The discussion on the status of the Universal Declaration bears reference in this regard and will not be revisited.[155] For present purposes the status of the norm of non-discrimination on the basis of race, which cuts to the core of apartheid, deserves mention. Already in the early 1970s the International Court of Justice held that racial

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152 See par 3.8 on seperate development.

153 Department of Foreign Affairs memo 1991.

154 The state law advisers (Department of Foreign Affairs) held the opinion that substantial compliance must be effected as from ratification and that ratification should ideally not take place before implementing legislation is in place or the necessary legislative ammendments had been effected.

155 See Chapter 2.

discrimination constituted a breach of international law.[156] In its Advisory Opinion on the legal consequences for states of the continued presence of South Africa in Namibia, the court declared that to "establish ... and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter".[157] After examining state practice, Devine concluded in 1988 that a norm of general customary international law had evolved over the past twenty years prohibiting internal racial discrimination.[158] This corresponds to the earlier position on the status of the UNDHR. Ghozali goes so far as to say that racial discrimination in the form of apartheid constitutes a serious breach of the rules of *ius cogens*.[159]

The South African government sent out confusing messages regarding its attitude towards racial discrimination. South African Prime Minister, DF Malan, an original apartheid theorist, remarked that although apartheid, being based on the separation of races, had frequently been described as a policy of repression, justice may exist on either side of the demarcation line.[160] Towards the early 1970s the government denounced so-called "petty apartheid" and made efforts to disassociate its policy of separate development or "grand apartheid" from discrimination on the basis of race. Dugard remarks with reference to official government statements, that the government moved away from its previous denials that racial discrimination was illegal under contemporary international law and argued that its policies did not amount to racial discrimination.[161] In reality very little had yet changed as most of the discriminatory laws remained on the statute books.

The question which remains to be answered, is whether South Africa, through the policy of apartheid, qualifies as a persistent objector and thus, became excluded from

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156 *Legal Concequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (1971) ICJ Reports 56; *Barcelona Traction Case* (1970) 3 ICJ Reports 32.

157 Note 79 chapter 2 above.

158 Devine (1988) 179. See also Dugard (1986) 9-10.

159 Ghozali (1984) at 78

160 As quoted by Ghozali (1984) 79.

161 Dugard (1986) 10. See also Devine (1988) 178 note 73.

a customary norm prohibiting racial discrimination. Various answers are suggested to this question. Devine suggests that the admission by the South African government in 1986 that apartheid had failed and that it should be abandoned, implies that it could no longer be regarded as a persistent objector. He further remarks that South Africa by reversing its position, contributed to the evolution of what was formerly regarded as a rule of general international law into a universal rule.[162] Devine's argument appears to suggest that South Africa was indeed not bound to a customary rule against racial discrimination prior to its change of heart. It is suggested that the answer should rather be sought in Meron's suggestion which was referred to when the customary status of the Universal Declaration of Human Rights was discussed, namely to accord limited value to state practice and instead to attribute central normative significance to UNGA resolutions.[163] Meron's thinking is in accordance with the Statement of Principles applicable to the Formation of General Customary International Law of the Committee on Formation of Customary (General) International Law of the International Law Association.[164] Part V (31) of the statement recognises that General Assembly resolutions themselves can in appropriate cases constitute part of the process of formation of new rules of customary international law. This has been addressed and will not be reconsidered. Another consideration worth mentioning is the status of apartheid as international crime. Suffice it to say that a state cannot be recused of an international crime by consistently committing the crime. Alternatively, should racial discrimination have attributes of *ius cogens*, states would be bound to such a rule without their consent.

3.7 International Humanitarian Law

Dugard remarks that "International humanitarian law, which seeks to introduce humane welfare considerations into the conduct of war ... has responded to the demands of decolonisation and to the frequently made claim that national liberation movements are entitled in law to use force to assert their right to self-

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162 Devine (1988) 179.
163 Meron (1989) 20 note 70.
164 Note 10 chapter 2.

determination."[165] The legal aspects of the conflict in South Africa made an important contribution in this regard.

The "law of The Hague" and the "law of Geneva" comprise the conventional sources of international humanitarian law. Substantial parts of these agreements can today be accepted as customary international law. [166]

"Hague law" is concerned with the limitation upon the means and methods of the conduct of warfare.[167] The Geneva Conventions, on the other hand, primarily focus on the protection of victims of armed conflict.[168] It consists of four Geneva Conventions of 1949 supplemented in 1977 by two Additional Protocols.[169] Protocol I includes "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" in the definition of armed conflict of the Geneva Conventions.[170]

Protocol II seeks to expand the protection accorded to victims of non-international armed conflicts.[171] Under art 96(3) of Protocol I, national liberation movements may declare themselves bound to the Geneva agreements by depositing a declaration to this effect with the Swiss Federal Council. As a consequence they would enjoy prisoner of war status in states bound by the provisions of protocol.[172]

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165 Dugard (1989) 103.
166 Dugard (2000) 432-437.
167 McCoubrey (1989) 145.
168 McCoubrey (1989) suggests at 145 that "The supposed division [between Hague and Geneva law] is useful for purposes of convenient categorization, but is ultimately rather artificial." See in general on the development of the humanitarian conventions and their application Pictet (1985) 29-58.
169 For the text of these treaties see Roberts & Guelf (1989).
170 Art 1(4).
171 Art 1.
172 The relevant parts of Article 45(1) and (2) of Protocol I provide:
(1) "A person who takes part in hostilities and falls in the power of an adverse party shall be presumed to be a prisoner-of-war and therefore shall be protected by the Third Convention if he claims the status of prisoner-of-war, or if he appears to be entitled to such status, or if the party on which he depends claims such status on his behalf by notification to the detaining power or to the protecting power. Should any doubt arise as to whether any such person is entitled to status of prisoner-of-war, he shall continue to have such status and therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal."
(2) "If a person who has fallen into the power of an adverse party is not held as a prisoner-of war and is to be tried by that party for an offence arising out of the hostilities, he shall have the right

The conflict in South Africa between the government and the liberation movements brought the Geneva rules, specifically those of the Additional Protocols, to bear. South Africa became party to the four 1949 Geneva Conventions in 1952,[173] whilst only becoming party to the Additional Protocols in 1995 when apartheid had formally been abolished. The ANC, on the other hand, handed a declaration to the President of the Red Cross in 1980 indicating that it would "wherever practically possible endeavour to respect" the rules of four the Geneva Conventions of 1949 and the 1977 Additional Protocol I.[174]

The prevailing question was whether captured members of the national liberation movements should be treated as prisoners of war, ordinary criminals, or terrorists. Had Additional Protocol I evolved into customary international law, it would bind South Africa as non-party to treat members of liberation movements accordingly.[175] South African courts refuted the idea that the political conflict at hand was of an international nature.[176]

In *S v Petane*,[177] the accused, a member of the military wing of the ANC, Umkhonto we Sizwe, was *inter alia* charged with contraventions of the Internal Security Act 74 of 1984. The accused claimed he was entitled to be treated as a prisoner-of-war in terms of the provisions of articles 45(1) and (2) of Protocol I. Hence notice of an impending prosecution for an alleged offence had to be given to the protecting power appointed to watch over prisoners-of-war.

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to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial of the offence."

173 See Treaty Index Department of Foreign Affairs. The Geneva Conventions were only published in the *Government Gazette* for general information and not incorporated into South African law by way of legislation.

174 Borrowdale (1982) 41. See also Dugard (1986) 17; Dugard (2000) 441 n 63; Dugard (1989) 107 and *S v Petane* 1988 (3) SA 51.

175 Dugard (1986) 17 suggests that the treatment of members of liberation movements as prisoners-of-war is not only customary law but also a matter of *ius cogens*. See also Dugard (1988) 74 and Dugard (1988) 75.

176 This stance is in accordance with the view held by the South African government that apartheid and the resultant conflict fell within its exlusive domestic jurisdiction. See discussion under par 3.1 above at 155.

177 Note 19 chapter 4 above.

The court, with reference to a wide variety of international law authority,[178] set out to establish whether the provisions of Protocol I bound the ANC and the state. Since neither had declared their intention to be bound in accordance with the provisions of the Protocol, it remained for the court to establish whether the Protocol had attained customary status and thus formed part of South African law. The court accepted, with reference to the *Nduli* case,[179] that customary international law was, subject to its not being in conflict with statutory or common law, *directly operative*[180] in the municipal sphere (my emphasis). The court, however, critisised the approach adopted in the *Nduli* case as far as the requirement of customary law needed to make it applicable in South Africa, is concerned. Conradie J expressed the opinion that to require either universal recognition or assent of South Africa as held in *Nduli* would lay down stricter requirements than required by international law itself. He held, in accordance with *Inter-Science Research and Development Services (Pty) Ltd v Republic Poplar de Mocambique*,[181] that international law does not require universal but rather general acceptance for a usage of states to become a custom.[182]

It was submitted on behalf of the accused that "such acceptance was evidenced by the practice of nearly every State in the world ... of expressing their frequent condemnation of the policies of South Africa at the United Nations General Assembly."[183] The court held that a rule of customary international law cannot be derived from such condemnation. Since Protocol I is open for all states to become party, it is doubtful that they would rather opt to be bound by its provisions through the indirect way of condemning apartheid. United Nations resolutions, within the context of Protocol I, can also not be evidence of state practice if they relate not to what the resolving states take upon themselves to do, but rather what they prescribe

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178 *Id* at 57-62.
179 *Id* at note 332
180 The direct application of custom is in accordance with the provisions of the 1993 and 1996 Constitutions.
181 Note 69 chapter 4 at 124-125.
182 *Id* at 56.
183 *Id* at 52.

for others.[184] The court held that there had not been sufficiently wide international acceptance of Protocol I for it to qualify as custom.[185]

3.8. Separate Development

Interesting interaction took place between the South African and general international interpretations of the right to self-determination. South Africa claimed that its policy of separate development was in accordance with international principles on self-determination, while the international community regarded separate development as being based on racial discrimination and a blatant defiance of the self-determination of the population as a whole.

The Promotion of Bantu Self-Government Act,[186] provided the cornerstone of the policy of separate development and was, according to Prime Minister HF Verwoerd, in line with the international objective of self-determination.[187] Separate development eventually led to the territorial fragmentation of South Africa. During the period 1976-1981 the South African government granted self-determination to individual ethnic groups by creating independent homelands. The creation of the newly independent territories led to a rethinking of the concepts of statehood and recognition in international law.

Devine[188] and Wiechers[189] point out that these homelands, namely Transkei, Bophuthatswana, Venda and Ciskei (the TBVC states), appeared to fulfil the traditional requirements of independent statehood namely territory, population and an independent effective government to which the majority of the population render

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184 *Id* at 59.

185 *Id* at 67. South African courts did, however, on occasion find that developments surrounding Protocol I and the resulting claim by members of national liberation movements that they were entitled to prisoner-of-war status constitute a mitigating factor for purposes of sentence: *S v Sagarius & others* 1983 (1) SA 336; S v Masina & others 1990 (4) SA 709 (A) at 717-19. See also the discussion in Dugard (2000) at 442 and note 73 and Dugard (1989) 109 .

186 Act 46 of 1959.

187 House of Assembly Debates vol 101 col 6221 (20 May 1959) as referred to by Dugard (1986) 11.

188 Devine (1988) 168.

189 Wiechers (1990/91) 119.

habitual obedience.[190] These "states" were nevertheless denied recognition by the international community and branded as puppet states defying the right to self-determination of the people of South Africa as a whole. It was argued at the time that since these territories were created in violation of the principle of territorial integrity, were demarcated on an ethnic basis, and remained economically and politically dependent on South Africa, their creation in essence denied the right to self-determination.[191] The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 clearly states that the disruption of national unity and territorial integrity of a country is incompatible with the purposes and principles of the United Nations Charter.[192] Dugard suggests that the precise content of the right to self-determination in international law is not clear insofar as it relates to the right of succession from an existing state. According to him, United Nations resolutions, however, provide a clear indication that self-determination accrues to all the people of South Africa within its borders as it existed before being fragmented by the granting of independence to the homelands.[193] It is interesting to note the value attached by Dugard, not an enthusiastic supporter of soft law, to United Nations resolutions.[194]

The legal standing of the TBVC states in foreign courts was examined in *GUR Corporation v Trust Bank of Africa (Government of the Rebublic of Ciskei, Third Party).*[195] The plaintiff, a Panamanian company, contracted with the Republic of Ciskei to construct a hospital and two schools in Ciskei. Flowing from the contract, a guarantee was issued in London by the defendant bank to the Ciskei Department of Public Works. In terms of the guarantee payment of an amount would be made to the

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190 As *per* Montevideo Convention of 1933. Dugard states that the Montevideo Convention is generally accepted as as reflecting the requirements of statehood under customary international law in Dugard (2000) 72.

191 Motala (1997) 296; Ferguson-Brown (1988-1999) 61 and Dugard (2000) 90.

192 For a discussion see Dugard (1986) 12.

193 For a discussion of the requirements of self-determination in international law see Dugard (1986) 13 and Dugard (2000) 90-96.

194 Dugard (2000) deals with soft law at 36 and states in a one paragraph discussion of the phenomenon that "Today it is suggested that there is 'something' in between {law and non-law} that merits the attention of lawyers: soft law. These are imprecise standards, generated by ... resolutions of international organizations, that are intended to serve as guidelines to states in their conduct , but which lack the status of 'law'."

195 [1986] 3 All ER 449; [1987] QB 599 (CA).

Ciskei on receipt of a certificate from the Ciskei Department of Public Works indicating the amount due. GUR Corporation instituted a claim against the defendants, Trust Bank of Africa Ltd, that the guarantee had expired with effect from 11.00 am London time on 15 November 1985 and repayment of the sum of 300 000 US dollars. The defendants claimed against Ciskei, joined as a third party, a declaration that the guarantee had expired on the said date, that no valid demand had been made under the guarantee prior to its expiry, and that the defendants were released from liability under the guarantee. Ciskei served a defence and counter claim against the defendants that a valid demand had indeed been made under the guarantee before its expiry and for payment of 375 000 US dollars or damages. At the trial, Steyn J raised the preliminary issue of Ciskei's *locus standi* to sue or to be sued in English courts.

Certificates were obtained from the Foreign and Commonwealth Office stating the policy of the British government not to accord formal recognition to governments, that it did not recognise the Rebublic of Ciskei *de facto* or *de iure,* that it did not have any dealings with the Ciskei, but had made representations to the South African government with regard to matters that occurred in Ciskei. The court found that by the Status of Ciskei Act 1981, the Republic of South Africa had delegated legislative power to the Ciskei government. Such power could be revoked by subsequent South African legislation. The government of the Ciskei was therefore a subordinate body acting on behalf of the Republic of South Africa and thus enjoyed *locus standi* in British courts.[196]

In *S v Banda*[197] the statehood of Bophuthatswana was examined by a Bophuthatswana court. The accused attempted to overthrow the government of Bophuthatswana and were charged with high treason. The accused objected to the indictment on the grounds that Bophuthatswana was not a sovereign independent state and possessed no *majestas*. The court held that Bophuthatswana courts take judicial cognisance of international law and that it is the court's duty to establish and

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196 For comments on this case see Botha (1987/88) 156; Mann (1987) 348; Beck (1987) 350.
197 1989 (4) SA 519 (B).

apply the appropriate rule of international law, provided that it is not in conflict with the law of Bophuthatswana. The court considered various international law theories on the question of statehood, before deciding to apply the declaratory theory which holds that an entity becomes a state when meeting the requirements of statehood set out by the Montevideo Convention on the Rights and Duties of States of 1933 which are 1) a permanent population 2) a defined territory 3) independent government 4) the capacity to enter into relations with other states.

The latter requirement raised problems since Bophuthatswana had relations only with the state responsible for its creation, namely South Africa and then, of course, also with its sibling states Ciskei, Venda and Transkei. The court, however, emphasised the fact that having a Department of Foreign Affairs and a foreign minister, Bophuthatswana clearly had the capacity and ability to enter into foreign relations. The fact that it was precluded from entering into relations with other states was due to political reasons and did not detract from Bophuthatswana's ability to do so.[198] The court further held that the question of recognition was immaterial in terms of the declaratory school.[199] The court rejected Dugard's argument based on the constitutive school that by virtue of its non-recognition, Bophuthatswana did not have the attributes of a sovereign independent state The court concluded in accordance with the Status of Bophuthatswana Act 89 of 1977 and the Republic of Bophuthatswana Constitution Act 18 of 1977 that Bophuthatswana satisfied all the Montevideo requirements and was therefore a sovereign independent state in terms of international law. It was further decided that Bophuthatswana possessed the *majestas* required for the crime of treason. The court accordingly dismissed the objection to the indictment.

The *Banda* decision shows a willingness and ability of the court to apply and access sources of international law. The court, however, in its analysis of international law dealt with the sources in a positivist fashion and failed to take the influence of United

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198 *Id* at 543C.
199 *Id* at 543G.

Nations resolutions against apartheid and the condemnation by apartheid by international law into account.[200]

According to Devine, the arguments relating to the non-recognition of the TBVC states introduce new and special rules relating to the characteristics of statehood by adding recognition to the traditional criteria.[201] The support for this approach internationally is apparent from the fact that South Africa was the only member of the international community to recognise the independence of these homelands.[202] Another aspect flowing from the international non-recognition of these territories is that they were consequently regarded as still falling under South African sovereignty, despite the fact that South Africa had officially transferred sovereignty.

Wiechers critisises the political bases of non-recognition of the TBVC states by the international community and describes it as factually and morally unsound.[203] From the South African government's perspective it claimed to deal with the TBVC states in strict compliance with the dictates of international law. In order to reincorporate these territories back into South Africa, Wiechers correctly points out that South Africa cannot resort to methods of incorporation which run counter to international law.[204]

3.9 The South African Judiciary and International Law

Much has already been said about the approach adopted by South African courts towards international law in the first part of chapter 3. It has been pointed out that

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200 For discussion of this decision see Thomas (1990) 65; Devine (1990) 434; Botha (1988/89) 197-208; Strydom (1992) 67.

201 Devine (1988) 169.

202 *Id* at 169 and 175.

203 Wiechers (1990/91) 121 points out that "the only mechanism for (re)incorporation which, in terms of international law, is left to the Republic of South Africa and the TBVC countries is mutual consent by the respective governments and the conclusion of a formal bilateral agreement."

204 This approach is in accordance with the method proposed by the state law advisers (international law) when dealing with the legal consequences with the 1994 coup in Bophuthatswana which led to a reassesment of the status of Bophuthatswana in view of the new constitutional order. Suggestions were made for South Africa to reincorporate the TBVC countries by way of presidential proclamation. After much debate the TEC adopted the advice that South Africa could

customary international was theoretically regarded as part of South African law whilst treaties needed to be transformed. Within the present context it will be pointed out how the negative attitude of the South African government towards international law permeated to the judiciary.

Dugard identifies the political appointment of judges as an important reason for the judicial antagonism towards international law. Progressive judges willing to rely on prevailing international law in order to temper the harsh effects of apartheid legislation, were quite simply not appointed to the bench.[205] The few judges who were willing to adopt an international law friendly approach were curtailed by the system of parliamentary sovereignty which was applied in South Africa at the time. Under the relativist interpretation of parliamentary sovereignty, courts may only pronounce on whether the formal requirements as to the manner and form of the adoption of legislation have been met. Hence courts were deterred from any expression on the validity of legislation based on its content.[206]

Dugard points out that in politically neutral matters with an international dimension courts were less antagonistic towards the application of international law. Where the issue before the court had political implications the marginalisation of international law was more obvious.[207] The following topics fall in the latter category:

(i) The status of South West Africa/Namibia

Instead of determining the status of South West Africa in accordance with the rules of international law, South African courts, specifically the Appellate Division, treated the matter as one of domestic law.[208]

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not unilaterally reincorporate the TBVC countries. See also Cilliers (1993/4) 93-104 on the constitutionality of reincorporation.

205 Dugard (1998) 113.

206 Wiechers (1981) 319.

207 This dicussion relies largely on Dugard (1998) 116 and Titus (1993) 35-147.

208 See in this regard *S v Thuhadeleni* 1969 (1) SA 153 (A) where the court, after termination of the Mandate for South West Africa by the United Nations, still applied South African constitutional rules which prohibited it from considering whether the Terrorism Act 83 of 1967 was invalid in respect of South West Africa. This was later confirmed in *Binga v Cabinet for South West Africa* 1988 (3) SA 155 (A).

(ii) Human Rights treaties

The South African courts refused to consider South Africa's human rights obligations in terms of the United Nations Charter when applying discriminatory legislation.[209] Courts also refrained from considering international human rights agreements.[210]

(iii) Prisoner-of-war status

The leading case in this regard, *S v Petane*,[211] was fully discussed under paragraph 3.7. The Appellate Division further refused to take cognisance of the consequences of international humanitarian law when sentencing members of the ANC's military wing to death for murder.[212]

(iv) Cross-border kidnapping

Cross-border kidnappings took place at regular intervals under apartheid, where accused were abducted from neighbouring countries in order to stand trial before South African courts. In *Nduli v Minister of Justice* [213] the accused was kidnapped from Swaziland by members of the security forces acting contrary to the instructions of their superior officer. The court refused to impute international responsibility to the state in accordance with the rules of international law for the unauthorised acts of its agents.[214] South African courts also held on

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209 *S v Werner* 1980 (2) SA 313 (W); *S v Adams ; S v Werner* 1981 (1) SA 187 (A).
210 *S v Rudman* 1989 (3) SA 368 (E) at 376 and *S v Rudman* 1992 (1) SA 343 (A).
211 Note 71 chapter 4 above.
212 *S v Mncube& Nondula* 1991(3) SA 132 (A).
213 Note 60 chapter 4 above.
214 See Dugard (1998) 119. The *Nduli* decision was fortunately rectified by the Appellate Division in *S v Ebrahim* 1991 (2) SA (A) where responsibility of the state was imputed by the court. The court further held in *S v Ebrahim* that under Roman-Dutch law South African courts had no competence to try a person abducted by its agents from another state. See also Booysen (1990/91) 133.

several occasions that the violation of the territorial integrity of neighbouring states by kidnapping of persons did not prohibit South African courts from exercising criminal jurisdiction.[215]

4. *Conclusion*

This chapter focussed on the role of international law in South Africa, in particular the relationship between South African law and international law, in the period preceding the democratic transformation of South Africa in 1994. Constitutional regulation of international law during this period was limited to requirements stipulating the procedure for becoming party to treaties. The relationship between international law and South African law was governed by common law, which bore a strong influence of British constitutional law and court decisions. A different approach was followed in respect of the two major sources of international law namely treaties and custom.

The executive was constitutionally empowered to enter into treaties. Where treaties were of such a nature that they intended to have an effect within the domestic sphere of a state, such obligations could only be domestically enforced through legislative involvement. It is in accordance with the dualist theory that such treaty rights and obligations require incorporation or transformation into domestic law as a precondition for municipal application. Such transformed treaties were then applied by South African courts as South African law, not international law. Unincorporated treaties, though binding South Africa internationally, enjoyed only limited recognition before South African courts.

The writers Dugard and Booysen evaluate South African practice in terms of the theories on the relationship between the two legal orders mentioned in chapter 3. Dugard supports the harmonisation theory with a monist bias by equating the transformation of treaties with harmonisation. Sanders and Booysen question the usefulness of theorising about the matter. Booysen, however, supports the

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[215] *Minister of Abrahams v Justice* 1963 (4) SA 542 (C); *Ndhlovu v Minister of Justice* 1976 (4) SA 250; *Nduli v Minister of Justice* 1978 (1) SA 893 (A): *Ex Parte Ebrahim: In re Maseko* 1988 (1) SA 991 (T); *S v December 1995* (1) SACR 438 (A).

harmonisation theory as far the application of international law in South African municipal law is concerned, although he does not regard international law as part of South African law. It appears that Dugard, with reference to O'Connell, supports harmonisation based on the way in which courts apply international law, instead of focussing on the question whether or not international law forms part of South African law. Although these two questions are closely related, it is submitted that the theories advanced in chapter 3 are primarily aimed at answering the latter question. If such theories are applied to the relationship between South African law and treaties, it appears that South African practice is firmly based on dualism, and that in applying legislation incorporating treaties, courts resort to harmonising the treaty with other sources of domestic law.[216] It is suggested that an act of transformation is primarily aimed at transforming international law into municipal law. Since international law and municipal law belong to two separate legal orders as per the dualist theory, transformation of international law is a *sine qua non* for domestic application.

Customary international law, on the other hand, was regarded as part of South African law and thus directly applied by South African courts. This position was based on Roman Dutch and British common law and confirmed by various court decisions, most notably by the Appelate Division in the *Nduli* case. Although the courts and writers differ on the requirements to be met before South Africa could be bound to a custom (universal recognition and/or assent of the country) there was wide consensus (with the notable exeption of Booysen) that customary international law formed part of South African common law. The practice followed in South Africa could be described as monist since no act of transformation or incorporation was required to make custom part of South African law.

The legal status of custom in domestic law during this period can be described using the terminology used to describe the domestic application of certain treaties, namely *self-execution* or *direct application*. It is interesting to note that there is far less

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216 Such harmonisation process should ideally take place before ratification/accession to a treaty as part the assesment of the compatibility of the treaty with South African law conducted by the state law advisers of the Department of Justice. In this regard see the relevant requirement contained in the Manual on Executuive Acts

resistance to the direct application of custom, which is uncodified, often lacking any express manifestation of consent, than to the direct application of treaties where the legal obligations are far more certain and concise.

Although custom and incorporated treaties were theoretically regarded as part of South African law, practice was contaminated by the politics of the day and proved unfriendly towards international law. The entrenched racial discrimination embodied in apartheid confronted international law and accelerated the development of rules of international law condemning and outlawing racial discrimination in general but specifically apartheid. Initially South Africa was accused of breaches of the human rights provisions of the United Nations Charter. Numerous resolutions, treaties, sanctions and South Africa's suspension from the United Nations followed these accusations.

South African courts, in support of the reigning political masters, refrained from considering mainstream international law in areas including statehood, recognition, self-determination, human rights and humanitarian law.

South Africa's rebuttal of the arguments leveled against its domestic policy was based on article 2(7) of the United Nations Charter which prohibited interference in domestic affairs. Although other states have pursued this avenue, the united stance of developing states against white South Africa, and the guilty conscience of some former colonial entities, ensured support for an emerging view that interference in domestic affairs may not be used to shield human rights abuses (especially racial discrimination) from international scrutiny.

The international law nature of apartheid remains a difficult question to answer. According to the literature examined no clear distinction can be made between apartheid and racial discrimination in general. The preferential condemnation apartheid enjoyed internationally may, however, indicate support for the view that apartheid should be regarded as a *sui generis* form of racial discrimination.

The condemnation of apartheid by way of international law, strengthened by the obstinate attitude of the South African government towards international law,

undoubtedly expedited the demise of apartheid. Domestically international law was seen as embodying universally fair and just standards held to be entitlements to all mankind. All these factors contributed to the strong position international law would enjoy under the post-apartheid constitutions, which forms the subject of discussion in chapter 5.

CHAPTER 5

INTERNATIONAL LAW IN A POST-APARTHEID SOUTH AFRICA

1. Introduction

The year 1993 presented a watershed in South African legal and political history, bringing an end to white minority rule and kick-starting the process of democratic transformation with the adoption of a constitution providing for the transition to a democracy. Because apartheid was so closely associated with the violation of international law, the democratisation of South Africa was inevitably coupled with a greater receptiveness towards international law at a domestic level. The Constitution adopted in 1993 restored international law as an equal and respected component of South African law.

At an international level South Africa, having rid itself of apartheid, was welcomed back in the international community. Multilateral fora, such as the United Nations and its specialised agencies from which South Africa had previously been excluded, opened their doors to the country. The international community was keen to illustrate its commitment to the new South African democracy, and this was manifested in offers of co-operation in a wide range of activities.

The increased interaction led to a host of international agreements entered into at a bi- and multilateral level. Foreign dignitaries lined up to pay official visits to South Africa. South African struggle veterans turned politicians became well-respected guests of foreign governments. Such visits were usually sealed by the conclusion of some form of treaty. Foreign development aid flowed into the country to boost the Reconstruction and Development Program. Cultural exchange programs became the flavour of the day. Binational committees were set up fostering numerous specific joint projects. Even at provincial level, premiers spread their wings, forging foreign liaisons in order to fill provincial coffers. The international agreements emanating from such interaction had to be processed and formalised by South African government officials acting under a new constitutional dispensation.

This chapter focuses on the provisions of South Africa's two post apartheid constitutions to internalise international law, in particular international human rights law, in South African law. The first strong influence of international law can be seen in the provisions catering for entrenched fundamental rights, which show great similarities with international human rights. In addition, and much to the delight of the few international lawyers in South Africa, both constitutions recognise international law as part of South African law, and lay down procedure for the conclusion of international agreements. Attention will also be devoted to the state practice emerging from government giving effect to the constitutional provisions.

2. *The South African Constitution, Act 200 of 1993*

The South African Constitution adopted in 1993 (in the present discussion referred to as the 1993 Constitution) provided for a negotiated transition from an apartheid state to a fully-fledged democracy. For purposes of the present discussion, which centres around international law, a few introductory remarks on the general nature of the 1993 Constitution will suffice: The 1993 Constitution paved the way for a constitutional democracy giving all South Africans access to the same ballot box, and the enjoyment of justiciable fundamental rights. It discarded the old Westminster model of government where parliament reined supreme and which, in the case of South Africa, was based on race.[1] Instead it established the Constitution as supreme law of the land and the yardstick in terms of which all law must be evaluated.[2]

Prompted by South Africa's history of human rights abuses, it was widely agreed by parties negotiating the 1993 Constitution that justiciable human rights should form

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1 Steenkamp (1995) 102.

2 Section 4 provides as follows:
4(1)This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
(2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels government.

part of the constitutional text. A separate chapter of the 1993 Constitution was set aside to cater for fundamental rights.[3]

The 1993 Constitution is commonly referred to as the "interim Constitution" because it was designed to provide for a transition to a constitutional state. It provided for an elected Constitutional Assembly consisting of members of the National Assembly and the Senate, which was tasked with the drafting of a new constitutional text often, incorrectly, referred to as the "final Constitution".[4]

The 1993 Constitution contained detailed "Constitutional Principles" with which the new constitutional text had to comply.[5] The Constitution specified that the new constitutional text could only be adopted and implemented, once the Constitutional Court had certified that all its provisions complied with the Constitutional Principles.[6]

In order to understand the 1993 Constitution in context, it is necessary to sketch important features of the negotiating process preceding the adoption of the 1993 Constitution.

2.1 Negotiating the 1993 Constitution

Nearly four years of protracted negotiations between the South African government led by the Nationalist Party; its historical rival, the African National Congress; and twenty-four other political groupings, led to agreement on a constitution for an interim period.[7] Due to the undemocratic nature of the political scene at the time, the negotiating parties never had the opportunity to participate in truly democratic elections and therefore did not possess proven constituencies. The democratic bases of the National Party and the parties representing the so-called self-governing states

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3 Chapter 3.

4 Section 68(1) provides for the composition of the Constitutional Assembly. Chapter 5 of the Constitution sets out the procedures for writing of the future constitution.

5 The Constitution Principles are contained in Schedule 4.

6 Section 71(2).

7 According to Venter (1994) 213, one of the drafters of the Constitution, the Constitution should have no title other than the "Constitution of the Republic of South Africa". It is therefore

likewise lacked legitimacy. It was therefore deemed inappropriate to grant the negotiating parties the power to decide on a final constitution. Instead they agreed on a constitution of a preliminary nature establishing the mechanism for the adoption of a replacing democratic constitutional text.[8]

Negotiations were conducted in the Negotiating Council. The Negotiating Council appointed various technical committees consisting of experts to advise on different aspects of the negotiating process. The Technical Committee on Constitutional Issues was responsible for the preparation of a draft constitutional text. This text was based on submissions received from the negotiating partners as well as from interested individuals and organisations outside of the process. The draft was then debated in the Negotiating Council where decisions on amendment of the text were taken on the basis of sufficient consensus and referred back to the Technical Committee on Constitutional Issues to bring the text into line with the decisions taken.[9] The corrected text was finally referred to the State Law Adviser, Department of Justice, to prepare it for enactment by parliament.

