

**INTERNATIONAL LAW IN THE POST-1994 SOUTH AFRICAN CONSTITUTIONS:
TERMINOLOGY AND APPLICATION**

by

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SUMMARY

An important change wrought by the post-1994 South African Constitutions is the attempt to have South Africa recognised as a democratic and sovereign state in the “family of nations.” The new Constitutions make extensive reference to the state’s international obligations and represent an endeavour to [re]define the status of international law vis-à-vis national law. Some provisions utilise international law in the interpretation and formulation of national jurisprudence and represent an [albeit not totally successful] endeavour to attain greater harmonisation between international and national law.

This is an attempt to systematize the various criticisms levelled against these provisions to date, and to highlight certain interpretational difficulties and problems that present themselves in the process. The distinction between the various terminologies and branches of international law is also taken to task. Lastly, this paper attempts to determine the extent to which international law is applied at national level under the post-1994 constitutions.

Key terms

International law (status of in the RSA); International obligations (constitutional recognition of); International human rights law; Treaty law; Customary international law; Humanitarian law (*ius in bello*); Law of warfare (*ius ad bellum*); Constitutional interpretation; Bill of Rights interpretation; Statutory interpretation; Human Rights recognition; Human Rights Commission; Truth and Reconciliation; Amnesty; Principle of legality (criminal law); International crimes; Universal jurisdiction.

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To my family, Marianne, Nadia, Celeste and Drikus: Thank you for standing by me throughout this ordeal, even though I was kept from being a husband and father, and from fellowshiping with you for approximately each night of the past two years or so. We have some catching up to do.

To my Maker, for His grace to have seen this through, I'm deeply grateful.

In a lighter vein

Although extensive use has been made of quotations from other works, it is hoped that the ancient Tibetan proverb: *Man who speaks in quotations, cannot speak for himself* will not be seen to be true regarding this dissertation.

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Abbreviations

BYIL	British Yearbook of International Law
CC	Constitutional Court
CPD	Cape Provincial Division (of the High Court of South Africa)
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
FC	Final Constitution (The Constitution of the Republic of South Africa Act 108 of 1996)
HRC	Human Rights Commission
IC	Interim Constitution (The Constitution of the Republic of South Africa Act 200 of 1993)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights of 1966
ICESC	International Covenant on Economic, Social and Cultural Rights of 1966
ICJ	International Court of Justice
ICL	International criminal law
ICLQ	International and Comparative Law Quarterly
IHRL	International human rights law
(JCRDL)	(Journal for the Contemporary Roman-Dutch Law) – See THRHR <i>infra</i>
LOAC	Law of armed conflict
LR	Law Reports
NCOP	National Council of Provinces (South Africa)
NmHC	Namibian High Court
RSA	Republic of South Africa
SA	South Africa (South African Law Reports)
SAA	South African Airways
SACR	South African Criminal Law Reports
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal

SANDF	South African National Defence Force
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeals (South Africa)
THRHR	Tydskrif vir die Hedendaagse Romeins Hollandse Reg
TPD	Transvaal Provincial Division (of the High Court of South Africa)
TRC	Truth and Reconciliation Commission
TSAR	Tydskrif vir die Suid Afrikaanse Reg
UCT	University of Cape Town
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNISA	University of South Africa
UP	University of Pretoria
USA	United States of America

CHAPTER I

GENERAL INTRODUCTION

1. INTRODUCTION

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CHAPTER I

GENERAL INTRODUCTION

1. INTRODUCTION

The advent of a new constitutional dispensation in the Republic of South Africa ushered in sweeping changes to the political nature, structure and philosophy upon which the state is built. For more than three hundred years,¹ this country had an appalling history of colonialism, segregation and, most notoriously, apartheid. Since becoming a Union in 1910,² and until 1994, South Africa went through three constitutions,³ all of them proclaiming a basic Westminster model (give and take a few variations in theme) of a democratically⁴ elected, strong central government.

Although all three pillars of a democratic government⁵ featured strongly in the different constitutional periods before 1994, the doctrine of parliamentary supremacy (introduced under English law) as applied in South Africa marred sound and independent development of jurisprudence. The positivist maxim *iudicis est ius dicere sed non dare [facere]*⁶ reigned and there was little (if any) evidence of judicial activism. Attempts at judicial activism⁷ were not always accepted by fellow judges and often rejected or ignored by the Appellate Division of the Supreme Court.⁸ Moreover, the justiciability of parliamentary legislation and executive acts was practically non-existent.⁹

Although marginalized citizens (and non-citizens) of the state through the years called upon courts to invoke (recognise and apply) international law¹⁰ to protect them against the

¹ This period is calculated from 6th April 1652, the date upon which Jan Van Riebeeck and the five ships under his command (flying the flag of the Dutch East India Company) landed at the Cape of Good Hope to establish a refreshment base for their merchant (and war) ships.

² It was only a few years later (the exact date is uncertain) accepted that South Africa became a recognised sovereign and independent state entitled to the status of a full subject of international law – J Dugard *International Law: A South African Perspective* 2nd Ed (2000) 19.

³ The Union of South Africa Act 1909; the Republic of South Africa Act 32 of 1961; and the Constitution of South Africa Act 110 of 1983.

⁴ Due to the notorious racial and other disqualifications from voting, “democracy” was a misnomer.

⁵ I.e. Legislature; Executive; and Judiciary.

⁶ “It is the province [duty] of a judge to expound [interpret] the law and not to give [create] it.”

⁷ E.g. Didcott J’s attempt to invoke international human rights conventions as a guide to judicial policy regarding an accused person’s right to legal representation in *S v Khanyile* 1988 (3) SA 795 (N) at 801.

⁸ E.g. *S v Rudman* 1989 (3) SA 368 (E) at 376 A-B; and *S v Rudman* 1992 (1) SA 343 (A).

⁹ Courts were limited to the doctrine of *ultra vires* – *Harris v Minister of the Interior* 1952 (2) SA 428 (A) – and ingenious interpretation techniques in order to test and overturn unjust actions by the Legislature and Executive, but undue positivism / formalism and so-called “ouster clauses” in especially emergency legislation, severely limited judicial activism.

¹⁰ Notably “international human rights law” (IHRL) which will be discussed *infra*.

iniquities perpetrated by the other two pillars of government,¹¹ they were often greeted by inertia.¹² Moreover, the history of South Africa abounds with atrocities¹³ committed by the security forces¹⁴ both intra and extra-territorially against citizens and non-citizens alike. Although common law provided some protection for individual rights, Parliament could amend the common law in whatever way it saw fit.

The **Interim Constitution**¹⁵ (IC) heralded profound change. **Firstly**, all citizens were accorded equal political and human rights free from racial and other unfair criteria for discrimination. **Secondly**, the strong central government of the past was replaced by a government based, by and large, on federal features; and an electoral system based on proportional representation was introduced. **Thirdly**, and most profoundly, the doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy, in terms of which the state is ruled by a supreme Constitution, which included (for the very first time in this country) a Bill of Rights. The courts were no longer limited to the doctrine of *ultra vires* or ingenious interpretation techniques to test and nullify Acts of Parliament or of the Executive. In fact, all actions by Parliament and the Executive were made subject to judicial scrutiny and control.

The notions of judicial scrutiny and control were so highly regarded by the drafters of the IC, that crucial issues, such as the constitutionality of the death penalty were left in the hands of the Constitutional Court (which was also a first) by not defining the basic right to life as enshrined in the IC in precise terms¹⁶ The Constitutional Court has not shied away from its new-found powers derived from the *Rechtstaat* principle and has struck (or read) down quite a number of pieces of legislation.¹⁷ The courts have even scrutinised the purely executive (prerogative) powers exercised by the President.¹⁸

¹¹Dugard *op cit* (n2) 22-25; and H Booysen *Volkereg en sy verhouding tot die Suid Afrikaanse reg* 2nd Ed (1989) 77-78.

¹² On the general reluctance of courts to be guided by IHRL, see J Dugard "The role of international law in interpreting the Bill of Rights" (1994) 10 *SAJHR* 208 at 208-209; "International law and the 'Final' Constitution" (1995) 11 *SAJHR* 241 at 242; and "The South African Judiciary and International Law in the Apartheid Era" (1998) 14 *SAJHR* 110.

¹³ During the public hearings by the Truth and Reconciliation Commission and its Amnesty Committees during the last few years, both well-known and previously unheard of atrocities were exposed.

¹⁴ I.e. the Police; Defence Force; and Intelligence Services.

¹⁵ I.e. the Constitution of the Republic of South Africa Act 200 of 1993 (IC).

¹⁶ The right to life was formulated in open-ended terms in section 9 of the IC. See *S v Makwanyane* 1995 (3) SA 391 (CC) where the Court rose to the challenge to determine the scope of the right to life in terms of, *inter alia*, section 35 (1) of the IC.

¹⁷ Notably the abolition of the death penalty, *Makwanyane*, *supra* (n16); and the so-called reverse onus provisions – from *S v Bhulwana* 1995 (1) SA 388 (CC) to *S v Manamela* 2000 (1) SACR 414 (CC).

¹⁸ E.g. *Hugo v President of the RSA* 1996 (6) BCLR 876 (D). But see also *President of the RSA v Hugo* 1997 (4) SA 1 (CC).

However, it is the insidious effect¹⁹ of international law on the national law and consciousness of the Republic of South Africa (which arguably rated foremost among pariah states in its disregard of international human rights law), which has brought about the most profound changes to the old constitutional order. Customary international law was unequivocally declared part of the law of the land,²⁰ thereby seemingly (but not effectively as will be argued, *infra*) putting an end to the controversy that reigned between two schools of thought, namely:

- **One** – Professor Booysen arguing that customary international law did not automatically form part of the national law of South Africa, although it was available for use by the courts under certain conditions as *lex fori*;²¹ and
- **Two** – Professor Dugard’s submission that international law formed part of the law of the land and that courts could invoke it (or should have done so), subject only to certain exceptions.²²

This constitutional “incorporation” of customary international law into the national law also largely settled the monist / dualist debate in the South African context, and the theory of harmonisation²³ was qualified in that customary international law had now only to be harmonised with the Constitution and other Acts of Parliament surviving constitutional scrutiny. South African common law, which conflicts with customary international law, is now subordinate to customary international law.²⁴

An attempt was also made to streamline the treaty-making process by involving Parliament in the ratification of treaties negotiated and signed by the President, and effecting virtually automatic “translation” of treaties into national law.²⁵ Moreover, the framers of the IC also clearly envisaged that international law (especially in the field of IHRL) would continue to exert a strong influence in the interpretation and formulation of national law²⁶ and even in the Defence Force’s use of force.²⁷

Furthermore, an attempt was made to address human rights (including IHRL) transgressions committed during the apartheid era through the creation of a Human Rights Commission (HRC) and a Truth and Reconciliation Commission (TRC) with its Amnesty Committees.²⁸ In

¹⁹ For an illustration of this kind of effect of international on national law, see GN Barrie “Human rights and extradition proceedings: Changing the traditional landscape” (1998) 1 *TSAR* 125-128. Now see also *Mohamed and Another v President of the Republic of South Africa* 2001 (2) SACR 66 (CC).

²⁰ Section 231 (4) of the IC.

²¹ “The court’s own law.” See Booysen *op cit* (n11) Ch 3 (especially 71-74).

²² Dugard, *International Law: A South African Perspective* 1st Ed (1994) Ch 4. His revised work *op cit* (n2) Ch2 merely echoes this sentiment as being the law pre-1994.

²³ Generally accepted to denote the status of international law vis-à-vis South African national law.

²⁴ Section 231 (4) of the IC.

²⁵ Section 231 (1)-(3) of the IC.

²⁶ Section 35 (1) and (3) of the IC.

²⁷ Section 227 (2) (d) and (e) of the IC.

²⁸ Section 116 and Epilogue / Post-amble of the IC.

an emotionally loaded aftermath to new-found political freedom and equality, and due to resentment towards the past history of atrocities, legislation aimed at giving the Amnesty Committees power to grant amnesty was in its early stages challenged – albeit unsuccessfully – for its alleged lack of constitutionality.²⁹ The Constitutional Court’s decision upholding the amnesty provisions³⁰ came under fierce attack.³¹

The warning sounded by Kotze CJ in *CC Maynard et alii v The Field Cornet of Pretoria*³², one hundred years earlier that a state which disclaims the authority of international law places herself outside the circle of civilized nations, and that if South Africa wanted to acquire and maintain the respect of all civilized communities and to preserve its own independence, it should adhere to this principle, finally received legislative expression when, in the Preamble to the **Final³³ Constitution³⁴** (FC), it was enacted that

“We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

...
Build a united and democratic South Africa *able to take its rightful place as a Sovereign state in the family of nations.*”³⁵

While certain sections in the FC maintained or even strengthened the changes with regard to international law introduced by the IC³⁶, the FC also effected material changes to the position introduced by the IC.³⁷ Some of these changes were for the better and some, arguably, for the worse.

²⁹ *Azanian Peoples’ Organisation and Others (AZAPO) v President of the RSA (AZAPO-2)* 1996 (4) SA 671 (CC). See also *AZAPO v Truth and Reconciliation Commission (AZAPO-1)* 1996 (4) SA 562 (C).

³⁰ *AZAPO-2 supra* (n29).

³¹ E.g. Z Motala “The Constitutional Court’s approach to international law and its method of interpretation in the Amnesty Decision: Intellectual honesty or political expediency” (1996) 21 *SAYIL* 29; and RC Blake “The world’s law in one country: The South African Constitutional Court’s use of public international law” (1998) 115 *SALJ* 668 at 680-684.

³² (1894) 1 SAR 214 at 223.

³³ It is obviously inaccurate to describe any Constitution as final in the sense that the document is not subject to any change. If the proper procedures are followed, and subject to the Constitutional Court’s approval in some instances, the Constitution of this country can be changed – De Waal *et alii*, *The Bill of Rights Handbook* (1998) 6-7. The term “final” is therefore used throughout this dissertation as descriptive tool only.

³⁴ The Constitution of the Republic of South Africa Act 108 of 1996 (FC).

³⁵ Italics added.

³⁶ E.g. Sections 39 (1), (2) and 232 of the FC replacing sections 35 (1), (3) and 231 (4) of the IC respectively.

³⁷ Whereas the IC mentioned international law in only four provisions – *viz* sections 35 (1); 116 (2); 227 (2) (d) and (e); and 231 – the FC makes mention of international law in nine sections, all of which will be discussed *infra*.

As will be pointed out, *infra*, the contents of at least one of the fundamental (or human) rights entrenched in the Bill of Rights was amended expressly to reflect international law.³⁸ The procedure governing the succession, ratification and incorporation of treaties was also amended,³⁹ but in a way that is sure to give rise to controversy. Sensing a *lacuna* in the IC, the drafters of the FC also amended the provisions regarding the training, powers and actions of all security forces (and not only the Defence Force) to include references to international law.⁴⁰ They also ensured that the controversy regarding the existence or not of the presumption of statutory interpretation that the Legislature does not intend to violate international law or the country's international obligations, was constitutionally entrenched⁴¹ - thereby strengthening this presumption. The provisions regarding the HRC were, regrettably, changed by the omission of reference to international law and IHRL in the sections detailing this body's powers and functions.⁴²

Although there were other changes to the IC, this dissertation will concentrate on those mentioned above since they most closely relate to the topic at hand. As the title indicates, this is an endeavour to ascertain the status of international law vis-à-vis the national law of South Africa in the new constitutional order. This will entail an examination of the exact meaning and scope (with reference to both semantic, and conceptual content) of the term international law both in the pre-1994 period and in the post-1994 constitutions, as well as of the relationship between international and national law from a South African perspective pre-and post-1994. Most of the work, *infra*, will attempt a systemization of the criticisms and commentaries regarding the changes under both the IC and the FC, with the addition of some personal impressions, viewpoints and arguments.

History will, of necessity, have to be considered for purposes of comparison in this endeavour to ascertain the true position of international law vis-à-vis national law in the new constitutional dispensation. This will, however, be limited to what is strictly necessary. Therefore, before discussing specific constitutional provisions in the following chapters, it is perhaps wise first to examine the position of international law vis-à-vis national law from a South African perspective at the "dawn" of the new dispensation.

³⁸ Section 35 (3) (l) [and (n)] of the FC replacing section 25 (3) (f) of the IC.

³⁹ Section 231 (1)-(5) of the FC replacing section 231 (1)-(3) of the IC.

⁴⁰ Sections 198 (c); 199 (1), (5); 200 (2); and 201 (2) (c) of the FC.

⁴¹ Section 233 of the FC.

⁴² Section 184 (2) and (4) of the FC.

2. THE TRADITIONAL (PRE-1994) MEANING AND SCOPE OF THE INTERNATIONAL LAW TERMINOLOGIES IN THE POST-1994 CONSTITUTIONS AND PERCEIVED RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL LAW

2.1 DEFINING INTERNATIONAL LAW

2.1.1 Definition

International law is usually defined as that body of (binding) legal rules and principles which regulates the relationship between states and other international legal *personae* with the status of “subjects of international law.”⁴³ This definition requires two aspects to be clarified, namely

- Who the **subjects of international law** are; and
- What the **sphere of application** thereof is.