The 1993 Constitution was formally adopted by parliament on 22 December 1993,[10] after having been passed by a two-thirds majority of both houses.[11]

3. International Human Rights and the 1993 Constitution

As might be expected, the chapter of the 1993 Constitution dealing with fundamental rights was strongly influenced by those international human rights instruments discussed in chapter 2 of this thesis. The fundamental rights protected by the 1993 Constitution largely coincide with the mentioned spectrum of international human rights and are often paraphrased in similar language. The technical committee responsible for the drafting of chapter 3 availed itself in the words of that committee:

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technically incorrect to refer to it as the "transitional" or "interim" Constitution. See also du Plessis & Corder (1994).

8 For more detailed discussion of the different claims on the negotiating table see Sachs (1996) 695-696.

9 Olivier (1993/94) 2-4.

10 The Constitution was promulgated in GG 15466 of 1994-01-28. (All section reference are to this Constitution unless otherwise specified.)

11 Section 73(2).

"of 'sources from abroad'[12] in two ways. First, the contents of Chapter 3 was inspired by international human rights documents of long standing such as the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1955). In cases of some controversial provisions in Chapter 3 the Technical Committee sought to expedite compromise by following certain of the wordings of international instruments quite closely ... Secondly, Bills of Rights of other countries were consulted."[13]

The following table compares the rights provided for by the UDHR, ICCPR and ICESCR with those contained in chapter 3 of the 1993 Constitution in broad terms. A detailed analysis of the various rights falls outside the scope of this study. It is rather the purpose to establish the extent to which the 1993 Constitution coincides with and differs from international instruments.

	UDHR	ICCPR	ICESCR	93 CONST
Equality	1, 2	2	2	8(1)
Equality between men and women	3	3		8
Right to life	3	6		9
Liberty	3	9		11
Security	3	9		11(1)
Treatment of persons deprived of liberty	10			25
Prohibition of imprisonment because of inability to fulfil contractual obligation	11			
Prohibition of slavery	4	8		12
Prohibition of torture	5	7		11(2)
Recognition as person before the law	6	16		6, 7(4), (6)
Equality before the law	7	14, 26		8(1)
Effective remedy	8			7(4)

12 Du Plessis & Corder (1994) 47. The mere fact that international law was described as a source from abroad illustrates the degree to which even the members of the relevant technical committee had been alienated from international law.

13 *Ibid.*

Affirmative Action				3(a)
Protection of children		24		30
Arbitrary arrest, detention or exile	9			25
Fair, public hearing by independent impartial tribunal	10	14		25(3)
Presumption of innocence	11(1)	14(1)		25(3)(a)
Right not to held guilty of retroactive penal offence	11(2)	15(1)		25(3)(f)
Arbitrary interference with privacy, family, home, correspondence or attacks on honour and reputation	12	17(1)		13
Freedom of movement	13(1)	12(1)		18
Right to leave any country, return to own country	13(2)	12(2)		20
Asylum	14			
Nationality	15	24		20
Right to marry and found family	16(1)	23(2)		
Consent of spouses	16(2)	23(3)	10(F)	
Property	17			28
Freedom of thought, conscience, religion	18	18		14
Freedom of opinion and expression	19	19(2)		15(1)
Freedom of assembly and association	20	21, 22		16
Access to public service, participation in government	21	25		
Universal, equal suffrage	21			6, 21
Social security	22		9	
Right to work	23(1)		6	26
Equal pay for equal work, just and favourable remuneration	23(2)		7(a)(i)	26
Form and join trade unions	23(4)	22(1)	8(a)	27(2)
Right to strike			8(b)	27(4)
Rest and leisure	24			
Adequate standard of living	25(1)		11	
Highest standard of physical and mental health	25(1)		12	
Protection of motherhood and childhood	25(2)	24	10(2) en (3)	

Child labour			10(3)	30(1)(e)
Education	26		13, 14	32
Right of persons belonging to minorities to enjoy own culture, profess own religion and use own language		27		31 8(2) 14(1)
Right to free participation in culture life, enjoy arts and to share in scientific advancement	27		15	31 8 (2)
Protection of authors interest in scientific, literacy or artistic production	27(2)			
Duties to community	29(1)			
Limitation to rights and freedoms	29(2)			33, 34
Self-determination		1	1	
Expulsion of an alien		13		
Prohibition of propaganda of war, advocacy of national, racial or religious hatred		20		8(2)

The above table indicates that there is a large area of overlap between the chapter 3 rights and the international instruments, but also significant areas of difference.

When comparing the said international instruments with the fundamental rights contained in chapter 3 of the 1993 Constitution, it should be kept in mind that they were drafted more than two decades apart. The language of the 1993 Constitution is therefore in certain respects more modern, and the content in tune with recent developments in human rights law. The 1993 Constitution is, for instance, drafted in gender neutral terms (*every person* shall have the right to *his or her* personal privacy-section 13) as opposed to the international instruments which use the masculine form to indicate the entitlement to rights. Despite the fact that article 2 of the UDHR indicates that *everyone* is entitled to the rights set forth in this Declaration, article12 reads that no one shall be subjected to arbitrary interference with *his* privacy ... nor attacks upon *his* honour.

Provisions dealing with the same basic right may be phrased in different language or grouped together with other rights for example:
Section 9 of the 93 Constitution provides: "Every person shall have the right to life." Article 3 of the UDHR states that: "Everybody has a right to life, liberty and security of

person." Article 6 of the ICCPR elaborates on the UDHR by stating that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Liberty and security of persons are dealt with in article 9 of the ICCPR: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." The 1993 Constitution deals with freedom and security separately in section 11(1) which reads: "Every person shall have the right of freedom and security of person, which shall include the right not to be detained without a trial."

Certain provisions of the 1993 Constitution are strongly influenced by the international instruments as is apparent from the following example:

Section 8(3) of the 1993 Constitution:

> "This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."

This provision bears a close resemblance to article 1 of CERD:

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups' or individuals' equal enjoyment or exercise of human rights and fundamental freedoms, shall not be deemed racial discrimination, provided, however that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

It is suggested that when South African courts applied the international human rights duplicated or incorporated in the 1993 Constitution, they applied South African constitutional law and not international law.[14]

Of importance for present purposes is to identify the major area of difference between the international human rights law and the South African Constitution. The 1993 Constitution contains certain rights with no roots in international instruments. Such provisions deal with demands presented during the negotiating process or which where deemed necessary to redress the wrongs caused by apartheid. Examples in this regard include: section 19 which gives everybody the right to freely choose his or her place of residence anywhere in the national territory; section 23 providing for access to information; and section 24 dealing with administrative justice. The granting of such rights does not stand in conflict with international law. Article 41 of the CRC bears reference in this regard:

> "Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:
>
> (i) The law of a State Party; or
> (ii) International law in force for that State."

Aspects of human rights governed by international law, not dealt with, or dealt with differently, by the 1993 Constitution, create the possibility of applying international law domestically in order to bring domestic law in line with international standards.

The following aspects which appear in the UDHR, the ICCPR and/or the ICESCR are not addressed by the 1993 Constitution:

- Equal rights of men and women.[15]

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14 For a discussion on the interpretation by South African courts of incorporated treaties endorsed under the 1993 Constitution see Botha (1993/94) 148.

15 Articles 3 of both the ICCPR and the ICESCR.

- Prohibition of imprisonment because of an inability to fulfil a contractual obligation.[16]
- The right to seek and enjoy asylum.[17]
- Rights regarding marriage.[18]
- Rights pertaining to social security.[19]
- The right to a standard of living adequate for a person's health and well-being.[20]
- The protection of motherhood and the family.[21]
- Protection of interests of an author in scientific, literary or artistic production.[22]
- Duties to the community.[23]
- Expulsion of aliens lawfully in the territory of a state party.[24]
- Propaganda for war and advocacy of national, racial or religious hatred.[25]

4. *The Constitutional Provisions Relating to International Law*

4.1 *Background*

For the first time in South African constitutional history the Constitution not only makes specific mention of the term "public international law" but also provides for the status and role of international law constitutionally. The importance of the constitutional recognition of international law had been widely acclaimed as elevating international law, a legal discipline previously neglected in South Africa, to its rightful status. Not only was it a symbolic break with South Africa's colonial history, but it was also regarded as an international declaration to the effect that South Africa is now willing to play by the rules.[26]

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16 Article 11 of the ICCPR.
17 Article 1 of the UDHR.
18 Articles 16 of the UDHR, 23 of the ICCPR and 10 of the ICESCR.
19 Aricles 22 of the UDHR and 9 of the ICESCR.
20 Articles 25 of the UDHR and 12 of the ICESCR.
21 Articles 25 of the UDHR and 10 of the ICESCR.
22 Article 27(2) of the UDHR.
23 Articles 1 and 29 of the UDHR.
24 Article 13 of the ICCPR.
25 Article 20 of the ICCPR.
26 Botha (1994) 245; Olivier (1993/94) 3; Dugard (1995) 241; Devine (1995.1) 2.

The constitutional provisions on the status of international law appear in the final chapter of the Constitution and were agreed on during the final hours of negotiation when the Negotiating Council battled to reach political consensus within tight deadlines. Suffice it to say that many of the politicians with whom the final say rested (and whose political future inevitably depended on the timeous finalisation of the negotiations), did not regard the question of constitutional accommodation of international law as of crucial importance. A draft text on international law was as prepared by the Technical Committee on Constitutional Issues taking into consideration the very few outside inputs received.[27] Suggestions contained in these inputs included the following:

- All sources of international law as they appear in article 38 of the Statute of the International Court of Justice should, if binding on South Africa, form part of the law of South Africa. The courts should rule on whether a particular rule is binding on South Africa.
- Express legislation should be required before an Act of parliament can be said to override international law.
- The executive should be responsible for the negotiation and signature of all international agreements.
- Parliament and not the executive should ratify important international agreements. (This requirement may be dispensed with in respect of executive agreements.)
- In order not to hamper government in cases where expeditious action is required, purely executive agreements should be possible and should not require parliamentary ratification The definition of an executive agreement should best be left to the courts to decide on the basis of comparative jurisprudence.
- All international agreements should be published in the Government Gazette.
- There should be a time limit for placing treaties before parliament.[28]

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[27] The inputs received were from Professors K Asmal, MG Erasmus, DJ Devine and NJ Botha.

[28] Proposal by Erasmus MG, Devine DJ and Dugard CJ dated 28 September 1993. See also Devine (1991) 216-227, reflecting the author's views at an earlier date. These views are criticised in a report of the SA Law Commission chapter 7 at 26. See also Botha (1992/93) 36-48.

It was acknowledged at the time by the drafters that the provisions on international law, which were finally incorporated in the text of the Constitution, were far from perfect. This was largely due to the circumstances under which the drafting took place, namely time constraints, participation by politicians and the pressure to reach sufficient consensus. The shortcomings should, however, be balanced against the fact that these provisions, as was the rest of the Constitution, represented a compromise and thus enjoyed a popular legitimacy unprecedented in South Africa.[29] At the very least the opportunity was seized by the said Technical Committee and sold to the Negotiating Council to regulate both the conclusion of treaties and the status of international law in domestic law, constitutionally.

The Constitution dealt with the conclusion of international agreements and the status of international law in sections 82 and 231. International law was also referred to in three additional provisions namely sections 35(1), 116(2) and 227(2). These provisions will now be discussed. The discussion will focus in greater detail on those provisions affecting the application of international human rights law in South African law.

4.2 The Human Rights Commission

A Human Rights Commission is instituted by section 115 of the 1993 Constitution. Section 116 dealt with powers of the Human Rights Commission. Section 116(2) specifically directed the Commission to measure national and provincial legislation against norms of international human rights law which form part of South African law or other relevant norms of international law. As in the case of section 35(1),[30] it appears that the Commission may have considered the broad spectrum of international human rights law and not just binding law, in carrying out its functions.[31]

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29 Olivier (1993/94) 3.
30 To be discussed under par 4.4.
31 For discussion see Dugard (1995) 243, and Dugard (1997) 86.

4.3 Humanitarian Law

Section 227(2) (d) and (e) incorporated international humanitarian law into South African law. It provided:

> "(2) The National Defence Force shall
>
> (d) not breach international customary law binding on the Republic relating to aggression;
>
> (e) in armed conflict comply with its obligations under international customary law and treaties binding on the Republic."[32]

In contrast with sections 116(2) and section 35(1), the present provision referred only to binding international law, which was further limited to binding treaties and custom. It may be argued that section 227(d) and (e) is tautologist in the light of the fact that section 231 contains a general provision recognising binding treaties and custom as part of South African law. Section 227 may, however, serve as a special reminder of South Africa's commitment to honour its international humanitarian law obligations.

4.4 The Interpretation Clause

Section 35(1) provided for the role of international law in the interpretation of chapter 3 of the Constitution, which dealt with fundamental rights.[33] It read that:

> "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law."

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[32] For more detailed consideration of this matter see Dugard (1995) 243-244.

[33] For a discussion of this provision see Botha (1994), Maluwa (1993/94) 38-39 and Dugard (1995) 241-242.

The phrase "public international law applicable to the protection of the rights entrenched in this Chapter" as it appears in section 35, is not qualified and requires further explanation. It appears that section 35(1) seeks to direct courts to have regard only to certain rules of public international law when interpreting the constitutional provisions dealing with fundamental rights. The rules of international law applicable to the protection of fundamental rights resort under the body of international law dealing with human rights, commonly referred by international lawyers as "international human rights law".[34]

The constitutional provision, however, qualified the use of international human rights law, by further directing that it should be used only where applicable. Botha argues that there is little likelihood that an international interpretation of a clause in chapter 3 could be regarded as anything but applicable.[35] This view is supported, although given the traditional wariness of both courts and politicians towards international law, the qualification was probably inserted to guard against too wide a use of international law to the exclusion of seeking a local solution instead. With the exception of the mentioned proviso, courts may have access to the full spectrum of international human rights law in a broad and general sense including both public international law binding on South Africa and international law not binding on South Africa (treaties to which South Africa is not party and custom not binding on South Africa, other sources named in art 38(1) of the Statute of the International Court of Justice, and also non-binding or evolving international law).[36]

Botha points out that the use of the phrase "a court" implies that the interpretation and application of human rights is not a matter left to the exclusive jurisdiction of the Constitutional Court. Any institution qualifying as a court of law may be called upon to rule on matters of human rights.[37]

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34 See chapter 3 Sources of International Human Rights Law.
35 Botha (1994) 247.
36 In *S v Williams and Another* (1995) 7 BCLR 861 [CC] at par 21 at 869.
37 Botha (1994) 247.

The use of the word "shall" makes it clear that courts do not have a choice in having to consider international human rights law. This mandatory tone of "shall" is watered down by the use of the words "have regard to" which does not imply an obligation to apply such international law where appropriate. Having regard to comparable foreign case law is, on the other hand, only permitted and not mandated. Chaskalson P points out in the *Makwanyane* case[38] that the application of neither is compulsory.

4.5 The Status of International Law

Under the heading "continuation of international agreements and status of international law", section 231 contains the most far-reaching provisions as far as international law is concerned and is therefore, together with section 35(1), of the greatest importance for purposes of the present discussion. Each subsection will be dealt with separately.

4.5.1 Continuation of International Agreements

Section 231(1) reads as follows:

> "All rights and obligations under international agreements which immediately before commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of parliament."

Botha is of the view that section 231(1) is a typical succession provision which is only required where one state succeeds to the rights and obligations of another.[39] The transition from apartheid to a democracy does not imply a change of state, but only of government.[40]

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38 1995 (6) BCLR 665 (CC) par 39 at 688A.
39 Botha (1994) 245.
40 Dugard (1995) 245.

This subsection was, however, not drafted with the intention to serve as a succession provision. It rather embodied the sentiment prevailing amongst many of the negotiating parties at the time, namely that a new democratic government should not automatically inherit all the international obligations of its non-democratic predecessor. Since it was common practice for the apartheid government to seek the company of other pariah nations in the international community, the agreements following from such associations should be reviewed.[41] According to Devine, this provision seeks to reassure foreign states they may continue to rely on existing treaties with South Africa despite the fundamental nature of the constitutional transformation.[42]

Besides the above question, further difficulties were identified with this provision. It is suggested that this provision authorised unilateral termination of treaties defying the applicable rules of international law governing treaty termination as provided for by the Vienna Convention.[43] According to another view, the relevant provisions governing the denunciation of treaties can and should still be honoured on the international plane. Should parliament elect to terminate a treaty, the procedure followed internationally must accord with the requirements prescribed by the particular treaty or the Vienna Convention. The Vienna Convention, being customary international law, forms part of South African law through section 231 (4) of this very Constitution[44] and must be complied with.

Devine pointed out that customary international law was subjected to legislation under section 231(4). Hence an Act of parliament (at variance with the Vienna Convention), providing that an existing treaty is no longer binding, would be constitutionally valid.[45] Since no treaty was submitted for parliament to decide on its validity in terms of section 231(1) whilst the 1993 Constitution was in force, the above debate is purely academic.

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41 Olivier (1993/94) 4. Agreements with Israel and Taiwan are cited as examples.
42 Devine (1995.2) 44 at 7.
43 Vienna Convention on the Law of Treaties (1969) part v art 42(1) and (2). As advanced by Botha (1994) and supported by Dugard (1995) 244.
44 Olivier (1993/94) 5.
45 Devine (1995.2) 7.

Finally, a further technical problem was raised by the insertion of the following italicised phrase by the legal draftsmen of the Department of Justice:

> "international agreements ... vested in or binding on the Republic *within the meaning of the previous Constitution* shall be vested in or binding on the Republic under this Constitution."

The definition of the Republic under the previous Constitution excluded the so-called independent states of Transkei, Ciskei, Bophuthatswana and Venda with whom the South African government conducted international relations. Since agreements between South Africa and the above states were recognised by neither the international community, nor the Negotiating Council, and the said territories ceased to exist under the 1993 Constitution, it was not the intention to address their position in this subsection.[46]

4.5.2 Conclusion or Entry into International Agreements[47]

The conclusion of international agreements was governed by the following two subsections in the Constitution:

Section 82(1)(i) provided that the President shall be competent to negotiate and sign international agreements.

Section 231(2) stated that:

> "Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i)."[48]

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46 Olivier (1993/94) 5.

47 The technical committee responsible for drafting the Constitution selected the term "international agreements, treaties and conventions". A term "international agreement" is regarded as reflecting modern state practice and as including various kinds of specific agreements. In this regard see Olivier (1993/94) 5 and Dugard (1994) 342.

48 These provisions replace section 6(3)(e) of the 1983 Constitution (Act 110 of 1983) which dealt with the power of the State President to enter into and ratify conventions, treaties and

The decision by the Negotiating Council to place the authority to approve entry into international agreements in the hands of the legislature and not the executive as was formerly the case under the previous dispensations, is in line with the underlying values of the 1993 Constitution, namely democracy and transparency. The democratisation of the treaty-making process was seen as a safeguard against repetition of the human rights abuses of the past.[49]

Section 82(1)(i) and 231(2) were open to various interpretations and presented a number of difficulties, especially to law advisers dealing with international law.

It appeared from the cross reference in section 231(2) to section 82(1)(i) that all international agreements which South Africa wished to enter into had to be referred to parliament.[50] This interpretation appeared to correspond to the intention of the drafters. The most apparent difficulty with such an interpretation was that parliament would barely be in a position to deal with any of its other work if it were required to approve the tide of international agreements flowing in after 1994.[51] This practical problem called for a distinction between various categories of treaties.[52]

There were, however, more serious flaws in the drafting. Section 231(2) presented a problem if the terms "ratification" and "accession" were understood in their international law meaning, as not all treaties require ratification or accession to come into force. Most bilateral treaties and uncontentious international agreements, for example, enter into force on the date of signature. There are, on the other side of the spectrum, also multilateral agreements already negotiated but not longer open to signature. Such agreements can only be acceded to. Signature, as required by section 82(1)(i), would be impossible because it is not an element of accession.

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agreements. Under previous South African Constitutions the executive authority to conduct foreign relations originated from both the Constitution and the prerogative powers of the State President. Prerogative powers have now been done away with by the 1993 Constitution. See Dugard (1995) 247.

49 Olivier (1993/94) 7, Dugard (1995) 248, Botha (1994) 255.

50 The cross-reference did not appear in the text originally adopted by the Negotiating Council, but was inserted during the technical refining exercises by the state law advisers. The omission of the cross reference would have prevented many interpretation problems.

51 Dugard (1995) 248.

52 Olivier (1993/94) 7-8.

The Manual on Executive Acts, issued by the Office of the President[53] offered practical guidelines to be followed by all government departments involved in obtaining approval for the conclusion of international agreements. With regard to the interpretation problems relating to the above sections it was suggested that parliament was merely competent, but not obliged, to agree to ratification or accession. It was therefore not compulsory to present all international agreements to parliament.[54] Certain agreements could indeed enter into force on signature. Agreements had to be submitted to parliament only under the following circumstances:

- where the agreement itself required ratification or accession before it bound a party at the international level;
- where the agreement required incorporation into municipal law;[55] and
- where the agreement had financial implications not budgeted for.

As regards the handling of multilateral agreements no longer open for signature, the Manual on Executive Acts required approval by the President under section 82 before parliament could approve accession in terms of section 231(2).[56] The term "signature" as required under section 82(1)(i) did not bear its usual meaning in terms of international law under these circumstances, but rather referred to signature within the meaning of the 1993 Constitution.

Devine points out that there is no indication that the "agreement of parliament to the ratification or accession of an international agreement" should be expressed by way of legislative act. In practice such approval was granted by way of resolution. Such a resolution would authorise the executive to prepare, sign and lodge instruments of ratification or accession to bind South Africa to the treaty as a matter of international law.[57]

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53 Issued on 10/5/94.

54 Devine (1995.1) 10 suggests that all agreements must receive parliamentary approval if they are to be binding as section 231 makes no distinction between different kinds of agreement.

55 Section 231(3) deals with incorporation into municipal law.

56 At 18.

57 Devine (1995.1) 44.

Dugard dealt with the problem by suggesting that the term "ratification" as used by section 231(2) has two meanings. The first, which he referred to as "international ratification", is the international process, where a treaty requiring ratification to enter into force is duly ratified by an intending state party. It secondly also referred to a process of "constitutional ratification" or internal procedure whereby parliament approves that South Africa become party to such agreement and thereby incorporates it into municipal law.[58] Although it may be argued that a new constitutional dispensation calls for the invention of new terminology, it is suggested that the use of the phrase "constitutional ratification" clouds the issue instead of clarifying it. Why talk only of "constitutional ratification" and not also of "constitutional accession"? Would the consent of parliament to acceed to a treaty also amount to "constitutional ratification"? It is further problematic that the said "constitutional ratification" not only conveyed parliament's approval for South Africa to become party to the treaty at an international level, but also denoted the incorporation of such treaty into South African law. The fact that section 231(3) required express provision by parliament before a treaty could become part of South African law clearly indicated a two-step process, the second step of which cannot be regarded as the internal equivalent of ratification at an international level. Instead, it is suggested, that approval to become party to a treaty as implied by section 231(2) on the one hand and express provision to make a treaty part of South African law as per section 231(3) on the other, should be referred to as such and be kept conceptually separate.

4.5.3 Incorporation of International Law into South African Law

Section 231(3) dealt specifically with the relationship between international law and South African domestic law and is therefore of central importance.[59] It reads as follows:

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[58] Dugard (1994) 342-343. The process of incorporation into municipal law is dealt with by section 231(3).

[59] This subsection deals with what Dugard terms "constitutional ratification".

"Where parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall form part of the law of the Republic, provided parliament expressly so provides and such agreement is not inconsistent with this Constitution."

The text of this provision differs substantially from that adopted by the Negotiating Council, due to last minute technical refinement. The Negotiating Council provided for an essentially monist and self-executing approach,[60] namely that an international agreement ratified or acceded to by parliament, would form part of South African law unless it was inconsistent with the Constitution or was excluded by an express provision in an Act of parliament. The amended text gave parliament the power to decide whether an agreement to which South Africa was party would form part of municipal law.[61] The final text kept South Africa firmly within the traditional dualist camp.[62]

Formal statutory incorporation as previously required for treaty incorporation by South African constitutional law, was no longer an explicit requirement. Section 231(3) did, however, not clearly stipulate the way in which parliament had to express its wish to incorporate treaty provisions. The lack of specificity opened the way to different interpretations. In Dugard's view an Act of parliament was apparently not envisaged for this purpose. Thus it would seem that a resolution accompanying the resolution of ratification or accession approved by both houses of parliament, indicating that the treaty was to form part of municipal law, was be sufficient.[63] Devine favoured the interpretation that legislative incorporation was required. This interpretation prompted the questions whether such incorporated treaties would thus become directly applicable and whether they would have the same status as other parliamentary legislation. According to Devine the *status quo* had to be maintained as the ethos of the whole section 231 clearly contemplated parliamentary primacy

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60 For a discussion of the nature of self-executing treaties or direct application, see chapter 3 of this thesis.

61 Olivier (1993/94) 10; Botha (1994) 256; Dugard (1994) 343 and Dugard (1995) 249.

62 Olivier (1993/94) at 10, expresses the hope that, in the absence of serious constraints, parliament will approve the incorporation of all agreements submitted for its approval.

63 Dugard (1994) 343; Keightley (1996) 409.

over all kinds of international law at the municipal level.[64] The Manual on Executive Acts fortunately favoured the less restrictive approach by opting for a resolution effecting incorporation.

The first agreements submitted to parliament under the 1993 Constitution, which required municipal incorporation, dealt with double taxation and illustrated this approach.[65] With respect to one of these agreements between South Africa and France, Government Notice 1443 of 27 September 1995 reads as follows:

> "It is hereby notified that parliament has in terms of section 231 (2) of the Constitution ratified the following Convention which is hereby published for general information, and has furthermore expressly provided in terms of section 231(3) of the Constitution that the Convention shall form part of the law of the Republic."

It is, however, interesting to note that no provision for incorporation in whatever way, was made in the case of the three human rights agreements to which South Africa became party to under the 1993 Constitution namely the CRC, CEDAW and the African Charter. This matter will be discussed more fully in chapters 5, 6 and 7.

4.5.4 Customary International Law

Section 231(4) dealt with the status of customary international law and provided as follows:

> "The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of parliament, form part of the law of the Republic."

This provision endorsed the pre–1994 common law position and settled any controversy that may have existed as to the rightful place of customary international

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64 Devine (1995.1) 18 and Devine (1995.2) 44 at 9.
65 Botha (1995.2) 200-210.

law as part of South African law.[66] Customary international law under the 1993 Constitution formed part of South African law, subject only to the Constitution or an Act of parliament. Whether a particular rule of customary international law bound South Africa, remained for the courts to determine.[67]

This determination had to be done by courts through testing whether the international law criteria of *usus and opinio iuris* were complied with both internationally, as well as by South Africa (in the case of custom with a particular rather than general field of application).[68]

Devine welcomes the reference in the provision that only customary international law "binding on the Republic" would form part of South African law. His view is shared that "in the absence of such a formulation one could arrive at the anomalous situation where the Republic might not be bound to a customary rule at the international level but the courts would be bound to apply the rule as part of South African law".[69]

Botha expressed concern that the general subjection of custom to parliamentary legislation would include pre-April 1994 legislation with discriminatory overtones.[70] It is, however, argued that pre-April legislation will only be valid if it complied with the Constitution as supreme law of the land, which included a chapter on fundamental rights based on equality and non-discrimination. Any reference to an Act of parliament should therefore be understood to refer only to such Acts compatible with the Constitution.[71]

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66 Dugard (1995) 251, Olivier (1993/94) 11-12, Botha (1994) 254. For a discussion of court decisions under the previous dispensation see chapter 4.

67 Botha (1994) 254, Olivier (1994) 11.

68 The provide that no rule of custom inconsistent with an Act of Parliament will apply is tautolgous according to Botha (1994) 255 as the existence of such inconsistent Act will already indicate that South Africa does not regard the customary rule in question as binding.

69 Devine (1995.2) 44 at 12.

70 Botha (1994) 254. See also Dugard (1995) 251.

71 Olivier (1993/94) 12.

5. *Judicial Decisions and the Application of International Law*

5.1 *Decisions by the Constitutional Court*

The Constitutional Court handed down only a small number of decisions under the 1993 Constitution in which international law was considered.[72] The court dealt with international law predominantly under section 35 of the 1993 Constitution, which provided for interpretation of the chapter on fundamental rights rather than under section 231, which dealt with the status of international law in South African law.[73] The cases will be examined in an attempt to identify emerging trends on the understanding of and receptivity towards international law by the court primarily responsible for interpretation of the Constitution.

In *S v Zuma,*[74] the court made cursory reference to the constitutional direction per section 35 to use international law as an interpretive aid. This case considered the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977, which presumes that unless the contrary is proven, a confession made by an accused has been made freely and voluntarily, if it appears *ex facie* the document containing the confession that it was indeed made freely and voluntarily. Kentridge J, who delivered the judgment, considered the provisions contained in section 25 of the Constitution that bore on the question.[75]

He stated that although the provisions of section 25 are more specific than many of the other provisions of chapter 3, they nonetheless give rise to problems of interpretation.[76] He proceeded to establish the principles upon which a constitutional bill of fundamental rights should be interpreted and cited authority that each constitution calls for "principles of interpretation of its own".[77] He remarked that the 1993 Constitution "must be interpreted so as to give clear expression to the values it

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72 For a discussion of early decisions see Carpenter (1996) 24-31.
73 According to Botha (1995.1) 222 this tedency was to be expected.
74 1995 (4) BCCR 41 (CC).
75 Par 12 at 410.
76 Par 12 at 410 E.
77 Par 14 at 410 I.

seeks to nurture for a future South Africa".[78] Such a direction is provided by section 35 of the 1993 Constitution:

> "South African courts are indeed enjoined by section 35 of the Constitution to interpret Chapter 3 so as to 'promote the values which underlie an open and democratic society based on freedom and equality', and, where applicable, to have regard to relevant public international law. This section also permits our courts to have regard to comparable foreign case law."[79]

No distinction was reflected as to the value the Constitution intended to be attached to international law on the one hand, and comparable foreign case law on the other: the consideration of international law being compulsory and that of comparable foreign case law optional. Kentridge J proceeded in delivering a judgment referring to international law authority only once,[80] and relying heavily on foreign case law.

Although Kentridge J does not use the opportunity in this decision to expound the role of section 35 clearly, and specifically the distinction between international law and comparable foreign case law in constitutional interpretation, he laid the basis for a value oriented method of interpretation, to be conceptualised in the *Makwanyane* case.

In the landmark decision of *S v Makwanyane and Another,* the Constitutional Court dealt with the constitutionality of the death penalty.[81] This decision came at a time when a moratorium on the carrying out (and not the imposition) of the death sentence still existed. The suspension of the death penalty was imposed by the previous government, due to the controversial nature of capital punishment. Numerous people, sentenced to death, were on death row awaiting the resolution of the matter.

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78 Quotation of Froneman cited by Kentridge in par 17 at 412 D.

79 Par 17 at 412 E.

80 Consideration*of* the "reverse onus" by *inter alia* the European Court of Human Rights at par 19 at 412 J.

81 (1995) 6 BCLR 665 (CC).

The 1993 Constitution does not express itself on the matter of capital punishment. It was decided during the negotiating process neither to exclude nor to sanction the death penalty, but to leave it to the Constitutional Court to decide whether the death penalty is consistent with Chapter 3 of the Constitution.[82] The matter was brought to the Constitutional Court for decision in *S v Makwanyane and Another* on behalf of two accused sentenced to death on counts of murder. It was contended on behalf of the accused that the imposition of the death penalty for murder was a cruel, inhuman and degrading punishment that should be declared unconstitutional. This was a case that lent itself to international law influences. The opportunity was seized by Chaskalson P, who made extensive and creative use of international law in his judgment.

Chaskalson P firstly made use of international law in interpreting the Constitution. It was argued that documents used during the negotiating process (specifically those relating to the position of the death penalty), formed part of the context within which the Constitution should be interpreted.[83] He considered circumstances existing at the time the Constitution was adopted, in interpreting the relevant provisions of the Constitution. Chaskalson finds authority permitting the use of such evidence in international law. He referred to the European Court of Human Rights and the United Nations Committee on Human Rights whose deliberations are informed by *traveaux preparatoires* as described by article 32 of the Vienna Convention on the Law of Treaties.[84] Since the present discussion is only aimed at the identification of trends, no arguments will be presented on whether article 32 of the Vienna Convention was correctly applied. Chaskalson also points out that in other countries where the constitution is the supreme law such as Germany, Canada, the United States and India, courts may have regard to circumstances prevailing during the drafting of the

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82 Par 25 at 682 A.

83 Pars 12-17 at 677-679.

84 Pars 16 and 17 at 679. Article 32 of the Vienna Convention provides under the heading "Supplementary means of interpretation": "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 [general rule of interpretation], or to determine the meaning when the interpretation according to article 31; (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

Constitution.[85] The judge also makes reference to the Vienna Convention on the Law of Treaties, which may assist the court in interpretation of the Constitution.[86]

The second point of relevance from an international law perspective appears in Chaskalson's clear distinction between decisions of courts of foreign countries and those of international tribunals (as expressions of international law), as directed by section 35.[87] As previously indicated, the consideration of the former is discretionary and of the latter obligatory.[88] The judge stressed that it is important to appreciate that the court is not bound to follow either international law or comparable foreign case.[89] He warned that the court must construe the South African Constitution and not an international instrument or the constitution of some foreign country and that this can only be done with due regard to South African realities.[90]

He stated as follows on the role of international law:

> "International agreements and international customary law accordingly provide a framework within which Chapter 3 can be evaluated and understood and for that purpose decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the international Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter 3."[91]

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85 Par 16 at 678-9G and A.

86 697 note 23. Sections 31 and 32 of the Vienna Convention contains factors which can be considered as aids in interpretation.

87 Par 34 at 686 A.

88 Botha (1995.1) 224 points out that under section 35 courts must consider only the international human rights law and not international law in general. He argues the decisions of foreign courts on matters of international human rights law can also be considered as peremptory but only in so far as they indirectly reflect the position under international law.

89 Par 39 at 688 A.

90 Par 39 687 F.

91 Par 35 AT 686 E-F.

He pointed out that public international law as referred to by section 35(1) includes both binding as well as non-binding law.[92] The reference to non-binding law immediately leads to the assumption that the judge is following a progressive approach to include sources falling outside article 38 of the Statute of the International Court of Justice such as soft law. As authority, however, he referred to Dugard's suggestion "that section 35 requires regard to be had to 'all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice ...'."[93] Dugard refers only to the traditional sources of international law. Dugard confirms this view in an article "International law and the 'final' Constitution" were he suggests that the following clause be considered for inclusion in the 1996 Constitution:[94]

> '"Public international law in section 35(1) is to be interpreted to included all the sources of international law referred to in article 38(1) of the Statute of the International Court of Justice. A court may have regard not only to treaties to which South Africa is a party but also to other treaties which may assist the court in ascertaining the relevant norm of international law."

One cannot help but wonder whether Chaskalson's reference to non-binding sources did not have in mind treaties to which South Africa is not a party and the sources mentioned in article 38(1)(c) and (d). Treaties to which South Africa is not a party can in terms of international law not be regarded as non-binding international law. The sources mentioned under article 38(c) and (d) are general principles of law recognised by civilised nations, judicial decisions and teachings of the most highly qualified publicists.[95]

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92 Par 35 at 686 D-F.

93 Note 46 at 686.

94 Dugard (1995) 242. Dugard's view on the relevance of soft law is clear from the following statement at 243: "If South African courts are permitted to have regard to all these sources of international law (art 38 of the ICJ Statute), including international human rights treaties to which South Africa is not a party, they will be able to draw on the whole field of international human rights law." In terms of this view there is no place for sources non-binding in terms of international law such as the Universal Declaration of Human Rights.

95 Maluwa (1998) 59 argues to the contrary that there is no doubt that the scope of international law envisaged by Chaskalson P encompasses not only the 'hard' law of customary rules, treaty provisions and judicial decisions, but also 'soft' law contained in resolutions, declarations and

Chaskalson concluded that "capital punishment is not prohibited by international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading within the meaning of section 11(2)".[96]

Chaskalson's view on the role of sources referred to by section 231 of the 1993 Constitution, namely incorporated treaties and custom which forms part of South African law, is not particularly clear. Although he acknowledges the fact international agreements become binding on South Africa after ratification or accession in terms of article 231, they provide only a framework for the interpretation of Chapter 3 under section 35. This is in contrast with the intention of the drafters that treaties to which South Africa is a party and binding custom, should form part of the law of the land in so far as they are not in conflict with the Constitution. It would be equally absurd to say that courts must consider South African legislation in order to interpret Chapter 3. Surely it is necessary to differentiate on a theoretical basis between binding and non-binding international law for purposes of the interpretation of Chapter 3. Binding law is binding and non-binding is not binding but may be used for other purposes, such as an interpretative aid. It is suggested that section 35 should only refer to non-binding international law and that binding international law should be treated in terms of the provisions of section 231. Binding international law should, in other words, be treated no differently from any of the other non-constitutional components of South African law such as parliamentary legislation and common law. Although the South African international law discourse benefited from the international law focus of Chaskalson's judgment, the judgment again clearly indicates that international law is still not regarded as an integral part of South African law. It would have been welcome had the judge acknowledged the broader function of international law, including cases where international human rights provide for more comprehensive protection than envisaged by Chapter 3.

Judges Ackermann, Kriegler, O'Regan and Didcott made no mention of international law in their judgments but relied heavily on foreign municipal law cases. Kentridge AJ

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guidelines drawn up by the appropriate international bodies, and also international law not binding on South Africa.

96 Section of the Constitution prohibiting cruel, inhuman or degrading treatment or punishment. Par 36 at 686 G.

referred in passing to international law by saying that although the death penalty is not yet contrary to international law, international law is developing in that direction.[97] Mahomed J stated that public international law is one of the factors that may be considered in interpreting the Constitution[98] and referred to United Nations research findings on the death penalty in his judgment.[99]

In their judgments, judges Langa, Madala and Mokgoro focussed on the death penalty from an internationalist perspective. Langa J, took up the reference made by Chaskalson to *ubuntu.*[100] Langa pointed to the values reflected in the Constitution and the need to move from victimisation to *ubuntu.*[101] He elaborated on the meaning of *ubuntu* as blue print of the "values we need to uphold".[102] *Ubuntu* becomes relevant in a debate on the death penalty because of the value it puts on life and human dignity.[103] Madala J, likewise, based his judgment on *ubuntu* and questioned the fact whether the death penalty complies with the precepts of *ubuntu*. Makgoro J took the argument on the relationship between *ubuntu* and the right to life further. She pointed out that balancing competing fundamental rights and freedoms can often only be done by reference to a system of values extraneous to the constitutional text itself.[104] This is in accordance with the constitutional imperative to the courts in terms of article 35(1). These values, which are common values in South Africa, can form a basis on which to develop a South African human rights jurisprudence.[105] Mokgoro identified *ubuntu* as an example of such a value. In her view, life and dignity are like two sides of the same coin. The concept of *ubuntu* embodies them both.[106] She speculated about the similarities between the spirit of the African concept of "ubuntu"

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97 Par 199 at 744 H.
98 Par 266 at 759 H.
99 Par 298 at 765 H.
100 Chaskalson states in par 131 at 718 D that "[t]o be consistent with the value of *ubuntu* ours should be a society that 'wishes to prevent crime ... (not) to kill criminals to get even with them'." Mokgoro J par 308 at 771-772, translates *ubuntu* as humaneness, personhood and morality. The concept places group solidarity central to the survival of the community. Its spirit empasises respect for human dignity, marking a shift from confrontation to conciliation.
101 Par 223 at 751 G.
102 Par 224 at 751 H.
103 Par 225 at 752 C.
104 Par 302 at 769 C.
105 Par 307 771 E.
106 Par 311 at 773 D.

and the rights to life and dignity as embodied in the ICCPR.[107] Western ideals and African indigenous law need not differ in spirit.[108]

Botha's view that "Mokgoro's judgment evidences a distinct internationalist trend – albeit with a distinctly African flavour!"[109], is supported. *Ubuntu* as value system, is of particular relevance within the context of section 35 of the 1993 Constitution. *Ubuntu* is a phenomenon with African roots, not limited to South Africa. The recognition by the court that South Africa subscribes to a value system followed internationally, albeit regionally, is to be welcomed and will hopefully manifest in more decisions. As such, one can only speculate on the extent to which *ubuntu* plays a role in African customary international law. Mokgoro's judgment further contributes to mainstreaming African values and gives them a legal content.

The case of *S v Mhulungu and Others*[110] indirectly bears on the relevance of international law in constitutional interpretation. The court *a quo* asked the Constitutional Court to consider whether in terms of section 102(1): (a) proceedings could have been said to have been pending immediately before the commencement of the Constitution; and (b) whether in the light of section 241(8) of the Constitution the provisions of the Constitution were applicable to the trial.

Although the decision contains no direct reference to international law, the judgment of Sachs J does have implications for the use of international law as envisaged by section 35. Sachs suggested a method of constitutional interpretation where:

> "the real question is not what meaning to give to that provision on its own, but how to interpret it in relation to the enjoyment of fundamental rights as set out in Chapter 3. That means that not one but two sets of provisions must be interpreted, not consecutively and independently, but simultaneously and in terms of their inter-relationship."[111]

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107 Par 309 at 772 G.
108 For a discussion see Botha (1995.1) 227.
109 *Ibid.*
110 1995 (7) BCLR 793 (CC).
111 Par 103 at 321.

Botha applies this thinking to the position of section 35 within the context of Chapter 3.[112] He refers to Sach's suggestion that: "One way of dealing with two sets of mutually contradictory provisions would be to apply a variant of the presumption to the effect that general provisions do not trump, override or derogate from specific ones."[113] Botha argues that the rule *generalia specialibus non derogat* may, if applied to sections 35 and 231 of the Constitution, be taken to mean that the specific *genus* of international law referred to in section 35, namely international human rights law, is not overridden, or trumped, by the general provisions of section 231. Therefore, should a conflict arise between the international human rights law of section 35 and general international law they should be reconciled. Where this proves impossible, Botha suggests that international human rights law must prevail.[114]

In the case of *S v Williams and Others*[115] the constitutionality of judicially imposed corporal punishment in terms of section 294 of the Criminal Procedure Act 51 of 1977, was at issue. It was submitted that corporal punishment violates both the right to dignity as contained in section 10 of the Constitution and the prohibition of cruel inhuman or degrading punishment as provided for in section 11(2) of the Constitution.

As far as section 11 (2) is concerned Langa J, who delivered judgment, remarked that its wording corresponds to that used in international instruments.[116] He referred to comparable wording used by article 5 of the UDHR, article 7 of the ICCPR, article 3 of the European Convention on Human Rights and Fundamental Freedoms and article 5 of the African Charter on Human and Peoples' Rights.[117] He remarked that "while our ultimate definition of these concepts must necessarily reflect our own experience and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the

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112 Botha (1995.1) 20 at 228.
113 Par 113 at 323.
114 Botha (1995.1) 20 at 229.
115 1995 (7) BCLR 861.
116 Par 21 at 869 note 24.
117 Note 24 at 869.

concepts are dealt with in public international law as well as in foreign case law".[118] Langa proceeded to examine interpretations of torture and inhuman or degrading treatment by the United Nations Human Rights Committee and the European Commission of Human Rights and domestic case law.

All considered, he concluded that courts are constitutionally compelled to "have regard" to the consensus contained in the authority referred to. He, however, warned that "we are not bound to follow it but neither can we ignore it."[119] He continues to remark that through the Constitution South Africa can now join the mainstream of the world community that is progressively moving away from corporal punishment.[120] The constitutional provision must be interpreted with regard to the emerging consensus of values in the civilised international community.[121] The final definition must, however, ultimately reflect the South African experience and circumstances.[122]

The court found corporal punishment inflicted on juveniles unconstitutional. No mention is made of the fact that South Africa was at the time a signatory to the Convention against Torture and party to the Convention on Children's Rights nor to the legal implication this holds for South Africa.

In 1996 the Constitutional Court adopted a number of decisions which referred to section 35. In *Du Plessis and Others v De Klerk and Another*[123] the respondents (plaintiffs in the court *a quo*) instituted action against the appellants claiming damages for defamation arising from a series of newspaper articles dealing with the supply of arms and other material to the Angolan rebel movement Unita. These articles were published prior to the coming into operation of the 1993 Constitution. In October 1994 the defendants amended their plea in order to claim the right of freedom of expression under section 15 of the 1993 Constitution as a defence against a civil, common law action for defamation. The court expressed itself on the

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118 Par 23 at 870.
119 Par 50 at 878.
120 *Ibid*.
121 Par 22 at 870 C and 39 at 874 G.
122 Par 23 at 807 C.
123 1996 (5) BCLR 658 (C).

questions of retrospective operation of the Constitution and the possible horizontal application of Chapter 3, with specific reference to section 15 of the Constitution, which guarantees the right to freedom of expression. The ruling of the court was negative on both questions.

In deliberating the questions the court made ample reference to foreign case law.[124] In the main majority judgment Kentridge AJ observed that the issues at stake ultimately depend on an analysis of the specific provisions of the interim Constitution. It was nevertheless regarded as illuminating to examine the solutions arrived at by courts of other countries such as the United States, Canada, Germany and Ireland.[125] The court did not choose to investigate the role of international law. Despite the fact that South Africa was not party to any agreements protecting freedom of expression at the time, such right can arguably be part of customary international law or soft or non-binding law as directed by the court in the *Makwanyane*[126] case.

In *Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others*[127] the court had to decide whether section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967, which renders it an offence to possess "any indecent or obscene photographic matter", contravenes the right to privacy as protected by section 13 of the Constitution where such erotic material was kept for personal use in a person's own home. The court ruled section 2(1) to be unconstitutional. In a separate judgment Mokgoro J remarked that:

> "Section 35 provides that this court 'shall, where applicable, have regard to public international law applicable to the protection of {chapter 3 rights}'. It is significant that at least four international human rights instruments provide specifically for the right to receive information under the general head of the right to free expression. ... Section

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124 At 667 B-683 C and 716 C.
125 Par 33 at 677 B.
126 Note 81 chapter 5 above.
127 1996 (5) BCLR 609 (CC).

35 of the Interim Constitution further permits this court to 'have regard to comparable foreign case law in interpreting Chapter 3'."[128]

The four international instruments are identified in a footnote[129] as article 9 of the African Charter on Human and Peoples' Rights, article 10 of the European Convention on Human Rights, article 19 of the UDHR, and article 19 of ICCPR. Mokgoro proceeded to examine foreign case law. Decisions by the European Court of Justice interpreting the European Convention of Human Rights[130] were dealt with as foreign case law and not international law.

The court adopted a similar approach in *Fraser* v *Children's Court, Pretoria North and Others.*[131] The court dealt with the question as to whether section 18(4)(d) of the Child Care Act 74 of 1983 was inconsistent with the 1993 Constitution and invalid insofar as it dispensed with the father's consent for the adoption of an illegitimate child. Instead of referring to the ample sources of international law on the topic, Mahomed DP, who delivered judgment, stated that "In addressing itself to these matters the legislature might, however, have to consider the judicial and legislative responses in certain foreign jurisdictions ... but only as far as they may be relevant to our conditions".[132] Under these 'foreign jurisdictions' he examined statutory responses and case law in various countries, but also the case of *Keegan v Ireland* by the European Court of Human Rights.[133]

In *Brink v Kitshoff* N0[134] provisions of the Insurance Act 27 of 1943 were challenged on the ground that they constituted a breach of section 8 of the Constitution which guarantees the right of equality before the law, and the right not to be unfairly discriminated against. In a separate judgment O'Regan J referred to various international instruments as well as foreign constitutions to clarify the concepts 'equality before the law' and discrimination, as directed by section 35 of the

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128 Par 29 at 623-624.
129 Note 41 at 624.
130 Pars 31-34 at 624-5.
131 1997 (2) BCLR 153 (CC) at 169-171.
132 Par 30 at 165 G.
133 Par 39 at 169.
134 1996 (6) BCLR 752 (CC).

Constitution.[135] She referred in this regard article 7 of the UDHR, article 26 of the ICCPR and also mentioned that there are other international conventions dealing with specific aspects of discrimination. After proceeding to consider constitutional provisions of other countries protecting equality in the same manner, O'Regan concluded:[136]

> "This cursory consideration of the international conventions and the foreign jurisprudence makes it clear that the prohibition of discrimination is an important goal of both national governments and the international community. However, it also illustrates that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality."

In *Bernstein and Others v Bester and Others NNO,*[137] the court found sections 417 and 418 of the Companies Act[138] providing for the summoning of individuals during a companies winding up to be constitutional. In considering the protection of privacy as provided for by section 13 of the 1993 Constitution, the court is aided by the European Convention on Human Rights, a resolution by the Consultative Assembly of the Council of Europe and conclusions reached by the Nordic Conference on the right to respect for privacy.[139] No distinction is made between these sources of international law not binding on South Africa and the "German, European and American approach" which the court subsequently considers.

In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[140] the court held that section 417(2)(b) of the Companies Act, requiring persons to

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135 "Section 35(1) of the Constitution requires us to have regard to international law to interpret the rights it entrenches." Par 34 at 766 G.
136 Par 39 at 768 E.
137 1996 (2) SA 751 (CC).
138 Act 61 of 1973.
139 Pars 72-73 at 790-791.
140 1996 (1) SA 984 (CC).

respond to incriminating questions asked in judicial investigations of bankrupt companies, to be in violation of section 25(3) of the 1993 Constitution providing for a fair trial. The court further looked into the right to freedom and security of the person in terms of section 11(1) of the Constitution. In establishing the meaning of the provision the court looks at the American Declaration on the Rights and Duties of Man, the ICCPR, the European Convention on the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and People's Rights, comments by Siegart, and findings of the European Commission of Human Rights and the European Court of Human Rights.[141]

The state of affairs regarding the relevance of article 35 to the Constitutional Court is indeed very disappointing. In cases where ample "applicable" international human rights law is available, very few and in some cases none of the judges accessed that source under section 35. Where they do, that is often the end of the process. International law is usually, as in the cases of *Case* and *Fraser,* merely referred to and then abandoned in favour of foreign case law, for which the court shows a clear preference. International human rights law is not analysed and interpreted in order to interpret the Constitution. The impression is left that a passing and superficial regard to international law is regarded by the courts as a mere formal and not a substantial step in judging a matter. A formalistic adherence to article 35 is a far cry from regarding international law as part of South African law as envisaged by the drafters of section 231.

The court further shows very little appreciation for the universal value system underpinning international human rights law, which would inevitably include South Africa as part of the international community. One is reminded of the apartheid legal order where South Africa recognised the existence of international law but did not subject itself to specific, generally accepted norms of international law. This is further not in keeping with the spirit of the 1993 Constitution as reflected in Constitutional Principle II (CPII), which states that:

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[141] See also Cameron Blake (1998) 678.

"everybody shall enjoy *all universally accepted fundamental rights, freedoms and civil liberties*, which shall be provided for and protected by entrenched and justifiable provisions in the Constitution, which shall be drafted after having given due regard to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution." (own emphasis)

It is suggested that the term "universally accepted fundamental rights" is synonymous with and should correspond to the rights contained in the international human rights agreements identified in chapter 2 of this thesis and corresponding customary international law.

In *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*[142] the court held that the constitutional principles are part of the Constitution. Like all provisions of the Constitution they must be interpreted in their context and, if relevant, may be taken into account in interpreting other provisions of the Constitution. The court further stated that the constitutional principles contained in Schedule 4 have a higher status than the rest of the 1993 Constitution in that they, unlike other provisions of the Constitution, cannot be amended at all.

In *Ex Parte Gauteng Legislature: In Re Gauteng School Education Bill*[143] the petitioners submitted that the right to education protected by section 32 (c) of the 1993 Constitution placed an obligation on the state to establish educational institutions based on a common culture, language and religion as long as there was no discrimination on the ground of race. Sachs J looks at universally accepted principles of international law in order to establish what bearing they could have on the interpretation of section 32(c).[144] The historic roots of minority protection and group rights are traced from the inception of the League of Nations. Sachs traces the international law protection of minority rights to the UDHR, ICCPR, the UNESCO Convention on Discrimination in Education and general comments of the United

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142 1995(10) BCLR 1289 (CC).
143 1996 (3) SA 165 (CC).
144 Par 54 at 190 H.

Nations Human Rights Committee. He specifically dwells on the views of international law proponents of minority rights such as Capotorti and Thornberry and their interpretation of section 27 of the ICCPR, which seeks to protect minority interests. The link between the affirmative action provision of the Constitution, CERD and the Afrikaner community as minority group entitled to protection under international law, is subsequently considered. After drawing parallels between the Constitution and international law, Sachs concludes that international law is in accordance with the provisions of the bill under consideration.

The limited reference made to international human rights law by the Constitutional Court is certainly not in keeping with the spirit of CPII. In *In re: Certification of the Constitution of the Republic of South Africa*[145] the Constitutional Court *inter alia* had to make an assessment whether the new constitutional text complied with the directions of the constitutional principles. With regard to Constitutional Principle II, the court remarked that the words "universally accepted" were inserted in Constitutional Principle II by the drafters of the 1993 Constitution to indicate which fundamental rights should be included in a new constitutional text and thus qualify the term "fundamental rights".[146] The court commented:

> "Although a strict literal interpretation should not be given to 'universal', for that may result in giving little content to CPII, it nevertheless establishes a strict test. It is clear that the drafters intended that only those rights that have gained a wide measure of international acceptance must necessarily be included in the NT [new text]. Beyond that description the CA [Constitutional Assembly] enjoys a discretion."

The court further remarked that the requirement of universal acceptance in CPII does not preclude the CA from including provisions in the NT, which are not universally accepted.[147] The CA was entitled to formulate rights more generously than would be required by the "universally accepted norm". Where the rights contained in an international instrument are more comprehensive than those contained in the

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145 1996 (10) BCLR 1253 (CC).
146 Par 51 at 1279 D.
147 Par 53 at 1280 F.

Constitution, the court adopted a different way of thinking. An example in this regard concerns the way the court dealt with the right to marriage and family life, which was not explicitly recognised in the constitutional text. The court noted that this right was protected in a number of international agreements to which South Africa is either a party or a signatory. It pointed out that "from this survey of international instruments it is clear that, in general, States have a duty, in terms of international human rights law, to protect the rights of persons freely to marry and raise a family."[148] The court, however, found it necessary to make a survey on the acceptance of this right in national constitutions in order to establish whether there was universal acceptance of this right and found that it did not exist.[149]

In an assessment of the decision in *In Re: Certification of the Constitution of the Republic of South Africa*, Carpenter remarks with regard to the Constitutional Court judgment itself, that the court illustrated a somewhat haphazard approach to the use of foreign and international authority, flowing from the lack of understanding of the requirement of "universal acceptance".[150] This view appears to hold general truth and is in line with the other Constitutional Court judgments discussed. Thus, it seems that the historic neglect of international law under the apartheid legal order was not redeemed by the Constitutional Court as custodian of the 1993 Constitution.

The only Constitutional Court decision which explicitly mentioned section 231 is *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*.[151] In this case the court had to decide on the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995, the provisions of which preclude civil and criminal liability on the part of persons granted amnesty in respect of acts, omissions or offences committed with a political objective prior to the cut-off date. The applicants contended that such amnesty infringed on the fundamental rights of victims to seek civil redress and to have the perpetrators prosecuted and punished in ordinary courts as protected by the

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148 Par 97 at 1296.
149 Par 98 at 1296.
150 Carpenter (1996) 174.
151 1996 (8) BCLR 1015 (CC).

section 22 of the Constitution. The applicants further contended that under international law, more specifically the Geneva Conventions of 1949, and the two Protocols of 1977, the state was obliged to prosecute those responsible for gross human rights violations.[152]

The court recognised that the provisions of section 20(7) of the Promotion of National unity and Reconciliation Act violated the right to obtain redress in the ordinary courts. The court decided that such limitation of the section 22 right was permitted by section 232(4) of the Constitution, which stated that the epilogue to the Constitution was deemed to form part of the Constitution. The epilogue provided for national unity and reconciliation. In deciding the question Mohamed DP stated that:

> "International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law."[153]

He argued with reference to the international humanitarian law conventions relied on by the applicant, that on authority of section 231(3), express incorporation by way of legislation was required before a treaty could become enforceable as part of municipal law.[154] He cited the succession clause contained in section 231(1) as authority for the contention that parliament may by way of legislation override international obligations entered into before commencement of the Constitution. Mahomed concluded that these provisions are consistent with section 35(1), which directed courts to have regard to applicable public international law. He added that it was in any event doubtful whether the Geneva Conventions and Protocols applied to South Africa during the liberation struggle.[155]

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152 Par 25 at 1031 B, C, D, E.
153 Par 26 at p 1031 F, G, H.
154 Par 27 at 1032 A.
155 Par 29 at 1032 H.

It appears that the court confused the issue of incorporation into domestic law (section 231(3)) with the termination of international agreements (section 231(1)). In both cases parliamentary legislation plays a role, but with a different purpose. The court further took a very restrictive dualist view of international law by only considering incorporated treaties. This is contrary to the more monistic approach in *S v Makwayane* which interpreted section 35(1) to enable courts to consider both binding and non-binding international law.[156]

5.2 Other South African Decisions

An overview of High Court case law reported in the South African law reports under the 1993 Constitution presents an even more scant crop of international law related jurisprudence than found in the Constitutional Court cases.

The following decisions identified referred to international law in interpreting the chapter on fundamental rights (section 35):

In *S v Melani* [157] the court expressed itself on the question of failure to inform an accused of his right to legal representation against the background of section 25(1)(c) of the Constitution[158] Section 25(1)(c) provides:

> "Every person who is detained, including every sentenced prisoner, shall have the right ....
>
> (c) to consult with a legal practitioner of his or her choice, to be informed of this rights promptly and, where substantial injustice would otherwise arise, to be provided with the service of a legal practitioner by the State."

Froneman J referred with approval to P Chaskalson's interpretation of the term "public international law" in *S v Makwanyane*[159]: In the context of section 35(1), public

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156 Motala (1996) 36-37.
157 1992 (2) BCLR 174 E.
158 184 E.
159 Note 81 of chapter 5 above.

international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter 3 can be evaluated and understood.

Within this context J Froneman referred to article 14(3) of the ICCPR, which is interpreted by the United Nations Committee on Human Rights to include access to legal counsel pending trail. He further referred to a decision of the European Court of Human Rights[160] where the court held that the protection accorded by article 6(3)(c) of the European Convention of Human Rights also applies to pre-trial proceedings. In addition he referred extensively to foreign case law. The clear distinction by the court between public international law including decisions of international organisations and tribunals, and foreign case law is indeed sound and to be welcomed.[161]

In *Fose v Minister of Safety and Security*[162] van Schalkwyk J was more reluctant to apply section 35(1) in a case involving damages for torture and assault by the South African Police Services.[163] The judge motivated his circumspection to apply section 35 as follows:

> "Different legal systems apply different principles and the rules are frequently so crafted to accommodate the idiosyncrasies which are inherent to each particular system."[164]

This statement does not reflect the clear distinction between international law and foreign law as provided by section 35. Courts are [only] enjoined by section 35 to have regard to public international law as opposed to foreign case law which courts have the option to consider.[165]

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160 *Imbriosca v Switzerland* 17 1994 EHRR 441.
161 Botha (1996) 174.
162 1996 2 BCLR 232 (W).
163 237 H.
164 237 H.
165 Botha (1996) 176-177.

Botha criticises the court's circumspection to consider international law as follows:

"The whole purpose of international law, and international human rights law in particular, is to create a homogeneous, concordant system of rights protecting the individual against sovereign might. The so-called "margin of appreciation" which arises in various municipal legal systems to accommodate the needs of the specific community served by the Bill of Rights, is largely foreign to international law which seeks to serve a universal reality."

Despite his misgivings, the judge proceeded to look at foreign case law. He dismissed references by the plaintiff to decisions of the European Court of Human Rights.[166] He stated that the rights flowing from international treaties are entirely distinguishable from an existing common law system and confound rather than clarify the issue.

Again in *S v Sefadi*, a case dealing with the limitation on the right of access to information, the court cited section 35(1) only to make an comparative study of foreign case law.[167] In *Reitzer Pharmaceuticals (Pty) Ltd v Registrar of Medicines*[168] the court again merely refers to section 35 (1993) when interpreting fundamental rights contained in the Constitution, but never considers international law relevant to the case as such.

Moeketsi v Attorney-General Bophuthatswana[169] dealing with the right to a fair trail is yet another example where the court chose not to distinguish between the peremptory consideration of public international law and the discretionary consideration of foreign case law. Although reference was made to two judgments of the European Court of Human Rights, the court based its decision almost exclusively on Canadian and United States decisions.

Du Preez v Attorney-General of the Eastern Cape[170] dealt with the right to be tried within a reasonable time after being charged as provided by section 25(3)(a) of the

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166 242 F.
167 1995 (1) SA 433.
168 1998 (4) SA 660.
169 1996 (7) BCLR 947.
170 1997 (3) BCLR 329 (E).

1993 Constitution. Zietsman J quoted section 35(1) of the Constitution and referred to "several cases decided in the courts of other countries" including article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms which forms part of the law of the Federal Republic of Germany. In this regard international law was considered on the strength of the fact that it had been incorporated into a foreign domestic legal system.[171] He referred with approval to *Eckle v Germany*[172] and *Foti v Italy*[173] on the interpretation of article 6(1), as well as to *Bate v Regional Magistrate Randburg*[174] where the above authority also features. Zietsman expressed himself as follows on the status of the above authority:

> "While regard must be had to these authorities they must be treated with circumspection and the conclusion reached in such cases will not necessarily be appropriate and provide the answer to the interpretation in our Constitution."[175]

In *Baloro and Others v University of Bophuthatswana and Others*[176] the court once again made extensive reference to foreign case law and none to international law on the basis of section 35. The importance attached to preparatory documentation in interpreting the Constitution by Chaskalson in *Makwanyane* found resonance the *Baloro* decision. Here the court stated that in promoting the values underlying an open and democratic society based on freedom and equality as the court is enjoined to do by section 35(1), a court is entitled to have regard to the circumstances and events leading up to the adoption of the 1993 Constitution. No reference was however made to the international law roots of *traveaux preparatoires*.

Despite their predisposition towards foreign case law, courts have on a number of occasions warned that such case law should, within the context of section 35, be treated with circumspection.

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171 334 H.
172 Federal Republic 193 (5) EHRR 1.
173 1983 (3) EHRR 313.
174 1996 (7) BCLR 974.
175 At B332.
176 1995 (4) SA 197.

In *Shabalala and Others v the Attorney-General of Transvaal and Others*[177] the court turned to section 35 in order to establish the extent to which an accused is permitted access to information in possession of the state. The court referred to the Botswana court of appeal decision of *Unity Dow v AG Botswana*[178] where it was held that treaties not incorporated into the law of the land may only be used as an interpretive aid: "The reference made by the learned Judge *a quo* to these materials amounted to nothing more than that". The relevance of Botswana law in interpreting section 35 being an interpretation clause itself is not understood. The court proceeded to look at article 3 of the European Convention on Human Rights and decisions of the European Court of Human Rights as well as foreign court decisions. Cloete concluded that the danger of cases decided in foreign jurisdictions is that a person not trained in the practice of law in those jurisdictions will not be able to place decided cases in context and can thus easily misinterpret the legal position. (The Botswana case on the status of international law is supposedly included in this category!). In conclusion Cloete referred with approval to the following *caveat* expressed by Froneman J in the *Qozeleni* case:[179]

> "Although section 35(1) of the Constitution enjoins one to have regard to comparable foreign case law where applicable in interpreting the provisions of chapter 3 of the Constitution, this should be done with circumspection because of the differing contexts within which foreign constitutions were drafted and operate in, and the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting."