2.1.2 Subjects of international law

Early international law was concerned with the relationship between states only. Since 1949, however, it has been generally accepted that certain international organizations (such as the United Nations and its specialized agencies) also enjoy international legal personality. Whilst such organizations are not “states,” the International Court of Justice (ICJ) ruled in an advisory opinion that the United Nations, which can be regarded as the quintessential international organisation

“... is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”⁴⁴

In modern times,⁴⁵ numerous treaties have been concluded between subjects of international law in terms of which the protection of international law is extended to individuals. They can be termed “human rights treaties,” imposing obligations of varying kinds upon signatory states to afford certain minimum protection to both their own citizens and foreigners. Some conventions are “universal” in nature, and some “regional.”⁴⁶ In terms of certain treaties, human rights and humanitarian law are recognised in order to protect individuals⁴⁷ against the actions of their own or foreign states in time of war.⁴⁸ Individuals are, therefore endowed with important rights and duties under international law. However, this does not mean that the individual is elevated to the status of “subject of international law”⁴⁹, but, as will be indicated

⁴³ Booyesen *op cit* (n11) 1; Dugard *op cit* (n2) 1-2.

⁴⁴ *Reparation for Injuries Suffered in the Service of the United Nations* 1949 ICJ Report 174 at 179.

⁴⁵ More or less in the wake of the notorious atrocities committed during World War II.

⁴⁶ The most important of both kinds of instruments will be discussed under 2.3 and in Chapter V *infra*.

⁴⁷ Such as soldiers at war, prisoners of war, liberation movement soldiers etc.

⁴⁸ E.g. the “Law of the Hague”; the “Law of Geneva”; etc. – Dugard *op cit* (n2) Ch 23.

⁴⁹ Booyesen and Dugard *loc cit* (n 43). See also I Detter De Lupis *The Concept of International Law* (1987) 22.

shortly, that the sphere of application of international law is extended to operate, not only between subjects of international law, but also between subjects and non-subjects.

Other entities such as non-governmental organizations,⁵⁰ corporations and liberation movements also actively participate in the activities of the global community at large, and frequently appeal to international law and institutions to advance or protect their interests. They are also, however, not afforded the status of subjects of international law.⁵¹

Therefore, although a host of organizations, corporations and individuals operate in the international sphere, enjoy the protection of international law, and frequently litigate internationally through international law instruments and structures, only states and certain international organizations qualify as subjects of international law.

2.1.3 Sphere of application

The sphere of application of international law is a controversial matter. Obviously, as the term ‘international’ indicates, international law applies or operates at international level as opposed to national level. In other words, it regulates the relationship between subjects of international law only. As pointed out, *supra*, individuals are not subjects of international law, but of national law.

As will be indicated under section 2.4, *infra*, international law may, however, in some instances also be related to national law and applicable in the national legal sphere, largely depending on which theory is accepted – dualism, monism or harmonization. But then it does not necessarily amount to the regulation of the relationship between subjects of international law as such, but rather the regulation of the relationship between the state (or other subjects of international law) and individuals in the national (or domestic) sphere. In other words, when international law is applied at national level, international law becomes part of the national law of the state and is applied as such. This extended sphere of application of international law (where it is made applicable in order to protect individuals and other non-subjects against subjects of international law) prompted Starke to advance a more comprehensive definition of international law. He defines international law as

“That body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also:

- (a) The rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and
- (b) Certain rules of law relating to individuals and non-state entities so far as the rights or

⁵⁰ E.g. the International Committee of the Red Cross and Amnesty International.

⁵¹ Dugard *op cit* (n2) Ch3. In general, see Detter De Lupis *op cit* (n49) 18-34 on this subject.

duties of such individuals and non-state entities are the concern of the international community.”⁵²

2.1.4 **“Public” and “private” international law**

Whilst on the topic of the sphere of application of international law from a South African perspective, the following also need to be examined. International law or “the law of nations” (*ius gentium*) is sometimes called “**public international law**” in order to distinguish it from “**private international law**”.⁵³ This leads to a popular misconception, which is particularly relevant to the topic of this dissertation, that “international law” is a broader term than “public” international law and that it might include “private” international law.⁵⁴

It is traditional for most domestic (or national) legal systems to differentiate between “public” and “private” law.⁵⁵ “Public” law usually denotes constitutional (including administrative) law and criminal law, whilst “private” law usually denotes the law of persons (including family law); the law of things (including law of property and obligations); and mercantile law.⁵⁶ Then there is also the law of evidence and procedure, which provides for remedies and proof of actions, and which differs in accordance with whether the action at hand is “criminal” or “civil”. The latter distinction indicates why it might be confusing (and often misleading) to distinguish between public and private law. The classification of law into various branches, however,

“... facilitates reaching a decision as to what remedy if any is available and the jurisdiction of the courts; and also the critical examination of the state of the law. But there is no clean-cut line of severance between the different branches of law, which should be regarded as no more than convenient compartments for the purposes of exposition.”⁵⁷

As national and international law (at least from a South African perspective) operate in different dimensions⁵⁸, it is incorrect to describe international law as “public” – this is a distinction that is normally drawn at national level.

For the same reason it is wrong to refer to “private international law” when the phenomenon of “conflict of laws” is applicable. Private international law (or conflict of laws) is not “international” in character *stricto sensu*, but forms part of each constituent state’s municipal (or national) law. The rules of conflict of laws come into play when, during an action at

⁵² JG Starke *Introduction to International Law* (1989) 3.

⁵³ See HR Hahlo and E Kahn *The South African Legal System and its Background* (1973) 111-112; and Hosten *et alii Introduction to South African Law and Legal Theory* 2nd Ed (1995) 1272-1274.

⁵⁴ See Chapter II *infra*.

⁵⁵ Hahlo and Kahn *op cit* (n53) 115-117.

⁵⁶ At 117-126.

⁵⁷ At 115.

⁵⁸ That is unless the theory of “monism” is accepted as opposed to “dualism” – See 2.4.1 *infra*.

national law, one or more of the legal issues is connected with a foreign (another country's national) system of law. It deals with questions such as the choice of law and the recognition and enforcement of foreign judgments when the laws of two or more countries interact in a single action at national level.⁵⁹ It has nothing to do with the relations between states vis-à-vis other states and international legal subjects, but is concerned with the relations between subjects of national (or domestic) law.

Although the term "conflict of laws" may appear objectionable in that it suggests a competition between the laws of different states, the term "private international law" is even more objectionable because

"First, it connotes a connection with public international law. But though there may be some overlap, ..., the two divisions belong to different spheres, the one to national the other to international law. Secondly, it may be understood to exclude intra-national jarring of territorial systems of law, such as between the laws of England and Scotland, yet this is part of the subject matter. Thirdly, it makes out that the sphere of application is private law."⁶⁰

Hahlo and Kahn⁶¹ point out that other names for the subject have been coined, but that none has proved acceptable. The term "conflict laws" is preferred because

"Faute de mieux we come back to conflict of laws, which at least is lawfully begotten, being used by the Roman-Dutch jurists."⁶²

Private international law is also easily mistaken for **international private law** (which is also not necessarily a title that can be supported in the light of the above, and perhaps new terminology should be invented to describe it). The first concerns the relations between individuals whose legal relations are governed by the national laws of different states (conflict of laws), whilst the latter can be regarded as a developing branch of international law involving "private law" aspects.⁶³

What all this boils down to is that "private international law" (or conflict of laws) should not be mistaken to be part of international law. It is part of each country's national law, and each country has its own rules regarding what (national) law to apply in case of conflict.

On the other hand, it seems anomalous to differentiate between national and international law if one chooses the theory of "monism" as opposed to either "dualism" or "harmonisation" to

⁵⁹ Hahlo and Kahn *op cit* (n53) 128-131; and Hosten *et alii op cit* (n53) 1333-1361.

⁶⁰ Hahlo and Kahn *op cit* (n53) 129.

⁶¹ *Ibid.*

⁶² At 129-130.

⁶³ H Booyen "International law as legal system: the quest and the need for a private law leg" (1996) 21 *SAYIL* 60.

explain the connection (or relationship) between the systems.⁶⁴ However, the theory chosen might differ according to the different perspectives (or political philosophies) of different states regarding the relationship (or connection) between international and national law. As will be indicated in section 2.4, *infra*, South Africa has always (pre-1994) viewed the relationship largely from a dualist perspective but, as will be pointed out in the forthcoming chapters, this situation has developed markedly towards a monist perspective by endeavouring to harmonise the two systems to greater extent. It will, however, also be pointed out that strong traces of dualism are still found in both the post-1994 constitutions, suggesting that, from a South African perspective, a differentiation between national and international law is still relevant.

Perhaps it would be wiser to use terms such as “the law of nations” or even “the world’s law” to describe what is known as “international law”, but the latter term is so part of legal (national and international) jargon, that one could hardly venture to invent a new name for it. It is also the term that is used in both the post-1994 constitutions and is therefore used throughout this dissertation.

For purposes of this dissertation it will therefore be accepted that international law is neither to be equated with, nor is it to be seen as connoting a wider term than, “public international law.” As pointed out, *supra*, it should also not be construed to include “private international law”, although “international private law” is included.

2.1.5 “Weak” and “soft” law

A definition of international law can, however, never be complete without having regard to the perceived character of the discipline; in other words, whether it can in fact be classified as “law.” Due to the absence of some features normally associated with “law” and legal systems, namely: a known central **legislature**, an **executive authority**, a **court** with compulsory jurisdiction over its subjects and **effective sanctions** for transgressions, the very character of international law as “law” is sometimes called into question.⁶⁵ Hence the perception that international law is “weak” law.⁶⁶

However, the fact that there exists

- a political community (the community of modern states); and
- a body of settled rules and principles that comprise the international legal order, which

⁶⁴ To be discussed under 2.4.1 *infra*.

⁶⁵ Dugard *op cit* (n2) 2-10.

⁶⁶ Booysen *op cit* (n11) 4.

- are recognised by the members of the international community as binding upon them, means that international law is, in fact “law.”⁶⁷

Although international law may be weak in character, its rules and principles are, nevertheless, binding because the members of the international community usually accept them as such. They are also capable of being enforced against pariah states (albeit ineffectively in the short term). A problem might arise whenever an individual state refuses to accept a rule of customary international law as binding. Whether such will amount to a question of the existence of a binding rule of customary international law or a question of its enforcement will depend upon timing. For example, as will be indicated in the next section, a state, which persistently objects to a rule of customary international law becoming binding, cannot be bound thereby and the rule does not come into being (at least in as far as that state is concerned), except when the rule is already operative (e.g. through state succession or acquiescence) or regarded as *jus cogens*. This concerns the existence of the rule. However, if a rule became binding on a subject of international law (e.g. through succession, acquiescence or *jus cogens*), a refusal to abide thereby (or to accept it as binding) cannot be equated with the persistent objector phenomenon. In such a case, it will be a question of enforcement, the ineffectiveness of which serves to highlight the weak character of international law.

Weak law should, however, not be confused with “soft” law and must be distinguished.⁶⁸ Soft law means all those international instruments that do not traditionally qualify as enforceable law as such, in other words non-binding law (which is a phenomenon only found in international law, because a concept that non-binding rules can actually be called “law” is unheard of in national jurisprudence).

Soft law includes non-binding General Assembly resolutions (except those that become customary international law on adoption – see *infra* under the next section); the opinions of writers and commentators (which do not amount to an exposition of legal rules and principles – otherwise they would be included as binding sources of law through article 38 of the Statute of the International Court of Justice – see *infra* under the next section); directives by administrative tribunals; practice in international organisations; etc.⁶⁹

⁶⁷ Dugard *op cit* (n2) 2-10. See also Starke’s definition of international law *op cit* (n52). For an authoritative and thorough thesis on the legal character of international law, the specific nature thereof and the rules and purpose therein, see T Nardin *Law, Morality and the Relations of States* (1983) PART TWO 115-220.

⁶⁸ Booysen *op cit* (n11) 4.

⁶⁹ *Ibid.* See also N Botha “International law and the South African Interim Constitution” (1994) *SA Public Law* 245 at 252.

Commentaries referring to non-binding international instruments such as informal agreements between states as “soft or weak law”, fail to distinguish properly between the two terms.⁷⁰ However, they are correct in stating that soft law could be seen as the grey area between law and non-law in that it complies with certain (but not all) of the criteria required for the establishment of binding international law and, often presents the preliminary ideas of what will, in the end, become binding law.⁷¹ This is the reason why, as will be indicated in the next section, soft law cannot be viewed as a source of international law.

However, the role of soft law in the international plane, especially in the field of international human rights law, should not be underestimated, because

“A common feature of these documents is the absence of their obligatory force; they lay down principles or general rules of conduct which lack *per se* legally binding effect, hence the reference to them as ‘soft law’ or non-legal rules. However, there is a growing body of consensus that such documents embody some form of pre-legal, moral or political obligation and can play a significant role in the interpretation, application and further development of existing law. *Quite often they become directly relevant through incorporation in binding international instruments, domestic laws and court judgments*”⁷².

2.2 SOURCES OF INTERNATIONAL LAW

A definition alone does not address the scope of international law and the issue of its practical application at national level. To find this we must examine the sources⁷³ of the field. As will become apparent from the further discussions, *infra*, the sources of international law differ both in content and in treatment at national level. The Statute of the International Court of Justice (ICJ) identifies the following as sources of international law:

- International conventions (treaties), whether general or particular;
- International custom;
- General principles of law recognized by civilized nations;
- Judicial decisions; and
- The teachings of the most highly qualified publicists.⁷⁴

⁷⁰ E.g. M Olivier “Informal agreements under the 1996 constitution” (1997) 22 *SAYIL* 63 at 69-70. See also RR Baxter “International law in her infinite variety” (1980) 29 *ICLQ* 550 at 550 for the same mistake.

⁷¹ Olivier *loc cit* (n70).

⁷² HA Strydom *et alii International Human Rights Standards Vol I (Administration of Justice)* (1997) 3 – Italics added.

⁷³ Due to the inadequacy of the term “source”, M Bos *A Methodology of International Law* (1984) 48-80 prefers to use the expression “recognised manifestations of law.” The term “sources”, however, is favoured by most authors, and is, therefore, used in this dissertation. The term “manifestations of law” as such also does not differentiate between sources and branches of law, and is therefore not supported. (Branches of international law will be examined in the next section.) Detter De Lupis *op cit* (n49) 44 further differentiates between “formal sources” – being the mechanisms through which law comes into being; and “material sources” – being the origins of legal rules. The term “sources” in this dissertation is, however, used to refer to both kinds of sources.

⁷⁴ Article 38 (1) of the Statute of the ICJ.

2.2.1 Treaties

Introduction

International law is largely consensual in nature. A treaty is a written agreement between subjects of international law (usually between states or between states and international organizations), which is binding in terms of international law. It is defined in the Vienna Convention on the Law of Treaties of 1969 as

“... an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”⁷⁵

Because this convention is concerned with treaties between states only, the Vienna Convention on the Law of Treaties between states and International Organisations or between International Organisations of 1986 was adopted. It follows roughly the same pattern as the original Vienna Convention.

A few observations on the definition of treaties in the Vienna Conventions need to be made at this early stage to demonstrate the line of thought and argument advanced in this dissertation. Although oral agreements between state representatives may create legal (binding) or non-legal (non-binding or political) obligations for states, they do not qualify as treaties in terms of the Vienna Convention due to the requirement that, in order to qualify as treaties, they should be in writing. Treaties also go by many names, of which the most commonly used ones other than treaty are convention, declaration, charter, covenant, pact, protocol, act, statute, concordat, exchange of notes and memorandum of agreement.⁷⁶ “Informal international agreements” (sometimes called gentlemen’s agreements for their non-binding – “soft law” – nature – see Chapter II, *infra*) can also not be regarded as treaties in terms of the Vienna Conventions, because they are not governed by (binding) international law. The importance of the latter three statements will become clearer when the meaning and scope of treaty law in a post-1994 South Africa is assessed in Chapter II, *infra*, with reference to the terminology used for treaty in the new constitutions.⁷⁷

The provisions of a treaty bind only those subjects of international law, who, through consent, sign and, where required, ratify the treaty (except if they are bound through succession). Treaties are either multilateral or bilateral in nature. As will be pointed out under 2.4, *infra*, treaties are often recognised and enforced at national law level only if they have been expressly incorporated or translated into national law.⁷⁸ Whether an act of incorporation or

⁷⁵ Article 2 of the Vienna Convention on the Law of Treaties of 1969.

⁷⁶ Dugard *op cit* (n2) 328-29.

⁷⁷ I.e. “international agreement.”

⁷⁸ Dugard *op cit* (n2) 26-27; 54-59; and Ch 18.

translation is required to give national effect to a treaty, depends on the requirements of the national law of the state concerned.

Treaty-making powers

As will become clearer during the discussions, *infra*, it is generally recognised that only internationally recognised sovereign and independent states and recognised international organisations (in other words, subjects of international law) are vested with full (universally accepted) treaty-making powers. It is not necessary for purposes of this dissertation to go into the requirements for the foundation of international organisations. From a South African perspective, and especially in the light of post-1994 constitutional developments regarding the status of the so-called TBVC states⁷⁹ and the validity of treaties between South Africa and them, it will, however, be necessary to have a closer look at the requirements for statehood. This will be discussed under 2.5, *infra*. It was, however, long before 1994 accepted that South Africa had full treaty-making powers⁸⁰, which will be of importance regarding the question of succession of states and treaties (also to be discussed, *infra*) with reference to the change of government in 1994.