Cloete adds that "section 35(1) does not "enjoin"; the word used is "may".

The *Shabalala* judgment shows a very clear understanding of the reasons why the drafters of the 1993 Constitution made it optional to consider foreign case law. What is overlooked, is that none of the dangers attached to the use of foreign case law is present in the case of international law. Here indeed we have a legal system

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177 1994 (6) BCLR 85 (T).
178 Civil appeal 4/91 referred to at 115 F.
179 Par D at 119 D.

designed to accommodate all nations and which remains equally suitable for application in different legal systems. One fact warned against however remains, namely that people not trained in the intricacies of a particular legal system (international law) cannot apply it correctly.

The *caveat* expressed in *Qozeleni* against the use of foreign case law, was again approved by the court in subsequent decisions namely *Park-Ross v The Director, Office for Serious Economic Offences,*[180] *Potgieter en 'n Ander v Kilian*[181] and *Nortje and Another Attorney-General of the Cape and Another.*[182] Despite this recognition, the court continued to make extensive reference to foreign case law, completely skirting any reference to international law.

Remnants of the apartheid legal order still crop up in unexpected places. In *Minister of Transport of Transkei, Transkei v Abdul,*[183] the court was confronted with a conflict of South African legislation and legislation of the Transkei. An action for damages arising from a collision which occurred in Transkei, was instituted in a South African court by the former Transkei Minister of Transport (the appellant). The appellant, in a special plea, pleaded that the respondent's counterclaim had become prescribed in terms of Transkei legislation. In considering the special plea, the court dealt with the matter as an international law issue and treated Transkeian law as foreign law, which was in conflict with South African law.

A number of cases came up during 1993-1996 where courts had to consider and apply specific rules of international law. In *S v Muchindi and Others,*[184] during a trial-within-a-trial, South African representatives of the International Committee of the Red Cross (ICRC) were subpoenaed by the defence with a view to proving a report by the

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180 1995 (2) BCLR 198 (C).
181 1995 (11) BCLR 1498 (N).
182 1995 (2) BCLR 236 (C).
183 1995 (1) SA 366.
184 1995 (2) SA 36.

ICRC. The court had to decide whether the Status Agreement published in Government Notice 2405 of 3 December 1978 granting immunities to ICRC representatives, carried the authority of municipal law and whether this granted the representatives immunity from giving evidence in court. Schutz J referred to the International Court of Justice judgment in the *Case Concerning United States Diplomatic and Consular Staff in Teheran*[185] to illustrate that diplomatic and consular immunities and privileges are principles deep-rooted in international law. Although ICRC representatives are not diplomats, immunities were granted to them by means of a status agreement entered into between the South African government and the ICRC. Without making any reference to the 1993 Constitution, Schutz states:

> "By law the conclusion of a treaty, convention or agreement with any other government is an executive and not a legislative act, and, as a general rule the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process: *Pan American World Airways Insurance Co Ltd* ..."

He concluded that such incorporation had taken place through the sections 3(4) and 4(b) of the Diplomatic Immunities and Privileges Act 74 of 1989, which provides that the State President may grant immunities and privileges to organisations recognised by the Minister of Foreign Affairs for purposes of the Act by way of agreement. This Act therefore elevates the Status Agreement to municipal law.

The question of sovereign immunity came before the court in *Mangope v van der Walt and Another NNO*.[186] This case dealt with the interesting "international law" situation which arose when the South African Transitional Executive Council, in anticipation of the coming into operation of the 1993 Constitution, took steps to reincorporate Bophuthatswana into South African territory. Two administrators, the respondents, who were appointed to run the country, issued a decree to substantially suspend the Constitution of Bophuthatswana. The applicant approached the court for a declaratory order rescinding the appointment of the respondents as administrators

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185 (1981) 61 International Law Reports 504 at 37 G-J.
186 1994 (3) SA 850.

and annulling the above decree. It was contended on behalf of the applicants that the unsolicited political intervention violated Bophuthatswana's sovereignty and had been in breach of the duty of one state to respect the territorial and political integrity of another state and not to interfere in the latter's affairs. Comrie J ruled that since South Africa violated Bophuthatswana's sovereignty it could not expect to enjoy the privilege of sovereign immunity in the courts of Bophuthatswana in respect of that very breach.[187]

The court rejected the applicants' arguments based on international law as not being apposite to the case in question. Instead the court ruled that principles of constitutional law should be applied. Accordingly, it was decided that the respondents achieved the required successor effectiveness and that the new regime had to be recognised as lawful. The court was confronted with a very difficult scenario in that it had to reverse the international law basis, which previously governed the relationship between South Africa and Bophuthatswana, and replace it with one of constitutional law. This judgment reminds of the attitude of courts during apartheid where legal arguments were selected to legitimise political decisions already taken.

The case of *Zantsi v Chairman, Council of State, Ciskei*[188] presented a rare example of creative application of international law by the higher courts. Heath J, relied on domestic legal precedent regarding international law in order to establish the supremacy of a domestic constitution:

> "A Constitution, according to international common law, is the supreme law of a country and all other laws are subordinate to the Constitution. See *Attorney-General, Botswana v Unity Dow ... S v Marwane*1982 (3) SA at 753A-D; *Bongopi v Chairman of the Council of State, Ciskei and others* ... The application of public international law applicable to the protection of rights entrenched in the Constitution has been specifically provided for and emphasised by the provisions of s 35 of the Constitution ...".

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[187] At 862 F.
[188] 1995 (2) SA 534 at 554 J.

In *Mulaudzi and Others v Chairman, Implementation Committee, and Others*[189] the Venda Supreme Court examined the validity of legislation of the Council of National Unity in terms of the Venda Constitution Act 9 of 1979. In determining the status of the South African Transitional Executive Council Act, van den Heever AJ, examined the relationship between domestic legislation and treaties and concluded as follows:[190]

> "Obligations imposed on a sovereign state in terms of an agreement, treaty, convention or mandate entered into between itself and another sovereign State, although binding in the international field, do not constitute a restraint against offending legislation or provide a procedure for the manner and form of future legislation amounting to a condition precedent for enacting valid legislation. If legislation was enacted which was repugnant to the terms of the agreement the courts will ... enforce the legislation and are not bound by the terms of any treaty which has not been embodied in our municipal law."

As authority for above quotation the court relied on *Pan American Airways v SA Fire and Accident Insurance Co Ltd*[191] and *S v Tuhadeleni.*[192]

6. Conclusion

The 1993 Constitution for the first time in South African history accorded constitutional recognition to international law. As such it created an enabling environment for international law to flourish. Although the influence of international law has permeated to various provisions of the Constitution, the above discussion focussed on the fundamental rights contained in the Constitution, the role of international law as an interpretative aid, and also section 231, governing the status of international law in South African law.

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189 1995 (1) SA 513.
190 513 E-F.
191 Note 7 chapter 4 above.
192 Note 18 chapter 4 above.

Chapter 3 of the 1993 Constitution dealing with fundamental rights showed a very distinct influence of international human rights instruments which is indicative of the importance accorded by the drafters to international human rights law. The provisions of international human rights law incorporated in Chapter 3 enjoyed legal supremacy being part of the Constitution. There were, however, areas of difference where either Chapter 3 or international human rights instruments provided for more comprehensive protection than the other. It is suggested that those areas where international law went beyond the constitutional boundaries were especially useful, having the capacity to expand South African human rights law through the application of sections 35 and 231.

Section 35 enjoined courts to use international human rights law as a tool to interpret the fundamental rights contained in the Constitution. Courts were directed by the *Makwanyane* case to consider both binding and non-binding sources of international human rights law when interpreting the constitutionally entrenched fundamental rights.

Section 231 clarified previous uncertainty regarding the place of international law in South African law and introduced some fundamental changes. The procedure laid down for the entry into international agreements differs substantially from the pre-1993 dispensation. After 1993, treaty-making capacity no longer fell exclusively in the hands of the executive. Despite some problems with the drafting, the intention was clear that treaty-making should essentially be a legislative power. The shift from executive to legislative power effectively addresses the previous concern that the state spoke with two voices if the executive was empowered to enter into treaties without legislative involvement and the legislator only became involved when treaties were incorporated into domestic law. The approach adopted by the Constitution, however remains dualist in that approval to enter into treaties and their incorporation into domestic law remain two distinctly separate steps. It can be argued that the dualist approach becomes nonsensical where the same government authority, namely the legislator, is responsible for both treaty-making and treaty incorporation.

The compatibility of treaty provisions and domestic law should be identified and addressed prior to becoming party to an agreement. It is the function of the State Law Advisers to ascertain, before a treaty is entered into, that there is no conflict with the Constitution or other domestic legislation. If conflict with other South African legislation is identified, the legislation should either be amended or alternatively reservations to the conflicting provisions of the treaty should be considered.

The Constitution clarifies the pre-constitutional uncertainty regarding custom by providing that it forms part of South African law subject to the *caveat* that it binds South Africa at an international level and is not in conflict with the Constitution or parliamentary legislation.

The hierarchy of norms laid down by section 231 of the Constitution was thus as follows: The Constitution is the supreme law of the land, with which all other law must comply. At the second hierarchical level below the Constitution, one would find parliamentary legislation, which includes incorporated treaties. Such legislation was subject only to the Constitution. The third level, after legislation, would comprise of common law and customary international law. These sources of law will only retain their validity if they comply with both legislation and the Constitution. Incorporated treaties thus enjoy a higher status in South African law than customary international law. Both sources remain subject to the Constitution.

Constitutional Court and high court cases examined in order to determine the attitude of courts towards international law focus mainly on the interpretation of the chapter on fundamental rights. Where international law is referred to by the courts under section 35, the following trends emerged:

- The clear distinction made by the *Makwanyane* case between international law and foreign case law as directed by section 35 did not find general resonance in subsequent decisions. Courts tended to equate international and foreign case law.

- Courts displayed a clear preference for foreign case law and were much less comfortable dealing with international law. References to international law were often cloaked as foreign case law. The decisions showed that where section 35 was identified by a court, it was often only to justify its use of foreign case law.
- International law as referred to by section 35 included both binding and non-binding law.
- International law is regarded as part of the value system underlying an open and democratic society as directed by section 35 and as such is used as an interpretative tool. Regional values such as *ubunt*u were embraced and developed by courts in this regard.
- Reference to international human rights instruments are usually only cited and not considered by the court.
- Although the *Makwanyane* decision recognised treaties ratified or acceeded to as part of South African law, courts have generally refrained from applying them under section 231. Nowhere has the Constitutional Court seized the constitutional direction to apply international law as an integral part of South African law.

The above picture does not measure up to the hope expressed that the 1993 Constitution would restore international law to its rightful place as part of South African law. The enthusiasm with which the judiciary embraced the human rights culture did not spill over to include international human rights.[193] International law is still regarded as foreign to South African law, more so than the domestic law of other countries. South Africa's active participation in international fora and the large number of treaties entered into by the new South African government do not seem to have any significant influence on jurisprudence. Unfortunately, despite a few

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[193] Cameron (1998) 680 identifies the following Constitutional Court cases were the majority opinion chose not to concider international law despite its apparant relevance, namely *AZAPO* (note 149 chapter 5); *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) 186; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) and *Case* (note 127 chapter 5).

international law friendly decisions, the decades of neglect of international law at the hands of the judiciary continues to show its influence.

CHAPTER 6

INTERNATIONAL LAW AND THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 108 OF 1996

1. Introduction

The present chapter will focus the role of international law in terms of the Constitution of the Republic of South Africa, Act 108 of 1996, which emerged from the Constitutional Assembly and was approved by the Constitutional Court. The drafting history of the Constitution, specifically pertaining to the international law provisions, will firstly be dealt with before coming to the specific constitutional provisions dealing with international law. The references to international law as it appears in the Bill of Rights, provisions relating to the security services and the General Provisions will subsequently be analysed. The provisions of the Bill of Rights will be compared with those of the UDHR, the ICCPR and the ICESCR in order to illustrate the substantial overlap of constitutional human rights and international human rights law. The focus will, however, fall on the interpretation of the provisions relating to entry into international agreements and the status of international agreements and customary international law in terms of South African law. Such interpretation will be done against the background of directions contained in the Manual of Executive Acts, the practice followed by government departments and case law.

2. Drafting History and Background

The negotiators of the 1993 Constitution agreed that there would be a two-stage transition of power from the old order to the new. Thus the 1993 Constitution provided for a Constitutional Assembly (CA) elected by universal adult suffrage tasked to draft and adopt a new Constitutional text within two years of the first sitting of the National Assembly. For such adoption, section 73(2) of that Constitution required a majority of at least two-thirds of its members. The new constitution had to comply with constitutional principles agreed to by the negotiators of the 1993 Constitution. These constitutional principles, contained in Schedule 4 of the 1993

Constitution, recorded a "solemn pact" made between the striving political groups to break a deadlock in the negotiations and facilitate a political settlement in 1993. The concept of constitutional principles enabled the previous government, which enjoyed only white minority support, to play a significant role in the drafting of a new constitution after the loss of their powerbase. For this reason section 71(2) of the 1993 Constitution provided that any constitutional text passed by the CA would not be valid unless the Constitutional Court had certified that all its provisions complied with the constitutional principles.

All political parties elected to the Constitutional Assembly, with the exception of the Inkatha Freedom Party, participated in the deliberations of the CA. A wide variety of experts were consulted on an ongoing basis to assist in the drafting of a new constitutional text. An open invitation was also extended to the general public to make submissions to the CA. On 8 May 1996 the CA adopted a new text by a majority of 86% of its members. The Chairperson of the CA transmitted the draft to the Constitutional Court to certify that it complied with the Constitutional Principles.[1] The Constitutional Court found that all the Constitutional Principles had not been complied with and consequently withheld certification and referred the text back to the CA for amendment. An amended text was subsequently adopted by the CA on 11 October 1996 and re-transmitted to the court. After consideration of the text, at this occasion, the Constitutional Court found that it complied with the Constitutional Principles.[2] The Constitution[3] (hereafter referred to as the Constitution or the 1996 Constitution in order to distinguish it from the 1993 Constitution) finally came into operation on 4 February 1997.

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1 *In re certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at 1271.

2 *Certification of the Amended Text of the Constitution of the Republic of South Africa (1996)* 1997 (1) BLR 1 (CC) at 60.

3 Act 108 of 1996.

2.1 Drafting of International Law Provisions

Various inputs were made pertaining to the constitutional provisions on international law. Dealing with these questions fell within the responsibility of Theme Committee Five of the Constitutional Assembly.[4] The inputs received this theme committee included those of professors J Dugard, D J Devine[5] and the state law advisers of the Department of Foreign Affairs (hereafter SLA). The SLA being responsible to provide all government departments with international law advice were able to comment on practical difficulties experienced with the implementation of the international law provisions of the 1993 Constitution, especially section 231. A working session was also held between the SLA, Professor Dugard and members of the particular theme committee. A formal submission was made by the office of the SLA in a letter from the Director-General Foreign Affairs to the Executive Director of the Constitutional Assembly, which reads as follows:

"25 January 1995

RE: INVITATION TO MAKE SUBMISSION

Your invitation to the Department of Foreign Affairs to make submissions refers.

We wish to make a submission regarding aspects of the Constitution which may have a bearing on the functions of this Department such as the conduct of international relations and the status and incorporation of international law in South African law. International relations and international law do not fall specifically under any of the topics being dealt with by the various Theme Committees. The only specific Theme Committee we can identify which will have a direct interest is Theme Committee IV as far as the international law aspects of fundamental rights are concerned.

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4 The possible reference to international law in interpreting the Bill of Rights fell under the mandate of Theme Committee Four.

5 See in this regard Devine (1995.1) 1.

Presently the conduct of foreign affairs is a function of the central government. We are of the opinion that this position should be maintained as the nature of foreign relations is such that it will be problematic to conduct at a provincial level.

The 1993 Constitution, for the first time in our constitutional history, makes explicit provision for the status of international law in South African law (section 231). After the neglect international law suffered at the hand of the previous Government, we welcome the fact that international law is restored to its rightful position in South African law.

Entry into and incorporation of international agreements into domestic law as well as the status of international law in general (presently being dealt with by sections 82 and 231 of the Constitution), are areas which fall within the functions of this Department. Due to our first hand experience regarding the implementation of the relevant provisions of the present Constitution, we have however come across certain practical difficulties. Against this background we would suggest that international law be dealt with by the Constitution in the following manner:

Section 82(1)(i) of the present Constitution provides that the President shall be competent to ***negotiate and sign*** *international agreements. The Manual on Executive Acts issued by the Office of the President on 10 May 1994 states that Presidential approval be obtained in terms of section 82 by means of a Presidential Act. In the practice of day to day diplomatic relations some difficulty has arisen with the requirement to obtain Presidential approval to negotiate an international agreement. When South African delegates are invited to attend an international conference where an agreement will be drafted, it is usually not clear at the outset what the parameters are within which the text will be negotiated. The conduct of international negotiations is a dynamic process of interaction between states. With regard to most international agreements it is extremely difficult to anticipate at the outset how the tactics of other role-players will evolve. The mandate required from the President within which negotiations are to take place could therefore not be formulated concisely before the start of the process. Delegates attending such drafting conferences should in any event negotiate within the parameters of South Africa's foreign policy. When unforeseen circumstances arise, they can easily consult with head office telephonically or by means of fax to obtain further instructions. We therefore propose that the new Constitution should not include the requirement of Presidential approval for negotiating the text of an international agreement.*

As far as section 231(1), which deals with the validity of pre-April 1994 agreements, is concerned, we see no reason to retain such a clause in the next Constitution. The reason

why it was included in the present Constitution was to give parliament the opportunity to scrutinise agreements entered into by the previous unrepresentative government. When the new Constitution enters into force, parliament would have had ample opportunity to review previously entered into agreements which may not coincide with its policy. There will also be no reason to question agreements entered into under the present Constitution as the legality of the current Government is above board.

Section 231(2) of the Constitution provides for parliamentary approval for ratification of and accession to international agreements, negotiated and signed in terms of section 82(1)(i). We have already argued that the requirement of negotiation should not be included in the future Constitution. As far as signature is concerned the cross-reference to section 82 in section 231(2) proves problematic in the following instance:

Multilateral agreements which are no longer open for signature but only for accession. As it currently reads, section 231(2) allows only for accession to agreements negotiated and signed in terms of section 82(1)(i).

We would therefore propose that the words 'negotiated and signed in terms of section 82(1)(i)' be deleted to enable parliament to agree to accession of agreements not open for signature, or which were not signed under section 82(1)(i).

In terms of section 231(2) parliament is competent to ratify or accede to international agreements negotiated and signed by the President. This competence is open to two interpretations.

In terms of the first interpretation, all international agreements must be referred to parliament before they can bind the Republic. International agreements requiring neither ratification on an international level, nor incorporation into municipal law are included. Although this interpretation would appear to correspond to the intention of the drafters, it places a heavy burden on parliament which will be required to scrutinises and debate ***all*** *international agreements. Parliament's limited time will have to be used to consider less important agreements which could easily be handled by the responsible minister and which could enter into force between the parties once Presidential approval had been obtained. One need only consider the large number of* ***pro forma*** *agreements establishing diplomatic and consular relations, which are currently being concluded, to realise the impracticability of such an interpretation.*

In terms of the second approach, which is the approach favoured by the Office of the President, parliament is merely competent, but not obliged, to agree to the ratification of or accession to international agreements. This competence would be exercised under the following circumstances:

- *where a particular international agreement requires accession or ratification to bring it into force on the international place*
- *section 231(3) provides that where parliament agrees to ratification or accession to international agreements under subsection (2) 'such agreement shall be binding on the Republic and shall form part of the law of the Republic, provided parliament expressly so provides'.*

It would appear that international agreements not requiring ratification or accession for entry into force on the international place, will only form part of South African law if subsequently ratified by parliament in terms of section 231(3). Consequently, only international agreements requiring municipal application need be submitted to parliament for constitutional ratification.

Section 231(3) deals with entry into international agreements on an international level and the application thereof in domestic law. Unfortunately the text adopted by the Negotiating Council at Kempton Park does not coincide with the Constitutional text. We propose that the new Constitution amend this mistake by providing that international agreements, where parliament has agreed to the ratification or accession, shall form part of South African law unless inconsistent with the Constitution or excluded by express provision of parliament. Express provision should not be necessary for treaty provisions to be incorporated in law. We are of the opinion that international agreements to which South Africa is party should in principle apply in our domestic law subject to the minimum constraints.

We are satisfied with the provisions of section 231(4) of the Constitution on customary international law and would propose that it be taken up in the new Constitution without amendment.

As far as the fundamental rights are concerned we are of the opinion that the Constitution should recognise and entrench internationally accepted human rights. South Africa's international law obligations in the field of human rights which forms part of our domestic law in terms of section 231 of the present Constitution should be kept in mind when drafting these provisions. International human rights law is only reflected to a limited extent by the present Constitution.

Since 1993 the South African government has signed the following international human rights conventions:

- *(i) The Convention on the Elimination of all forms of Discrimination against Women.*
- *(ii) Convention on the Political Rights of Women.*
- *(iii) Convention on the Nationality of Married Women.*
- *(iv) Convention on the Rights of the Child.*
- *(v) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*
- *(vi) International Convention on the Elimination of All Forms of Racial Discrimination.*
- *(vii) International Convention on Civil and Political Rights.*
- *(viii) International Convention on Economic, Social and Cultural Rights.*

Steps are presently being taken to ratify the above Conventions within the next two years. Adherence to the African Charter on Human and People's Rights is also enjoying urgent attention. Section 231(2) and (3) of the present Constitution stipulates that parliament has to agree to ratification. When parliament is approached in this regard it will simultaneously be requested to provide for incorporation of the provisions of the Conventions in to South African law. It will therefore be imperative that the drafters of the new Constitution take account of existing international law obligations in the field of human rights when drafting the new Constitution.

International human rights should be reflected in such a manner that it is consistent with the provision dealing the incorporation of international law in general (compare sections 35 and 231 of the Constitution).

THE DIRECTION-GENERAL"

It appears from the above and other inputs received that everybody was keen to retain the spirit of the 1993 text, which reflected democratic values and a receptive attitude towards international law. Different ideas on ways to resolve the problems experienced with the interpretation and implementation of the 1993 Constitutional

provisions, were however, put on the table. Various texts emerged from the theme committee throughout the drafting process.

The inputs included the following suggestions:

- to delete the requirement of presidential approval for the negotiating of international agreements.[6]
- deletion of the section 231(1)[7] or excluding the succession to treaties from parliament's discussion.[8]
- clear provision for two different categories of agreements, namely those requiring only presidential approval and those requiring approval of parliament.[9]
- clarity on the position of provinces to enter into international agreements.[10]
- provision for giving effect to decisions of international organisations such as Security Council resolutions.[11]
- definition of the term international agreement.[12]
- the inclusion of an interpretation clause based on the presumption that it was not the intention of the lawmaker to violate international law.[13]
- automatic incorporation of international agreements binding on South Africa into South African law with the alternate suggested qualification: unless otherwise provided by the Constitution or an Act of parliament.[14]

These suggestions were once again left in the hands of politicians and drafting committees to marry with political considerations and transform into a constitutional text.

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6 Suggested by SLA in a letter from Minister Nzo to the Constitutional Assembly dated February 1995.
7 *Ibid.*
8 Dugard (1995) 245.
9 Nzo letter; Dugard (1995) 249; Devine (1995) 14.
10 Nzo letter.
11 *Ibid.*
12 *Ibid.*
13 Dugard (1995) 251.

3. *Constitutional Provisions Relating to International Law*

The Constitution reflects on international law in three different chapters:

(i) The Bill of Rights (chapter 2)
(ii) Security Services (chapter 11)
(iii) General Provisions (chapter 14)

The role of the Human Rights Commission to monitor legislative compliance with international human rights law as provided by section 116(2) of the 1993 Constitution was not carried over to the 1996 Constitution.[15] The relevant section of the 1996 Constitution contains no reference to international law, as was the case with its predecessor. The reason for this deletion is not clear.

3.1 *The Bill of Rights*

A fully fledged Bill of Rights is contained in chapter 2 of the Constitution as opposed to the Chapter on fundamental rights in the 1993 Constitution. The constitutionally entrenched rights again show a strong influence of the international human rights instruments.[16] The following table compares the rights contained in the UDHR, ICCPR, ICESCR and the 1993 Constitution with those contained in the Bill of Rights:

	UDHR	ICCPR	ICESCR	93 CONST	96 CONST
Equality	1, 2	2	2	8(1)	9
Equality between men and women	3	3	8(2)		
Right to life	3	6	9		11
Liberty	3	9	11		
Security	3	9	11(1)		12

14 Devine (1995.1) 23.
15 Section 184 of the 1996 Constitution deals with the fuctions of the Human Rights Commission.
16 Dugard (1996) 305 at 314 remarks that the Bill of Rights is clearly inspired by international human rights conventions. At 310 he suggests that the drafters of the 1993 Constitution were aware of the likelihood that South Africa would shortly become party to the two international covenants. They were therefore careful to ensure that the Bill of Rights would make it possible for South Africa to comply with obligations assumed under these treaties.

Treatment of persons deprived of liberty	10	25			
Prohibition of imprisonment because of inability to fulfil contractual obligation	11				
Prohibition of slavery	4	8	12		13
Prohibition of torture	5	7	11(2)		12
Recognition as person before the law	6	16	6, 7(4) (6)		9
Equality before the law	7	14, 26	8(1)		9
Effective remedy	8	7(4)			8
Affirmative. Action	3(a)				9
Protection of children	24	30			28
Arbitrary arrest, detention or exile	9	25			35
Fair, public hearing by independent impartial tribunal	10	14	25(3)		35
Presumption of innocence	11(1)	14(1)	25(3)(a)		35
Right not to held guilty of retroactive penal affiance	11(2)	15(1)	25(3)(f)		35
Arbitrary interference with privacy, family, home, correspondence or attacks on honour and reputation	12	17(1)	13		14
Freedom of movement	13(1)	12(1)	18		21
Right to leave any country, return to own country	13(2)	12(2)	20		21
Nationality	15	24	20		20
Right to marry and found family	16(1)	23(2)			
Consent of spouses	16(2)	23(3)	10(F)		
Property	17	28			25
Freedom of thought, conscience, religion	18	18	14		15
Freedom of opinion and expression	19	19(2)	15(1)		15, 16
Freedom of assembly and association	20	21, 22	16		17, 18
Access to public service, participation in government	21	25			
Universal, equal suffrage	21	6, 21			19
Social security	22	9			27
Right to work	23(1)	6	26		22

Equal pay for equal work, just and favourable remuneration	23(2), (3)	7(a(i)	26		
Form and join trade unions	23(4)	22(1)	8(a)	27(2)	23
Right to strike	8(b)	27(4)			23(2)(c)
Rest and leisure	24				
Adequate standard of living	25(1)	11			27
Highest standard of physical and metal health	25(1)	12			27
Protection of motherhood and childhood	25(2)	24	10(2) en (3)		28
Child labour	10(3)	30(1) (e)			28(e)
Education	26	13, 14	32		29
Right of persons belonging to minorities to enjoy own culture, profess own religion and use own language	27	31, 8(2)	14(1)		31
Protection of authors interest in scientific, literacy or artistic production	27(2)				
Duties to community	29(1)				
Limitation to rights and freedoms	29(2)	33, 34			36
Self-determination	1	1			
Expulsion of an alien	13				
Prohibition of propaganda of was, advocacy of national, racial or religious hatred	20	8(2)			

Section 39(1) titled "Interpretation of the Bill of Rights" contains an equivalent provision to section 35(1) of the 1993 Constitution. It reads as follows:

"When interpreting the Bill of Rights, a court of law, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law."

Although this provision reads virtually the same as its predecessor, there are a few minor amendments or elaborations. The first aspect one's attention is drawn to is that section 35's reference to a court of law has been extended to include tribunals and forums, which widens the scope of bodies responsible for interpretation and application of the Bill of Rights considerably.

The second deviation from the 1993 text is that the word "consider" was substituted for the phrase "have regard to". Although this is a very subtle change, one may venture to suggest that it places a somewhat stronger obligation on the relevant bodies to look into international and foreign law. This provision maintains the distinction between international law and foreign law as was well understood by the Constitutional Court when interpreting the fundamental rights of the previous Constitution, namely that the consideration of international law is mandatory and foreign case law a matter of choice.[17]

The critisism levelled against section 35 of the 1993 Constitution namely the inherent conflict with section 231, is equally applicable under the 1996 Constitution. The point in case is namely what is given by section 231 and 232 is taken away by section 39: where sections 231 and 232 recognise all custom and certain treaties as part of South African law, section 39 enjoins courts merely to consider these sources. Booysen shares this view when he argues with regard to customary international human rights law:[18]

> "Customary international law on human rights must, however, not merely be considered by a court but actually be applied. The obligation to apply customary international law arises from section 232 of the constitution which makes it part of South African law."

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17 *S v Makwanyane* note 81 chapter 5 above at 686 A par 34; *S v Zuma* note 74 chapter 5 at 412 E and *S v Williams* note 115 chapter 5 above at 878 E par 50.

18 Booysen (1997) 53.

The same would apply to treaties incorporated into South African law through either legislation or self-execution.

3.2 Security Services

Chapter 11 of the Constitution, which deals with Security Services, reflects and respects principles of international law specifically international humanitarian law. In this spirit section 198 states, as one of its guiding principles, that national security must be pursued in compliance with the law, which includes international law. The security services are further obliged by section 199(5) to act in accordance with, and to teach their members to act in accordance with the Constitution and the law, which includes customary international law and international agreements binding on the Republic.

Section 37(8), which forms part of the Bill of Rights, endorses the general spirit of respect for international humanitarian law by providing that non-South African citizens detained in an international armed conflict must be treated in accordance with the standards of international humanitarian law binding on South Africa.

Section 200 deals with the National Defence Force and replaces section 227 of the 1993 Constitution. Section 200 (2) provides that:

> "The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international regulating force."

Under 201(2)(c) the President is authorised to employ the defence force in fulfilment of an international obligation. In this case the old and the new provisions differ substantially from each other, although both refer to international law in some or other form. It is however not within the scope of the present study to analyse the implications of this provision.

3.3 International Law

The most important provisions on international law, namely those relating to the entry into international agreements and the status of international law in South African law, are located in chapter 14 under the heading "General Provisions". International agreements are once again dealt with under section 231, which now includes the provisions previously found in section 82(1)(i). The provisions on customary international law are dealt with separately in section 232, whilst section 233 provides for the role of international law in the interpretation of legislation.

The following table compares the relevant provisions of the 93 Constitution with those of the 1996 Constitution. The left column indicates the provisions of the 1996 Constitution while the right column lists the provision in the 1993 Constitution, replaced by the 1996 text.

1996 CONSTITUTION	**1993 CONSTITUTION**
231 International agreements (1) The negotiating and signing of all international agreements is the responsibility of the national executive.	**82 Powers and functions of the President** (1) The President shall be competent to exercise and perform the following powers and functions, namely – (i) to negotiate and sign international agreements;
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection	**231 Continuation on international agreements and status of international law** (2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i).
(3) An international agreement of a technical, administrative or executive	

nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.	
(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision is an agreement that has been approved by parliament is law in the Republic unless it is, inconsistent with the Constitution or an Act of parliament.	(3) Where parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided parliament expressly so provides and such agreement is not inconsistent with this Constitution.
(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect	(1) All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic, unless provided otherwise by an Act of parliament
232 Customary international law Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament.	(4) The rules of customary international law binding on the Republic, shall, unless inconsistent with his Constitution or an Act of parliament, form part of the law of the Republic.
233 Application of international law When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with	

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

The underlying spirit of the international law provisions in the 1993 and 1996 Constitutions do not appear to differ substantially. The 1996 text attempts to deal with the shortcomings and criticism of its predecessor. However, new pitfalls are created.

The main differences between the two texts appear to be the following:

- The negotiating and signing of international agreements are now in the hands of the national executive, which consists of the President and cabinet, and not only the President as was the case under the 1993 Constitution.