International law does not prescribe how a state (and which part of government) should exercise its treaty-making powers. This is a fact to be determined by the national law of each state involved in the making of treaties.⁸¹ In South Africa, as in most democratic states, it is the prerogative of the Executive⁸² to conduct foreign affairs and, therefore, to negotiate and sign treaties.⁸³ Naturally, this is really the Head of State's prerogative, but in practice (in both the United Kingdom and South Africa), this power and function has always been shared with other members of the Executive.⁸⁴ Normally, however, the negotiation and signing of treaties was left in the hands of the Minister and Department of Foreign Affairs, although the exercise of that function by other ministers and state departments were not uncommon.⁸⁵

⁷⁹ Transkei; Bophutatswana; Venda; and Ciskei.

⁸⁰ The exact date is, however, uncertain – Dugard *loc cit* (n2).

⁸¹ Dugard *op cit* (n2) 329; Booysen *op cit* (n11) 410.

⁸² The Head of State and the Cabinet.

⁸³ Dugard *loc cit* (n81).

⁸⁴ Booysen *loc cit* (n81). Section 7 (4) of the Republic of South Africa Constitution Act 32 of 1961 read: "The State President shall in addition as Head of State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative." See too Section 6 (4) of the Republic of South Africa Constitution Act 110 of 1983.

⁸⁵ *Ibid.*

Ratification, accession and reservations

As a rule, treaties become binding on the parties upon signature. Normally, formal treaties⁸⁶ (particularly multilateral ones) require ratification in addition to signature before they become effective and binding. This provides the state with an opportunity to reconsider its decision⁸⁷ to be bound and, if necessary, to effect the changes to its own law that might be necessary to fulfil its obligations under the treaty.⁸⁸ This was normally done by means of consultation by the official responsible for the treaty with the rest of the members of the Executive and, with their permission, he or she merely endorsed the earlier signature by means of a diplomatic note asserting that the constitutional requirements of his or her country had been met.⁸⁹ This function, like the negotiation and signing of treaties, resorted exclusively under the Executive's prerogative power to conduct foreign affairs, and neither Parliament nor the courts had any say in the matter.⁹⁰

Not all treaties need be ratified in order to become binding law at international level. Routine treaties flowing from the daily activities of government departments (sometimes called less-formal treaties) usually become operative upon signature. Treaties that are more formal can, however, also become operative upon signature. According to Article 14 of the Vienna Convention of 1969, it all depends on the intention of the parties involved whether a treaty requires ratification, which intention has to be ascertained from the surrounding circumstances. In the case of South Africa, the Executive (in practice, the relevant line-Minister, Director-General or Head of Mission in the other state party) has the right to determine which treaties need not be ratified.⁹¹

⁸⁶ I.e. treaties with major political or other significance or treaties that have financial implications for the parties or those that affect national law. In other words, treaties that had best not be left in the hands of one official who may act on behalf of the state only, but that rather have to be considered by the government as a whole. Examples of less formal treaties (and this terminology does not intend to include informal international -in the sense of non-binding or "soft" law - agreements, *supra*) are the inter-departmental treaties (which are of a routine nature flowing from the daily activities of government departments in their relationship with foreign governments) mentioned by Booysen *loc cit* (n81), whilst the International Covenant on Civil and Political Rights (ICCPR) can be classified as a formal treaty for its major political significance. See also the "Manual on Executive Acts" issued by the Office of the President in May 1999 for this same kind of distinction necessitated by the IC in a post-1994 South Africa. The fact that a certain school of international law commentators uses the terminology "informal international agreements" to refer to non-binding (or "soft" law) agreements and the desirability thereof will be debated in Chapter II *infra*. It is however submitted that the distinction between formal and less formal treaties are more in place when distinguishing between treaties requiring ratification and those that do not.

⁸⁷ Taken by the official who signed the treaty.

⁸⁸ Dugard *op cit* (n2) 329-31.

⁸⁹ RP Schaffer *A critical Analysis of the Treaty-Making Powers of the Union of South Africa and the Republic of South Africa* Unpublished PhD thesis, University of the Witwatersrand (1978) 109-73.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* See also Articles 12 and 14 of the Vienna Convention which distinguish between treaties requiring ratification and those for which signature is sufficient.

Although a state is not bound by a treaty that it has signed, but not ratified (if ratification is required), it is still obliged to refrain from acts which would defeat the object/-s and purpose of the treaty until it has made it clear that it is not going to ratify the treaty and that it is not going to be bound thereby.⁹²

A state may become party to a treaty, which it did not originally sign, by means of accession⁹³, if the original parties accept that such states may accede thereto. However, multilateral law-making treaties that seek to achieve a large measure of universality usually include an ascension clause, declaring it open to accession by any state.⁹⁴ Like negotiation, signature and ratification, the function and power to decide whether to accede to a treaty belonged solely to the Executive.

As will be indicated, *infra*, some treaties can be regarded as codifications of customary international law, and customary international law binds all new states (founded after the rule became law) and those that did not publicly and persistently object to it becoming law. However, in such a case it is strictly speaking not the treaty itself that becomes binding on a state that did not participate in its negotiation and signature, but a rule (or rules) of customary international law. This will also be the case where a treaty (or some of its provisions) can be regarded as *jus cogens* or obligations *erga omnes* (to be discussed, *infra*).

If a state has reservations about certain provisions to be included in a treaty, it should, in the case of a bilateral treaty, renegotiate the provisions before signing it, but, in the case of a multilateral treaty, it may become party to a treaty by entering a reservation.⁹⁵ This too is a function that was reserved for the Executive.

From the above it should be clear that the negotiation, signing, ratification of, accession to treaties and entering reservations thereto, vested in the sole province of the Executive. Parliament never had any say in the matter. The Executive could therefore engage in treaty making (and formation of customary international law – see, *infra*) and consequently bind the state internationally, unbridled as it were, because it was not subject to parliamentary control or judicial scrutiny for its compliance with national or international law. This was, so to speak, somewhat undemocratic because voters' choice could be ignored freely in respect of

⁹² Dugard *op cit* (n2) 329-31.

⁹³ *Ibid.*

⁹⁴ E.g., article 48 (3) of the ICCPR.

⁹⁵ Dugard *op cit* (n2) 331-35.

foreign affairs.⁹⁶ It, therefore, had to be addressed in the new dispensation, even though parliamentary involvement was required before a treaty could be made applicable at national level.⁹⁷

Succession to and termination of treaties

The difference between a change of government and state succession need not be discussed in detail for purposes of this dissertation, and a few general observations should be enough to highlight some of the problems arising from post-1994 developments. It is trite law according to international legal principles that a change in government only does not affect the validity of treaties entered into on behalf of a state before the date of change of government. In the case of a change of government only, the new government is bound by the treaties of its predecessor.⁹⁸ This “principle of continuity” applies, even if the internal change has been brought about by revolution, or involves a change from a monarchy to a republic.⁹⁹ In cases of doubt, new governments may consent to the “succession” (or rather continued application, because succession really is a misnomer in the case of change of government) of treaties.¹⁰⁰ Such consent, however, is of no real consequence internationally, except for informing the international community that the new government is committed to honour its treaty obligations inherited from its predecessor.¹⁰¹

True succession to treaties only arises when a state ceases to exist and it is replaced by another state or, in other words, “state succession.”¹⁰² In the case of state succession, there is a difference of opinion whether the Roman law principle of “universal succession” or the “clean slate” doctrine should apply.¹⁰³ The Vienna Convention on Succession of States in Respect of Treaties of 1978 has received unenthusiastic support from states, because it cannot be regarded a true codification of international custom in this regard.¹⁰⁴ The position of succession to treaties in the case of state succession is therefore unclear.¹⁰⁵

⁹⁶ In the pre-1994 dispensation, the ruling party ruled by means of only a small majority (or even a minority in a multiparty system with constituent electoral divisions where the other parties combined drew more votes). Moreover, the majority of people were excluded from exercising a political choice on grounds of race. The Executive’s decision could therefore never be described as democratic.

⁹⁷ See 2.4.2 *infra*.

⁹⁸ Dugard *op cit* (n2) 341-44.

⁹⁹ *Ibid*.

¹⁰⁰ NJ Botha *The History, Basis and Current Status of the Right or Duty to Extradite in Public International and South African Law* – Doctoral thesis UNISA (1992) Chapter IV.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*. See also N Botha *op cit* (n69) at 253.

¹⁰³ Dugard *op cit* (n2) 342.

¹⁰⁴ *Ibid*.

¹⁰⁵ E.g. see *S v Eliasov* 1965 (2) SA 770 (T); *S v Bull* 1967 (2) SA 636 (T); *S v Devoy* 1971 (3) SA 899 (A); *S v Oosthuisen* 1977 (1) SA 823 (N) for conflicting decisions in this regard.

It is, however, not only the concept of succession to treaties that provides difficulty in the post-1994 dispensation, but also the concept of unilateral termination of treaties. Termination of treaties, and especially unilateral termination, has always been problematical and complex. Treaties are to be honoured in accordance with the principle of *pacta sunt servanda*. A treaty may, therefore, as a rule only be terminated or suspended if the treaty itself contemplates such termination or where the parties agree thereto. The principle of *rebus sic stantibus*, according to which a state is afforded the right to terminate a treaty due to “a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it”, is recognised by international custom.¹⁰⁶ It is also codified by article 62 of the Vienna Convention.¹⁰⁷ It will, however, be pointed out in Chapter III, *infra*, that it is doubtful whether the principle of *rebus sic stantibus* can be applied in respect of **all** treaties dating from the pre-1994 period - with the result that pre-1994 treaties continue in force post-1994, unless they are terminated in terms of the treaty itself, where parties agree or through the Vienna Convention. Naturally, according to the law of obligations (as we know it at national level), a contract is terminated between parties at the demise of one of them. Because a treaty can be viewed as an international contract, it should follow quite logically that a treaty would cease to be binding between remaining state parties and the ones that ceased to exist. Therefore, they cannot be succeeded to by any new states or governments replacing one or more of the remaining parties with reference to the relations between them and those that ceased to exist. This affects the position of treaties between South Africa and the TBVC states entered into pre-1994 after the IC became operative, and will be discussed in Chapter II, *infra*.

2.2.2 Customary international law

Nature and formation

Customary international law consists of that body of rules of international law, which come into existence through custom as practised by the international community. Because international law is largely consensual in nature, international custom is recognised as binding law because the international community accepts it as such. Where a rule of custom has already been recognised by the international community before a state is succeeded by a new state, the rule will also bind the new state through the principles of state succession. A rule of custom can only be changed or terminated by development of new custom or treaty obviating the continued existence of the rule.

¹⁰⁶ *Fisheries Jurisdiction (UK v Iceland) Jurisdiction of the Court* 1973 ICJ Reports 3 at 18.

¹⁰⁷ *Supra* (75).

International custom usually becomes law (with binding character) through the tacit consent of states through practice. Consent of states to a customary rule is generally inferred from their conduct. Two main requirements have been defined as proof of the existence of a rule of customary law: **settled practice** (*usus*) and **the acceptance of a legal obligation to be bound** (*opinio juris sive necessitatis*). They are essentially two separate and progressive requirements. The ICJ has held that, in order to constitute *usus* and *opinio juris*, there must be evidence of “constant and uniform usage,” which is “accepted as law.”¹⁰⁸ From a South African perspective, *usus* and *opinio juris* were first interpreted to mean “*universally accepted and acted upon* as to justify this court in treating them as binding principles of law.”¹⁰⁹ Later they were interpreted to mean “general recognition” or “widely accepted” by states.¹¹⁰

Settled practice (usus)

Usus means that states should generally (or widely) act uniformly and constantly in observance of a rule. Prolonged practise is, however unnecessary and the requirement of *usus* may be fulfilled very quickly.¹¹¹ Furthermore, according to South African courts it is “practice” (in the sense of state actions) and not “preaching” (or mere statements) that counts.¹¹²

Acceptance of a legal obligation to be bound (opinio juris sive necessitatis)

Opinio juris sive necessitatis means:

“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.”¹¹³

A rule of customary international law does not bind a state that publicly and persistently objects to such practice becoming law.¹¹⁴ This is simply because in such a case it cannot be said that the requirement of *opinio juris* has been satisfied. Logically, a state that does not make its objection public (and do so persistently), will be bound by the rule it didn’t object to through its acquiescence. As it is difficult to prove *opinio juris*, it will, according to

¹⁰⁸ *The Asylum Case* 1950 ICJ Reports 266 (Columbia v Peru).

¹⁰⁹ *Du Toit v Kruger* (1905) 22 SC 234 at 238; and *Nduli v Minister of Justice* 1978 (1) SA 893 (A) at 906D.

¹¹⁰ *Inter-Science Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) at 125; and *S v Petane* 1988 (3) SA 51 (C) at 56-7.

¹¹¹ *S v Petane supra* (n110).

¹¹² *Ibid.*

¹¹³ *North Sea Continental Shelf Cases* 1969 ICJ Reports 3 at 44.

¹¹⁴ *Booyesen op cit* (n11) 49; *Brownlie Principles of Public International Law* 5th Ed (1998) 10; *Anglo-Norwegian Fisheries Case* 1951 ICJ Reports 115 at 131; *North Sea Continental Shelf Case supra* (n113) at 26-7; and *S v Petane supra* (n110) at 64. See also, however, JI Charney “The Persistent Objector Rule and the Development of Customary International Law” (1985) 56 *BYIL* 1.

Brownlie, generally be presumed when there is proof of general practice in support of the specific rule.¹¹⁵

New developments

The current international mood, however seems to be softening regarding these requirements. For instance it has recently been opined¹¹⁶ that a verbal statement by a state (“preaching”) - and not only physical acts (“practicing”) - as well as, in appropriate circumstances “omissions”(e.g. through a state’s acquiescence), may also count as sufficient *usus* for purposes of the formation of a rule of international custom.¹¹⁷ However, in the same report it is stated that for states’ actions to be regarded as *usus*, the actions should clearly and patently be committed as if to obey the rule in question, and not as if merely to extend courtesy towards the other states.¹¹⁸ Therefore, although a state may become bound through its acquiescence, mere courteous behaviour will not be regarded as *usus* for purpose of formation of a rule of custom. The international mood also seems to be moving in a direction where proof of the existence of *opinio juris* “is not always, and probably not even usually” necessary to prove the existence of a customary rule.¹¹⁹ Whether the South African courts will be persuaded to accept this move towards softening of the established requirements, however, remains speculative for the moment.

As will be indicated, *infra*, some UN Resolutions may also give rise to the formation of custom, provided they conform to the two requirements of *usus* and *opinio juris*.

2.2.3 General principles of law recognised by civilized nations

General principles of law recognised by civilized nations is a source utilized as a reserve store of legal principles upon which international tribunals may draw where *lacunae* exist at international law. They are common principles of law found in relevant national systems (in so far as they are capable of being applied in regulating relations between subjects of

¹¹⁵ I Brownlie *op cit* (n114) 7-9.

¹¹⁶ The International Law Association’s Committee on Formation of [General] Customary International Law published a “final” report during the London 2000 Conference titled “Statement of Principles Applicable to the Formation of General Customary International Law.” This document represents, so it is submitted, the most up to date opinion on the nature and formation of customary international law.

¹¹⁷ At 14-15 of the Report.

¹¹⁸ *Ibid.*

¹¹⁹ At 31 of the Report it is stated: “5. Broadly stated, therefore, the purport of these sections is that it is not always, and probably not even usually, *necessary* to prove the existence of any sort of subjective element in addition to the objective element, but (a) where it is *present*, that may be *sufficient* to establish the existence of a customary rule binding on the State (s) in question; and (b) proof of its *absence* may mean that such rule has not come into existence, either because the practice is not of a sort which ‘counts’ towards the formation of a customary rule, or because persistent objection has prevented a general rule from emerging, or at any rate has prevented its binding the particular objector(s).” – Original italics.

international law) that are used in order to fill gaps in international law. They are sparingly utilized and it is said that they generally do not have a consensual basis, as do treaties and custom.¹²⁰ However, so it is submitted, the terminology “general” and “recognised by civilized nations” denotes consensus that those principles are recognised by the family of nations as international law. Although consensus to recognise such principles as law is expressed individually rather than collectively, the international tribunal applying them as principles of international law must, at least, still find a certain convergence in the various national systems from which the general nature of those principles can be established before they can be treated as part of international law.

2.2.4 Judicial decisions and teachings by the most highly qualified publicists

Judicial precedent and text writings by renowned publicists are subsidiary means only for determining rules of international law where clarity is sought. Although tribunals may rely upon the *rationes* of previous decisions in order to determine the existence and scope of a specific rule of international law, international law knows no rule of *stare decisis*. In modern times, tribunals seldom use the writings of jurists as sources to determine rules of international law, as new sources (treaties, custom etc.) tend to render their opinion obsolete.¹²¹

2.2.5 Codification

Due to the normal uncertainties regarding the existence and scope of rules of customary international law, resort is nowadays taken to codification. The General Assembly of the United Nations has established an International Law Commission, consisting of thirty-four persons of recognized competence in international law, charged with the encouragement of progressive development of international law and its codification.¹²²

The Vienna Convention on the Law of Treaties¹²³ is, for example, generally accepted to be a codification of international custom regarding treaty law.¹²⁴ Although South Africa has neither signed the treaty, nor accorded it national application through legislation, the Department of Foreign Affairs has declared that the state considers itself bound by its provisions and uses it to guide the formulation of South Africa’s treaty policy.¹²⁵ There is no reason to believe that the new government will deviate from this practice, especially because the treaty is not

¹²⁰ Dugard *op cit* (n2) 36-38.

¹²¹ *Ibid.*

¹²² Dugard *op cit* (n2) 39-40.

¹²³ *Supra* (n75).

¹²⁴ N Botha “Interpreting a treaty endorsed under the 1993 Constitution” (1993-4) 19 *SAYIL* 148 at 153. See also Brownlie *op cit* (n114) at 607-608; TO Elias *The Modern Law of Treaties* (1974) 5.

¹²⁵ Botha *loc cit* (n124); Booyesen *op cit* (n11) 34.

political in nature. In Chapter II, *infra*, it will be pointed out, however, that the Constitutional Court's treatment of the Vienna Convention leaves an impression that this contention is all but trite.

As will be indicated, *infra*, some UN Resolutions can provide proof of the existence or the acceptance of customary rules by member states, and may therefore be regarded as codifications of custom.

2.2.6 *Jus cogens* and obligations *erga omnes*

The concepts of *jus cogens* and obligations *erga omnes* complicate matters somewhat for the orthodox study of international law, which is largely consensual in nature. *Jus cogens*, or "peremptory norms" of international law, are norms

"... accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹²⁶

Although the application of the doctrine of *jus cogens* outside of treaty law is viewed with scepticism by some¹²⁷, others generally support the existence of the doctrine, though differing as to which norms qualify as peremptory.¹²⁸ The rules regarding the prohibition of the use of force by states, self determination, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy are, reportedly, generally accepted as *jus cogens*.¹²⁹ They cannot be set aside by treaties and even if they emerge from custom, "the specific content of norms of this kind involves the irrelevance of protest, recognition, and acquiescence: prescription cannot purge this kind of illegality."¹³⁰ It follows that a single state will not be able to bar a rule from becoming *jus cogens* through persistent objection.

Obligations *erga omnes* are obligations that states owe to the international community as a whole¹³¹ (as opposed to obligations arising vis-à-vis another state in, for example, the field of diplomatic protection¹³²), and in the enforcement of which all states have an interest.¹³³

¹²⁶ Article 53 of the Vienna Convention on the Law of Treaties *supra* (n75).

¹²⁷ Booysen *op cit* (n11) 38.

¹²⁸ Dugard *op cit* (n 2) 40.

¹²⁹ *Ibid.* See also Brownlie *op cit* (n114) 514-17.

¹³⁰ Brownlie *op cit* (n114) 517.

¹³¹ E.g., the *South West Africa Cases* 1966 ICJ Reports 6.

¹³² *The Barcelona Traction, Light and Power Company Limited* 1970 ICJ Reports 3 at 32.

¹³³ In general, see Dugard *op cit* (n2) 40-41.

2.2.7 UN Resolutions

It is generally accepted that resolutions of international organisations of which South Africa is a member, like the United Nations (UN), do not form part of binding international law, except those resolutions that can be regarded as codifications of customary law or that are accepted as custom by member states¹³⁴ and, as will be indicated, *infra*, some resolutions by the Security Council of the UN. Neither are they afforded national recognition and application, unless they have expressly been incorporated into national law. Such a resolution can therefore not be regarded as a real source¹³⁵, although it may, of course, develop into a rule of binding customary law.¹³⁶

2.2.8 Soft law

As pointed out under 2.1, *supra*, soft law is non-binding in character. It can therefore not be regarded as an independent source of international law. Soft law developments may, however, give rise to legally non-enforceable (political) relations between subjects of international law and, eventually, binding treaty law or custom. It can therefore be seen as an indirect (preliminary) source of international law. It will be pointed out in Chapter II, *infra*, that, as soft law comprises only non-binding rules while it can still be regarded as soft law, soft law provisions will not be binding on South Africa or applied directly at national level. It may only be utilised to interpret and develop national law in certain areas, but subjects of national law cannot be bound thereby before the soft law provisions have been made binding law.

2.2.9 Hierarchy of sources

Article 38 (1) of the Statute of the ICJ does not expressly provide for a hierarchy of sources, although a hierarchy can be inferred in order of importance. Therefore, Dugard argues that treaties, which take the place of legislation in the national sphere, are to be viewed as primary sources, while custom is viewed as a secondary source; and that they both take preference over all other (subsidiary) sources for their "normative superiority."¹³⁷ Others, like Bos¹³⁸, prefer a different hierarchical structure, where custom is rated the most important. It will also be pointed out in Chapter III, *infra*, that, due to the post-1994 developments in the

¹³⁴ ILA Report *op cit* (n116) at 61-64. Here it is pointed out that UN Resolutions may give rise to binding custom if they are accepted and utilized as such by member states or where it provides proof that the two requirements of *usus* and *opinio juris* have been satisfied. During the Conference, the ILA also accepted (after a division and considerable dissent) that in exceptional circumstances even a single resolution could give rise to binding custom.

¹³⁵ Bos *op cit* (n73) 80-89 prefers to speak of "alleged manifestations of law" when referring to this phenomenon (or "soft" law).

¹³⁶ ILA Report *loc cit* (n134).

¹³⁷ Dugard *op cit* (n2) 26.

¹³⁸ *Op cit* (n73) 94-104.

relationship between international and national law, customary international law is, in South Africa, regarded as more important at national level than treaty law, simply because it is automatically regarded as part of national law, save in so far as it is in conflict with the Constitution and national legislation, whilst treaty law needs to be specifically incorporated into national law. However, the relationship between international and national law must first be discussed, *infra*, before this point can be made clear.

2.2.10 The “act of state” doctrine – (Prerogative powers)

Apart from the traditional sources discussed above, a study of international law within the South African context will soon bring one to the so-called “act of state” doctrine. This doctrine, although not a source of international law as such, has played an important role in delimiting the scope of international law within the South African municipal context and particularly within the provenance of the courts. Here too, as will be pointed out in Chapter III, *infra*, the FC has wrought important changes, which require consideration. Hence the discussion thereof under this section.

International law and relations normally flow from states’ (and/or other subjects’) actions. Treaties, custom and general principles of law discussed above all emanate from the actions of states and/or other subjects of international law. However, the “act of state” doctrine does not refer to state actions in general. Anglo-American (and therefore pre-1994 South African) national law views the prerogative of the Executive to act on behalf of the state as non-justiciable, and it is sometimes referred to as prerogative power.¹³⁹ **Prerogative power** has been defined as “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”¹⁴⁰ One can distinguish between **domestic** and **international** acts of state, of which only the latter are of importance for this discussion.¹⁴¹

International acts of state can again be divided into **own** and **foreign** international acts of state.¹⁴² In a South African context, the prerogative power to perform an international act of state on behalf of the state is known as the prerogative power to conduct foreign affairs; and the prerogative power to commit an own international act of state vests in the Executive.¹⁴³

¹³⁹ Booyesen *op cit* (n11) Ch11. In the words of Lawton LJ in *Laker Airways v Department of Trade* 1977 2 All ER 182 (CA) at 210 there is “[a] well-known and well-founded proposition that the courts cannot take cognisance of Her Majesty’s Government’s conduct of international relations.”

¹⁴⁰ Dicey *Law of the Constitution* 10th Ed quoted by Booyesen *op cit* (n11) 372.

¹⁴¹ Booyesen *loc cit* (n139).

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

The reason why the courts would usually exercise judicial restraint and refrain from interfering with “acts of state” is found in the following dictum by Lord Atkin

“Our state cannot speak with two voices ... the judiciary saying one thing, the executive another.”¹⁴⁴

Own state actions

Due to the doctrine of separation of powers, international acts of state performed by South Africa (own international acts) were pre-1994 recognised to fall within the exclusive province of the Executive; and its power to conduct foreign affairs was considered to be unlimited – meaning that the courts would never have interfered with or have reviewed or tested an international act of state in the light of either national or international law.¹⁴⁵ The only function of the courts was to establish whether a given action by the South African Executive in connection with foreign affairs was an act of state, and if so, to abide thereby.¹⁴⁶

In cases of doubt, it became customary for South African courts (especially in the field of treaty law) to request (and/or to accept into evidence) certificates from the relevant minister representing the Executive to establish the will or intention of the Executive.¹⁴⁷ These certificates were considered as absolutely binding on the courts, and it was suggested by some authors that they could never be tested against either international or national law.¹⁴⁸

Therefore, the South African government could even act in a way that breached international law, and the courts had no authority to test such actions. When such an act by the Executive had to be interpreted by the courts, it could therefore easily have been mistaken as a source of international law. The perception was, therefore, that the Executive could on its own create or ignore new developments in international law, e.g. by refusing to keep abreast with developments of new branches of international law such as IHRL. More importantly for purposes of this discussion, this doctrine meant that the courts were prevented to recognise and apply rules of international law where acts of state were inconsistent therewith. This practically meant that the Executive could (and frequently did) exclude the recognition and application of international law at national level.

Foreign state actions

However, under certain circumstances the courts have reserved the right to test acts of state performed by foreign states, such as the right to determine the legality of a foreign state’s legislation.¹⁴⁹ Whenever a foreign state’s laws were recognised and applied in South African

¹⁴⁴ *Government of the Republic of Spain v SS ‘Arantzazu Mendi’* [1939] AC 256 (HL) at 264.

¹⁴⁵ Booyesen *loc cit* (n139).

¹⁴⁶ *Ibid.*

¹⁴⁷ Booyesen *op cit* (n11) 84, 88-9.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Haak and Others v Minister of External Affairs* 1942 AD 318 at 326.

law, it was because South African law said so¹⁵⁰, and not due to a rule of international law.¹⁵¹ Nevertheless, because the courts reserved the right to treat foreign acts of state as justiciable, the courts generally refused to apply foreign revenue laws and to enforce foreign penalties and legislation that were *contra* the interests of national justice.¹⁵²

2.3 BRANCHES OF INTERNATIONAL LAW

Development of branches

As will become evident in the discussion, *infra*, it has to be pointed out that, besides the different sources, international law also comprises different branches of law such as the law regarding jurisdiction, extradition, of the sea, air and space, environment, warfare (*ius ad bellum*) and humanitarian law (*ius in bello*). Although the law in each of the branches develop in terms of the different sources discussed above, each has its own provisions; rules; and field of application, especially at national level in the different states. These are not necessarily closed subjects because they overlap to some extent and new branches of international law - such as international private law (see 2.1, *supra*) and international human rights law (IHRL) (to be discussed shortly) - are constantly formed.

The reason why reference is made in this introduction to the phenomenon of development of different branches of international law, will become evident during the discussions in Chapters III, IV and V, *infra*. Except for a difference in treatment of international law emanating from different sources¹⁵³, some specific branches of international law are also catered for in specific provisions of the post-1994 constitutions¹⁵⁴, whilst other branches thereof are not specifically mentioned.¹⁵⁵ In a case where the branch is not specifically mentioned in the Constitution, the position of the international legal rule in issue would therefore depend on, either the source it originated from (if that source is catered for in the Constitution), or the law as it existed pre-1994. It is therefore necessary to take cognisance of the development of different branches of international law.

Furthermore, due to the prerogative powers of the Executive to conduct foreign affairs, unbridled as it were, the history of South Africa abounds with examples where certain rights, which were afforded individuals and organisations by international law, were ignored or impinged upon by the Executive. As will be pointed out in Chapter V, *infra*, the courts and the

¹⁵⁰ "Conflict of laws" *supra*.

¹⁵¹ Booysen *op cit* (n11) 401.

¹⁵² *Ibid.*

¹⁵³ E.g. Treaty and custom – Chapter III *infra*.

¹⁵⁴ E.g. *ius ad bellum* and *ius in bello* – Chapter III; IHRL – Chapter IV; and International criminal law – Chapter V, *infra*.

¹⁵⁵ E.g. the law regarding jurisdiction (save in so far as it is being catered for in the criminal law provision – Chapter V, *infra*), extradition, of the sea, air and space, environment etc.

national law of South Africa refused to interfere with the Executive's actions in breach of international law. The pre-1994 developments of some new branches of international law, especially IHRL, were therefore largely ignored by South African courts and lawyers.

International Human Rights law (IHRL)

Although human rights are invariably embodied in most modern constitutions, their protection is no longer of purely domestic concern. Atrocities such as those in Nazi concentration camps and acts of genocide in African and East block countries shocked the international community. Under pressure of the international community, the protection and enforcement of human rights became a principal aim of international law.¹⁵⁶ This constitutes "a separate branch of public international law deriving from the constitutional will of states aimed at the protection of the individual in the face of sovereign might."¹⁵⁷ Because, as will be pointed out in Chapters IV and V, *infra*, the post-1994 constitutions mandate courts to consider international law (especially IHRL) in interpreting the Bill of Rights and in formulating national law, it is necessary to list the sources of IHRL as a separate branch of international law as it developed internationally pre-1994 under this section. Modern-day IHRL, which, as will be pointed out, has already had a profound effect in a post-1994 South Africa, and is sure to continue doing so, largely consist of universal and regional international documents, treaties and other instruments. They are

- **Universal documents**
The Universal Declaration of Human Rights¹⁵⁸
- **Universal conventions or treaties**
The Charter of the United Nations¹⁵⁹
The International Covenant on Civil and Political Rights (ICCPR)¹⁶⁰
The International Covenant on Economic, Social and Cultural Rights (ICESC)¹⁶¹
International Convention on the Elimination of All Forms of Racial Discrimination¹⁶²
Convention on the Elimination of All Forms of Discrimination against Women¹⁶³

¹⁵⁶ Dugard *op cit* (n2) Ch 13. See also L Henkin *The Age of Rights* (1990) 1-64 in this regard.

¹⁵⁷ Botha *op cit* (n69) at 247. For a detailed discussion on this subject – see T Maluwa "International human rights norms and the South African Interim Constitution" (1993-94) 19 *SAYIL* 14; "Democracy and Human Rights – The Significance of Human Rights Law to Developing Countries" (1995) 6 (1) *ALR* 24 at 24-6.

¹⁵⁸ GA Res 217A (III) UN Doc A/810 (1948). This declaration is not a treaty that is binding upon member states or to which states may accede. However, although "[o]riginally conceived as a statement of principles devoid of any obligatory legal character [soft law], it has developed into a universal yardstick for measuring the respect governments show towards the protection of human rights." – Strydom *et alii op cit* (n72) 4. The question may even be asked whether this declaration (or at least portions thereof) cannot be regarded as a codification of customary international law – Dugard *op cit* (n2) 34-5, 240-42. According to Botha *op cit* (n69) at 249, however, the Declaration is to be regarded as a separate source of IHRL, even though it can be regarded as partially a codification of customary international law and partially as "soft" law.

¹⁵⁹ Botha *op cit* (n69) at 248. See also Dugard *op cit* (n2) 236-240.

¹⁶⁰ GA Res 2200 21 UN GAOR Supp 16 at 52; UN Doc A6316 (1966) and its two Optional Protocols. See PM Mtshaulana, J Dugard & NJ Botha *Documents on International Law* (1996) 176, 190, 193.

¹⁶¹ (19 December 1966) 993 UNTS 3. See Mtshaulana *et alii op cit* (n160) 195.

¹⁶² Mtshaulana *et alii op cit* (n160) 209.

¹⁶³ Mtshaulana *et alii op cit* (n160) 219.

Convention on the Rights of the Child¹⁶⁴

International Convention on the Suppression and Punishment of the Crime of Apartheid¹⁶⁵

- **Regional conventions or treaties**

The European Convention on Human Rights¹⁶⁶

The Charter of the Organization of American States and the American Convention on Human Rights¹⁶⁷

The African Charter on Human and Peoples Rights (Banjul Charter)¹⁶⁸

The Conference on Security and Cooperation in Europe: Final Act (Helsinki Accords)¹⁶⁹

Arab Charter of Human Rights¹⁷⁰

- **Other instruments**

Decisions of national courts interpreting analogous Bills of Rights within their own jurisdictions

Customary international law

Soft law¹⁷¹

The regional human rights conventions have been adopted to complement and reinforce universal conventions, but, at the same time to cater for the differing needs of different peoples and states clustered together in specific regions. Most of these instruments also provide for courts, forums or tribunals to which states and individuals can turn for declaratory orders and protection. South Africa is not a party to all the mentioned sources, nor can some of the sources (e.g. decisions by foreign courts and soft law) be regarded as binding on South Africa. It will, however, be pointed out in Chapter IV, *infra*, that none of these sources of IHRL, except perhaps customary international law, is rendered redundant. In a post-1994 South Africa, all of them must, at least, be considered in interpreting the Bill of Rights and developing Human Rights jurisprudence. Some sources, however, raise the question of universal jurisdiction in order to try international crimes, which will be discussed in Chapter V, *infra*.