- The entry into, or approval of entry into, international agreements, has now been divided into two different categories as suggested by some critics of the 1993 text. It is now clear that only certain agreements require parliamentary approval whilst executive approval and subsequent tabling in parliament will suffice for others.

- The 1993 text in section 231(2) speaks of parliament agreeing to enter into agreements whilst the new section 231(2) refers to the fact that an international agreement will bind the Republic after it has been approved by parliament. The word "bind" presumably refers to bind at an international level, since section 231(4) deals with requirements to be met before an agreement can be considered as law in South Africa. The new section 231(2) makes it clear that parliament will express its approval by way of resolution and further refers to both houses of parliament by name. The new sections 231(2) further is not linked to the executive's function of signing and negotiating as was done in the 1993 text.

- Section 231(3), which deals with those agreements which require only executive approval before they can be considered to bind the Republic, does so by introducing certain novel criteria to distinguish them from the general

principle stated in section 231(2), namely that international agreements require parliamentary approval. This category of agreements is defined by the following terminology "technical, administrative or executive or does not require either ratification or accession". The possible meaning of the terms will be discussed later. This section introduces another novel aspect namely that although only executive approval of these agreements is required before they can bind the Republic, tabling in parliament within a reasonable time thereafter is required.

- Section 231(4), the equivalent of the old 231(3), states emphatically that parliamentary legislation is required before an agreement can become law in the Republic. This brings to an end the dispute regarding the provision in the 1993 text on whether legislation or a mere resolution was required to bring an agreement into law. This approach of express incorporation by way of legislation falls squarely within dualist thinking. Section 231(4) does, however, introduce an exception to this rule which is altogether new in South African law, though it represents an increasing tendency in international law: self-executing provisions of an approved agreement are law automatically in so far as they are consistent with the Constitution and parliamentary legislation. The phenomenon of self-executing treaties and their importance in human rights treaties have already been discussed extensively in chapter 3 of this study. In the light of parliament's reluctance under the 1993 Constitution to incorporate human rights treaties in legislation, this provision is to be welcomed.

- Section 231(5) speaks of the continuity of international agreements and not of "rights and obligations under international agreements" as the old section 231(1) did. Such agreements now automatically remain binding and are not subject to termination by Act of parliament.

- The new section 232 provides for all customary international law to be law in the Republic subject only to parliamentary legislation or the Constitution. The old section 231(4) spoke only of customary international law *binding* on the Republic.

- Section 233 is entirely new, although it accords with the common law presumption regarding interpretation of statutes.

4. *An Analysis of Sections 231, 232 and 233 and Suggestions for Interpretation and Application*

Not much has yet been written as far as analysis the above sections is concerned. Presently the primary sources in this regard are the Manual on Executive Acts (hereafter Manual)[19], issued by the Office of the President and prepared in consultation was the State Law Advisers of the Department of Foreign Affairs, and practice arising from application of the Manual by the said state law advisers. The Manual only deals with section 231 and concentrates on process rather than status. The following discussion will aim to elucidate the above provisions by referring primarily to these two sources but also taking cognisance of academic discussion on the topic.

4.1 *Defining the Term "International Agreement"*

Where the 1983 Constitution referred to "international agreements, treaties and conventions",[20] both the 1993 and the 1996 Constitutions speak only of "international agreement". The generic term "international agreement" was favoured when drafting the 1993 Constitution because it would include various kinds of agreement described by a variety of names such as treaties, protocols, conventions, exchange of notes, etcetera. Although neither of the constitutions defines the term "international agreement", it was understood that the definition based on the Vienna Convention on the Law of Treaties would be followed which describes an international agreement as a written agreement between states governed by international law.[21] South Africa is not party to the Vienna Convention, but follows its provisions as a matter of customary international law. The generic nature of the term "international agreement" is reflected in the Manual, which states that an international agreement includes any

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19 March 1999.
20 See section 8(3)(e) of Act 110 of 1983.
21 See Olivier (1993) 5.

written agreement between South Africa and another state or states.[22] Although the Manual makes no specific mention of agreements between South Africa and international organisations, it is submitted that such agreements would qualify as international agreements under general principle.[23] It is further suggested that the clear reference by the Manual that an international agreement should be in writing rules out the inclusion of oral agreements from the constitutional understanding of an international agreement.

Classification of the term "international agreement" forms an important part of the functions of the SLA. They have to determine whether a particular agreement falls within the ambit of international agreements envisaged by the Constitution in order to advise on the appropriate steps to be taken to obtain the necessary approvals. The above description of an international agreement provides only broad parameters for identification of such instruments. The classification of the multitude of different documents reflecting on various forms of international interaction crossing the desk of the SLA, present them with a very complex task. Not all these agreements can be regarded as international agreements in terms of the Vienna Convention definition. It has been remarked that current international practice has shown that there are an infinite variety of agreements, which may be classified as being of an international nature. How to accommodate these agreements within the framework of the Constitution calls for innovative thinking.[24]

Practice emerging from the SLA shows that the title of a particular document does not determine its status. Even documents bearing the title of "joint communique", "statement" or "memorandum of understanding" can be regarded as international agreements and must fall subject to the constitutional requirements for approval. The test adopted in practice is the following:[25]

- the agreement should be in writing;

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22 Manual chapter 5 at 23.
23 Botha (2000.1) 72.
24 Olivier (1997) 63.
25 *Ibid*.

- the agreement must be between subjects of international law, and
- rights and obligations must flow from the agreement.

The latter requirement is of crucial importance because it indicates an intention to create a legally binding document. Only legally binding international agreements will fall under the definition of "international agreement" as envisaged by the Constitution. Legally non-binding agreements such as so-called friendship agreements, not leading to rights and obligations, are not regarded as international agreements as envisaged by the Constitution, although they are strictly speaking agreements at an international level. Such agreements do not have to comply with the constitutional requirements. Practice followed by the SLA is described as follows:

> "The binding nature of an instrument is established in accordance with various factors of which language is the most important. In this regard various words and phrases are identified as indicating an intention to create rights and obligations for the parties for example: 'agree', 'shall', and treaty-like entry into force clauses. The conciseness in which the text is drafted is also considered an important factor in ascertaining whether it is legally binding or not. Not much weight is attached to the title of an instrument or its format."[26]

An example in this regard is the *Joint Declaration on Principles of Relations and Cooperation Between the Ukraine and South Africa* where it was stated by the SLA that:

> "We are of the opinion that the above Declaration does not constitute a binding international agreement as envisaged by the South African Constitution. Since the Declaration is of a non-legal nature, there are no legal requirements that must be complied with before it can be signed."[27]

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[26] *Id* at 75.
[27] RO 59/97 of 3 March 1997.

Dugard argues that there should be no distinction between "international agreements" and "treaties". [28] This view appears to be correct only for purposes of section 231. Once it is established that an international agreement falls within the ambit of section 231, there is no purpose in making a distinction between treaties and international agreements. The fact that there are international agreements falling outside the scope of the Constitution, and which will not qualify as treaties because they do not create rights and obligations, is a different issue altogether.

4.2 Interpretation of International Agreements by South African Courts: The Harksen Cases

South African courts first entered the debate on clarifying the meaning of the term "international agreement" and the classification of different kinds of agreements for purposes of section 231 in the *Harksen* cases.[29] The judgment of the Cape High Court[30] followed by a Constitutional Court decision[31] endorse the practical relevance of academic discourse on the meaning of the term "international agreement". The resulting constitutional interpretation provides government law advisers with much needed guidance in applying section 231.[32]

The facts leading to the court applications are as follows: Harksen, a German citizen present in South Africa, was sought by the Federal Republic of Germany to face charges of fraud. The South African government received a request for Harksen's extradition from Germany in March 1994. Both the South African and German governments denied the existence of an extradition treaty between them. Section 3(2) of the South African Extradition Act[33] provides for extradition between South Africa and foreign countries where there is no extradition agreement:

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28 Dugard (2000) at 59.
29 For a dicussion see Botha (2000.2) 274 and Botha (1999) 330.
30 *Harksen v President of the Republic of South Africa and Others* 2000 (1) SA 1185 (CPD).
31 *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825.
32 See Schneeberger (2001) 28.
33 Act 67 of 1962.

"Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being surrendered."

A series of diplomatic notes dealing with Harksen's extradition were exchanged by the German government and the South African government through the Department of Foreign Affairs. The president subsequently granted his consent to extradite Harksen on the basis of section 3(2) of the Extradition Act.

4.2.1 Cape High Court Application

Harksen brought an application before the Cape High Court consisting of a constitutional application and a review application. The review application dealing with irregularities in the extradition inquiry will not be considered here. Of importance for present purposes is the constitutional application.

It was argued on behalf of Harksen that the President's consent in terms of section 3(2) of the Extradition Act to the German request for extradition constituted an international agreement. In fact "every extradition is regarded *per se* as an international agreement between the State requesting extradition and the state acceding to that request".[34] Such bilateral agreement contravenes the provisions of section 231 of the Constitution and is therefore invalid[35]. Harksen *inter alia* relied on a supporting affidavit of Professor MG Erasmus where he stated that the "inter-State transaction" relating to Harksen's extradition indeed established a bilateral international agreement reflected in the exchange of notes. This agreement created binding rights and obligations for both states. To deny this would demonstrate an "executive-mindedness that cannot be reconciled with South Africa's new constitutional dispensation".[36] It was suggested on behalf of Harksen that the Vienna Convention, specifically the definition of a treaty, forms part of South African law

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34 Par 29 at 1195.
35 Pars 23-34 at 1194-1197.
36 Pars 25 H at 1194.

through section 232 of the Constitution. It was, however, submitted that the term "international agreement" is wider than the term "treaty" and would include *ad hoc* agreements of an informal nature. The relevance of this argument was not substantiated by indicating into which of the above categories the present series of diplomatic notes would fall. All international agreements must be dealt with under section 231(2) requiring parliamentary approval, alternatively under section 231(3) requiring tabling in parliament within a reasonable time. To become part of South African law it would have to be enacted in national legislation. Section 3(2) of the Extradition Act, which makes no provision for either parliamentary approval or tabling, would therefore be unconstitutional.

The respondents addressed two issues in their arguments namely the nature of extradition and the applicability of section 231. Regarding the first, it was suggested that in the absence of an extradition treaty, extradition is essentially an act of state based on comity between nations or the principle of reciprocity. In this regard reference was made to Botha's article "The basis of extradition: The South African perspective"[37] where he observes that a formalised strain of comity is reflected through section 3(2) of the Extradition Act. An *ad hoc* request for extradition and consent thereto by the President therefore does not amount to an international agreement with a status similar to that of a treaty.[38] Extradition in the absence of a treaty is a voluntary act, based on comity and determined by municipal law. As far as the second issue was concerned, it was argued that since there was no intention on the part of either South Africa or Germany to create an international agreement with enforceable rights and duties, the present arrangement could be regarded as an informal or *ad hoc* agreement or arrangement. Such instruments are legally non-binding and fall outside the scope of section 231.[39]

In delivering judgment, van Zyl J addressed the question whether the consent of the President under section 3(2) of the Extradition Act amounts to an international agreement for purposes of section 231 of the Constitution. It is heartening to find that

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37 Botha (1991/1992) 17.
38 Par 38 at 1197.
39 Par 42 at 1198.

the court did not shy away from an in-depth investigation of an international law issue. Van Zyl makes use of a wide spectrum of authority ranging from Roman law writers, internationally renowned experts on international law, to local government officials to explain the meaning of an international agreement. The requirement lying at the heart of a binding international agreement is the intention of the parties to create reciprocal rights and obligations. The court stated that " it is this very intention and consent that distinguishes treaties from informal or *ad hoc* arrangements or agreements."[40] Van Zyl proceeded to quote extensively from Baxter on the difference between "hard" and "soft" law.[41] The above authority led the court to conclude that since the intention to create reciprocal rights and obligations was clearly absent in the present case, section 231 did not come into play.

Schneeberger comments on the court's decision from the perspective of the office of the SLA. As far as exchanges of notes are concerned, she alludes to the practice that the clear intention to create an international agreement should explicitly be reflected in both the note as well as the replying note. She remarks that:

> "In addition to being used as a vehicle for the conclusion of international agreements diplomatic notes are also the bread and butter of diplomatic relations and are used on a daily bases as the standard method of diplomatic communication, Diplomatic notes would certainly make up a significant portion of what Baxter terms 'the vast sub-structure of inter-governmental paper' and if each note dealing with any matter of substance were to be considered an international agreement then it would certainly create administrative chaos ... In this sense it is a great relief that the court rejected Harksen's argument."[42]

The judgment can be commended for the measure of judicial clarity it provides on the meaning of the term "international agreement" in section 231. By excluding extradition under section 3(2) of the Extradition Act from the scope of section 231,

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40 Par 52 at 1201.
41 Baxter (1980) 549 at 556.
42 Schneeberger (2001) 33.

the court indirectly supported the understanding that the term "international agreements" as used by section 231 applies only to legally binding agreements creating enforceable rights and duties.[43] By following this line of argument the court further recognised the separate and thriving species of informal agreements. Although they fall outside the scope of the Constitution and are not legally binding they may still bear significant legal relevance as was illustrated in the present case.

4.2.2 The Constitutional Court Application

The above clearly did not accord with Harksen's understanding of matters as he proceeded to approach the Constitutional Court. Harksen maintained that presidential consent under section 3(2) constituted an international agreement, which would be invalid for non-compliance with section 231.

As in the case of the Cape High Court decision, the Constitutional Court considered the legal effect of the presidential consent under section 231. In a judgment delivered by Goldstone, the court stated that although presidential consent under section 3(2) may eventually have international resonance, the Extradition Act governs applications for extradition on the domestic plane only.[44] It neither initiates nor concludes extradition.[45] In the light of the above the court supported the High Court decision and dismissed the submission regarding the unconstitutionality of section 3(2). Even if section 231 were to govern acts under section 3(2), failure to expressly incorporate the terms of section 231 would not render section 3(2) unconstitutional. All legislation is automatically read subject to the Constitution.

The court further disposes of the applicant's remaining submissions that presidential consent would be invalid for want of compliance with the provisions of section 231. The court accepted, with reference to *Oppenheim's International Law*[46] that:

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43 See Olivier (1997) 65.
44 Par 14 at 831.
45 Par 15 at 832.
46 Par 21 at 834.

> "Although the judicial determination of the existence of an international agreement may require the consideration of a number of complex issues, the decisive factor is said to be whether 'the instrument is intended to create international legal rights and obligations between the parties'."

The court, however, proceeded to follow a different line of reasoning than that of the Cape High Court. The latter regarded the intention of parties to create binding rights and obligations as the test for a binding international agreements, however agreements between international role players not intended to create such rights and obligations were accepted as informal agreements, falling outside the scope of the Constitution. The Constitutional Court, however, maintained that there were no agreements at all in the present case, neither formal nor informal.[47] The court held that the decision to extradite in terms of section 3(2) was never more than a domestic act, which was never transformed into an agreement by way of the exchange of diplomatic notes:

> "In this case there is no evidence to suggest that any formal response was conveyed on behalf of South Africa to the FRG. It is thus not necessary to consider whether, if there had been such a response, an international agreement would thereby have been concluded."[48]

The court in effect finds that there was never any meeting of minds between the two states to extradite Harksen. The court does not address the scenario where South Africa did in fact send a diplomatic note to Germany expressing its willingness to adhere to Germany's request for extradition. It is unfortunate that the court did not express a view on the legal nature of such an agreement. In terms of this line of argument, the court pays no regard to the phenomenon of informal agreements but does not denounce their existence. The aspects of the judgment of the Cape High Court regarding informal agreements in general therefore stand.

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47 Par 21 at 834.
48 Par 23 at 834.

The court finally addressed a new argument brought by the appellant, based on the doctrine of estoppel. It was suggested by the applicant that since the FRG was informed of the President's consent, a representation was made that he entered into an international agreement as contemplated by section 231(2). Germany was entitled to rely on this representation. This argument was based on section 46(1) of the Vienna Convention on the Law of Treaties:

> "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless the violation was manifest and concerned a rule of its law of fundamental importance.
>
> The court, with some hesitance, assumed in favour of the applicant that the above provision is customary international law and therefore forms part of South African law. The court replied to this argument by once again falling back on the argument that the President's consent under section 3(2) was a purely domestic act and refrained from noting that Germany was notified of this domestic act. The better way of dealing with the argument would have been to suggest that South Africa's consent to extradite Harksen, which was conveyed to Germany was neither understood nor intended by any of the parties to constitute "consent to be bound by a treaty".

The significance of the Constitutional Court judgment can be summarised as follows:

The first significant consequence of the Constitutional Court decision is its support for the view of the Cape High Court that international agreements for purposes of section 231 are agreements where the parties intend to create mutually enforceable rights and obligations. The meaning of the term "international agreement" as used by section 231 of the Constitution should be given a narrow interpretation to coincide with the term "treaty" as it is used in the Vienna Convention. In other words, the category of international agreements envisaged by the Constitution, refers only to legally binding agreements or treaties. Since all international agreements cannot be regarded as binding, it is implicit from the judgment that non-binding agreements between states fall outside the scope of section 231. Regrettably, the court chose not to comment on this distinction identified by the Cape High Court.

The court's view that the reason why the decision by the President in favour of extradition under section 3(2) of the Extradition Act is not an international agreement, is flawed. This decision is firstly and correctly based on the domestic nature thereof. The court however departs from this line of thinking when it argues that the facts did not indicate that the correspondence between South Africa and Germany was ever completed to formalise the matter of Harksen's extradition. The potential contradiction of the first argument lies in the fact that the court recognises the possibility that if there had been such a response, an international agreement would thereby have been concluded.[49]

This leads to the inevitable question as to what the legal situation would be when Germany is eventually informed of the decision to extradite Harksen. If such diplomatic correspondence (Germany's request for extradition and South Africa's communication of its decision to extradite) leads to an international agreement, the question remains whether it would be an international agreement for purposes of section 231. (The answer cannot be anything but affirmative if the existence of informal international agreements is not recognised.) If this is indeed the case, the decision by the President under section 3(2) of the Extradition Act would indeed require additional approval under section 231(2) or (3). In such a case the argument as to the domestic nature of decisions under section 3(2) goes up in smoke.

The *Harksen* case confronted the court with arguments where it had to search for answers in international law. Fortunately, and surprisingly, the court did not attempt to deal with this matter in terms of foreign domestic case law. The court was forced to consider the Vienna Convention in response to the applicant's arguments. Although the court is wary to accept the customary status of the Convention as a whole, it had to consult international authority such as Oppenheim and Brownlie to come to this decision. The court further attempted an interpretation of article 46(1) of the Vienna Convention. Although this was done somewhat half-heartedly, the court must have

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[49] Par 23 at 835.

been urged on by the fact that under section 46(1) municipal law may under certain (albeit limited) circumstances override international law.

Despite the above perceived errors and omissions in the court's judgment, it nevertheless focussed the debate on the relevance of international law in matters of domestic law. It also provided the court with an opportunity to familiarise itself with previously unexplored legal principles.

4.3 Who may Enter into International Agreements?

Parties to a treaty must have international legal personality. Thus from the South African side, only central government and not a state department or provinces may bind the Republic. The legal capacity of provinces and state departments to enter into international agreements will be examined separately.

4.3.1 The Legal Competence of Provinces to Enter into International Agreements

The above question should be answered against the background of both international law and constitutional law. At a constitutional level regard should be had to two categories of constitutional provisions: those dealing with international law, and those dealing with the powers of provinces.

Only states and international organisations, not provinces, are recognised as subjects of international law.[50] In international law provinces will only be permitted to enter into international agreements if the domestic law of a particular state authorises provinces to act as such.[51] The South African Constitution, being the supreme law of the land, does not permit provinces to exercise such powers. It was stated above that South Africa follows the Vienna Convention definition of a treaty (being customary

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50 Dugard (2000) 1.

51 These views are reflected in SLA legal opinion 490/30/9 of 30 April 1997 titled *Powers of Provincial Governments to conclude International Agreements* contained in a letter from the

international law, which is part of South African law as per section 232). In terms of this definition a treaty is an international agreement between *states*. In terms of the Constitution provinces enjoy limited executive and legislative powers. Provinces are constitutionally empowered to exercise legislative authority over matters falling within the functional areas listed in schedules 4 and 5 of the Constitution. Neither schedule 4 titled, Functional Areas of Concurrent National and Provincial Legislative Competence, nor Schedule 5, providing for exclusive provincial legislative competence, contains any reference to the conduct of foreign relations or the entry into international agreements. All powers not falling within these schedules or granted specifically by the Constitution, fall within the exclusive competence of the central government. It may be argued on behalf of the provinces that the exercise of some of the powers allocated to them may involve interaction with foreign states. Foreign aid may be sought to benefit, for example, agricultural and housing projects.

Such actions could well have international implications for the South African government on a political as well as a legal level. On a political level they could interfere with the official policy not to conduct relations with a particular state. From a legal point of view, foreign governments may be mislead into believing that provinces are indeed authorised by the South African Constitution to enter into international agreements.

As indicated above, the Constitution does not confer any power on the provinces to conduct or become involved in foreign affairs. The exercise of powers falling in Schedule 4 and 5, are therefore limited to the jurisdiction of each particular province.

The Constitution does, however, not prohibit provinces from entering into contracts with entities abroad as they have no influence on the conduct of foreign relations and as long as they fall within the functional areas of Schedule 5. Contracts are not governed by international law as in the case of international agreements. The other

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Director-General of Foreign Affairs to the Director-General of the Department of Constitutional Development.

option is to enter into an informal understanding indicating mutual intentions and goodwill but which does not create a legally binding agreement.[52]

Section 231 underlines the notion that only the state through the central government is entitled to take up rights and obligations in terms of international law. Section 231(1) confers the power on the national executive to negotiate and sign international agreements. Section 231 (2) and (3) lays down further requirements, with which those international agreements must comply in order to *bind the Republic.*

4.3.2 The Legal Status of Inter-Departmental Agreements

Schneeberger remarks that many authors (including Baxter, Fawcett and Aust) treat interdepartmental agreements as a category of non-binding international agreements.[53] Due to the lack of international legal personality, agreements concluded between the state departments of different states cannot be regarded as international agreements proper.[54] The matter is, however, more complex than in the case of inter-provincial agreements. States being amorphous entities must of necessity participate in international interaction through their organs, which include their state departments. At an international level the rights and obligations created by such an agreement will be enforceable against the state provided that the agreement complies with all the requirements for a legally binding instrument. Section 231 only recognises international agreements binding on the Republic. Departments acting in their own name will therefore require the necessary constitutional approval to act on behalf of the Republic.

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52 *Ibid*. It is suggested in the same legal opinion that provinces submit all agreements (excluding contracts and city twinning agreements) with foreign entities to the Department of Foreign Affairs to ascertain from a legal perspective that they do not involve international law and are compatible with the government's foreign policy. Should provinces however wish to obtain benefits from other countries which could only be derived by way of international agreement, the matter should be taken up with the Department of Foreign Affairs which could investigate the possibility that South Africa enter into an international agreement with such a state with the purpose of channelling the benefits to a particular province.

53 Schneeberger (2000) 15.

54 *Id* at 14.

The practice adopted by the office of the SLA is not to approve formal departmental international agreements, in other words, agreements falling within the scope of section 231. A similar result is achieved by concluding those agreements in the name of the government. Such an agreement may specify the particular department responsible for the implementation of the agreement as so-called implementing agency. Agreements of this nature will be closely associated with the day-to-day functions of a particular department and thus fall into the category of technical and administrative agreements envisaged by section 231(3). According to Schneeberger, there is, however, the distinct danger that whereas South Africa considers these agreements as legally binding, the counterpart would consider them as administrative arrangements that are non-binding.[55]

4.4 Different Categories of International Agreements Provided for by Section 231

Entry into international agreements entails two dimensions. Firstly there is an international law component indicating what steps a state must take in order to become party to an international agreement. Secondly, states can only act internationally if they have the necessary authority in terms of their domestic constitutional law to take these steps referred to. The Manual deals with this second component by indicating to government departments the process to follow before South Africa can make its intention known internationally to become party to an international agreement. In practice the compliance with the constitutional requirements (second component), must take place before a state complies with the international law requirements (first component).

The Manual identifies two frameworks for concluding international agreements in this regard:[56]

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55 *Id* at 18.

56 Manual Chapter 5, 5.1 at 23. This provision in the Manual is in accordance with recommendations made by the Department of Foreign Affairs during the drafting of the Manual (memo from ME Olivier to NRL Haysom) dated 7 Feb 1997.

"(a) The framework which applies to international agreements which require *ratification* or *accession* in order to be brought into effect; and

(c) The framework which applies to international agreements which merely require the signature of a duly authorised representative of a contracting state party to come into effect."

Depending on whether a treaty requires signature plus ratification or accession on the one hand, or signature alone on the other, before a state can become a party, a different constitutional procedure to obtain domestic approval for entry into international agreements is required. Section 231 distinguishes between the following categories of international agreements for purposes of obtaining such approval:

(i) Agreements requiring only Executive approval but which must be tabled in parliament within a reasonable time thereafter.

(ii) Agreements which require both executive and parliamentary approval before binding South Africa."[57]

4.4.1 Agreements Requiring Executive Approval

The distinction between agreements requiring parliamentary approval and those requiring executive approval turns on the definition of the terms "technical administrative or executive nature" as provided by section 231(3). Wide consultations were conducted by the SLA, *inter alia*, with Professor MG Erasmus one of the drafters of section 231, in order to clarify these terms without any decisive outcome. What was clear from conversation with Professor Erasmus, is that the terms were intended by the drafters to be regarded as synonyms or interchangeable, thus depicting one specific kind of agreement instead of three kinds. At face value it appears that it is the intention that these terms refer to less important agreements in the light of the fact that they do not require parliamentary approval. A distinction between routine and more important agreements where routine agreements would require executive approval and other non-routine agreements would require

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[57] Manual Chapter 5, 5.3 at 24. This provision was also taken over from the Foreign Affairs memo dated 7 Feb 1997.

parliamentary approval would be in accordance with the problems experienced by the SLA with section 231 of the 1993 Constitution. The method chosen to make such a distinction (the terms technical, administrative and executive) must however be attributed solely to the creativity of the drafters.[58]

Since these terms have no roots in either international law or South African law and are not defined by the Constitution their determination is open to interpretation.[59] In the absence of authoritative legal guidance, the SLA were looked to, to develop a practice of interpretation. Understanding the terms technical and administrative in their ordinary meaning in order to identify a category of "routine and politically non-contentious agreements", proved problematic as many, if not most, important agreements are technical or administrative, or contain both technical or administrative elements. This applies to both bi- and multilateral agreements. Another question government officials were confronted with, was just how "technical" or "administrative" an agreement must be to fall under this definition. Virtually no hard law agreements are without at least some provisions of a technical or administrative nature. An important multilateral treaty such as the United Nations Charter would be unable to hold its own were it not for certain technical and administrative provisions.

The Manual expresses itself on this question as follows:[60]

> "5.6 Technical and administrative agreements are not specifically defined and it will be for the department responsible for processing the agreement to determine, (in conjunction with the Law Advisors of Justice and Foreign Affairs), whether an agreement falls in this category.
>
> The terms technical administrative and executive are used interchangeably and refer to the following categories of international agreements:

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58 The Manual states in 5.5 at 24: "At the constitutional assembly not much weight was attributed to the difference between these three terms. It was rather the intention to provide for an expedited way of dealing with the many minor every-day issues that can be subject of agreement between two states and to save parliament from having to consider technical and departmental matters."

59 Botha (2000.1) 75.

60 Manual par 5.5 at 24.

(a) Agreements which are departmentally specific.

(b) Agreements that are not of major political or other significance.

(c) Agreements that have no financial consequences, and do not affect domestic law. These are agreements flowing from the daily activities of government departments."

The Manual attaches further qualification to the term "executive" agreements by stating that it refers to agreements not internally operative, and should not be confused with self-executing agreements as envisaged by section 231(4).[61] The Manual proceeds to state that technical, administrative and executive agreements are "agreements between two states". Therefore only bilateral agreements will fall into this category.

Where "technical, administrative or executive" agreements refer to one category of agreements, section 231(3) refers to a second category of agreements not requiring parliamentary approval, namely agreements not requiring ratification or accession. It is not clear whether these two categories are intended to be mutually exclusive.[62] Botha foresees the following scenario that a treaty that is of a technical or administrative nature, but also allows for accession or ratification could avoid the need for parliamentary approval by being treated under section 231(3).[63] It is suggested that the correct reading of section 231(3) should be to refer to technical, administrative or executive agreements that do not require ratification or accession. Since technical, administrative and executive agreements refer to bilateral agreements one would seldom find such agreements requiring ratification or accession. South Africa would, by the very nature of bilateral agreements, participate in their negotiation. It is up to the South African delegates negotiating a bilateral agreement to ensure that the agreement should enter into force at signature. Where such a provision is not acceptable to the other negotiating party, the via media is usually to provide that the agreement can enter into force once the states notify each other through the diplomatic channel that they have complied with their constitutional

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61 Manual note 5 at 24.

62 See Botha (2000.1) 76.

63 *Ibid.*

requirements. Such a provision would still permit South Africa to treat the agreement under section 231(3).

The Manual warns against manipulation of section 231(3) to circumvent parliament and frustrate the general intention to involve parliament in the treaty-making process. Departments should not lightly determine that agreements requiring ratification or accession are technical or administrative. Failure to allow parliament to ratify an agreement might result in a defect in the conclusion of the agreement.[64] This understanding reflected by the Manual supports a reading that the above mentioned two categories of agreements are indeed mutually exclusive.

The human rights treaties selected for purposes of this study would not fall under any of the categories of agreement falling under section 231(3). Such agreements require parliamentary approval under section 231(2).

4.4.2 Agreements Requiring Parliamentary Approval

Agreements which are not of a technical, administrative or executive nature and those requiring ratification or accession fall under section 231(2) of the Constitution and must be approved by both houses of parliament. All international human rights agreements approved under the 1996 Constitution, were dealt with in terms of section 231(2).

4.4.2.1 Procedure for Obtaining Parliamentary Approval

The Manual provides that the procedure for remitting such agreements to parliament for approval remains as has been established in accordance with the analogous provisions of the 1993 Constitution Act.[65]

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64 Manual par 5.6 at 25.

65 See cabinet memorandum 22/94, Department of Foreign Affairs and cabinet memorandum 10/95, Office of the President.

In accordance therewith, the department responsible for the processing of the international agreement will submit it by way of a cabinet memorandum to the cabinet for its consent to submission of such agreement to parliament for ratification or accession. Before submission to cabinet, the relevant department must submit the agreement to the state law advisers of the Departments of Justice and Foreign Affairs in order to establish respectively that it is not in conflict with South African domestic law and other international obligations.[66]

After the cabinet has agreed to the submission of the agreement to parliament, the department concerned will table the agreement together with a draft resolution and an explanatory memorandum by way of a notice of motion. The memorandum sets out the history, purposes and consequences of the agreement and whether its incorporation into domestic law is sought in terms of section 231(4).[67] The committees of parliament may not negotiate or re-negotiate the terms of international agreements. This is especially important to understand in the case of multilateral treaties, which are negotiated in multilateral international forums. They may, however, be able to insist on a reservation or to refer the agreement back to the executive.[68]

Once parliament has approved ratification of, or accession to the agreement, the responsible department is required to submit an instrument of ratification or accession for signature by the Minister of Foreign Affairs who in turn will deposit it with the relevant body specified in the international agreement. It is recommended, but not constitutionally prescribed, that the text of agreements approved by parliament be published in the Government Gazette.[69]

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66 Manual par 5.9 and 5.20 at 25.
67 Manual par 5.10 at 25.
68 Manual par 5.11 at 25.
69 Manual par 5.12 at 26.

4.5 Incorporation into South African Law

As already mentioned, section 231(4) is of particular importance to this study. This section provides for two methods according to which international law can be applied in South African law. The first alternative restates the classical dualist approach familiar to South Africa and endorsed by legal precedent prior to 1993,[70] namely that international agreements become law in South Africa only when incorporated into national legislation. This approach, being consistent with previous practice, is implemented, at least at an administrative level, without serious problems.[71] Section 231(4), however introduces a second alternative new to South African law: Self-executing provisions of an agreement approved by parliament form part of South African law without the need for legislative incorporation, provided they are consistent with parliamentary legislation and the Constitution. The introduction of this novel concept into South African law was met with an outcry of dissatisfaction from eminent South African legal academics.