¹⁶⁴ Mtshaulana *et alii op cit* (n160) 266.

¹⁶⁵ Mtshaulana *et alii op cit* (n160) 204.

¹⁶⁶ (1958) 213 UNTS 221. See Mtshaulana *et alii op cit* (n160) 294.

¹⁶⁷ Dugard *op cit* (n2) 259.

¹⁶⁸ Mtshaulana *et alii op cit* (n160) 282.

¹⁶⁹ Botha *op cit* (n69) at 249.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

2.4 RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL¹⁷² LAW

2.4.1 Theory regarding relationship

The approach to the connection or relationship between international and national law depends largely upon which school of thought is preferred. As Dugard points out, there are two main approaches to this subject – the monist and the dualist.¹⁷³

Monism

According to the monist school, there is no real question of a “connection” or “relationship” between two essentially different themes of law, because international and national law must both be regarded as manifestations of a single (universal) concept of law.¹⁷⁴ This theory claims that international law is superior to national law. In fact, it claims that there is only one system of law on the globe (and in the universe for that matter), namely international law. The notions of state and national law stem from international law; and international law, like national law, is also intended to regulate the actions, obligations and rights of individuals and not only those of states as separate entities. If a rule of national law is in conflict with international law, the latter is void.¹⁷⁵ The leading exponents of this school are Kelsen, Kunz, Verdross and Scelle.¹⁷⁶

Dualism

At the other extreme, lies the theory of the dualists, led by Triepel and Anzilotti.¹⁷⁷ They see international and national law as two completely different systems of law. According to them, international law regulates the relationship between states only, whilst national law regulates the relationship between state and citizen and between citizens *inter se*. There exists no tension between the two systems, as each operates in a different sphere. International and national law originate from different sources, and have different subjects and areas of application. If a state’s law contravenes or ignores a rule of international law, it does not follow that national law is invalid, but merely that a state has contravened international law, and that the state might be liable on the international plane.¹⁷⁸

¹⁷² Although “domestic law” may seem a more appropriate name for this manifestation of law than, for instance, “municipal law” - which in a South African context might be mistaken to mean “subordinate law” created by local authorities known as “municipalities”; or “national law” - which might be mistaken for laws passed by the Nationalist party that ruled during apartheid, the latter term is the one used in the new Constitution and will be used throughout this dissertation.

¹⁷³ *Op cit* (n2) 43.

¹⁷⁴ *Ibid.*

¹⁷⁵ Booysen *op cit* (n11) 62.

¹⁷⁶ Dugard *op cit* (n2) 43. See also JG Starke “Monism and Dualism in the Theory of International Law” (1936) 17 *BYIL* 66-81.

¹⁷⁷ *Ibid.*

¹⁷⁸ Booysen *op cit* (n11) 65.

Harmonization

Between these two extremes, scholars have mooted the theory of harmonization (or “co-ordination”). This development was necessitated by the inability on the part of theorists from either school to find a basis on which to resolve an apparent conflict/difference between the two systems. This led to a compromise, dualists accepting that conflict might exist between the two systems of law when proven, and monists accepting that a difference might exist between the two systems; and both schools accepting that conflicts/differences have to be reconciled amicably so as not to offend the international order. According to this theory, a judge is bound by his/her own jurisdictional rules in the case of irreconcilable conflict between the two systems of law.

Therefore, this theory is not so much about the connection or relationship between international and national law, but rather an application theory that determines when international law can or should be enforced at national level.¹⁷⁹ This theory attempts to harmonize monism and dualism by declaring that, although differences exist, they can sometimes be reconciled by applying international law at national level.

On its own, the theory of harmonization could, however, not resolve the problem of application. As will be pointed out, *infra*, there are as many opposing views as to how and when international law should be applied at national level as there are theories regarding the relationship between the two systems.

It should also not be forgotten that cultural and regional differences exist and may result in differing systems of law, which do not necessarily conform to international sentiment at large. This, in turn, means that regional rules or principles of international law can come into existence to cater for the needs of the different peoples and states in a specific region, which may differ from the international rules and principles in other regions. As indicated, *supra*, regional, as opposed to universal, human rights conventions (such as the European Convention on Human Rights and the African Charter on Human and Peoples Rights) have been adopted to complement and reinforce universal conventions. Instead of “globalism,” it would therefore appear that we are rather moving towards a system of “regionalism.”¹⁸⁰ Universal sentiment (and pressure) can, however, never be avoided nor ignored.

¹⁷⁹ Dugard *op cit* (n2) 43-44; Booysen *op cit* (n11) 65-66; Brownlie *op cit* (n114) 33-34; and Starke *op cit* (n176).

¹⁸⁰ SP Huntington *The clash of civilizations and the re-making of world order* (1996). See also R Falk *Law in an emerging Global Village – A post-Westphalian perspective* (1998). See for instance the difference in treatment of the peoples’ right to self-determination in article 20 of the Banjul Charter as opposed to article 1 of the ICCPR (quoted in Annexure I). From that it is clear that the regional convention takes cognisance of the wrong of colonisation (of which especially African states were

2.4.2 Application of international law at national level – theories and practice

a.) Treaty law

The principle

Traditionally, a distinction is drawn in common-law countries between treaty law on the one hand and customary international law on the other when the application of international law at national level is in issue. Pre-1994, South African law, like English law, required treaties to be incorporated into national law through an Act of Parliament before they could be treated as part of the law of the land.¹⁸¹ The Appellate Division found

“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 legislative process. ... In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject.”¹⁸²

This “application practice”, supports the dualist theory regarding the relationship between international and national law. (As will be indicated, *infra*, this legal position has witnessed a seesaw-like change in the new constitutional order.) It is also called the “principle of transformation”¹⁸³ (or “translation”¹⁸⁴).

UN Resolutions

This practice has also been extended to resolutions of the General Assembly and the Security Council of the UN (or of other international organisations for that matter) although they are not treaties.¹⁸⁵ Therefore, all resolutions taken by international organisations also had to be legislatively incorporated (“transformed” or “translated”) into national law before they could be applied as law at national level pre-1994.

victims) whilst the universal document makes no mention thereof. The regional document, therefore takes special precaution to recognise and counter the wrongs that the region has suffered in the past, whilst the universal document is not as concerned about what happened in specific regions. Dugard *op cit* (n2) 255 says the following about regional conventions: “These conventions are likely to be more successful than their universal counterparts because political and cultural homogeneity and shared judicial traditions and institutions within a region provide the basis for confidence in the system, which is necessary for effective implementation.”

¹⁸¹ *Pan American World Airways Inc v SA Fire and Accident Insurance Company Ltd* 1965 (3) SA 150 (AD) 161 (“The Pan Am case”).

¹⁸² At 161B-D.

¹⁸³ Dugard *op cit* (n2) 49.

¹⁸⁴ DJ Devine “The relationship between international law and municipal law in the Light of the Interim South African Constitution” (1995) 44 *ICLQ* 1 at 5.

¹⁸⁵ *Binga v Administrator General, South West Africa and Others* 1984 (3) SA 949 (SWA) at 968E. See also Dugard *loc cit* (n183) as well as the discussion in Chapter II - p90 - *infra* of the fact that resolutions of this kind are not included in the language used in the treaty provisions of both the IC and the FC.

Methods of incorporation

Three principal methods were pre-1994 employed by the legislature to transform treaties into national law

- The treaty is embodied in the text of an Act¹⁸⁶;
- The treaty is incorporated as a schedule to an Act¹⁸⁷; or
- An Act which provides that the President may incorporate a treaty by means of Proclamation (delegated legislation).¹⁸⁸

Exceptions

To this practice there existed four exceptions where unincorporated treaties could have been applied at national level, namely

- A national court may have had recourse to an unincorporated treaty in order to interpret an ambiguous statute;
- An unincorporated treaty may have been taken into account in a challenge of the validity of delegated legislation on grounds of unreasonableness;
- Where an unincorporated treaty provided evidence of a rule of customary international law it may have been applied as customary rule, but not *qua* treaty; and
- Where the treaty and its national application fell solely within the purview of the Executive's prerogative.¹⁸⁹

The first two exceptions applied to treaties to which South Africa was a party through signature, ratification or accession; whilst the third exception applied to treaties regarded as codifications of international custom, **regardless** of whether South Africa was a party thereto.¹⁹⁰ The fourth exception applied to a treaty in which the legislature had no say for it to become law.¹⁹¹ Examples of such treaties are those declaring war or peace, those recognising states, and those about the acquisition of new territory or boundaries.¹⁹² For instance, a court would not have refused to find that a state of war (or peace) existed for purposes of national law if the Executive concluded a treaty to that effect (or conducted another "act of state" such as a formal declaration of war). Likewise, it would not have refused to take cognisance of territorial boundaries created by treaty (or to recognise a foreign state as a sovereign independent state) when the Executive, through treaty (or another "act of state"), declared the

¹⁸⁶ E.g. the Civil Aviation Offences Act 10 of 1972 incorporates the Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft of 1963, the Hague Convention for the Suppression Unlawful Seizure of Aircraft of 1970 and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 in this way.

¹⁸⁷ E.g., the Diplomatic Immunities and Privileges Act 74 of 1989 incorporates some provisions of the Vienna Convention on Consular Relations of 1961 and the Vienna Convention on Consular Relations of 1963 by means of a schedule to the Act.

¹⁸⁸ E.g., section 2 (3) (a) and (3) ter of the Extradition Act 67 of 1962 before amendment in 1996.

¹⁸⁹ Dugard *op cit* (n22) 51-7.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Booysen *op cit* (n11) 109-115.

territorial boundaries (or recognised a foreign state as such), even though that treaty or act might have been contrary to customary international law.¹⁹³ The application of these treaties at national level belonged solely to the Executive in terms of its prerogative to conduct international affairs. As indicated, *supra*, the courts have always exercised judicial restraint so as not to interfere with acts of state, and are likely to continue doing so. That this proposition has, to a certain extent proven to hold true post-1994, will be discussed in Chapter III, *infra*. It will, however, also be pointed out there that the act of state doctrine has not survived unscathed in the new dispensation, and that the courts will not hesitate to nullify acts of state which are unconstitutional. In fact, it will be shown that the courts have already interfered with so-called acts of state for their failure to comply with the Bill of Rights. Therefore, the fourth exception may not necessarily prove to be a true exception post-1994.

Interpretation of incorporated treaties

At international law, there are three approaches to the interpretation of treaties, namely *textual*, *teleological* and *intention of the parties*, and they are all recognised by the Vienna Convention.¹⁹⁴ The problem, however, was whether, in the light of the translation theory as applied in the *Pan Am* - case¹⁹⁵, interpretation of an incorporated treaty was to be approached as normal statutory interpretation (because it now forms part of national statutory law), or as treaty interpretation according to international law.

Booyesen¹⁹⁶ advocates the opinion that in such a case one deals with normal statutory interpretation. Others take a different view.¹⁹⁷ As will be pointed out, the issue is still very relevant when the interpretation of treaties under the new constitutions is at stake.

b.) Customary international law

The principle

The position of customary international law was, however, completely different and subject to some controversy. The Appellate Division of the Supreme Court of South Africa declared that:

“While it is obvious that [customary] international law is to be regarded as part of our law, it has to be stressed that the *fons et origo* of this proposition must be found in Roman-Dutch law.”¹⁹⁸

A long and bitter debate raged between two of South Africa’s leading theorists, Professors Booyesen and Dugard, about which application theory best reflects the position of international

¹⁹³ See the act of state doctrine *supra* and recognition of foreign states under 2.5 *infra*.

¹⁹⁴ *Op cit* (n75) - Articles 31 and 32.

¹⁹⁵ *Supra* (n181).

¹⁹⁶ *Op cit* (n11) 110.

¹⁹⁷ E.g., see Botha’s discussion in this regard - *op cit* (n124).

¹⁹⁸ *Nduli and Another v Minister of Justice and Others supra* (n109) at 906.

law vis-à-vis South African national law.¹⁹⁹ According to Booysen, English law on this subject cannot be seen as part of South African law and international law did not form part of Roman-Dutch law. Therefore, customary international law did not automatically form part of South African law. According to Dugard, both Roman-Dutch and Anglo-American law recognise customary international law as part of national law. It therefore does not matter to which system South African law turned for guidance in this regard, but customary international law could therefore automatically have been regarded as part of South African law.

English law knew the theories of:

- “Adoption”, in terms of which customary international law is *adopted* to its full extent by the common law and held to be part of the law of the land (essentially supporting the monist theory);
- “Transformation”, in terms of which international law formed part of the law of the land only in so far as it was *expressly incorporated* (“transformed”) into English law (essentially supporting the dualist theory); and
- “Incorporation”, in terms of which all rules of international law are to be considered as *automatically incorporated* into English law, *but only in so far as they are not inconsistent with Acts of Parliament or judicial precedent* (essentially supporting the theory of harmonization).²⁰⁰

It seems that the theory of incorporation came out victorious in English law.²⁰¹ According to Dugard, this theory also applied in South African law, whilst Booysen remains sceptical about this proposition. Referring to Bridge²⁰², he notes that, although it is generally accepted that rules of international law will be applied by the courts in proper cases as *lex fori*, making no distinction between them and rules of national law, this is a far cry from accepting that all rules of international law form part of national law save in so far as they are inconsistent with precedent and legislation as suggested by Dugard.²⁰³

From case law, however, it appears that the South African courts pre-1994 accepted, at least in theory, that customary international law is part of national law as suggested by Dugard.²⁰⁴ In

¹⁹⁹ *Op cit* (nn21,22).

²⁰⁰ See Booysen *op cit* (n11) 71-77; Dugard *op cit* (n2) 46; RP Schaffer “The inter-relationship between international law and the law of South Africa: An overview” (1983) 32 *ICLQ* 277- 315; JW Bridge “The relationship between international law and the law of South Africa” (1971) 20 *ICLQ* 746-749; DJ Devine “Qualifications on the incorporation of international customary law into South African municipal law” (1973) 1 *Natal University LR* 58-63; N Botha “The coming of age of public international law in South Africa” (1992-93) 18 *SAYIL* 36 at41-42; etc.

²⁰¹ *Per* Lord Denning MR in *Trendtex Trading Corporation v Central Bank of Nigeria* (1977) QB 529 (CA) at 553-554. See also Dugard *op cit* (n2) 46, especially his n22.

²⁰² *Op cit* (n200).

²⁰³ Booysen *op cit* (n11) 82.

²⁰⁴ *Nduli and Another v Minister of Justice and Others, loc cit* (n198); *Inter Science Research and Development Services v Republic Popular Da Mocambique supra* (n110); and *Kaffraria Properties v Government of the Republic of Zambia* 1989 (2) SA 709 (E).

certain exceptional situations, however, customary international law was not regarded as part of national law. These exceptions were:

- If the rule of customary international law was inconsistent with common law, the customary rule was not regarded as part of national law;
- For custom to be part of national law it should not have been in conflict with an Act of Parliament - “**parliamentary supremacy**.” (International custom was regarded as a species of - albeit subordinate to - common law and, therefore, subordinate to all forms of legislation, even delegated legislation. Except for a presumption of interpretation that the legislature does not intend violating international law or the country’s international obligations, all legislation was regarded as superior.);
- In order to be applied as national law it should not have been in conflict with judicial precedent;
- In cases where the Executive performed an “act of state” in furthering its prerogative to conduct foreign affairs, the courts would not interfere even though such act may have been committed in contravention of national or international law – “**executive supremacy**”;
- In cases where there was doubt, a certificate issued by the Executive as to the status of international law vis-à-vis national law was accepted as correct (especially in the field of treaty law); and
- In the case of treaties, as indicated *supra*, they could only form part of the law of the land once they had been expressly incorporated or “translated” into national law through an Act of Parliament. However, customary international law embodied in a treaty could, subject to the aforementioned exceptions, automatically form part of South African law, but only as a customary rule, not as a treaty.²⁰⁵

In effect, this meant that very little customary international law remained to be treated as “part” of South African law.

Why treaty and customary international law were treated differently

The reason for this traditional distinction between treaty and customary international law is not altogether clear. Brownlie²⁰⁶ ventures the following explanation

“In England, and also it seems in most Commonwealth countries, the conclusion and ratification of treaties are within the prerogative of the Crown (or its equivalent), and if a transformation doctrine were not applied, the Crown could legislate for the subject without parliamentary consent. As a consequence treaties are only part of English law if an enabling Act of Parliament has been passed.”²⁰⁷

It will, therefore, offend against the principle of separation of powers²⁰⁸ if the Executive, through conclusion of a treaty, were enabled to legally bind subjects without (the democratically elected) Parliament legislating that subjects are to be bound. On the other hand, as indicated *supra*, the courts exercised great deference to the prerogative powers of the

²⁰⁵ See Booyesen *op cit* (n11) 77-115; Dugard *op cit* (n2) 47-50; N Botha *loc cit* (n200); etc.

²⁰⁶ *Op cit* (n114).

²⁰⁷ At 46. See also Dugard *op cit* (n2) 47,49.

²⁰⁸ Where a clear distinction is drawn between the powers and functions of the Legislature, the Executive and the Judiciary for purposes of a democracy.

Executive so as not to offend against this principle, resulting in some treaties being applied nationally even though they were not legislatively incorporated. This reason for the distinction could therefore not consistently supply an explanation for the distinction being drawn. As will be pointed out in Chapter III, *infra*, the lines of distinction between the three pillars of government have become almost indistinguishably thin as a direct result of the post-1994 constitutions and the practice of the courts. The continued necessity for such distinction between treaty and custom with reference to its application at national level is therefore doubted.

The distinction between treaty and customary international law in order to determine application at national level, however, seems to ignore the existence of phenomena like *jus cogens* and obligations *erga omnes*, which can of course originate from either treaty or customary international law. Can *jus cogens* or obligations *erga omnes* form part of national law without the need for express incorporation? The question whether such phenomena formed part of national law without specific acts of incorporation, is as controversial as the debate between Booyesen and Dugard seems to indicate concerning the status of customary international law.

The very nature of *jus cogens* and obligations *erga omnes* suggests that, at least from an international law perspective, it is impermissible for a state to outlaw them. As indicated *supra*, they are regarded as peremptory norms “*from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*” It is therefore inconceivable that a state committed to compliance with international law, respect for human rights and the promotion of the rule of law in its new constitutional order would tolerate the violation of peremptory norms of international law.²⁰⁹ The question is therefore largely academic.

However, it seemed doubtful that ambiguous national legislation would readily have been interpreted by courts as outlawing *jus cogens* or obligations *erga omnes*. This was due to the presumption of interpretation that existed that the legislature does not intend violating international law.²¹⁰ As will be pointed out in Chapter IV, *infra*, this presumption received constitutional backing in the new dispensation.²¹¹ It is now part of legislation itself and no longer a common law presumption utilised to interpret statutes.

²⁰⁹ Dugard *op cit* (n2) 42.

²¹⁰ Dugard *op cit* (n2) 48-49; DJ Devine *op cit* (n184) at 5-6. This presumption (and its current effect) will be discussed in more details, *infra*, when sections 231 and 233 are discussed.

²¹¹ Section 233 of the FC.

The distinction does not really affect the application of sources like precedent, teachings of highly qualified publicists or codifications as they are manifestations of either custom or treaty law. Their “partness” of South African law would therefore depend on whether they originated from (or provide evidence of) treaty or custom. Whether general principles of law recognised by civilized nations were also recognised as international law for purposes of this distinction, however, remains controversial, because, naturally, states are not bound by the national law of other states, and, as far as could be determined, no South African court has ever thus far been vexed with this question.

2.5 MISCELLANEOUS ASPECTS APPLICABLE TO TOPIC UNDER DISCUSSION

a.) Requirements for statehood

As will be indicated in Chapter II, *infra*, post-1994 constitutional developments regulating the continuation (succession) of treaties concluded before that date, once again drew the attention to the international status of the TBVC states pre-1994. It is therefore necessary briefly to revisit the requirements for statehood.

Before a state can be classified as a subject of international law, it has to satisfy the traditional qualifications for statehood. It has to have

- a permanent population;
- a defined territory;
- a government; and
- the capacity to enter into relations with other states.²¹²

b.) Recognition as state

Booyesen²¹³ points out that the fourth requirement seems to be superfluous because it is a natural consequence of the fulfilment of the other three requirements. According to him²¹⁴ the fourth requirement means no more than that constitutionally a state has to be independent of other states and to have the capacity to enter into relations with other states. The capacity to enter into foreign relationships is therefore dependent only on the state’s own constitutional recognition thereof.

²¹² Montevideo Convention of 1933. Although only fifteen Latin American states and the USA are parties to the convention, it is generally accepted as reflecting the requirements of statehood under customary international law – e.g. Opinion 1 of the Arbitration Commission re Dissolution of Yugoslavia 92 ILR 162. However, the fourth requirement is in this opinion regarded rather as “sovereignty” than as a capacity based on, e.g. recognition by other states.

²¹³ *Op cit* (n11) 120 n4.

²¹⁴ 134 *et seq.*

The position of the TBVC states under this criterion for statehood presented difficulties. Although they enjoyed full constitutional independence in terms of the respective Status Acts²¹⁵ and, therefore, the formal capacity to enter into treaty and diplomatic relations²¹⁶, they were unable to conduct international relations with states other than South Africa and other pariah states (e.g. Israel) due to their non-recognition by the rest of the international community. Although a government may be recognised by the international community as being either the *de facto* or *de iure* government, no such distinction is possible in the case of a state. An entity is either recognised as a state or not.²¹⁷

The purpose and consequences of recognition of states (as opposed to governments) are controversial matters. According to the **constitutive** school, recognition creates or constitutes a state, and recognition is therefore an additional requirement for statehood. The **declaratory** school, on the other hand, maintains that recognition is simply a declaration (acknowledgement) “as a fact something that has hitherto been uncertain”²¹⁸, and that an entity becomes a state on meeting the factual requirements for statehood expounded in the Montevideo Convention.

The statehood of Bophuthatswana was challenged in terms of the constitutive theory before the Supreme Court of that territory in a case of treason, *S v Banda*.²¹⁹ Friedman J rejected the theory and accepted the declaratory one. It was held that recognition as requirement for statehood did not apply where the state had “an infrastructure to implement relations with other states should it be given the opportunity to do so” but was “precluded from so doing due to political considerations”, and “[a]n entity possessing all the other essentials of being a state, cannot be regarded as not having the capacity to enter into relations with other states if it is denied the opportunity to demonstrate this capacity in practice.”²²⁰

Although recognition of a state as such by other states is closely connected to the fourth requirement, because other states’ views are relevant to determine whether a state is internationally recognised to have such capacity, Booysen is of the opinion that recognition is

²¹⁵ Section 1 of the Status of Transkei Act 100 of 1976 declared that “the territory known as Transkei ... is hereby declared to be a sovereign and independent state and shall cease to be part of the Republic of South Africa”. See also sections 1 in the Status of Bophuthatswana Act 89 of 1977; Status of Venda Act 107 of 1979; and Status of Ciskei Act 110 of 1981.

²¹⁶ H Booysen “The South African Homelands and their Capacity to Conclude Treaties” (1982) 8 *SAYIL* 58.

²¹⁷ Dugard *op cit* (n2) 80.

²¹⁸ JL Brierly *Law of Nations* 6th Ed (ed H Waldock, 1963) 139.

²¹⁹ 1989 (4) SA 519 (B).

²²⁰ At 543.

not a requirement for statehood.²²¹ He clearly supports the declaratory approach and, therefore, advocates the proposition that the TBVC states were pre-1994 to be regarded as proper subjects of international law.²²²

Whilst recognising the fact that the declaratory approach is less arbitrary than the constitutive approach and that it enjoys the support of most writers (as has been held in *S v Banda, supra*), Dugard, on the other hand, points out that a state which is not recognised by any state other than its creator state, does not possess the functional capacity to enter into relations with other states. From this viewpoint the TBVC states lacked the functional capacity to enter into relations with other states, and, therefore, they had no treaty-making capacity in the eyes of the broader international community. All treaties between them and other pariah states can therefore be regarded as null and void from an international law perspective.

Whatever the international position was, however, treaties between South Africa and the TBVC states entered into pre-1994 were recognised as binding international agreements *inter se* in terms of the Status Acts and their respective constitutions. This is exactly the position that sparked off some controversy regarding the so-called “typical succession provision” in the IC, and which will be discussed in Chapter II, *infra*.²²³

c.) Other aspects

In order to avoid duplication, other relevant aspects of international law and its relationship with South African national law pre-1994 will be discussed together with the post-1994 developments in the chapters dealing therewith.²²⁴

3. CONCLUSION

From the discussion above, it should be clear that international law had a very restricted meaning and scope from a pre-1994 South African perspective. It was largely regarded as subordinate – both conceptually and in practical application – to all sources of South African national law.²²⁵

²²¹ *Op cit* (n11) 120.

²²² *Loc cit* (n214).

²²³ See also *Treaty-making powers and Succession and termination of treaties supra* under 2.2.1.

²²⁴ I.e. *ius ad bellum* and *ius in bello* – Chapter III; IHRL – Chapters IV and V; and International criminal law and Jurisdiction – Chapter V *infra*.

²²⁵ I.e. Legislation, common law, judicial precedent and “acts of state.”

Due to the difference in treatment thereof at national level, it would seem that from a South African perspective, international law was pre-1994 perceived to have mainly three manifestations, namely

- treaty law (which had to be legislatively incorporated before it could be applied at national level);
- customary international law (which was regarded as part of national law subject to certain exceptions, leaving very little thereof that could be applied by the courts); and
- international legal relations emanating from prerogative powers (in which the courts had no say but to recognise and, where necessary, apply “acts of state”).

As will become clearer in the following chapters, the situation has, in the main, changed for the better in post-1994 South Africa. However, some problems from this era persist and need to be addressed. The new dispensation has also raised some problems of its own, which need to be addressed to avoid confusion.

CHAPTER II

THE MEANING AND SCOPE OF INTERNATIONAL LAW – A SOUTH AFRICAN PERSPECTIVE ACCORDING TO TERMINOLOGY IN THE POST-1994 CONSTITUTIONS

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1.2 THE HISTORY OF THE NEW CONSTITUTIONAL DISPENSATION

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3. CONCLUSION

CHAPTER II

THE MEANING AND SCOPE OF INTERNATIONAL LAW – A SOUTH AFRICAN PERSPECTIVE ACCORDING TO TERMINOLOGY IN THE POST-1994 CONSTITUTIONS

1. INTRODUCTION

1.1 GENERAL

As can be seen from the index to this chapter, the FC utilises different (and sometimes divergent) international law terminologies to describe the different sources, branches or derivatives (manifestations) of international law. Before one can attempt to analyse the application of international law in a post-1994 South Africa, which will be done in the following chapters, one first has to ascertain the exact meaning and scope of the law (from a South African perspective) according to the terminology employed by the drafters of the FC.

This chapter will accordingly examine the meaning and scope of the law according to the different terminologies in the different sections of the FC; whether any changes were effected to what was understood under those terminologies pre-1994 and under the IC; and, if so, what the international and national consequences thereof might be. Naturally, in order to do this, the political and drafting history that led to the FC seeing the light of day will have to be examined. One will also have to examine the theory and practice of modern-day constitutional interpretation to find, not only the original intention of the drafters of the FC, but also the import of those provisions for the community they serve, as well as the political and moral needs of that community.

1.2 THE HISTORY OF THE NEW CONSTITUTIONAL DISPENSATION

The importance of examining the political and drafting history of the new constitutional dispensation in asserting the meaning and scope of international law terminologies and the application of international law at national level in a post-1994 South Africa, is almost self evident. As will be pointed out, one of the major role-players, the National Party (NP) government, came from a background of denial and rejection of international law; while the legitimacy (if not indeed the existence) of some of the others, e.g. the African National Congress (ANC) and the Pan Africanist Congress (PAC), was a product of international law.

The NP government's racial policies (and especially apartheid) are notorious for their unfair and unequal treatment of people. In practice they led to a minority government governing the masses, simply because the majority had no vote. In striving for self-determination, national

liberation movements (NLMs) such as the ANC and the PAC were formed. Naturally, they were considered a threat to the power of the apartheid regime, and were outlawed. This led to what is known as the “armed struggle.” Members and sympathisers of the NLMs were persecuted and killed by the armed forces of South Africa and, when apprehended, they were either detained without trial or prosecuted criminally. In order to facilitate criminal prosecutions, Parliament enacted so-called “security legislation”, *inter alia* declaring (internationally legitimate) acts of liberation: acts of treason, terrorism, subversion or sabotage with severe punishments (including the death penalty) in case of conviction. At the height of apartheid, so-called “emergency legislation” (*inter alia* providing for arrest, detention and interrogation without trial) and its notorious “ouster clauses” (prohibiting the courts from testing both primary and delegated legislation) were the order of the day.

As pointed out in Chapter I, there was very little South African courts could do (or would do) about recognizing international human rights standards and instruments.¹ The reason for this was twofold. **Firstly**, none of the previous Constitutions² made mention of human rights. The idea of human rights was foreign to our law and even deemed to be unnecessary³, and it was only much later accepted that a South African Constitution (or at least textbooks about constitutional law) should include reference to human rights.⁴ Constitutionally, Parliament was regarded as supreme, and the protection of human rights therefore required a change to the constitution or, at least, an Act of Parliament. South Africa was party to only one international instrument with human rights clauses - the Charter of the United Nations (the Charter) - which was not incorporated into national law. The preamble and articles 1, 13, 55 and 56 of the Charter could consequently not be applied directly in South African law. Pleas to persuade the courts “to take these clauses into account as a guide to statutory interpretation fell on deaf ears.”⁵

Secondly, although common law provided some protection for individual rights, Parliament could amend the common law in whatever way it saw fit⁶, which it frequently did by enacting security and emergency legislation. Due to tradition and the appointment procedure that

¹ Chapter I *supra* at 3 (n12).

² Chapter I *supra* at 2 (n3).

³ Verloren van Themaat *Staatsreg* 2nd Ed (1967) 129.

⁴ Verloren van Themaat *Staatsreg* 3rd Ed (1981) 143, 144, 151 and 156. See the discussion hereof in Chapter V *infra*.

⁵ Dugard *International Law: A South African Perspective* 2nd Ed (2000) 263. See also *Sobukwe v Minister of Justice* 1972 (1) SA 693 (A); *S v Werner* 1980 (2) SA 313 (W); and *S v Adams*; *S v Werner* 1981 (1) SA 187 (A).

⁶ Chapter I *supra* at 3.

prevailed, judges were also notoriously loyal to the government of the day.⁷ There was, therefore, little if any evidence of judicial activism in the old South Africa. Attempts by individual judges at a more liberal approach were rejected by fellow judges and ignored by the Appellate Division of the Supreme Court.⁸ The Judiciary, therefore, generally toed the line of the NP government.

The international community was at first divided about the correctness and lawfulness of South Africa's racial policies and evidenced some support for South Africa's contentions in this regard, namely: That its racial policies fell exclusively within its domestic jurisdiction; and that article 2 (7) (protecting a state's domestic policies from international scrutiny and control) took precedence over the human rights clauses of the Charter. However, "as apartheid became more brutal, South Africa more intransigent, and decolonisation more widespread,"⁹ international sentiment changed.¹⁰ As will be pointed out in Chapter V, *infra*, apartheid was also outlawed as international law crime and it can even be argued that it formed part of *jus cogens*. All of this led to the extension of the sphere of application of international law. As Dugard puts it: "Apartheid forced states to choose between the supremacy of domestic jurisdiction and human rights. They chose human rights and, in so doing, took international law into a new era"¹¹, where human rights is no longer of a purely domestic concern, but also a principal aim of international law.¹²

As a result, a wide range of international sanctions, including a mandatory arms embargo, was imposed on South Africa as punishment (or means of persuasion) for its discriminatory and repressive laws and practices.¹³ Furthermore, the NLM's and their liberation struggles were recognised as legitimate by the UN, and their wars were no longer viewed as purely internal civil wars, but as international wars to which the laws of war and humanitarian law applied.¹⁴

⁷ However, according to modern-day commentators, there exists a very real danger that this position may even continue under the new dispensation, unless the courts exercise their supervisory and review powers granted to them by the FC sparingly and in a manner facilitative of democracy. For instance, J Klaaren "Structures of Government in the 1996 South African Constitution: Putting democracy back into human rights" (1997) *SAJHR* 3 at 25 said that, as the Constitutional Court is not constituted in a counter-majoritarian fashion, "the membership of the Court is likely to (continue to) be in broad agreement with the thinking of the legislature and the executive."

⁸ Chapter I *supra* at 2 (nn7,8).

⁹ Dugard *op cit* (n5) 239.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Dugard *op cit* (n5) 234. See also the more comprehensive definition of "international law" by Starke quoted in Chapter I *supra* at 8-9 where provision is made for the application of international law vis-à-vis individuals in the traditionally national sphere.

¹³ Dugard *op cit* (n5) 7.

¹⁴ Dugard *op cit* (n5) 428.

Although this was not directly so admitted, the economic isolation and increasing international pressure apparently led to State President FW de Klerk's decision to abandon apartheid in February of 1990. This decision led to the unbanning of the ANC (banned since 1960) and other previously banned organisations. It led to Mr Nelson Mandela being freed and, ultimately a new constitutional dispensation under his leadership as the first democratically elected president.

The IC was the result of a lengthy process of negotiation between different parties, including the NP government (who, as pointed out, had a background of denial and rejection of international law) and its former enemies, including the ANC and PAC together with their military wings (whose foundation and legitimacy were a result of international law). It was therefore to be expected that the latter (clearly representing the majority of peoples in South Africa) would demonstrate a certain predilection for international law in their negotiations.

The process (characterised by compromise or political horse-trading) began with the convening of the Conference for a Democratic South Africa (Codesa) on 20 December 1991 and ended with the adoption of the IC by the tri-cameral Parliament of the old South Africa on 22 December 1993. After the 1994 elections and the establishment of a new government (but not a new state as will be indicated, *infra*), the Constitutional Assembly (Members of Parliament elected during the elections) started another agonizing process of negotiations aimed at drafting the FC. The final constitutional text was completed and adopted by Parliament on 8 May 1996. Although the Constitutional Court initially refused to certify its compliance with the 34 Constitutional Principles previously agreed upon¹⁵, the amended text (passed on 11 October 1996) was, on re-submission, found to conform thereto.¹⁶

The result of the aforementioned process, and especially of the composition of the Constitutional Assembly, was that, in addition to an indication in the Preamble of the FC that international law was highly rated by the drafters, the FC made provision for the recognition of international law and its treatment at national level in nine of its sections, all of which will be discussed, *infra*. Compared to the mention of international law in only four sections in the IC (and none in the previous constitutions), the FC therefore indicates that the drafters were serious about the recognition and inclusion of international law in a South African context. In the chapters concerning the application of international law at national level, *infra*, it will be

¹⁵ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).