The background to the insertion of this provision is shortly as follows: The drafters of section 231 were aware of the fact that the provision of the 1993 Constitution regulating the relationship between South African law and international law (section

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70 The position is regarded as trite law in *Pan American Airways Incorporated v SA Fire and Accident Insurance Co Ltd* note 7 chapter 4 above.

71 Manual par 5.10 at 25. Keightley (1996) 410 suggests that the express requirement of incorporation by way of national legislation reverses the positive change introduced by the comparable provision of the 1993 Constitution. She suggests that the change introduced by section 231(4) is to be found in the "attitude" of government departments not to to refer treaties to parliament for ratification prior to aligning domestic legislation with treaty obligations. She argues that "Government departments have dealt with their fear of section 231(3) of the interim Constitution by simply holding back on forwarding international treaties to parliament for ratification." This reasoning is not in tune with either governmental practice or with the law. It is suggested that there is no difference between the effect of incorporation by express provision as envisaged by the 1993 Constitution and incorporation by way of legislation as provided by the 1996 Constitution: these are merely different mechanisms used to make a treaty part of domestic law. In addition, it is suggested that the reference of treaties by government departments to parliament for ratification and incorporation by either express provision or legislation, without simultaneously addressing existing conflicting legislation, would lead to legal and administrative chaos.

231(3)) deviated from the original text adopted by the Negotiating Council.[72] The intention behind the original text was that once parliament had agreed that South Africa become party to an international agreement, such agreement should become part of South African law, subject of course to the Constitution. Previously treaty-making was exclusively an executive matter in South Africa. The legislator became involved for the first time when it had to incorporate such treaty obligations into South African law. This two-fold process was justified in the light of the fact that the executive could not legislate for South African citizens through international agreements. Under the 1993 Constitution the treaty-making capacity was placed in the hands of the legislator. Before approving South Africa's becoming party to an international agreement, parliament is advised and considers the effect such treaty would have on South African law. Only if parliament is satisfied that the limitations a particular treaty would place on South African sovereignty are acceptable, should it approve the treaty. To provide for an additional requirement of incorporation by legislation in effect gives parliament a second bite at the cherry. Parliament is further not obliged in terms of constitutional law to adopt such legislation at all. The danger further exists that legislation may be adopted which does not correctly reflect the treaty. Provisions may be left out or distorted. Parliament should not, as happened under the apartheid government, be given the opportunity to manipulate international law for political interests. It is the opinion of Maluwa that African states are especially reluctant to incorporate international law directly into their legal systems because it would limit their freedom of auto-interpretation of the applicable international law principles.[73]

The fact that no new legislation was adopted giving effect to any of the human rights agreements South Africa became party to after 1993, shows that this fear is not unfounded.[74]

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72 See discussion under chapter 5 par 4.5.3.

73 Maluwa (1998) 57.

74 It was argued by parliamentary committees that the South Africa Constitution adequately takes care of such treaty obligations.

Dudard argues that the introduction of the concept of self-executing treaties is bound to create problems in South African law. He argues that a treaty will be self-executing when existing law will be adequate to enable South Africa to carry out its international obligations without legislative incorporation of the treaty and non self-executing in the sense that further legislation is required.[75] Dugard, a critic of the 1993 text, now states with reference to McDougal that the term self-executing is essentially meaningless.[76] Dugard's understanding of the term indeed clouds the matter. As discussed in chapter 3, the self-executing nature of an agreement should be determined by the international agreement through a consideration of factors such as the language and subject matter of the instrument. The domestic law of a state party to an agreement is only relevant in so far as it permits self-execution. In other words, should certain treaty provisions be capable of direct application, such direct application can only be effected in the legal systems of state parties permitting the concept of direct application. Strydom sums up the position as follows: "The self-executing nature of a treaty is usually derived from a characteristic inherent to the provisions that can be directly applied by the national courts and authorities ... In practice the anomalous position exists that the direct applicability of treaty provisions is determined by national constitutional law."[77]

Botha is equally sceptical of the concept. He argues that: "This provision, which was taken over – unwisely it is submitted – from United States' jurisprudence with no regard to its suitability to the South African context, has not yet been tested by the courts but can be expected to raise considerable problems when it does."[78] He does not state why the notion of self-execution would not be suitable in the South African context. No cognisance is further taken of the increasing body of academic discussion and judicial consideration of self-executing treaties within the context of the European Union.[79] It is submitted that self-executing treaties (where states do not

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75 Dugard (2000) 58.
76 *Ibid.*
77 Strydom (1997) 93.
78 Botha (2000.1) 91.
79 See par 4 chapter 3.

have the choice to opt out of their treaty obligations) will come increasingly under the spotlight as treaty regimes providing for regional integration develop. The possible positive contribution of the notion of self-executing treaty provisions in the field of human rights treaties appears as yet to have been unappreciated by South African commentators. This may still be attributed to inherited remnants of positivism, coupled with a reluctance to recognise the universal application of international human rights. Critics of the doctrine of direct-application of treaties do not seem to hold the same criticism against customary international law which is recognised as part of South African law in the absence of any specific act of incorporation.[80]

For purposes of legal certainty it would be advisable for parliament to state which provisions it regards as self-executing when agreeing that South Africa becomes party to an agreement. In the absence of such a statement, this would be a question for the courts to determine in accordance with the criteria discussed in chapter 3.

4.6 Customary International Law

Section 232 states that customary international law is law in South Africa subject only to the Constitution or parliamentary legislation. The additional qualification that only "binding" customary international law will form part of South African law was not retained in the 1996 Constitution. As such section 232 is indeed far more international law friendly in that even those rules not binding on South Africa at an international level may now arguably become part of South African law. Such application will still be limited at a municipal level by the enactment of parliamentary legislation.[81] Limitation at an international level through objecting persistently is not expressly reflected in this provision, as was the case under its predecessor.

This provision may indeed be dangerous if it is to include customary international law other than that of a universal nature. Keightley is of the view that customary

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80 See discussion on self-executing custom in chapter 3.

81 Customary international law is no longer subject to subordinate legislation as it was pre-1994. See in this regard *Inter Science Research and Development Services (Pty) Ltd v Republica de*

international law under section 232 would also include non-binding law as proposed with regard to section 35 of the 1993 Constitution in the *Makwanyane* case.[82] Although one would agree that non-binding customary international law is included in section 232, it would be wrong to base such an assumption on the interpretation clause of the Bill of Rights and the interpretation thereof in the *Makwanyane* case. The latter authority indicates sources of law to be taken into consideration when interpreting the Bill of Rights, while section 232 elevates custom to an equal component of South African law. Courts will be obliged to apply custom under section 232 and cannot merely consider it as directed by section 39. Dugard has criticised the approach that the omission of the words "binding on the Republic" from the 1996 Constitution will lead to the conclusion that even rules South Africa has persistently objected to will become part of her common law. He, however, suggests from a municipal law perspective, that, as far as South Africa is concerned, a practice to which the country has persistently objected is simply not a customary rule.[83]

How the courts will interpret the clear omission of the word "binding" remains to be seen. The role of the courts will clearly be more limited than under the 1993 text. Although it will still be left in the hands of the courts to determine the content of customary international law, any customary international law for that matter, they no longer have to establish whether it is binding on South Africa. A rule of customary international law must only be measured against the Constitution or parliamentary legislation. It is suggested that courts will underplay the important role "consent" has played in the past in determining *usus* and *opinio iuris*.[84]

A further interesting implication of section 232 is the impact it may have on possible conflict between an existing precedent and a newly evolved rule of customary international law.[85] Strydom points out that inconsistency of customary international

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Popular Mozambique 1980 (2) SA 111 (T) at 124 *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 (2) SA 709 (E) at 712, 715.

82 Note 81 chapter 5 above.

83 Dugard (1997) 80; Botha (1994) 255.

84 Dugard (1997) 81.

85 It was held in *Trendex Trading Corporation v Central Bank of Nigeria* (1997) QB 529 (CA) at 554 and 579, that a changed rule of international law should override a previous precedent to the contrary.

law with judicial precedent can no longer be invoked.[86] Dugard reiterates the view that section 232 supports the position that customary international law in its present form, forms part of South African law, despite the fact that it may previously have been applied differently by South African courts.[87]

4.7 Interpretation of Legislation

The potential limitation legislation places on the application of international law in sections 231 and 232 is tempered by section 233 which provides that when interpreting any legislation, courts must give preference to a reasonable interpretation consistent with international law. This provision is regarded as giving constitutional effect to the interpretive presumption in South African law that legislation is intended to comply with international law.[88] Botha remarks that this is a "catch-all' provision, wide enough to mandate all courts, from the highest to the lowest, to test any legislation coming before them against international law.[89] Section 233 places an onus on courts to determine the international law position governing the subject matter of the legislation. It remains to be seen how courts will meet this challenge.

Since the reference to "international law" is not qualified, it can be argued that it should include all international law both binding and non-binding. Being an interpretation clause it is suggested that the reference to international law be interpreted in line with the interpretation clause of the Bill of Rights, save for the fact that here it should include all international law and not only international human rights law as in the case of section 39. The effect of section 233 is much wider than that of section 39. In the case of section 39 courts are mandated to consider international human rights law, whilst in the case of section 233 courts are bound to interpret any legislation in a manner consistent with international law in general.

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86 Strydom (1997) 95.
87 Dugard (1997) 80.
88 Keightley (1996) 415.
89 Botha (2000.1) 94.

4.8 The Status of Other Sources of International Law

It appears from the above discussion that the Constitution only provides for the incorporation of treaties and custom into South African law. No explicit mention is made of the other sources named in article 38 of the ICJ Statute. These sources may however be taken into consideration through the two interpretation clauses namely sections 39 and 233. On authority of the *Makwanyane* case, courts must also consider non-binding sources of international law for interpretative purposes. This view is shared by Booysen when he points out that:

> "the constitution has not made all of public international law, law in South Africa. Only customary international law and in certain instances treaties binding on South Africa are accorded this status. General principles of law and the subsidiary sources of international law are not law in South Africa, but must merely be taken into account when interpreting legislation or the bill of rights."[90]

It, however, remains unclear whether such non-binding sources would include, in addition to treaties to which South Africa is not a party and article 38(c) and (d) sources, other non-article 38 sources such as soft law.

An identifiable void in the Constitution is that it makes no provision for legally binding decisions of international organisations to which South Africa is a party. A particular need exists in this regard for a legal mechanism to provide for the implementation of Security Council resolutions. Prior to the coming into operation of the 1993 Constitution an Act was adopted titled "The application of Resolutions of the Security Council of the United Nations" in terms of which such resolutions could be implemented in South African law by way of presidential proclamation in the Government Gazette. Due to certain fundamental flaws, this Act never became operative.[91] These resolutions cannot be accommodated under the constitutional provisions, since they cannot be considered as treaties. Thus there is currently no

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90 Booysen (1997) 51.
91 Botha (2000.1) 89.

clear mechanism to facilitate the domestic implementation of South Africa's obligations arising from binding resolutions of international organisations.

In conclusion it is necessary to point out the important difference between the role and status of international law as envisaged by section 39 on the one hand, and sections 231 and 232 on the other. As is clear from the previous discussion, that international law as envisaged by section 39(1)(b), is something the courts must consider when interpreting the Bill of Rights. International law within the meaning of section 39 includes both binding and non-binding law.[92] Section 231 and 232 deal with the requirements to be met when entering into international agreements and for international law to become part of South African law. Section 231(4) and 232 specifically address the question of when international agreements and customary international law become part and parcel of South African law. Should these requirements be met, courts are obliged to apply such law. There is no discretion involved in the matter, nor is it something courts may merely consider as an interpretative aid for only a particular part of the Constitution. Should international human rights law form part of South African law by virtue of section 231(4) and 232, courts are bound to apply it as such and not only consider it.

5. Court Decisions

5.1 High and Appeal Court Decisions

Reported High and Appeal Court decisions on international law emerging under the 1996 Constitution deal with a wide variety of subject matter. Few cases focus directly on international law. Most of the cases identified in a search on international law related jurisprudence, refer to international law only in passing. The cases where the courts were directly confronted with an international law question mostly deal with treaty obligations on *inter alia* extradition and immunity as incorporated into domestic law. Generally the cases may be categorised as follows:

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92 *S v Makwanyane and Another* note 81 chapter 5 at 688 par 39.

5.1.1 Interpretation of the Bill of Rights

The role of international law as an interpretive aid received considerable attention under the 1993 Constitution via section 35. The basis laid in this regard by the *Makwanyane*[93] case appears to be equally relevant in the application of section 39 of the present Constitution.

In *Dawood and Another v Minister of Home Affairs and Others Shabalani and Another v Minister of Home Affairs and others Tomas and Another v Minister of Home Affairs and Others,*[94] the Cape Provincial Division considered various aspects pertaining to alien spouses of South African permanent residents. In interpreting the right to marriage and family life, the court turned to international instruments and the status accorded to such instruments by the Constitutional Court. The court refers to a number of international instruments identified by the Constitutional Court in the first certification judgment, to which South Africa is either a party or has signed pending ratification which protects the right to marriage and family life namely the ICCPR, ICESCR, CEDAW and the African Charter on Human and People's Rights. On authority of *S v Makwanyane,* permitting the consideration of binding and non-binding law for purposes of interpretation, the court also refered to the recognition of such right by the European Convention for the Protection of Human Rights and Fundamental Freedoms and "generally accepted principles and rules of current international law".[95] Van Heerden J delivering judgment, concluded that:[96]

> "From a careful consideration of the abovementioned international law authorities, I am convinced that, if possible, the South African Bill of Rights must be interpreted so as to afford protection to, at the very least, what I would regard as one of the 'core elements' of the 'institution of marriage and family life', namely the right (and duty) of spouses '(t)o live together as spouses in community of life'."

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93 *Ibid.*
94 2000 (1) SA 997.
95 Par H at 1034 – D at 1035.
96 Par G at 1035.

In *Director of Public Prosecutions: Cape of Good Hope v Bathgate*[97] the Cape Provincial Division, in a judgment by van Zyl J, correctly interpreted section 39 of the Constitution enjoining the court to consider international law and allowing it to consider foreign case law when interpreting the Bill of Rights. Against this background the court referred to the Vienna Convention of 1988, which South Africa has ratified and stated that that the court is obliged to have regard to this Convention.[98] No reference is made to the status of the Convention in terms of section 231. This approach is consistent with the court's thinking in the *Makwanyane* case, where the fact that South Africa is a party to a treaty is not relevant at all for purposes of section 39, as courts are obliged to consider all international law as interpretive aid, and where the status of a convention is not considered in terms of section 231. Van Zyl does venture in the direction of section 231 by saying that "inasmuch as South Africa has obligations in terms of international law, they should not lightly be disregarded.

5.1.2 Immunity from Jurisdiction

Where international agreements are incorporated into South African legislation, courts have no other choice but to consider international law when applying the legislation. In the case of *Portion 20 of Plot 15 Athol (Pty) LTD v Rodrigues,*[99] the Witwatersrand Local Division had to decide whether the Angolan ambassador to South Africa was entitled to diplomatic immunity with regard to the purchase of immovable property. The applicant company approached the court for an order evicting the Angolan ambassador (respondent) from immovable property owned by it after the respondent failed to comply with his obligations under a contract of sale between the respondent and a trust in terms of which the respondent had purchased the shareholders' equity in the applicant from the trust for the sum of R6,6 million. After the sheriff refused to serve the papers on the respondent, the applicant effected service in terms of section 13 of the Foreign States Immunities Act.[100] The

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97 2000 (2) SA 535.
98 Par E-F at 546.
99 2001 (1) SA 1285.
100 87 of 1981.

respondent claimed immunity from civil jurisdiction in terms of the Diplomatic Immunities and Privileges Act.[101] The applicant contended that no immunity availed the respondent on the strength of section 6 of the above Act and article 31(1)(a) of the Vienna Convention on Diplomatic Relations, which provided that immunity will not extend to a real action relating to private immovable property not held on behalf of the sending state.

Hussain J, who delivered judgment, showed a clear understanding of the international law at hand and its interplay with South African law. He traces the background and content of the Vienna Conventions on Diplomatic and Consular relations and refers to work of the International Law Commission and international law writers.[102] He points out that the Diplomatic Immunities and Privileges Act, adopted to give effect to South Africa's obligations under the Vienna Conventions, does not incorporate the conventions *in toto*, by way of schedule, although section 2 (1) of the Act suggests that the conventions in their entirety form part of South African law. The court concluded on the facts that the matter had clearly been a private one between the respondent, the seller and the applicant, and that the respondent had not succeeded in rebutting the exclusion of immunity contained in section 6(1)(a) of the Act and article 31(1)(a) of the Convention.

Immunity from jurisdiction was again considered by the Cape Provincial Division in *The Akademik Fyodorov: Government of the Russian Federation and Another v Marine Expeditions Inc.*[103] The respondent company, a Canadian charterer of ships for tourist voyages, obtained an order for the arrest of the Akademic Fyudorov in 1995 in terms of South African law,[104] as security for the respondent's claims in arbitration proceedings pending in London between the respondent and the owner of the ship the Akademic Shuleykin. The respondent claimed that the two ships were associated ships. The respondent alleged that its claim in arbitration was against the Arctic and Antarctic Research Institute (AASRI) and Roshydromet as parties to the

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101 74 of 1989.
102 At 1292-1293.
103 1996 (4) SA 422.
104 Admiralty Jurisdiction Act 105 of 1983.

charterparty. The applicant in turn contended that AASRI had no independent legal existence as it was an organ of Roshydromet which, in turn, was a department of the Russian government. The applicant alleged that both vessels were owned by the Russian government and claimed immunity as a foreign state from the jurisdiction of the court in the proceedings for the arrest of the Akademik Fyodorov in terms of the Foreign States Immunities Act.

In dealing with the matter the court points to the following exceptions under the Foreign States Immunities Act namely, acts relating to commercial transactions (section 4), relating to arbitration (section 10) and relating to admiralty proceedings (section 11). Decisions such as *Inter-science Research and Development Services (Pty) Ltd v Republica Poplar de Mocambique*[105] and *Kaffraria Property Co (Pty) Ltd v Government of Zambia*[106] predating the 1993 Constitution,were considered by the court in clarifying the matter. After considering the various statutory exceptions to immunity, the court came to the conclusion that the ship at the time of arrest was not used for commercial purposes but for polar research from which the owner derived no commercial profit. The arrest was therefore set aside.

The Foreign States Immunities Act was considered by the court in the case of *CGM Industrial and Others v KPMG and Others.*[107] The government of the Kingdom of Lesotho (fourth respondent) initiated an investigation into allegations of customs fraud against a clothing manufacturer in Lesotho (appellant) who imported fabrics, manufactured garments therefrom which were then again exported to stores *inter alia* in South Africa. In order to conduct the investigation, the third respondent, who conducted the investigation on behalf of the government of Lesotho, seized documents from the appellant. The court *a quo* dismissed an application by the appellants for repossession of the documents. The appellants lodged an appeal against the whole judgment. The appellants contested then power of the Attorney-General of Lesotho to represent the Kingdom in the legal matter, arguing with reference to Oppenheim, that the action should be brought by an accredited envoy of

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105 1980 (2) SA 111 (T).
106 1980 (2) SA 709 (E).
107 1998 (3) SA 378.

Lesotho. They further argued that the Attorney-General may not act in legal matters abroad as it would accord extra-territorial effect to the Constitution of Lesotho. Both these arguments were considered and dismissed by the court.

5.1.3 The Hague Conventions

The Hague Convention on Civil Aspects of International Child Abduction was incorporated into South African law through the Hague Convention on Civil Aspects of International Child Abduction Act.[108] The Convention provides for the return of a child wrongfully removed from his/her habitual residence.

In *K v K*[109] the court had to consider the alleged wrongful removal of a child from the United States to South Africa, prior to the adoption of incorporating legislation in South Africa.[110] The applicant, who requested the court to order the return of his child to the United States, referred the court to "the best interest of the child" principle enshrined in both constitutional and international law. The court ruled that, due to the fact that the removal took place before the Convention came into force for South Africa, this should be regarded as a "non-Convention case".[111] The court however considered the United Nations Convention on the Rights of the Child, ratified by South Africa, as well as comments emanating from the Committee on the Rights of the Child on the "best interest of the child" as directed by section 39 of the Constitution.[112] The court found despite the fact that the Convention was not applicable to the present case, that even in this decision the paramount consideration still had to be best interest of the child and that the principles of the Convention were thus applicable to the extent that they indicated what was normally in the interest of such child.[113] It was ordered that the best interest of the child in this case required that his future be adjudicated on by the United States court.

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108 Act 72 of 1996.
109 1999 (4) SA 691. For a dicussion see Nicholson (2001) 332.
110 For discussion of *K v K* see Labuschagne (2000) 255.
111 Par H at 702.
112 Par E-J at 703.
113 Par C at 693.

In the case of *WS v LS*[114] the Cape Provincial Division again dealt with an application for return of children allegedly wrongfully removed from their habitual residence, this time in the United Kingdom. In this case the removal took place after the coming into operation of the Hague Convention on Civil Aspects of International Child Abduction Act, therefore the Convention applied. It was argued by the mother, who brought the children from the United Kingdom to South Africa, that article 13 of the Hague Convention applied. Article 13 provides *inter alia* that the judicial or administrative authority in the requested state is not bound to order the return of a child, if the person who opposes the return establishes that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The court pointed out that since it could not establish on the papers that the youngest child in particular might suffer any physical or psychological harm if removed from the mother, the question was whether the proposed return would otherwise place the children in an "intolerable situation". The court referred to a number of English cases in interpreting article 13. The court held against the background of the protection granted to children by the South African Bill of Rights and South African law, that the framers of the Act incorporating the Hague Convention into South African law, could not have intended to impose an onus any greater than that ordinarily applicable in civil proceedings. The court dealt with the matter on the basis of intolerability and found that there was a grave risk that the children would face an intolerable situation if removed from their mother.[115]

In *Fitzpatrick and Others v Minister of Social Welfare and Pensions*[116] the court was presented with a case where South African legislation did not comply with the provisions of the CRC and the Bill of Rights. An application was by two British citizens to adopt a South African child. The Child Care Act,[117] section 18 (4)(f), does not permit inter-country adoptions. This is in conflict with article 21 of the CRC, which provides that:

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[114] 2000 (4) SA 104.

[115] The most recent consideration of the Convention was by Court of Appeal in the case of *Smith v Smith* 2001 (3) SA 854.

[116] 2000 (3) SA 139.

[117] 74 of 1983.

> "States parties shall ... recognise that inter-country adoption may be considered as an alternative means of a child's care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."

The court was also informed that South Africa was considering accession to the Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption which provides for inter-country adoption. The court ordered that the Child Care Act had to be amended to allow for inter-country adoptions for children who cannot be placed in a foster or adoptive family, and cannot in any suitable manner be cared for in the child's country of origin.

5.1.4 International Human Rights Treaties

It appears that the High Court is well aware of the existence of international human rights treaties. They are often merely referred to, but not used for any analytical or comparative purposes and do not contribute in any way to the decision reached by the court. In *Buhrmann v Nkosi and Another*[118] the court, in considering the content of the right to freedom of religion and belief in terms of the Extension of Security of Tenure Act,[119] remarks without any reference to sections 39 or 231 of the Constitution that "(a) brief reference to a few instruments of public international law may be useful ...".[120] Ngoepe JP, in a dissenting judgment, proceeds to refer to the relevant provisions of the UDHR, ICCPR, the European Convention on Human Rights and the Namibian Constitution. Except for the statement that it is apparent that the international instruments entitle the holder of the rights to actually manifest them, these instruments do not impact on the judgment in any way. In the case of *Jooste* v *Botha,*[121] dealing with the rights of an illegitimate child to love, affection and attention the court points a number of international law instruments on children's

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[118] 2000 (1) SA 1145.
[119] Act 62 of 1997.
[120] See 1159.
[121] 2000 (2) SA 199.

rights, but disregard them due to the fact that these instruments have only vertical application.

5.1.5 Incorporated Treaties

In *Seton Co v Silveroak Industries Ltd*[122] the court considered the recognition of a foreign arbitration award. The court was referred to the New York Convention on the Recognition of Foreign Arbitraration Awards to which South Africa is a party and which is incorporated into South African law by The Recognition and Enforcement of Foreign Arbitral Awards Act.[123] The respondent contended that the court should refuse the enforcement of the award due to the fact that the award was allegedly obtained through fraud and that it would be contrary to public policy to recognise such an award.[124] In dealing with the matter the court stated that the interpretation of the New York Convention by courts of other state parties has persuasive authority in our courts.[125] Harzenberg J proceeded to quote section 233 of the Constitution directing courts to interpret legislation consistent with international law and went right on to consider British authority on international awards based on illegal contract. This *modus operandi* leaves the impression that international law is to be found in foreign domestic legislation and court decisions on international law.

The status of the Chicago Convention on Civil Aviation and the annexes thereto in domestic law was considered by the Supreme Court of Appeal in *Welkom Municipality v Masureik and Herman T/A Lotus Corporation and Another.*[126] The Convention itself is incorporated into domestic law in terms of section 1 of the Aviation Amendment Act[127] but not annex 14 made pursuant thereto. Without making

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122 2000 (2) SA 215.
123 Act 40 of 1977.
124 Section 4(1)(a)(ii) of act 40 of 1977 provides that a court may refuse to grant an application for an order of court if it finds that enforcement of such an award would be contrary to public policy in the Republic.
125 Pars E-F at 229.
126 1997 (3) SA 363.
127 Act 42 of 1947.

any reference to the constitutional provisions regarding the status of international agreements in domestic law, the court points out that[128]:

> "While the Convention itself has been adopted and enacted as if it were domestic legislation (s 1 of the Aviation Amendment Act 42 of 1947), any recommendations which maybe made pursuant to it by ICAO are not automatically, and without more, invested with the status of a municipal law binding upon the citizenry of South Africa. Apart from the fact that they are no more than recommendations, the Convention itself does not impose upon parties to it an absolute obligation to implement them."

Section 22 A of the Aviation Act makes it clear that unless an international aviation standard is incorporated in the regulations by ministerial notice in the Gazette, it will not be deemed to be a regulation made in terms of the Act. Despite the correct conclusion reached by the court, one would have hoped that the Supreme Court of Appeal would set an example for dealing with a matter such as the one at hand by indicating how the Aviation Act lines up with Constitutional provisions and clarifying the status of the annexes both in terms of the Constitution as well as international law (on recommendations of international organisations).

Where an international agreement is incorporated in legislation, courts consider the convention for purposes of interpreting the legislation. An example in this regard is the case of *McDonald's Corporation v Joburgers Drive-Inn Restaurant (PTY) Ltd and Another McDonald's Corporation v Dax Prop CC and Another Mc Donald's Corporation v Joburgers Drive–Inn Restaurant (pty) Ltd and Dax Prop CC*[129] were the Paris Convention on the Protection of Industrial Property of 1983 was applicable. The court however specifically mentioned that the Convention provision in question (article 6 bis (1)) was only given legislative effect in South African law under the Trade Marks Act,[130] which came into effect in 1995.

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128 Pars D-E at 371.
129 1997 (1) SA 1.
130 Act 194 of 1993.

5.1.6 Extradition

Courts are directed to apply their minds to applicable international law in cases which have a domestic law as well as international law component for instance extradition as illustrated in the *Harksen* cases and *Abel v Minister of Justice and Others.*[131] In the case of *Abel* the court had to interpret an extradition treaty between South Africa and the United States of America. The applicant applied to a High Court for an order reviewing and rescinding the minister's decision to accede to the request for extradition received from the United States. One of the grounds for the application was that an extradition treaty did not apply to an offence committed by the applicant in the requested state. The court with reference to South African authority and publications on international law that neither the treaty nor the South African Extradition Act prohibited extradition under the treaty where both the requested and requesting state have concurrent jurisdiction. In a discussion of the case, Botha[132] questions the approach adopted by the court in interpreting the treaty and the Act in terms of the same rules of interpretation, instead of resorting to rules applicable to treaty interpretation determined by the nature of the instrument. He points out that the literalist approach advocated by *Abel,* differs from the provisions on treaty interpretation contained in the Vienna Convention on the Law of Treaties. As suggested earlier, this Convention is followed as custom by South Africa and forms part of South African law in terms of section 232 of the Constitution.[133]

5.1.7 Other

In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa* [134] the court was confronted with a number of international law issues. This case arose against the background of treaties between Lesotho and South Africa providing for the Lesotho Highland Water Project (LHWP). The LHWP is designed to effect the delivery of water by Lesotho to South Africa and to generate

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131 2001 (1) SA 1230.
132 Botha (2000.3) 245.
133 Botha (2000.3) 249.
134 1999 (2) SA 279.

hydro-electric power in Lesotho. In executing the LHWP, mining rights granted to Swissborough to mine in Lesotho, were infringed. Swissborough approached the Lesotho High Court for an interdict restraining the authority appointed by the treaty to oversee the implementation thereof (LHDA) from carrying out its operations in the area in question. Shortly hereafter, Lesotho revoked all mining leases and excluded the court's jurisdiction. The revocation was set aside on application by Swissborough, who claimed in excess of R945 million for unlawful interference with its rights under the leases. It was alleged by Swissborough that South Africa in fact controlled the various bodies created to implement and administer the project. The LHWP is further seen as a partnership dominated by South Africa. The court therefore had to decide whether it had jurisdiction to determine the nature of the agreement between South Africa and Lesotho. The court cites with approval the standard passage from *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*[135] indicating the pre-1993 position that the conclusion of a treaty is an executive and not a legislative act which cannot affect the rights of subjects except by legislative process.

Since the treaties in question have not been incorporated into South African municipal law, it is clear that the rights of subjects are not affected.[136] The court refers with approval to the 1994 edition of Dugard's *International Law: A South African Perspective* citing four exceptions to the general rule.[137] The court did not consider these exceptions because it was not contended that any of them were applicable. No reference is made by the court to section 231, reflecting the shift in treaty-making power from the executive to the legislature amending the position held in the *Pan American Airways* case. As far as incorporation in domestic law is concerned, the court does refer to section 231(4) to illustrate that there is no need for statutory incorporation in the case of self-executing treaty provisions. The court, without referring to any authority, however, concludes that the international agreements relevant in this matter are not self-executing. Without paying any heed to the recent constitutional changes, the court concludes that "the principles set out

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135 1965(3) SA 150 (A) at 161 B-D.
136 Par G at 327.
137 Pars H-I at 327. See discussion chapter 4 par 2.1.

above are derived from English law".[138] The court continues to refer to English authority indicating that unincorporated treaties may be used for interpretive purposes.

In *Schlumberger Logelco Inc v Coflexip SA*[139] the Supreme Court of Appeal considered the question whether a South African patent was capable of being infringed beyond territorial waters but within the exclusive economic zone. The court resorted to both international law writers and international conventions in order to deal with the matter. The court accepted the authority of international law without regarding it as necessary to resort to the enabling provisions of the Constitution.

5.2 Constitutional Court Decisions

Decisions emanating from the Constitutional Court during this period in terms of the provisions of the 1996 Constitution, did not produce any significant input in the discourse on the status of international law in South African, with the possible exception of the *Harksen*[140] case.

In *de Lange v Smuts NO and Others*[141] the court made passing reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms in an analysis of the "right to freedom and security of the person."[142] The court points out that the description of these rights in the European Convention differs from the South African Bill of Rights in that the latter provides protection in broad unqualified terms, whilst the former explicitly excludes certain forms of detention. No further conclusion is drawn from this difference and the court proceeds with an in depth analysis of foreign law.

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138 Par C at 328.
139 2000 (3) SA 861.
140 Note 31 chapter 6.
141 1998 (3) SA 785 (CC).
142 Par 45 at 804.

Section 39 of the Constitution was once again considered in *Sanderson v Attorney-General, Eastern Cape.*[143] The following statement by Kriegler underlines the view that international law is, despite the provisions of sections 231 and 232, regarded as foreign law:[144]

> "... I wish to repeat a warning I have expressed in the past. Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies. Both the interim and the final Constitutions, moreover, indicate that comparative research is either mandatory or advisable."

Kriegler proceeds to quote sections 35 and 39 of the respective Constitutions. After this general warning, he embarks on an analysis of foreign case law.

In *South Africa National Defence Union v Minister of Defence,*[145] O'Regan J considered international law as directed by section 39 of the Constitution. She states that the meaning and scope of "worker" as used by section 23 of the Constitution should be considered against the background of conventions and recommendations of the International Labour Organisation (ILO).[146] O'Regan concludes that if the approach of the ILO is adopted "it would seem to follow that when section 23(2) speaks of 'worker', it should be interpreted to include members of armed forces, even though the relationship they have with the Defence Force is unusual and not identical to an ordinary employment relationship."[147]

The right of children to shelter was considered by the Constitutional Court in *Government of the RSA and Others v Grootboom and Others.*[148] Yacoob J quotes Chaskalson P's now well known dictum from the *Makwanyane* case,[149] directing

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143 1998 (2) SA 38 (CC).
144 Par 26 at 53 B.
145 1999 (4) SA 469 (CC).
146 Par 25 at 483.
147 Par 27 at 483-484.
148 2001(1) SA 46 (CC).
149 Note 81 chapter 5.

courts to consider both binding and non-binding international law under section 39.[150] Yacoob however adds to this statement the qualification that was lacking in *Makwanyane*[151]:

> "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa [ss231-5], it will be directly applicable."

Yacoob's dictum presents a ray of hope for a turnaround in the neglect international law has suffered at the hands of the Constitutional Court since the *Makwanyane* case. Not only does Yacoob J acknowledge the varying weight to be attached to different sources of non-binding law, but he also recognises that the value of international law is not in all cases limited to an interpretive aid. Sources of international law binding on South Africa do form an integral part of South African law, and must be applied as such.

Yacoob J proceeds to identify applicable provisions of the ICESCR and analyse the obligations of state parties thereto. He concludes that the difference between the relevant provisions of the Covenant and the Constitution are significant in determining the extent to which the provisions of the ICESCR may be a guide to an interpretation of the Constitution. These differences are:[152]

(i) The ICESCR provides for a *right to adequate housing* while the Constitution provides for the *right of access to adequate housing*.

(ii) The ICESCR obliges states parties to take *appropriate steps* which must include legislation, while the Constitution obliges the South African state to take *reasonable* legislative and other measures.

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150 Par 26 at 63.
151 *Ibid*.
152 Par 28 at 64.

Comments of the committee responsible for monitoring implementation of the ICESCR by state parties indicating that state parties are bound to fulfill a minimum core obligation by ensuring the satisfaction of a minimum essential level of socio-economic rights, including the right to housing, were considered. State parties dropping below the minimum core content of a right are not in compliance with their international law obligations. Yacoob concludes that sufficient information is lacking to determine what would comprise the minimum core obligation in the context of the South African Constitution.[153]

In *Minister of Welfare and Population Development v Fitzpatrick*[154] the Constitutional Court was approached by the minister for confirmation of a High Court order. The court held that the provisions of the Child Care Act proscribing the adoption of a South African child by a non-citizen, do not give paramountcy to the best interests of children and are therefore inconsistent with the provisions of section 28(2) of the South African Constitution. The provisions of the Child Care Act are therefore invalid. In commenting on "the best interest of the child", the court states that the concept has never been given an exhaustive content in either South African law or in comparative international or foreign law. It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interest of a particular child.[155] The court refers to both the CRC and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, in reaching its conclusion.

The Hague Convention on Civil Aspects of International Child Abduction came under scrutiny of the Constitutional Court *in Sonderup v Tondelli and Another.*[156] The case concerned the wrongful removal of a four year old girl by her mother from Canada to South Africa. A provincial division ordered the return of the child to Canada in terms

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153 Par 33 at 66.
154 2000 (3) SA 422 (CC).
155 Par 18 at 428-429.
156 2001 (1) SA 1171 (CC).

of the Hague Convention on Civil Aspects of International Child Abduction Act.[157] The mother appealed directly to the Constitutional Court on the ground that such an order would be against the child's best interests and therefore in conflict with section 28(2) of the Constitution. The court conceded that the best interests of the child in the determination of custody matters as required by the Convention might in certain circumstances require that the child's short term best interests be overridden in favour of the long term best interests in other juridical matters. However, given the objectives of the Convention, the inconsistency was justifiable under section 36 of the Constitution.

The issue of the death penalty was again considered by the Constitutional Court in *Mohamed and Another v President of the RSA and Others.*[158] Mohamed, the first appellant, was handed over to the United States by the South African authorities to stand trial on charges relating to the bombing of the United States embassy in Tanzania, which occurred in 1998. Mohamed sought leave to appeal against the judgment of a Provincial Division in which he was denied an order declaring i) that his arrest, detention, interrogation and handing over to United States agents was unlawful and unconstitutional, and ii) that the respondents had breached his constitutional rights by not obtaining an assurance from the United States government that the death penalty would not be imposed or carried out in the event of his conviction. The government, on the other hand, alleged that Mohamed was an illegal immigrant whom the immigration authorities had properly decided to deport in terms of the provisions of the Immigration Control Act 96 of 1991. In its judgment, the court pointed out that there was a clear distinction between extradition and deportation. In terms of the Immigration Control Act, the destination for deportation is determined by regulation 23, promulgated under section 56 of the Act, leaving no discretion to the state. The court held that the South African authorities had not been empowered to deport Mohamed to the United States. Regarding the permissibility of the death penalty, the court endorsed the decision reached in the *Makwanyane* case as being equally applicable under the 1996 Constitution. The court referred to the

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157 *Ibid.*
158 2001 (3) SA 893.

international trend against capital punishment, without conducting an investigation into the relevant international law authority. The court held the obligation to secure an assurance that the death penalty will not be imposed or carried out on a person whose removal to another country was caused by the government, cannot depend on whether the removal is by extradition or deportation: such obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty. By not seeking assurances that Mohamed would not be sentenced to death, the South African government acted contrary to the constitutional provisions protecting the right to life.

6. Conclusion

The constitutional provisions dealing with international law in the 1996 Constitution, are underpinned by the same values of democracy and transparency as applicable under the 1993 Constitution. Substantial differences are, however, introduced. The drafting of a new constitution provided the opportunity to deal with the drafting errors and technical difficulties experienced in the implementation of the 1993 Constitution. New problems were unfortunately created, especially as far as the entry into treaties is concerned. This chapter offers suggestions on how to resolve the resulting problems of interpretation.

As far as the definition of the term "international agreement" is concerned, the definition provided by the Vienna Convention is followed as a matter of customary international law. The agreements entered into between South Africa and other states are, however, numerous and diverse, and do not always fall neatly into the scope of the definition. The categorization of international agreements is crucial in order to establish whether such an agreement qualifies as an international agreement envisaged by section 231, and if so whether it falls within the scope of section 231(2) or section 231(3). The approach to the categorization of international agreements followed by the SLA, namely to distinguish between legally binding and non-binding international agreements, provides authoritative guidance to state practice. The latter category can be equated with treaties (as defined by the Vienna Convention on the Law of Treaties) and will necessarily fall within the scope of section 231.

The interpretation of section 231 is argued with reference to the *Harksen* cases. The Cape High Court decision proves particularly helpful by distinguishing between various categories of international agreement, thus creating a framework for categorisation. The distinction between hard and soft law, as was first reflected on by the court in the *Makwanyane* case, provides the criterion to establish whether an international agreement falls within the scope of section 231. Non-binding international agreements are soft-law, and do not fall within the scope of section 231. They remain relevant for purposes of section 39. Section 231 covers only international agreements where parties intend to create mutually enforceable rights and obligations. This explanation of terminology would imply, for purposes of the *Harksen* case, that where mutual consent to extradite exists following a section 3(2) of the Extradition Act procedure, it could merely establish an informal international agreement.

Once it is ascertained that an international agreement falls within the scope of the Constitution, it remains to be established whether it falls under section 231(2) or 231(3). Both state practice, administrative guidelines and *traveaux preparatoires* are examined in order to interpret the constitutional guidelines.

The Constitution departs from established legal tradition by introducing the possibility of direct application of treaties in addition to incorporation by way of parliamentary legislation. Despite the criticism from South African legal academics invoked by this provision, it is argued that it holds benefits for the domestic enforcement of South Africa's treaty obligations, especially where individual rights are concerned. Practice has shown that parliament often refrains from timeously adopting the necessary incorporating legislation in order to give domestic effect to treaties entered into in terms of section 231(2), leaving individuals without the protection envisaged by the treaty. It is suggested that the provision for self-execution is in accordance with the spirit of the 1993 Constitution, muddled by legal rounding off. In addition, it is suggested that where the responsibility to approve entry into international agreements and deal with incorporation both fall in the hands of parliament, there is no need to divorce the two steps from one another.

This chapter points to the importance that international law be applied by courts and practitioners in accordance with the relevant constitutional provisions. In this regard it is imperative to distinguish between the role of international law in terms of section 39 on the one hand, and section 231 on the other. Sections 231 and 232 provide for treaties and custom to become part of South African law: Treaties to which South Africa is a party, will form part of South African domestic law if incorporated into legislation or alternatively directly applied in the case of self-executing provisions approved by parliament. The status of such treaties will be on par with South African legislation, being subject to the supremacy of the Constitution. Customary international law is part of South African law, subject to both legislation and the Constitution. The status of sources other than treaties and custom is not governed by the Constitution (sections 231 and 232). Treaties and custom complying with these requirements, form part of South African law and must be applied as such. These sources, and other sources of international law not covered by sections 231 and 232, namely treaties and custom not binding on South Africa, sources contained in article 38(b) and (c) of the ICJ Statute, and non-binding international law (soft law) may be used for interpretative purposes under sections 233 and 39.

An overview of court decisions dealing with international law issues follows trends established under the 1993 Constitution. Save when confronted head on with the application of a specific treaty, for example child abduction, diplomatic immunity or extradition, courts still limit their interaction with international law to passing references. When dealing with human rights issues under the Bill of Rights, courts usually make references to comparable provisions of international human rights instruments, often after citing the direction to do so under section 39. Although the need to differentiate between international law and comparable foreign case law is recognised, such distinction is not reflected in practice. Foreign case law continues to exercise a far greater influence on South African law than does international law. With the notable exception of Yacoob J's dictum in the *Grootboom* case, no recognition has been given to the possible application of binding international human rights law in terms of the provisions of sections 231 and 232.

CHAPTER 7

SOUTH AFRICA'S PARTICIPATION IN INTERNATIONAL HUMAN RIGHTS AGREEMENTS

1. Introduction

The government that came to power in South Africa after the democratic transformation in 1994, has openly declared its intention of becoming party to the major international human rights agreements. The purpose of this chapter is to take stock of what has been done by government regarding firstly the signature and ratification of or accession to the international human rights instruments identified in chapter 2, and secondly, the implementation of those agreements.

The larger part of information has not been officially documented. The source material for the present chapter is therefore made up of legal opinions of the government law advisers, especially the SLA, and other forms of communication within government departments, most notably the Department of Foreign Affairs.

2. Signature and Ratification of and Accession to Human Rights Agreements

When the Government of National Unity came to power in May 1994 after the first democratic elections, South Africa had signed, but not ratified the CRC, CAT and CEDAW.[1] After approval of the 1993 Constitution, but prior to the first democratic elections, the matter of South Africa's participation was taken up by the sub-council Foreign Affairs of the Transitional Executive Council (TEC). The Department of

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1 Signature of these instruments took place on 29 January 1993.

Foreign Affairs made a submission to this sub-council[2] in which signature of or accession to the following eight human rights agreements was recommended:[3]

(i) ICCPR
(ii) ICESCR
(iii) CERD
(iv) Convention on the Reduction of Statelessness
(v) Convention relating to the Status of Stateless Persons
(vi) Convention relating to the Status of Refugees
(vii) Protocol relating to the Status of Refugees
(viii) Convention on the Rights of Migrant Workers and the Members of their Families

In a resolution adopted by the sub-council on 1994-01-24, the Department of Foreign Affairs was requested to proceed with the process of initiating the signature of or accession to the agreements listed. The department decided to concentrate on the ICCPR, ICESCR and CERD as a point of departure. As a first step the department requested the various state departments and provincial administrations responsible for the administration of legislation regulating subject matter also governed by the treaties, to identify such law which did not comply with the provisions of the three agreements identified. This was a massive task, as it involved assessing the compatibility of the entire body of South African statutory and common law with the provisions of the three agreements. Feedback was received from twenty-three departments. The Department of Justice, however, responded that although it supported the signature of the agreements in principle, it could not complete a comparison of the approximately one hundred and sixty Acts under its administration within the given time frame. Eleven of these departments could not identify any conflicting legislation.

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2 Dated 1994/01/17.

3 Signature was suggested with regard to those agreements with which South Africa could not at that stage fully comply. Accession was recommended where existing South African legislation and policy were substantially in line with the provisions of the convention.

The outcome of the initial assessment showed that a limited number of statutory provisions were still in force which contravened the provisions of the Covenants and CERD. The SLA advised in a letter from the Minister of Foreign Affairs[4] to his colleagues that this did not bar South Africa from signing the agreements and reaping the benefits of such a step. Should it be decided that South Africa sign the particular conventions, ratification should follow as soon as possible. It was, however, pointed out that subsequent ratification would only be possible if the contravening provisions of South African law identified were addressed. Where it was not desirable to amend such legislation, the exclusion of the relevant provisions of the conventions by way of reservation should be investigated. Once ratification had been agreed to by parliament under the 1993 Constitution, parliament would have the power to proclaim the provisions of the agreements part of South African law in as far as it they were not inconsistent with the Constitution. The provisions of the Conventions would under such circumstances be enforceable in South African courts and be complementary to the constitutional provisions on fundamental rights.[5]

This process culminated in the signature of CERD, the ICCPR, and the ICESCR by President Mandela on an official visit to New York on 3 October 1994. At this event, in an address to the United Nations General Assembly, President Mandela remarked:[6]

> "... We have this morning acceded[7] to the Covenant and Conventions adopted by this Organisation, which address various matters such as economic and cultural rights, and the elimination of all forms of racial discrimination, to say nothing of our irrevocable commitment to the realization of the objectives contained in the Universal Declaration of Human Rights."

The Department of Foreign Affairs merely acted as facilitator in order to kick-start the process. The actual responsibility for signature, ratification of or accession to each

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4 Legal opinion GO 12/94 dated 11 May 1994.
5 *Ibid.*
6 Official record of address dated 3 Oct 1994.
7 Confusion as to the correct use of the terms "signature, ratification and accession" runs like a golden thread through political statements accompanying such events.

specific treaty, fell to the relevant line-function department. The identification of the responsible line-function department is therefore crucial.

The responsible line-function department is usually the department whose functional area coincides with the topic covered by a particular convention. Such department will carry the responsibility of spearheading the obtaining of approvals for signature, ratification and accession and the subsequent implementation of and reporting under the convention. The Department of Home Affairs will, for instance, be responsible for conventions on statelessness or refugees. Where treaties cut across the functional areas of more than one department, the approach followed is to allocate a convention to a department who will be responsible for administration of a substantial part of the convention. Thus the Department of Justice assumed responsibility for the ICCPR, CAT and CERD, the Department of Health for the CRC, the Department of Welfare for CEDAW, and the Department of Labour for the ICESCR. Line-function departments must obtain the comments of all role players affected by the convention. Other relevant departments must indicate whether they are responsible for the administration of any legislation incompatible with particular provisions of a convention. The line-function department must, in liaison with the other role players, decide on the need for new legislation, legislative amendments or possible reservations in order to deal with these problems. It is compulsory to obtain the advice of the law advisers of the Departments of Justice and Foreign Affairs as part of this process. Once all problems have been ironed out, the line function department proceeds to obtain the necessary constitutional approvals as prescribed by the Manual on Executive Acts.

The first substantive inter-departmental meeting to discuss human rights agreements since the Government of National Unity came to power took place on 29 November 1994, chaired by the Department of Foreign Affairs. Earlier that month the Department of Foreign Affairs received a letter from the United Nations urging South Africa to ratify the basic human rights treaties - namely the ICCPR, ICESCR, CRC, CEDAW, CERD and CAT.[8] The purpose of the meeting was to determine:

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[8] Departmental note of human rights meeting of 29 November 1994.

(i) Which department accepts line-function responsibility for each of the above treaties.

(ii) Whether the contents of the treaties are compatible with South African domestic law.

(iii) When the treaties should be signed or ratified. A strategy was to be decided on in this regard.[9]

(iv) Whether international goodwill should override grassroots considerations or *vice versa* in drawing up a strategy.

At the meeting participants were warned by the chief-director, human rights of Foreign Affairs that: [10]

> "Living up to human rights conventions is far more difficult, and important, than either signing or ratifying them. The publicity value of the latter is a single, unrepeatable and transient matter. The damage done by non-compliance is a slow and insidious process. The old 'sign, ratify and forget about it' approach, is now definitely coming under strain. Monitoring bodies have become notably more critical towards African countries ... They will doubtless scrutinize official compliance with treaty obligations with an eagle-eye. If Government is found wanting, some of them will not hesitate to take their reproaches to international fora."

It was decided that not only should all the basic agreements be ratified during 1995, but also the Convention on the Political Rights of Women; Convention on the Nationality of Married Women; Hague Convention on Civil Aspects of International Child Abduction; and the African Charter on Human and People's Rights.[11]

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9 The Human Rights Desk of the Department of Foreign Affairs suggested the following appropriate dates: 10 December (International Human Rights Day), 21 March (South African Human Rights Day), 16 June (Youth Day), and 8 August (Women's Day).

10 From notes taken at meeting.

11 Memo prepared by the Director: Human Rights, Department of Foreign Affairs, dated 1995/03/13. The Minister of Foreign Affairs at the time, Mr Nzo, announced that "having signed these [abovementioned 8 conventions] instruments, we shall this year be seeking parliamentary approval to formally accede to them. This is our way of saying what kind of nation we seek to be...". Towards the end of 1998, the Department of Foreign Affairs was requested by Justice to advise on possible accession to the International Convention on the Suppression and Punishment of the Crime of Apartheid. The feed-back obtained by the Department of Foreign

This intention was echoed in the address by President Mandela on the occasion of the opening of the second session of parliament:[12]

> "This year, the nations will be observing the related 50th anniversary of the end of the second World War and the establishment of the United Nations Organisation. Coming as we do from our own specific past, it will be important that we join in the observance of these historic events. Thus should we affirm our own commitment to the vision contained in the Universal Declaration of Human Rights, the UN Charter and other important legal instruments and conventions that the UN has evolved to deal with the issues of racism, war and peace, human rights and development. Among these conventions, which we will be ratifying during the course of this parliamentary session, is the very important Convention on the Rights of the Child."

Addressing a press conference on 21 February 1995, the Minister of Foreign Affairs affirmed the government's commitment to the Universal Declaration of Human Rights, the United Nations Charter and "other important legal instruments and conventions that the United Nations has evolved to deal with the issues of racism, war and peace, human rights and development."[13]

At the UNGA meeting 51 of 1995, South Africa supported a resolution[14] adopted urging all states parties to human rights instruments to take their responsibilities seriously. In the directive drawn up by the Human Rights desk of the Department of Foreign Affairs, South Africa's position is explained as follows:[15] "Support. We can do this with a clear conscience, as we have already ratified the Conventions on children and discrimination against women."

By the end of 1995, this was indeed the state of affairs. Despite the ambitious intentions expressed at the beginning of that year, government managed to ratify only the CRC on 16 June 1995 and CEDAW on 15 December 1995. The following

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Affairs from the United Nations treaty section, however, indicated that the treaty was dormant and that the last state to have become party was Zimbabwe in 1991.

12 17 Feb 1995.

13 Official record of press conference.

14 Res 50/170 of 22 Dec 1995.

15 Directives prepared by the Human Rights Desk.

discussion will focus on how government has dealt with each of the individual six priority human rights instruments.

2.1 International Convention on the Elimination of All Forms of Racial Discrimination

The Department of Justice assumed responsibility as the line function department to oversee the ratification of CERD. After signature, no further initiative was taken to proceed towards ratification. On 14 March 1995 the Department of Foreign Affairs attempted to revive interest in the matter by directing a letter in the name of the Director-General to the Director-General of Justice urging that parliament be approached to approve ratification and that the necessary legislation be prepared to incorporate the provisions of CERD into South African legislation as a matter of priority.[16]

On 17 April 1997 the Director-General of the Department of Justice finally indicated that department's readiness to take the necessary steps on behalf of government to become party to CERD. Responding to a request for comments, the SLA on behalf of the Foreign Affairs Director-General, pointed out that states party to CERD are obliged to adopt legislation in order to give effect to its provisions. The following provisions were cited underlining the requirement of legislation:

Article 2 obliges parties to review policy and to repeal or amend legislation which has the effect of creating or perpetuating racial discrimination. Appropriate means, including legislation, should be adopted to end and prohibit racial discrimination by any person, group or organization.

Article 4 states that parties shall *inter alia* declare dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination an offence punishable by law. Organisations involved in such activities should be declared illegal.

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[16] RO 75/95.

Article 6 requires parties to guarantee to everyone within their jurisdiction effective protection and remedies against acts violating the provisions of CERD.[17]

The Namibian Racial Discrimination Prohibition Act was attached to serve as an example of such legislation.

A debate ensued between the SLA and the law advisers of the Department of Justice as to the time frame within which legislation should be adopted. The SLA favoured the idea that approval of ratification by parliament and the adoption of implementing legislation should ideally be synchronised. As authority it was pointed out that South Africa will be considered a party to CERD thirty days after depositing its instrument of ratification and thus be bound to implement its provisions domestically in terms of international law. One year later a report must be submitted to the Committee on the Elimination of Racial Discrimination on steps taken to implement CERD. Legislative measures giving effect to the provisions of CERD in South African law, will form the backbone of such a report. The neglect to have such legislation in place will send a clear message to the international community that South Africa is not taking its treaty obligations seriously.[18] The Department of Justice, on the other hand, held the opinion that the need for legislation was something to be considered after ratification.

CERD was eventually ratified on 10 December 1998 without reservations. Although the essence of CERD, namely the prohibition of racial discrimination, is already reflected in the Constitution, the ratification was not accompanied by any specific incorporating legislation. Subsequently legislation has been adopted referring to international human rights agreements including CERD or giving effect either directly or indirectly, to certain provisions of such agreements. The Promotion of Equality and Prevention of Unfair Discrimination Act has been enacted but is not yet in force.[19] It gives effect to the prohibition on discrimination provided for by ICESCR, ICCPR, CEDAW, CERD and customary provisions (of the Universal Declaration). The purpose of the Act is to give effect to section 9 of the Constitution, which provides for

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17 RO 129/97.
18 *Ibid.*
19 Act 4 of 2000.

the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups. The preamble to the Act mentions CERD and CEDAW by name:

> "South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Elimination of All Forms of Racial Discrimination"

Section 2 identifies the objects of the Act, including:

> "To facilitate further compliance with international law obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women."[20]

Section 3, titled "Interpretation of Act" again foresees a role for international law in plain legal language:

> "3(1) Any person applying this Act must interpret its provisions to give effect to –
> (a) the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination;
> (b) The Preamble, the objects and guiding principles of the Act.
>
> (2) Any person interpreting this Act may be mindful of –
> (a) any relevant law or code of practice in terms of a law;
> (b) international law, particularly international agreements referred to in section 2 and customary international law;
> (c) comparable foreign case law."

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[20] Sec 2(h).

Section 3 appears to provide for a dual role for international law: International law must be given effect to as directed by the Constitution (see sections 39, 231 and 232), and the Preamble and objects and guiding principles of this Act. In addition, one must be "mindful" of both international law and comparable foreign case law, when interpreting the Act.

The interplay between this provision and section 39 of the Constitution is interesting: Both documents refer to two categories of law to be considered when interpreting its contents, the first mandatory and the second optional. The Constitution obliges courts to consider international law, while the consideration of foreign case law is optional. The Act, on the other hand, enjoins "a person" to give effect to its Preamble, object and guiding principles (which includes references to CERD, CEDAW and customary international law). The second category again refers to international law referred to in section 2 and customary international law, but this time a person must only be mindful of these provisions.

The Employment Equity Act[21] was adopted in 1998 dealing with discrimination in employment. The purposes of the Act are to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination and the implementing of affirmative action measures to redress disadvantages in employment, experienced by designated groups.

The interpretation of the Act is provided for by section 3, and reads:

> "This Act must be interpreted
> (a) in compliance with the Constitution
> (b) so as to give effect to its purpose
> (c) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No111) concerning Discrimination in Respect of Employment and Occupation."

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[21] Act 55 of 1998.

South Africa's initial report was due 9 January 1999, but has to date not been submitted.

2.2 Convention on the Elimination of Discrimination Against Women

The Department of Justice acted as line-function department to oversee the ratification of CEDAW. The Department of Justice sent out an inter-departmental letter during August 1995 asking government departments involved, for their input on ratification. Ratification of this convention revealed certain potential difficulties. The SLA responded by pointing to the existence of South African customary law (also known as indigenous law) discriminating against women. Justice and Foreign Affairs agreed that such discriminatory provisions were necessarily also contrary to the chapter on fundamental rights of the 1993 Constitution. Since the Constitution, as supreme law of South Africa, was in accordance with CERD, conflicting subordinate law should therefore not stand in the way of ratification.[22] It was suggested that once CEDAW had been ratified, government would be internationally bound in terms of its provisions to eradicate all forms of discrimination against women in accordance with the provisions of the Convention.

The SLA identified only one area where a provision of the Constitution may contravene CEDAW. Section 14(3) of Chapter 3 of the 1993 Constitution states that nothing in this Chapter (which includes the equality clause) shall preclude legislation recognising a system of personal or family law adhered to by persons professing a particular religion, and recognises the validity of marriages concluded under a system of religious law. It appears that these exceptions to Chapter 3 are especially mentioned because of their inherent conflict with the principles contained in the Chapter 3. Should such legal systems, recognised by the Constitution, indeed condone discrimination against women, it is advised that a reservation to this effect be made. A number of North African states have made reservations to exclude provisions of the Sharia from the Convention. It should, however, be kept in mind that certain Western states objected to reservations of that nature. Even though it may be

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[22] Letter dated 5 September 1995 ref 95HREG090501.

legally sound to enter such a reservation, it may be regarded as politically inconsistent to treat Muslim personal and family law differently from African customary law.[23]

The protection of certain of the women's rights envisaged by CEDAW goes further than the provisions of the South African law and Constitution. The following articles, provide for equal protection in areas where South African law is silent, for example:

Article 2(e): State Parties undertake to take all appropriate measures to eliminate discrimination against women by *any person, organization or enterprise.*

Article 5(a): State Parties shall take all appropriate measures to modify social and cultural patterns with a view to eliminating *inter alia* prejudices against women.

Article 13: State Parties shall take all appropriate measures to eliminate discrimination against women in areas of economic and social life, to ensure equal rights for women to *inter alia* bank loans, mortgages and other forms of financial credit.

Article 15(3): State Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

CEDAW was ratified without reservation on 15 December 1995. Except for the protection of women's rights by prohibiting discrimination on the basis of sex and gender in terms of the equality clause of the Constitution,[24] no legislation incorporating the provisions of CEDAW was in place at the time of ratification. Subsequently legislation was adopted giving effect to provisions of CEDAW in a piece-meal fashion: The Promotion Equality and Prevention of Unfair Discrimination Act,[25] will give effect to the constitutional prohibition of discrimination, when it

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23 *Ibid.*
24 Sec 9.
25 See discussion in par 2.1.

becomes operative. The Domestic Violence Act[26] was adopted to protect women from the effects of domestic violence. The Maintenance Act[27] caters for the rights of women in maintenance issues.

South Africa's first report was due on 14 January 1997, and was only submitted on 5 February 1998. The second report due on 14 January 2001, has to date not been submitted.

2.3 Convention on the Rights of the Child

During 1995, ratification of the already signed CRC enjoyed serious consideration. Children's rights in South Africa enjoyed particular attention, partly due to the efforts of President Mandela who enjoyed world-wide recognition as a patron for children's rights. On 29 November 1994, the Cabinet Committee for Social and Administrative Affairs met to discuss the ratification of the CRC. The Cabinet Committee appointed the Ministers of Welfare and Population Development, Health and Justice as a ministers core group to take responsibility for the ratification of the Convention and report back to Cabinet. The group was also tasked to oversee the process of a National Programme of Action (NPA) on issues concerning children, consisting of various departments, non-governmental organisations and representatives of the United Nations Children's Fund (UNICEF) in South Africa. The Minister of Foreign Affairs, as responsible minister for the international part of the process, was later co-opted to the group.[28]

The CRC was ratified on 16 June 1995, coinciding with the celebration of Youth Day in South Africa. Parliament at the time did not make any express provision to incorporate the CRC into South African law. Instead government opted to address the problem of law reform progressively *in tandem* with the implementation process

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26 Act 116 of 1998.
27 Act 99 of 1998.
28 See letter from the Director-General of Foreign Affairs to the Director-General of Welfare and Population Development addressing the role of the Department of Foreign Affairs.

of the CRC.[29] The NPA Steering Committee, a committee established to coordinate and formulate policies and actions related to children, initially chaired by the Minister of Health and since 1998 coordinated by the Office of the Deputy President later the Office of the President, play an important role in overseeing the implementation of the CRC.[30]

As far as the implementation of the CRC under the 1996 Constitution is concerned the SLA remarked as follows in 1997:[31]

> "Section 231(4) of the Constitution deals with the application of international agreements in South African law and states that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of parliament. The reference to self-executing provision introduces a novel aspect in South African law which deviates from all previous constitutions which required express incorporation."

Provisions of the CRC capable of direct application can now be applied as such without the intervention of incorporating legislation. No guidelines or precedents have yet been laid down on how this provisions will be applied. In event of conflict between the CRC and national legislation, the legislation will prevail. This situation is tempered by section 233 of the Constitution, which provides that legislation must be interpreted in a manner consistent with international law.

As a first step there is an urgent need to review and revise legislation, (especially the Child Care Act, 1983) and underlying policies that affect children to ensure compliance with the CRC.

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29 Legal memo 97hreg 050701.
30 See RO143/97 dated 22 May 1997.
31 97hreg 050701.

The Department of Justice is responsible for the investigation of proposals for new and amending legislation and for the formulation and drafting of such legislation for parliament. Legislation, which emanates from investigations of the South African Law Commission is also prepared for submission to parliament.

Children's rights are specifically protected by sections 28 and 29 of the Constitution. Although the constitutional provisions are in accordance with the substantive core of CRC, they do not deal with children's rights in as much detail as the CRC. Additional incorporating legislation is therefore necessary. Although no single incorporating law has been adopted, a piece-meal approach has been followed. The following statutes that affect children were approved by parliament during the 1995/1996 parliamentary session:

(i) National Youth Commission Act, 1996[32] creates a board that will coordinate and develop an integrated national youth policy and develop an integrated national youth development plan that utilises available resources and expertise for the development of youth.

(ii) Legal Aid Amendment Act, 1996[33] that ensures every detainee and accused person has the right to consult with a legal practitioner of his or her choice and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the State or with legal representation at State expense.

(iii) Hague Convention on the Civil Aspects of International Child Abduction Act, 1996[34] facilitates the implementation of the Hague Convention, restricting the wrongful removal of children across international boundaries and establishing a procedure to restore children to their rigthful custody as soon as possible.

(iv) Criminal Procedure Amendment Act, 1996[35] aims to address problems caused by delays surrounding the administration of justice.

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32 Act 19 of 1996.
33 Act 20 of 1996.
34 Act 72 of 1996.
35 Act 86 of 1996.

(v) Films and Publications Act, 1996[36] aims to protect children from unwanted exposure to classified material.

Subsequently the Maintenance Act[37] and the Domestic Violence Act[38] were adopted regulating related aspects of children's rights.

South Africa's first compulsory report on implementation of the CRC was due on 17 July 1997, two years and thirty days after the date of ratification. The report was submitted in November 1997. The second report is due in 2002.