¹⁶ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC).

argued that, although dualism as opposed to monism is still starkly evident under the FC, greater harmonisation between the two systems of law was envisaged and obtained in this manner. This result has been widely welcomed by all international law commentators.

Certain parts of the FC are subject to entrenchment¹⁷, which is not a strange occurrence in constitutions worldwide. However, although the most recent Constitution can be regarded as final for the moment, passing an Act with the support of the required majorities may still change it. This explains the fears of minorities before and during the 1999 elections that the ANC government would obtain a two-thirds majority in the National Assembly and Council of Provinces, even though their fears might have been unfounded in the light of the declared predilection for the observance of international law in the Preamble to the FC. It is especially the possibility that the Bill of Rights may be amended by the current (or a future) government that is most feared. Even the death penalty may still be re-introduced with an amendment effected by special majority. However, the Constitutional Court has already (albeit tentatively) indicated that radical amendments to the Constitution, which affect its most basic features, may not be regarded as valid

“It may perhaps be that a purported amendment to the Constitution, following the normal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organising the fundamental premises of the Constitution, might not qualify as an ‘amendment’ at all.”¹⁸

Therefore, for present purposes, the FC may be taken as “final.” The Bill of Rights (which originated through the influence of international law) in its present form and international law provisions would therefore appear to be a given in both the current and future constitutions. On the other hand, however, it has already been indicated, *supra*, that the Constitutional Court’s political loyalty might pose a problem, as it is not constituted in a counter-majoritarian fashion.¹⁹ Due to the selection and appointment procedures, the majority of judges may prove to be loyal to the political thinking and aspirations of the government of the day, even if that means approving radical and fundamental amendments to the Constitution. This might prove that fears of future amendments to the Constitution (possibly ignoring minority or other basic human rights) were well founded. Whether or not such problems will manifest themselves, however, remains a question of speculation.

¹⁷ E.g. to amend section 1, a special majority of at least 75% of the members of the National Assembly supported by six Provinces in the National Council of Provinces (NCOP) is required. To amend Chapter 2 – the Bill of Rights – a special majority of two thirds of the members of the National Assembly supported by six Provinces in the NCOP is needed. See section 74 of the FC.

¹⁸ *Premier of KwaZulu-Natal v President of the Republic of South Africa* 1996 (1) SA 984 (CC).

¹⁹ *Loc cit* (n7).

Although the insertion of (and entrenchment of certain) international law provisions in the FC and the clear attempt at greater harmonisation between the two systems were widely welcomed by all pre-eminent international law commentators, one further aspect of the drafting history must not be lost sight of. The status of international law vis-à-vis national law as defined in the IC “was debated by the negotiating Council at the eleventh hour when successful finalisation of the constitution was a matter of urgency both within South Africa and abroad” and “the final say rested with politicians, many of whom lacked a clear understanding of the technical aspects of the incorporation of international law into a municipal system.”²⁰ These facts, as well as the bureaucratic-mindedness of the law advisers (from the old regime) who had to refine the drafts technically before they were passed by parliament, led to, not only sloppy drafting, but also to some constitutional texts regarding the status of international law being couched in a way which was not intended by the drafters.²¹ As some of the terminologies and provisions were merely taken over from the IC, and as scant attention was paid both to the criticisms levelled against them and the suggestions regarding the ultimate constitution, the same can be said of the drafting history of the FC. This led to sloppy drafting of some of the texts; providing some confusion as to what was intended by the drafters; and whether the needs of society and the law were served.

1.3 THE ROLE OF CONSTITUTIONAL INTERPRETATION

The question may well be asked why a discussion of constitutional interpretation is necessary in a discussion of the meaning and scope of international law and its relationship vis-à-vis South African national law. As will become clearer from the discussions, *infra*, some of the international law provisions in the FC are couched in vague, and ambiguous terms; some were framed exceptionally widely, others exceptionally narrowly; and some were new but left undefined. The international law terminology used has mostly proven to be controversial or unclear, and therefore open to interpretation.

Furthermore, as will be pointed out in Chapter IV, *infra*, both the IC and the FC contain interpretation clauses with instructions regarding the interpretation of the Bill of Rights in the light of, *inter alia*, “international law”, where even “soft” law must be considered in interpreting human rights provisions and in formulating human rights jurisprudence.²² It will however, also be submitted, *infra*, that the FC contains a further instruction regarding

²⁰ M Olivier “The status of international law in South African municipal law: section 231 of the 1993 Constitution” (1993-94) 19 *SAYIL* 1 at 3.

²¹ Olivier *op cit* (n20) at 6,10.

²² Section 35 of the IC and section 39 of the FC. See *S v Makwanyane* 1995 (3) SA 391 (CC) at 413 G where it was decided that the term “international law” in the context of section 35 of the IC (39 of the FC) includes binding as well as non-binding international law.

interpretation of any legislation (including the Constitution as a whole, and not only the Bill of Rights²³) in the light of “international law”, but that the international law referred to there, although not expressly so stated, includes only **binding international law**.²⁴ This submission will provide argument that the same terminology in different sections of the FC means different things. A knowledge and understanding of constitutional interpretation is therefore necessary, not so much for the interpretation of other parts of the constitution, but in order to interpret the international law provisions. The interpretation sections referred to above also need to be interpreted to ascertain the meaning of the term “international law” therein. Consequently, the theories of constitutional interpretation need to be applied.

Constitutional interpretation differs from normal statutory interpretation because

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a ‘mirror reflecting the national soul,’ the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.”²⁵

The Constitutional Court echoed similar tones

“We are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation. A constitution is no ordinary statute. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive and the Courts as well as the fundamental rights of every person which must be respected in exercising such powers.”²⁶

Modern day constitutional interpretation is controversial. The debate centres around the question whether the constitutional text should be interpreted in a totally literalistic way²⁷, or rather value orientated in the light of the prevailing political climate and type of community (democracy, etc.) it serves.²⁸ In essence, the debate evolves from the post-modernistic

²³ The term “any legislation” in the Constitution obviously includes the Constitution itself as a piece of national legislation.

²⁴ Section 233 of the FC.

²⁵ *S v Acheson* 1991 (2) SA 805 (NmHC) at 831B *per* Mahomed AJ (as he then was). See the Preamble to the FC – discussed *infra* - for similar tones regarding the purpose of the Constitution.

²⁶ *S v Makwanyane supra* (n22) at par [15].

²⁷ A Fagan “In defence of the obvious: Ordinary language and the identification of constitutional rules” (1995) 11 *SAJHR* 545; E Fagan “The longest Erratum note in history” (1996) 12 *SAJHR* 79; Z Motala “The Constitution is not anything the court wants it to be: The Mhlungu decision and the need for disciplining rules” (1998) 115 *SALJ* 141.

²⁸ DM Davis “The underlying theory that informs the wording of our Bill of Rights” (1996) 113 *SALJ* 385; “The twist of language and the two Fagans: Please sir may I have some more literalism!” (1996) 12 *SAJHR* 504; RK Greenstein “Text as Tool: Why we read the law” (1995) *Washington & Lee LR* 105.

debates²⁹ between **classical liberalism**³⁰ and **communitarianism**³¹ in the field of legal philosophy.³²

Classical liberals are of the opinion that words and phrases in the constitutional text can have only one meaning, namely that which was originally intended by the drafters of the text.³³ **Post-liberalists**, on the other hand, argue *de lege ferenda*³⁴ that the political nature of modern-day decision making calls for a more value orientated approach to interpreting constitutional texts.³⁵ For them, a constitution should be a living organism that can change if necessary (according to political and moral changes in the society ruled by it) without having to alter the text.³⁶ However, even post-liberalists are divided on this subject. Whilst **modernistic realism**³⁷ points out that the classical liberal model smacks of majoritarianism and lack of judicial objectivity and neutrality³⁸, **post-modernistic realists** argue that communitarianism leads to authoritarianism as it intends to restrict the interpretative community to a single body or institution, and therefore fails to take social dissent seriously.³⁹ Therefore, neither classical liberalism nor communitarianism proves satisfactory in determining the rules (if any) of constitutional interpretation. However, even if post-liberalistic interpretation methods are advocated, the counter-majoritarian difficulty remains.⁴⁰

Some scholars advocate a **compromise** between the two extremes. According to them, the text and literalism cum original intent should be the starting point of all constitutional interpretation. Only when the text is *either* ambiguous *or* open to a more purposive or generous interpretation, may one follow a more purposive (and even generous) approach.⁴¹

²⁹ I.e. the *agency debate* (individualism v socialism); the *meta-ethical debate* (universalism v particularism); and the *political debate* (priority of individual rights v communitarian rights).

³⁰ Which favours a positivistic/formalistic – therefore “literalistic” – approach to constitutional interpretation.

³¹ Which favours a naturalistic/realistic – therefore “value orientated” – approach to constitutional interpretation.

³² AE van Blerk *Jurisprudence: An Introduction* (1996) Ch 9. See also T Maluwa “Democracy and Human Rights – The Significance of Human Rights Law to Developing Countries” (1995) 6 (1) *ALR* 24 at 29-35 for a discussion of the effect of these jurisprudential insights on South African law.

³³ Positivism/formalism *supra*.

³⁴ “Concerning the law as it (ideally) should be.”

³⁵ Naturalism/realism *supra*.

³⁶ The “living constitution” theory.

³⁷ Communitarianism *supra*.

³⁸ The counter-majoritarian difficulty, *supra*.

³⁹ H Botha “Democracy and rights: Constitutional interpretation in a post realist world” (2000) 63 (4) *THRHR (JCRDL)* 561. See also S Woolman & D Davis “The last laugh: Du Plessis v De Klerk, classical liberalism, Creole liberalism and the application of fundamental rights under the interim and final Constitutions” (1996) 12 *SAJHR* 361.

⁴⁰ Klaaren *loc cit* (n7); Botha *op cit* (n39) at 578 *et seq*.

⁴¹ LM du Plessis & JR de Ville “Bill of Rights interpretation in the South African context (2)” (1993) 4 *Stell LR* 199 and “(3)” at 356; L du Plessis “Legal academics and the open community of constitutional

They also prefer that intra-textual contextualisation (where the text should not be read in isolation but in the light of the constitution as a whole) should take place before extra-textual contextualisation is attempted.⁴² This approach seems to be favoured by the courts at this stage

“I would venture to sound a note of caution. Sweeping generalisations by those who scarcely had the honour to sit on the Supreme Court Bench in the old South Africa about ‘judicial behaviour under the old pre-constitution order’ are not helpful to fulfilling the task at hand, which is the proper interpretation of the Constitution. Obviously, when one seeks to interpret the fundamental rights clauses of chap 3 thereof, which set out broad principles, this has to be done in the spirit of the Constitution. But surely not when one has to determine whether Bloemfontein is the seat of the Appellate Division as provided for in s 106 (2)?”⁴³

The Constitutional Court has also already warned against underestimating the importance of the text in constitutional interpretation.⁴⁴ Constitutional interpretation must, according to the court, be “rooted” in the language of the text. In other words, if there is an evident and plain meaning of a provision, it cannot simply be ignored in favour of a purposive and generous account of its meaning in the light of the spirit and tenor of the Constitution if such an interpretation would be totally contrary to the language, otherwise the result would be “divination, not interpretation.” However, a purposive and generous interpretation of the language used is still possible where the language is open for such an interpretation, even if the language is not totally ambiguous, as long as it doesn’t result in emasculating the clear meaning and purpose of the provision. The text itself may even in given circumstances be altered to serve the purpose of the provision, provided it doesn’t amount to “divination” as opposed to “interpretation.” It should therefore be clear that the Constitutional Court also favours the compromise approach.

There have been occasions where the Constitutional Court’s decision to follow a more literal interpretation⁴⁵ has been severely criticised.⁴⁶ On other occasions, the Court’s decision to follow a more purposive and generous interpretation at the cost of textualism⁴⁷ has been as severely criticised.⁴⁸

interpreters” (1996) 12 *SAJHR* 214; J Kruger “Is interpretation a question of common sense? Some reflections on value judgments and section 35” (1995) *CILSA* 1. See also Z Motala *op cit* (n27).

⁴² Du Plessis & De Ville “(3)” *op cit* (n41) at 367; Kruger *op cit* (n41) at 10; Motala *op cit* (n27) at 147.

⁴³ *Per* Van Dijkhorst J in *Kalla v The Master* 1995 (1) SA 261 (T) at 268. See also *Govender v Minister of Safety and Security* 2001 (2) SACR 197 (SCA) par [11] *re* normal statutory interpretation post-1994.

⁴⁴ E.g. *S v Zuma* 1995 (2) SA 642 (CC) par [20].

⁴⁵ E.g. *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa (AZAPO-2)* 1996 (4) SA 671 (CC).

⁴⁶ E.g. Z Motala “The Constitutional Court’s approach to international law and its method of interpretation in the ‘Amnesty decision’: Intellectual honesty or political expediency” (1996) 21 *SAYIL* 29; and RC Blake “The world’s law in one country: The South African Constitutional Court’s use of public international law” (1998) 115 *SALJ* 668 at 680-684.

⁴⁷ *S v Mhlungu and Others* 1995 (3) SA 867 (CC).

⁴⁸ E.g. Motala *op cit* (n27).

Other post-liberalist schools of thought, such as **critical legal studies**, tend to only criticize the courts' approach to constitutional interpretation without providing a real alternative.⁴⁹

They normally present

“a nihilistic assumption of the Constitution as always capable of infinite interpretations, the role of the judge being to choose one interpretation from the many available. The text is a maze of many dimensions and there is no exclusive meaning in the text. There are no constraints such as, for example, plain literal meaning, on interpretative freedom.”⁵⁰

As quoted from the case law, *supra*, the South African courts (including the Constitutional Court) generally do not accept such a nihilistic approach, and some degree of textualism is still alive and well in constitutional interpretation, subject, however, to extensions when a more teleological (and even generous) interpretation is required in the circumstances. Indeed, it is clear, at least for the moment, that the courts have accepted the compromise approach to constitutional interpretation and, therefore, it can be regarded as the current legal position regarding constitutional interpretation. The problem, however, is: Who will decide when a constitutional text is **either** ambiguous **or** capable of purposive and generous interpretation according to the compromise approach and, if so, whether a text-altering interpretation is required?

It has always been the courts (now with the Constitutional Court at the top), which were the true interpreters of the Constitution and, logically, it will be they who will decide this issue in future. Naturally, as in the past, the preferred political and moral philosophies of the judges will play a role in deciding whether a more purposive and generous approach is to be preferred above a more literalist one, although judges will, presumably, still be careful not to deviate from plain meaning in controversial issues. It has, for instance, been said that, to the extent that the text of the Constitution allows, judges in the new South Africa (especially those in the Constitutional Court) are bound to give political decisions according to their preferred political (and moral) philosophy, but where their political philosophies are controversial – not shared by all members of the community – “judges will generally offer literal constructions of the text rather than constructions of the text that reveal expressly their political philosophy.”⁵¹ It has, however, been pointed out, *supra*, that political decisions by the courts might be problematical for reason of the counter-majoritarian issue. Therefore, the

⁴⁹ E.g. the criticism of A Cockrell “Rainbow jurisprudence” (1996) 12 *SAJHR* 1.

⁵⁰ See Motala *op cit* (n27) at 154 and especially his footnotes 104-106 for a succinct and useful description of this movement's style, although his proposition that Davis, *op cit* (n28), is a supporter of this approach, is not agreed with.

⁵¹ Woolman & Davis *op cit* (n39) at 361-2.

answer to which interpretation theory and methods are to be utilized to interpret the Constitution is not an easy one, and is definitely not clear-cut at the moment.