2.4 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights

In order to expedite outstanding ratifications, a cabinet decision was taken on 18 June 1997 to the effect that the Minister of Foreign Affairs establish a committee of ministers to examine all outstanding conventions and advise cabinet in this regard. This decision was endorsed by the Foreign Affairs Portfolio Committee, the parliamentary committee responsible for foreign affairs. This decision in effect empowered the Minister of Foreign Affairs to take over certain line function responsibilities of those departments who failed to effect ratification of treaties under their responsibility. In a "dear Colleague" letter to other members of Cabinet, the minister invited his colleagues to a meeting to get the process of ratifications of particularly the two covenants back on track.[39] The letter contains a breakdown of the various articles of the covenants and indicates which departments would be responsible for execution of that particular article, for example:

ICESCR:

Article 1(1): Constitutional Development

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36 Act 65 of 1996.
37 See note 26.
38 See note 27.
39 Drafted 22/07 1997.

Article 1(2): Agriculture

Constitutional Development

Finance

Labour

Land Affairs

Mineral and Energy Affairs

Trade and Industry

Water Affairs and Forestry

Affected departments were requested by the letter to ensure that the articles in question are compatible with existing policy and legislation:

> "Where necessary, legislation may be required to bring law into conformity with the covenants. Alternatively conflicts between treaty provisions and legislation may be addressed by way of reservations where permissible in terms of international law. Thereafter the department whose line-function responsibilities are most relevant to the specific covenants, will be requested to take steps to ratify the covenants, in conjuction with other interested departments. As regards the other 'main human rights instruments' not yet ratified, the ministers concerned would be required to make progress reports at the forthcoming meeting."

As far as compulsory reporting is concerned, the letter states that:

> "It would be preferable, once treaties have been ratified, for our committee to coordinate the compulsory submissions of reports to treaty-monitoring bodies and ensure that South Africa lives up to its international obligations in terms of the treaties. However, in cases where other arrangements have already been made in this connection, a periodic report to the committee is all that would be required."

In his speech at the meeting,[40] the minister directed a stern warning that ratifications of especially the Covenants were long overdue, as the exerts from his speech indicate:

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[40] The first suitable date for the meeting was January 1998.

"Some progress, though limited, has been made since April 1994. South Africa has in this period become party to some very important conventions such as the UN conventions on women's and children's rights and the African Charter on Human and People's Rights. South Africa has moreover given its unequivocal support to the Universal Declaration on Human Rights, at a conference in Warsaw during January 1997. The event commemorated the 50th anniversary of the Declaration. The three co-sponsors were Germany, Poland and South Africa, chosen because they were all, states which did not vote for the Declaration in 1948.

Those Conventions which South Africa has only signed, are now in urgent need of being ratified. It is embarrassing for South Africa that we are not a party to the torture and racism conventions. My Department is of the opinion that there are no insurmountable legal impediments to our becoming party to these conventions."

The meeting faced a poor turn out of both ministers and officials. Notable by their absence were the Ministers of Justice and Labour, who were respectively responsible for the ICCPR and ICESCR. Reasons for the poor response were amongst others denial of the urgency and importance of the issue under discussion, or alternatively a motion of no confidence in the Minister of Foreign Affairs as the correct person to take the lead in the process.

During June 1998, the Department of Foreign Affairs was notified by the Department of Justice of a "National Action Plan" workshop on international human rights instruments. This was in pursuance of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, held in Vienna, during 1993. A committee under the auspices of the Deputy-Minister of Justice was established to arrange a series of workshops dealing with different aspects of human rights. The Department of Foreign Affairs was requested to open the workshop. It is recommended by the Vienna Declaration that "each state consider drawing up a national action plan identifying steps whereby the State would improve the protection and promotion of human rights."[41]

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[41] Speech prepared for the deputy-minister of Foreign Affairs to be delivered at workshop.

The National Action Plan in effect replaced the committee of ministers chaired by the Minister of Foreign Affairs, which was effectively ignored by other role players. This highlighted the bureaucratic and political conflict between the Departments of Foreign Affairs and Justice, who both claimed overarching responsibility for international human rights. Justice assumed responsibility for the National Action Plan, in effect taking over the brief of Foreign Affairs but simultaneously offering Foreign Affairs a prominent but subordinate role in the process. The department of Foreign Affairs had no option but to become involved in the process led by Justice for fear of further marginalising itself. In his speech at the opening of the workshop, the Deputy-Minister said that Foreign Affairs feels that:

> "this is a very good initiative and it is pleased to be part of the process, particularly where these efforts can reinforce the work which is being done by the Department ... While the inter-ministerial committee has met and assigned specific human rights conventions to particular departments for follow-up, it would be useful at this juncture to take stock of where we stand. We are in fact hopeful that this workshop will lend impetus, where necessary, to the process of ratifying outstanding human rights treaties, or acceding to them as the case may be ... The Department can unfortunately not assume this responsibility [consultation and obtaining approval for ratifications] on behalf of departments, but it would like to be included in any consultative committees which are established, so that it can provide advice on any international law aspects that may arise."[42]

He further highlighted the close link between international human rights and foreign policy, and the recognition South Africa enjoys on several international human rights related bodies.

As far as reporting is concerned, he remarked:

> "The Government has recently completed its reports on two conventions, namely those on women's rights and on children's rights. In the case of both these conventions, the lead department established a committee consisting of

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42 *Ibid.*

representatives from various departments and from civil society to draft the reports. The department affected most by the provisions of a particular convention, acts as the lead department. At the time when the process started it became apparent that government department had generally underestimated the work involved in compiling these reports, since in both cases an extension of the dead-line for the submission of the report had to be requested."[43]

A follow-up workshop was held during June 1998 on international and regional human rights instruments adopting yet another action plan indicating yet again which department is responsible for signature and ratification of the key international human rights instruments.

2.5 Convention Against Torture and Other Cruel, Inhuman or Degrading Forms of Treatment or Punishment

The Convention was amongst the first to be signed on 29 January 1993, and was assigned to the Department of Justice to act as line function department.

Initially ratification was postponed pending clarification of the position regarding corporal punishmnet in South Africa. Corporal punishment inflicted on juveniles was found to be unconstitutional by the Constitutional Court in *S v Williams and Others*[44] in 1995. Despite various attempts by the South African Police Service to effect ratification, it only took place on 10 December 1998. Ratification was accompanied by a declaration in terms of article 30(2) of CAT accepting the provision of article 30(1) which reads:

"Any dispute between two or more States Parties concerning the interpretation or application of this Convention, which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization

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43 *Ibid*.
44 See note 115 chapter 5.

of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

South Africa's report on CAT was due on 8 January 2000 and was according to United Nations records still outstanding in January 2002.

3. Problems Hampering the Process

The enthusiasm with which government embarked on the process of subscribing to international human rights instruments soon waned as the post democratic euphoria had to make place for the toils of governance. Numerous bureaucratic and political problems were experienced delaying ratifications and accessions to the instruments identified and signed at the time of transition to democracy.

It was not always clear to start with, which department should carry the responsibility as the line-function department for each particular convention. Most human rights agreements, such as the covenants, CERD, CRC and CEDAW, impact on the line function activities of many different, if not all, government departments. It was therefore problematic to decide on a particular department to carry the responsibility for the various conventions. The Department of Justice was, for instance, keen to take up responsibility for various international agreements, but due to various problems has not always lived up to its promises. The Department of Labour, on the other hand, was reluctant to accept as line-function the ICESCR assigned to it.

Dealing with human rights conventions placed an additional burden on an already down-sized civil service. Not all departments had the capacity in terms of personnel and financial resources to deal adequately with additional functions now allocated to them. Another problem experienced from the side of line-function departments was that they often did not succeed in getting the required or timeous response from other governmental role players. Many government departments did not allocate specific personnel or sections to deal with human rights agreements. One would get different and inconsistent answers from the same department regarding the impact of a particular treaty on its functions over a short time span.

After 1993 not only the Department of Foreign Affairs, but also the Departments of Justice and Trade and Industry became involved in international issues. This led to a situation were coordination between the activities of the various departments was often absent and consistent approaches to international law issues were not followed.

The above problems contributed to the fact that government was not able to meet its own timeframes for accession and ratification and is late with the submission of reports.

4. Reporting Obligations

By mid-1995, South Africa had signed the following six human rights instruments, which require periodic reporting on their implementation within a certain period after becoming party:

(i) CEDAW
(ii) CRC
(iii) CAT
(iv) ICCPR
(v) ICESCR
(vi) CERD

Reporting forms the central element in monitoring the full and effective national implementation of international human rights standards. The reports are expected to provide comprehensive information on the measures taken by a government to fulfill its commitments resulting from the ratification of or accession to a particular human rights convention. The reporting procedure establishes a yardstick to measure a government's accountability in terms of international law with regard to its human rights responsibilities, which is open to the scrutiny of the international community.[45]

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[45] RO 176/95.

It was pointed out in a legal opinion rendered in July 1995 that as the South African government does not have any prior experience of reporting, an infrastructure should be created to deal with all aspects of reporting in the most effective and professional way:[46]

> "It is in the government's best interest to ensure that the best equipped staff is provided with the necessary time to effectively carry out its reporting assignments. The preparation of reports requires input from various sources such as national, provincial and local government bodies, administrative agencies, nongovernmental organisations and others. The authority of a reporting officer will influence the way requests for information are handled.
>
> It is necessary that a reporting officer or team be established with the power to co-opt a broad circle of participants from various governmental bodies with detailed knowledge of their area of responsibility. The participants may vary depending on the content of each individual treaty.
>
> In order to establish continuity and efficiency in report writing the lead responsibility should be assigned to one Ministry and to one person or core-group. Given the importance accorded to the report writing process, a high-level interdepartmental task force chaired by the Minister of Foreign Affairs may be established for this purpose. (Proposal made in the UN Manual on Human Rights Reporting, 1991.) In various courses on report writing attended by officials of this Department it was indicated that international practice favours an important role for state law advisers (International law) in the process, as they are best equipped to interpret and monitor international law on human rights. The law advisers from the Department of Justice, the line function department responsible for the domestic application of human rights, should likewise be included in the core group on a permanent basis.
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> It is apparent from the above guidelines that this Department should play a leading role in the writing and presentation of reports, regardless of the fact that other departments will carry the line function responsibility for implementation of the various

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46 *Ibid.*

instruments. We therefore propose that the Department take the initiative at this early stage to establish the appropriate infrastructure."

This call fell on deaf ears. When the first reports on the CRC and CEDAW had to be produced the responsibility was taken up by the NPA, chaired by the Department of Health, and the Department of Welfare respectively. Both the NPA and the Department of Welfare no longer carry the key responsibility for these conventions. Experience gained will thus be lost for future exercises in report writing.

5. Conclusion

The constitutional changes after 1993 created a legal and political environment enabling South Africa to become party to the major international human rights agreements. Much has been achieved if it is considered that South Africa has since become party to the ICCPR, CERD, CEDAW and CRC, leaving only the ICESCR and CAT to be ratified. However, as far as implementation and domestic application of the resultant treaty obligations are concerned, the current picture is one riddled with problems. It has become very clear that ratification or accession is not the end of the process. This chapter focused on the bureaucratic birth pains emanating from the implementation of two new constitutions within a period of three years. The following factors were identified as stumbling blocks hampering the process:

- A restructured and downsized public service was responsible for transforming political decisions into practice in terms of new and unfamiliar constitutional requirements. Bureaucratic processes developed to implement the constitutional procedures for obtaining approval for signature, ratification of and accession to international multilateral agreements are cumbersome and highly technical.
- The bickering between different government departments competing to act as lead department in the ratification process, made it impossible to meet time frames for ratification.
- The reluctance of other departments, specifically the Department of Trade and Industry, to act as lead department in the ratification process.

- The general absence of cooperation by government departments in providing timeous and accurate feedback in response to requests from the lead department to indicate how they will be affected by the provisions of particular international agreements.
- The absence of a well-planned and consistent strategy on implementation of ratified instruments by government.
- The absence of an institutional memory recording a consistent position by the relevant departments on their various positions.
- The absence on a consistent and coherent approach to reporting in terms of the various instruments.
- The absence of a policy on whether and under what circumstances to enter reservations.
- The lack of an implementation strategy and policy by government.
- The lack of clear and consistent guidance by both courts and parliamentarians on the status accorded to these international instruments.
- Confusion regarding the implementation of the relevant constitutional provisions, especially regarding the identification of self-executing provisions.
- The inability to submit reports to treaty monitoring bodies on time.

The above points of criticism are of a general nature. There are fortunately welcome exceptions to the general picture of confusion and inefficiency. Most notable in this regard is the handling of the CRC, where an implementation strategy was in place well in advance of ratification and where law-reform is a continuous process. South Africa will only be able to address its international human rights obligations once government develops a clear and viable policy dealing with both ratification/accession and implementation and sticks to it. A continuity of trained government officials allocated to deal with the implementation of such policy is a prerequisite to building an institutional memory, which is both reliable and consistent. Once this has been achieved, South Africa will be able to do justice to the spirit of an international law friendly Constitution.

CHAPTER 8

CONCLUDING OBSERVATIONS

The paying of outstanding dues in terms of international law obligations presents itself as one of the demanding challenges the post-apartheid South African government is faced with. The apartheid legal system, by its very nature, flew in the face of international human rights norms. Hence, international law presented itself as a powerful tool in the struggle against apartheid. The present thesis investigates the difficult problem relating to the implementation of international law, specifically international human rights law, in South Africa. Specific conclusions reached must be understood within the overall framework of the thesis. The problem regarding the domestic implementation of international human rights law presents itself at two levels: It is firstly imperative to establish the applicable rules of international law, in order to ascertain the relevant principles governing international human rights law. The status and legal nature of international human rights are to be determined accordingly. In the absence of central enforcement of international law, the implementation of these rules depends on the domestic legal systems of states. The second question thus concerns itself with the enforcement of rules of international law by states, having agreed to abide by those rules. Different domestic jurisdictions deal differently with the enforcement of rules of international law. The domestic implementation of international human rights law is a question of law, strongly influenced by politics and policy. This is evidenced by the approach of both the Nationalist government in South African before 1994 as well as the approach of the present ANC-led government as illustrated by the present thesis. This chapter will expound the most important conclusions reached in the research.

International human rights law shares its sources with international law in general which are usually traced to article 38(1) of the ICJ Statute. Moreover, binding international human rights law appears to be based on either international treaty or custom. The remaining sources of article 38, to whit general principles of law, judicial decisions and the teachings of publicists are of secondary relevance. When these

sources deal with international human rights law, they are more often than not already evidenced by either treaty or custom.

Treaties and custom, however, do not account for all expressions of international human rights. It is important to distinguish at a theoretical and practical level between *international human rights law*, and other expressions of *international human rights* contained in sources not listed in article 38. Whilst the former category constitutes binding law, the latter cannot be regarded in the same vein and are best explained as *soft law*. The phenomenon of soft law includes, *inter alia,* decisions of international organisations such as the Universal Declaration of Human Rights, the most influential of all human rights instruments. It is therefore an important issue of international human rights law to take account of such non-legal instruments. Although instruments of soft law may develop into treaties and custom should they comply with the essential requirements, their essential value lies on a moral and political level by facilitating and mobilising the consent of states. Thus, despite their non-binding nature, some legal value should be attached to instruments of soft law.

Recent comments on customary international human rights law have shown a deviation from the traditional criteria required for the formation of custom and underline the relevance of soft law. Not only may resolutions of international organisations contribute to the creation of *usus* and *opinio iuris*, they may also in themselves present adequate evidence of either or both constituting elements. It is therefore theoretically possible that customary international human rights law may be created by the adoption of a resolution, which is designated as a non-binding instrument.

In terms of international law, states are legally bound to honour their international obligations. How that is done, however, is regulated by the domestic legal systems of states. *Monism* and *dualism* are traditionally held as the opposing theoretical models advanced to explain the modes of domestic application. Practice often comprises of a mixture or modification of monist and dualist elements. Monism, translated into modern practice, essentially regards treaties and custom binding on a particular state as an integral part of the legal system of that state and can therefore be directly

applied. In terms of the dualist perspective, international obligations must first be transformed into national law before it can be enforced at a domestic level.

The theoretical model favoured by a particular state is a question of law and policy, but is also closely related to the constitutional dispensation of a particular state. In states where the executive is empowered to enter into treaties, legislative enforcement of such treaty obligations is usually required before they can affect the rights of individuals in that particular state. Where the legislature enjoys treaty-making powers, an additional legislative action is often not necessary to transform treaties into domestic law. It is, however, dangerous to describe a monist approach as "international law friendly", and dualism as impeding implementation of international law obligations in domestic law. Domestic courts may refrain from applying available international law or apply such law incorrectly, despite its availability, in states following a monist approach. Countries adhering to a dualist model may, on the other hand, consistently and diligently incorporate their treaty obligations into domestic law, which are interpreted and applied by courts in accordance with international rules of interpretation.

As far as human rights treaties are concerned, a number of arguments can be advanced suggesting that direct application by states party to international human rights treaties is potentially more conducive to making those rights available to individuals. To summarise these arguments: Should treaties lend themselves to direct application, individuals may resort to internationally protected human rights at a domestic level and domestic courts are obliged to enforce such rights without any intervention or meddling by parliament. On the down side, the identification of treaty provisions capable of direct application requires legal officials well acquainted with the intricacies of the phenomenon. Random and inconsistent direct application may play havoc on domestic jurisprudence, especially in the hands of the lower courts. Current practice in a number of countries selected for purposes of the research show a tendency towards direct application of customary international law, while they are more cautious of direct application of treaty obligations. Countries affected by sophisticated models of regional integration, such as members of the European Union are, however, under pressure to accord direct application to treaty law regulating regional issues.

Any evaluation of the position of international law in South African must necessarily take place against the theoretical bases expounded above. The traditional approach followed with regard to international law, was radically and irrevocably changed by the 1993 Constitution, which introduced democracy to a state previously governed on the basis of race. It remains relevant to study the reciprocal relationship between South Africa before 1993 and international law for legal historical reasons and also because certain aspects continue to exert an influence even under a post-apartheid dispensation. Secondly, apartheid placed international law rules of the time, especially those dealing with human rights, under pressure and prompted their development to address the malpractices associated with apartheid. Areas of contemporary international law directly affected by apartheid include the erosion of sovereignty so as to permit international involvement in domestic human rights abuses; the recognition of apartheid as a crime against humanity; the interpretation and status of the right to self-determination; the status and influence of repeated UNGA resolutions focusing on the same issue; and the concern of international humanitarian law with internal conflicts.

Before 1993, treaties were entered into by the executive but depended on legislative incorporation for their enforcement as dictated by the dualist model as opposed to custom which, despite the trepidation voiced by Booysen, enjoyed automatic domestic application without the need for legislative involvement in accordance with monism. Although incorporated treaties and customary international law were theoretically regarded as part of South African law, courts generally took a hostile stance towards international human rights law in accordance with the dictates of the apartheid legislature and executive.

The above bleak picture took a turn for the better with the adoption of the 1993 South African Constitution, which brought a much acclaimed formal end to apartheid. Predictably, international law was elevated from the inferior position it held *vis-à-vis* other branches of law under apartheid. International law influences were wide spread throughout the Constitution. Most important though, the Constitution regulated the role and status of international law in South African law. Despite the laudable intention of the constitutional drafters to honour internationally acceptable principles and bring international law closer to the people, the importance of these provisions in

the eyes of the parties negotiating the Constitution, paled in comparison to the urgency to reach agreement on important political issues. Such agreement was at the time regarded as a *sine qua non* for a peaceful settlement in South Africa, which by mid-1993 hovered on the brink of political upheaval.

The international law provisions emerging from this process were poorly drafted, but nevertheless revolutionised the position of international law in South African law. International law related issues were now constitutionally governed and no longer based on British inherited common law principles and judicial precedent. Treaty-making power was placed in the hands of the legislature, custom and international agreements binding on South Africa were regarded as part of South African law, a chapter on fundamental rights borrowing heavily from international human rights law was introduced; and courts were obliged to consider international law when interpreting these constitutionally entrenched rights. In addition, the traditional term "treaty" was substituted for the imprecise term "international agreement". Thus an enabling environment was created for international law to flourish.

The approach adopted as far as the status of international law *vis-à-vis* South African law is concerned, remained dualist with regard to treaties (express incorporation required), and monist relating to customary international law (automatically forms part of the law of the land). In terms of the hierarchy of norms, incorporated treaties, being on par with South African legislation, enjoyed a higher status than binding customary law. Both these sources, however, remain subordinate to the supreme Constitution.

Jurisprudence on international law under the 1993 Constitution, unfortunately presents an unimaginative picture. Courts were both wary and ignorant of international law and generally only ventured into this unfamiliar territory if a matter could not be addressed in terms of national law. Being well sensitised by the advocates for the creation of a human rights culture in South Africa, judicial practitioners had a superficial knowledge of the international human rights instruments but were not equal to the task of interpreting their legal nature. Thus court cases during this period contain numerous mechanical references to various international human rights, be they embodied in treaties, declarations, decisions of international tribunals or decisions of foreign courts referring to international human

rights. These sources were usually referred to without any distinction as to their legal nature. A notable exception to this approach was presented by the *Makwanyane* case were the Constitutional Court, *inter alia* distinguished between binding and non-binding international law in terms of section 35. Although the correctness of using binding international law as an interpretative tool can be criticised, it gave direction to the international law debate in South Africa.

South Africa was given the rare opportunity to address the technical errors and practical difficulties created by the international law related provisions of the 1993 Constitution, especially section 231, three years later through the adoption of the 1996 Constitution. As in the case of its predecessor, the 1996 Constitution was underpinned by an openness towards international law and democratic and transparent decision-making. Although attempts were made to iron out technical problems experienced under the old section 231, significant new difficulties were introduced in turn. Few of the suggestions made in submissions of the governmental international law advisers to the drafters actually found a place in the new version of section 231, which was now covered by three sections, namely 231, 232 and 233. The interpretation clause of the Bill of Rights (section 39) in essence coincided with that of the 1993 Constitution (section 35). Again, the Bill of Rights, despite taking account of the political views prevalent in the Constitutional Assembly, displayed great similarities with the standard international human rights instruments. One of the suggestions coming from the governmental law advisers, which did find its way into the Constitution, was to formally provide for two alternative procedures for obtaining approval to enter into international agreements. Standard, routine agreements required only executive approval and subsequent tabling in parliament, while a longer parliamentary route is prescribed for the remaining agreements. The terminology used to identify the first category, namely *technical*, *administrative* and *executive*, is however, somewhat unusual. Parliamentary legislation is a stipulated prerequisite for domestic application of international agreements, except in the case of self-executing agreements or provisions thereof, which enjoy direct application once approved by parliament, subject to the Constitution and other parliamentary legislation. Customary international law is no longer subject to the qualification of being *binding*

before it can be regarded as part of South African law.[1] A new interpretation clause is introduced requiring that legislation in general should be interpreted in accordance with international law.[2]

One of the issues which has so far provoked much debate amongst academics, state law advisers and by the courts, deals with the appropriate definition of the term "international agreement" and the concomitant two categories of international agreement introduced by the Constitution (section 231(2) and (3)). The debate turns on the question whether the term "international agreement" as used by the Constitution is synonymous with the definition of the term "treaty", as it appears in the Vienna Convention on the Law of Treaties. It is suggested with reference to the Cape High Court's decision in the *Harksen* case and practice adhered to by the state law advisers, that international agreements as referred to by the Constitution, should indeed be defined in accordance with the Vienna Convention definition. As in the case of treaties, international agreements refer to binding agreements between subjects of international law. There are, however, other species of international agreements, falling outside the scope of the Constitution. Such international agreements denote the category of so-called non-binding international agreements. They can be regarded as expressions of soft law, not intended to be legally enforceable. These agreements form the bulk of daily diplomatic interaction amongst states. Such documents, though informal, nevertheless constitute understandings amongst states making international interactions more predictable.

The 1996 Constitution also introduces the doctrine of self-executing treaties to South Africa. This concept has provoked sharp criticism modeled on problems experienced with direct enforcement of treaties in American law, where the concept originated. Such criticism is not only outdated, it also fails to take account of subsequent refinement of the doctrine in Europe, its suitability to South African realities, and its inherent suitability for enforcement problems experienced by international human rights law. Direct enforcement of treaties so intended by the drafters, subject to the

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1 Sec 232.
2 Sec 233.

supremacy of the South African Constitution, is very much in tune with the intention expressed by the original Kempton Park draft, and is also in line with the Constitutional provisions regarding the domestic enforcement of customary international law. So far South African courts have, given their positivist roots, refrained from resorting to application of unincorporated treaty law. Parliament has likewise not made any statements that it considers treaty provisions self-executing. This is unlikely to occur in future as a practice is developing for parliament not to express itself on the implications of a treaty for domestic law, leave alone to make provision for domestic application of such treaty obligations, at the time of approving accession to or ratification of treaties.

The drawing together of international law requirements with domestic law and policy, vest predominantly in the hands of the state law advisers. South Africa's position with regard to international human rights agreements since 1993, provides an illustration of how state practice has developed to accommodate a changed legal, political and policy milieu. After 1993 the legal impediments barring South Africa from active participation in multilateral human rights were removed. International fora welcomed South Africa back into their midst, and expected the new South African government not only to correct its local human rights record, but also to act as patron saint of human rights in Africa.

At a domestic level, problems were however experienced on a different plane: teething problems regarding administrative procedures relating to implementation of the new Constitutions; bickering amongst government departments and cabinet ministers regarding their role in the process; lack of consistent policy regarding ratification of or accession to treaties and how to implement the resulting treaty obligations; and the absence of a policy regarding reporting and reservations. Courts continue to attach minimal value to international human rights, leave alone South Africa's treaty obligations. A piece-meal and ineffective implementation strategy ensures that international human rights law remain a world apart for South African citizens. In addition the South African government has displayed a wariness to introduce human rights in its foreign policy, for fear of affronting former allies. Thus, despite the corrective action introduced by the post-apartheid Constitutions in the arena of human rights, international human rights appear to play a far less significant

and change-inducing role in a post-apartheid legal system than visionaries had hoped for.

ANNEXURE A

1. Declaration on the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, pmbl., U.N. Doc. A/4354 (1959).

2. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, 67, para. 7, U.N. Doc. A/4684 (1960).

3. Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 2018, U.N. GAOR, 20th Sess., Supp. No. 14, at 46, pmbl., U.N. Doc. A/6014 (1965).

4. Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, G.A. Res. 2037, U.N. GAOR, 20th Sess., Supp. No. 14 at 40 pmbl., U.N. Doc A/6014 (1965).

5. UNESCO Declaration of the Principles of International Cultural Cooperation, Nov. 4, 1966, pmbl., art. 4, reprinted in UNESCO's STANDARD-SETTING INSTRUMENTS at IV.C.I.Intro, 3, 5 (1981).

6. Declaration on the Elimination of discrimination against Women, G.A. Res. 2263, U.N. GAOR, 22d Sess., Supp. No. 16, at 35, pmbl., U.N. Doc. A/6716 (1967).

7. Declaration on Territorial Asylum, G.A. Res. 2312, U.N. GAOR, 22nd Sess., Supp. No. 16, at 81, pmbl., art. 1, U.N. Doc. A/6716 (1967).

8. Declaration on Social Progress and Development, G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 49, 50, pmbl., art. 5, U.N. Doc. A/7630 (1969).

9. Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856. U.N. GAOR. 26th Sess., Supp. No. 29. at 93. pmbl., U.N. Doc. A/8429 (1971).

10. Universal Declaration on the Eradication of Hunger and Malnutrition, Nov. 16, 1974, endorsed in G.A. Res. 3348, U.N. GAOR, 29th Sess., Supp. No. 31, at 75, pmbl., U.N. Doc. A/9631 91974) (adopted by the World Food Conference).

11. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, U.N. GAOR, 29th Sess., Supp. No. 31, at 146, art. 6, U.N. Doc. A/9631 (1974).

12. Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, G.A. Res. 3384, U.N. GAOR, 30th Sess., Supp. No. 34, at 86, pmbl., art. 2, U.N. Doc. A/1 0034 (1975).

13. Declaration on the Rights of Disabled Persons, G.A. Res. 3447. U.N. GAOR, 30th Sess.. Supp. No. 34, at 88, pmbl., U.N. Doc. A/1 0034 (1975).

14. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, pmbl., art 2, U.N. Doc. A/I 0034 (1976) (adopted December 9, 1975).

15. UNESCO Declaration on Race and Racial Prejudice, No. 27, 1978, pmbl., arts. 5, 6, reprinted in UNESCO'S STANDARD-SETTING INSTRUMENTS at III.C.I.Intro, 4, 7, 8 (1981).

16. UNESCO Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War, November 28, 1978, pmbl., art. 1 1, reprinted in UNESCO' STANDARD-SETTING INSTRUMENTS at IV.C3. Intro, 3, 8-9 (1981).

17. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, U.N. GAOR, 34th Sess. Supp. No. 46, at 185, pmbl., art. 2, U.N. Doc. A/34/46(1979) (commentary).

18. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36155, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, 172, pmbl., arts. 3, 8, U.N. Doc. A/36/51 (1981).

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ANNEXURE B

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18. International Convention Against Apartheid in Sports, GA Res. 40164, UN GAOR, 40th Sess., Supp. No. 53. at 37, 38, pmbl., UN Doc. A/40/53 (1985).

ABBREVIATIONS

AASRI	Arctic and Antarctic Research Institute
AD	Appellate Division
AJICL	Arizona Journal of International and Comparative Law
AJIL	American Journal of International Law
All ER	All English Law Reports
ANC	African National Congress
Art	Article
AYBIL	Australian Yearbook for International Law
AYIL	African Yearbook of International Law
BCLR	British Columbia Law Reports or Butterworths Constitutional Law Reports
BILC	British International Law Cases
BLR	Buffalo Law Review
BYIL	British Yearbook of International Law
CA	Constitutional Assembly
Can HRY	Canadian Human Rights Yearbook
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Woman
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CILSA	The Comparative and International Law Journal of Southern Africa
Cir	Circular
Conf	Conference
CP	Constitutional Principle
CPD	Cape Provincial Division (of the High Court of South Africa)
CRC	Convention on the Rights of the Child
DFA	Department of Foreign Affairs

Doc	Document
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	Economic and Social Council of the United Nations
EJIL	European Journal of International Law
EU	European Union
FRG	Federal Republic of Germany
GJICL	Georgia Journal of International and Comparative Law
GO	Legal Opinion of the Department of Foreign Affairs
GYIL	German Yearbook of International Law
HHRY	Harvard Human Rights Yearbook
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILA	International Law Association
ILO	International Labour Organisation
ILR	International Law Report
Int'l Comm of Jurists Rev	International Commission of Jurists Review
Int'l Legal Mat	International Legal Materials
JILP	Journal of International Law and Politics
LHWP	Lesotho Highland Water Project
MLR	Michigan Law Review
Mich ILJ	Michigan International Law Journal
N	Natal Provincial Division (of the High Court of South Africa)
NILR	Netherlands International Law Review
NM	Namibia
NYIL	Netherlands Yearbook of International Law
NZLJ	New Zealand Law Journal
PCIJ	Permanent Court of International Justice

QB	Queens Bench
Res	Resolution
RO	Legal Opinion of the Department of Foreign Affairs
SA	South Africa (South African Law Reports)
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SAYIL	South African Yearbook of International Law
SLA	State Law Advisers of the Department on Foreign Affairs
SLR	Stellenbosch Law Review
Supp	Supplement
SWA	South West Africa
T	Transvaal Provincial Division (of the High Court of South Africa)
TBVC	Transkei, Bophuthatswana, Venda and Ciskei
TEC	Transitional Executive Council
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TLR	Texas Law Review
TS	Transvaal Supreme Court Reports or Treaty Series
UDHR	Universal Declaration of Human Rights
UILR	University of Illinois Law Review
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNISA	University of South Africa
US	United States
UTLJ	University of Toronto Law Journal
VJIL	Virginia Journal of International Law
VLR	Vanderbilt Law Review
W	Witwatersrand Local Division
WM and Mary L Review	William and Mary Law Review

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