However, from the available case law,⁵² and reflections by some commentators⁵³ it can, in conclusion, be ascertained that all of the following methods of interpretation⁵⁴ are available to courts confronted with the fraught task of constitutional interpretation:

- *Grammatical (or strict literal) interpretation* – This method involves an investigation into the normal meaning (semantic content) of the words and phrases used in the text. If the text is unambiguous and clear (and uncontroversial), this method should normally be used. If it is necessary to invoke one or more of the other methods, this method should still be used as a starting point.
- *Contextual (or systematic) interpretation* – This method is also called “intra-textual contextualisation” (as opposed to extra-textual contextualisation involved in all the following methods mentioned) and involves the reading of words and phrases, not in isolation, but in context of the constitutional text as a whole in order to determine the meaning thereof.
- *Historical interpretation* – Specific provisions in the text are construed against the background and in the light of both the *political* and the *drafting* history in order to ascertain the meaning that the political community at large and the mandated negotiators had in mind when the provisions were created. (See the history of the new dispensation section, *supra*.)
- *Comparative interpretation* – This method involves the consideration of comparable principles from other jurisdictions and international law such as that required by section 39 (1) of the FC in interpreting the Bill of Rights.
- *Teleological (or value orientated) interpretation* – This method is also sometimes referred to as “purposive” interpretation, and involves an investigation into the purpose for which the provision was created and the values of the community it serves.
- *Generous (or broad) and liberal interpretation* – When indulging into extra-textual contextualisation (any of the methods after grammatical and contextual interpretation, *supra*) the Constitutional Court has adopted the approach that such interpretation should be generous.⁵⁵ This implies “that a supreme constitution cannot be interpreted in the narrow and legalistic way in which statutes are sometimes construed in systems where the legislature is sovereign.”⁵⁶

Therefore, when ascribing a meaning to the international law terminology in the various sections, *infra*, the arguments and submissions will be advanced *de lege lata*⁵⁷, although the *de lege ferenda*⁵⁸ arguments sound very attractive. This means that it will be necessary to interpret unclear and controversial international law terminologies used in the FC, not only according to the normal semantic content, but also in terms of the textual and extra-textual context in which they are used. Therefore, none of the interpretation methods will be singled

⁵² Succinctly set out by De Waal *et alii* *The Bill of Rights Handbook* (1998) Ch 6.

⁵³ Du Plessis & De Ville; Du Plessis; Kruger; Motala *op cit* (n41).

⁵⁴ Not necessarily in hierarchical order except for the first-mentioned which should be the starting point according to the Constitutional Court in *S v Zuma supra* (n44).

⁵⁵ *S v Mhlungu supra* (n47).

⁵⁶ De Waal *et alii op cit* (n52) 101.

⁵⁷ “The current legal position” as expounded by the courts - the compromise approach *supra*.

⁵⁸ The post-realist approach *supra*.

out consistently in order to advance the arguments and submissions made, *infra*, although the text itself will be used as a starting point and preferred where it is unambiguously clear and uncontroversial. Given the rapid and sweeping changes brought about by the new constitutional dispensation, the cards might, however, be on the table for a change in moral and political outlook of judges who may, in turn, favour the *Creole liberalism* outlook advocated by the post-liberalists, *supra*. Should this happen, some of the arguments and submissions made, *infra*, will not necessarily hold true.

2. ASSERTING THE MEANING AND SCOPE OF INTERNATIONAL LAW ACCORDING TO TERMINOLOGY IN THE FC

2.1 THE ROLE OF THE PREAMBLE OF THE FC

The Preamble of the FC represents, almost *in toto*, a solemn undertaking to demonstrate a certain predilection for the law of the nations (“international law”). The extensiveness of the italicised portions in the following complete quote thereof will make this point.

“ We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
 We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
 May God protect our people.
 Nkosi Sikilel’ iAfrika. Morena boloka setjhaba sa heso.
 God s’een Suid Afrika. God bless South Africa.
 Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.”

The recognition of the injustices from the past and undertaking to heal the divisions of the past, clearly represent the pre-1994 vision of the international community with the sanctions imposed against South Africa to persuade the state to abandon its racial policies and with the outlawing of apartheid as international crime, *supra*. The honour and respect voiced for those who have “suffered for justice and freedom in our land” and “who have worked to build and develop our country” represents a clear recognition of the “armed struggle” and the NLMs (recognised or created by international law, *supra*) and what they meant for the new dispensation. The belief “that South Africa belongs to all who live in it, united in our diversity”, not only reaffirms two of the international law requirements for statehood⁵⁹, but

⁵⁹ “A permanent population” and “a defined territory” Chapter I *supra* at 38.

creates a new dimension of “the right to self-determination”, which is a central theme in modern-day international law⁶⁰ and which can even be regarded as *jus cogens*⁶¹, by stating that people can actually be “united” in their diversity. Therefore, this phrase implies that a community can, despite its diversity with others, develop its “self-ness” to the utmost within the framework of unity.

As indicated in Chapter I, the domestic protection of fundamental human rights has become a primary aim of international law, so much so that IHRL has developed into a separate branch of international law. The indication in the Preamble that the society in the state is based on social justice and fundamental human rights (and the inclusion for a very first time in the history of this country of a Bill of Rights) is a strong indication that the drafters of the FC felt strongly about the influence of international law on South African national law.

The undertakings to “[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law” and to “[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations” speak for themselves. They represent undertakings to have the other two requirements for statehood⁶² recognised by the international community. Moreover, they represent undertakings that the state’s future policies will be acceptable to the community of nations and that the state will not, as in the past, violate acceptable international norms.

Last, but not least, the undertaking to “[i]mprove the quality of life of all citizens and free the potential of each person”, not only recognises the iniquities brought about by apartheid, but is also broadly in line with the protection of third generation rights (such as the right to self determination, *supra*, the right to a satisfactory environment, and the right to development), which feature prominently in the Banjul Charter.⁶³ This again is part of IHRL.⁶⁴

In the light hereof, the Preamble of the FC clearly reflect the spirit of the negotiation process and purpose of constitutional interpretation referred to, *supra*.⁶⁵ The spirit of the Constitution as reflected in the Preamble is therefore closely connected to international law and even leans towards advancing monism. Therefore, whenever a court is faced with the task of interpreting

⁶⁰ Dugard *op cit* (n5) 90-96.

⁶¹ Dugard *op cit* (n5) 40, 90, 116.

⁶² “A government” and “the capacity to enter into relations with other states” – Chapter I *supra* at 38.

⁶³ The African Charter on Human and Peoples Rights.

⁶⁴ Dugard *op cit* (n5) 252.

⁶⁵ See the discussions under 1.2 and 1.3 *supra* and especially the quote from *S v Acheson supra* at 49, and especially the remark made in (n25).

the meaning of international law terminologies and the extent of the envisaged application of international law at national level from one of the sections in the FC, the clear predilection to recognise and invoke international law in the Preamble should be kept in mind. This will also be done in order to formulate most arguments, *infra*.

In fact, as will be pointed out in Chapter IV, *infra*, the courts, but especially the Constitutional Court, have post-1994 recognised this vision of the constitutional drafters in interpreting and developing national law from even before the Preamble of the FC saw the light of day and are likely to continue doing so until the greater envisaged harmonisation has been achieved.

However, as will be indicated in the chapters regarding application of international law, *infra*, not all the provisions of the FC reflect this “dedication” to international law. For example, the FC does not give treaties automatic application at national level as did the IC, and customary international law is still made subject to national legislation.⁶⁶ It will also, in the light hereof, be argued in the next section, *infra*, that, although the term “international law” in Section 39 of the FC⁶⁷ includes non-binding or “soft” law, the same term in Section 233⁶⁸ does not include “soft” law. These represent only some of the strong traces of dualism still to be found in the FC. The advancement of monism (or, at least, greater harmonisation) in the Preamble therefore strikes a discordant note when the application of international law is in issue.

2.2 “INTERNATIONAL LAW” – SECTIONS 35 (3) (l); 39 (1) (b); 198 (c); AND 233

The relevant sections read as follows

“35. (3) Every accused person has a right to a fair trial, which includes the right –
(l) not to be convicted for an act or omission that was not an offence under either national or *international law* at the time it was committed or omitted.”

“39. (1) When interpreting the Bill of Rights, a court, 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.”

“(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

“198. (c) National security must be pursued in compliance with the law, including *international law*.”

“233. 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*.”⁶⁹

⁶⁶ See Chapter III *infra*.

⁶⁷ Interpretation of the Bill of Rights.

⁶⁸ Interpretation of any legislation.

⁶⁹ The relevant terminology in each of the sections italicised.

2.2.1 Which parts (sources and branches) of international law

a.) Sources

Naturally, the term “international law” would normally include international law emanating from all recognised sources. That is the apparent meaning of the terminology used in the sections under discussion. If the drafters of the Constitution wanted to convey a different message, they could have done so in more express terms as they did in other sections.⁷⁰

Nothing in the context of the text in the sections mentioned, or in the context of the specific part of the Constitution in which each of them is used, or in the Constitution as a whole suggests otherwise. Nothing *obvious* in the purpose with which those provisions were adopted justifies a restriction of this part of the meaning of the term. It therefore appears that one may safely assume that when the FC uses the term “international law”, it refers to international law emanating from whatever source, treaty, custom, general principles of law recognised by civilized nations, judicial decisions and the teachings of the most highly qualified publicists.

Law emanating from sources already included in South African national law

The obvious may, however, (put colloquially) be a tricky horse to ride, which is why Kentridge AJ in *S v Zuma*⁷¹ has said that it amounts to a fallacy to suppose that general language must have a single objective meaning.⁷²

For purposes of the argument to follow, one has to distinguish between so-called “application sections” and “interpretation sections.” Sections 35 (3) (l) and 198 (c) of the FC⁷³, in which this term is used, are “application sections” through which it is sought that international law should be applied unaltered at national level. The same can be said of sections 199 (5), 201 (2) (c), 231 and 232 of the FC.⁷⁴ On the other hand, however, Sections 39 and 233 are “interpretation sections.” As will become clearer from the discussion, *infra*, they, so to say, “allow” only international law, which is not yet part of national law, to play a (not necessarily decisive) role in the interpretation and formulation of certain parts of national law. The question that comes to mind is, therefore, whether international law, which already forms part of national law, can have any role to play in interpreting and developing national law in terms of Sections 39 and 233. It is here also that the distinction drawn between treaty law and international custom⁷⁵ is of some importance.

⁷⁰ E.g. as in Sections 231 (treaties) and 232 (customary international law).

⁷¹ *Supra* (n44).

⁷² At par [17].

⁷³ *Supra*. They will be quoted shortly under the sub-heading *Branches infra*.

⁷⁴ Which will all be discussed *infra*.

⁷⁵ See the discussion in Chapter III *infra*.

Before attempting to argue the point under the FC, it is perhaps wise to refer to a commentary on the IC regarding the role of customary IHRL within a bill of rights structure where all basic rights traditionally conferred by international custom have already been entrenched.⁷⁶ Professor Botha has already doubted the value of international custom in such a dispensation.⁷⁷ He states

“For the present purposes it may merely be noted that, to my mind, there is no general international customary human rights law. Since the seminal decision in *Filartiga v Pena Irala*, it is clear that the development of customary international human rights will take place on a right-by-right basis. The usefulness of customary international law within a bill of rights structure is questionable. It would appear that, in the face of an entrenched bill of rights, the role of customary law is secondary.”

However, referring to the following statement by Lillich regarding the Hong Kong Bill of Rights, he acknowledges that international custom might still have a role to play in Bill of Rights interpretation.

“[C]ustomary international human rights law has not been rendered redundant. In the first place, it can be used both to inform and flesh out various provisions in the Bill of Rights. Secondly, it can be invoked as an independent rule of decision in situations where the Bill of Rights offers no or less protection”⁷⁸

It is submitted that Botha’s doubts were not wholly without merit, but for different reasons. Customary international law is, in terms of Section 232, unequivocally declared to be part of national law, subject only to the Constitution and (constitutional) Acts of Parliament. This means that customary international law must be applied directly as national law, except where it is in conflict with the Constitution or an Act of Parliament. If it is to be applied directly, it makes no sense that it should be called upon (or allowed) to play a role in interpreting or formulating national law in terms of sections 39 or 233. It is already law, save in so far as it is inconsistent with the constitution or Acts of Parliament. Customary international law, therefore, is not part of the “international law” that needs to be taken into account in interpreting the Bill of Rights or any other legislation in terms of sections 39 or 233, and has to be applied directly as law.

The same can be said regarding treaties that have already been entered into or ratified, and incorporated into South African law. As will be pointed out, *infra*, treaty law normally⁷⁹ does

⁷⁶ The IC didn’t have a similar provision as Section 233 of the FC, and Section 35 (1) of the IC was therefore the only interpretation provision where international law was included. However, the same arguments advanced regarding Section 39 (1) of the FC apply to Section 233.

⁷⁷ N Botha “International law and the South African interim Constitution” (1994) *SA Public Law* 245 at 252.

⁷⁸ RB Lillich “Sources of human rights law and the Hong Kong Bill of Rights” (1990-91) 10 *Chinese Yearbook of International Law and Affairs* 27 at 48ff.

⁷⁹ That is unless it is created by a self-executing provision of a treaty approved by Parliament.

not form part of national law, unless it is legislatively incorporated through Section 231(4).⁸⁰ It doesn't matter in terms of what constitution a treaty was incorporated into South African law, the incorporated provisions of a treaty have to be applied directly as part of national law, and need not be used in order to interpret or develop the law as such. If it is already part of the law, how can it be used to interpret or develop the law? Incorporated treaties are, therefore, not part of the "international law" mentioned in sections 39 (1) (b) and 233 of the FC. However, as far as could be ascertained, no human rights treaty has already been incorporated into South African law. Therefore, for the current purposes, as will be motivated further, *infra*, it can be accepted that all binding (but unincorporated) human rights treaties (such as the ICCPR and the Banjul Charter), as well as non-binding (but unincorporated) treaties or other international documents (such as the Universal Declaration of Human Rights of 1948), must be used when interpreting the Bill of Rights; and that only binding (but unincorporated) treaties must be used in the interpretation process envisaged in Section 233 of the FC.⁸¹ Incorporated treaties, on the other hand, must be applied directly as law, subject only to the Constitution or (constitutional) Acts of Parliament.

For purposes of sections 39 and 233 of the FC, the term "international law", therefore, means only international law emanating from other sources than customary international law or incorporated treaties which are consistent with the Constitution or (constitutional) Acts of Parliament. In other words, only international law, which is not yet part of national law, can, logically, be used to interpret and develop national law.

For purposes of the application sections 35 (3) (l) and 198 (c), on the other hand, it matters not whether the law has been incorporated into South African national law. This submission is, however, subject to acceptance of the arguments advanced, *infra*, that only binding rules of international law are included in the term "international law" in these sections. In terms of Section 232 binding customary international law has to be applied as law in any event. Non-binding custom cannot be applied in terms of either of these sections or Section 232. However, binding treaties need not be incorporated into South African law for purposes of observance or application in terms of these sections, simply because the terminology used does not make them subject to the incorporation process required by Section 231 (4) which will be discussed in more detail, *infra*.

⁸⁰ However, as will be pointed out in Chapter III *infra*, the situation was different under the IC, where treaties were virtually automatically declared part of South African Law.

⁸¹ See the discussions *infra*.

Jus cogens and obligations erga omnes

Naturally, the same argument as above goes for *jus cogens* or obligations *erga omnes*⁸² emanating from either treaty or customary international law. In as far as they are part of South African national law, such principles should be applied directly as law, and cannot be used to interpret the law.

What has to be kept in mind, however, is the fact that all international law, including *jus cogens* and obligations *erga omnes* is regarded as subject to the Constitution or Acts of Parliament⁸³, which implies that, although rules of *jus cogens* or obligations *erga omnes* are deemed to be universally binding, and that no derogation therefrom is permitted in the international sphere, a situation may be reached where such rules and /or obligations can be in conflict with the Constitution or Acts of Parliament. Against this background it has to be noted the *obiter dictum* of the Cape Provincial Division in *Azanian People's Organization (AZAPO) v Truth and Reconciliation Commission*⁸⁴ (*AZAPO-1*) that it would seem that South Africa's constitutional rules would enable Parliament to pass a law even if such law is contrary to *jus cogens*⁸⁵ is not totally without merit. However, as indicated in Chapter I, *supra*, it is inconceivable that a state committed to compliance with international law, respect for human rights and the rule of law in its new constitutional order (as voiced in the Preamble to the FC) would tolerate the violation of a rule of *jus cogens*.⁸⁶ Even so, it is still technically possible in terms of the language of the Constitution for Parliament to legislate against a rule of *jus cogens* and nothing prevents the current (or a future) Parliament from attempting to do so. However, in the light of the arguments surrounding the undertaking by the drafters of the FC in the Preamble, *supra*, to demonstrate a certain predilection for international law, it is dubious whether the Constitutional Court would uphold such legislation in all cases. (The Constitutional Court's decision in the *AZAPO* matter, *supra*, will be examined against this background in Chapter V, *infra*.)

The "act of state" doctrine

One should also keep in mind that all state actions, including those traditionally known as unjusticiable "acts of state", are under the FC made subject to judicial scrutiny.⁸⁷ Therefore, even if the Executive should attempt to perform an act of state in contravention of international law, it will not necessarily be constitutional by virtue of the Preamble of the FC

⁸² Even though they are not strictly speaking "sources" *eo nomine*.

⁸³ E.g. see the discussion of the status of international law vis-à-vis national law in terms of section 231 and 232 in Chapter III *infra*, where it will be pointed out that dualism is still the basis of the South African (constitutional) perception of international law.

⁸⁴ 1996 (4) SA 562 (C).

⁸⁵ At 574B-C.

⁸⁶ Chapter I *supra* at 37. See also Dugard *op cit* (n5) 42.

⁸⁷ This will be discussed more fully in Chapter III *infra*.

and all sections using the term “international law” or other parts or derivatives thereof. An “act of state” which conflicts with the Constitution will, no doubt be invalidated by the Constitutional Court unless its political loyalties move it to ignore its duty to uphold the Constitution and the Law. Therefore, the “act of state” doctrine cannot be utilised by the post-1994 Executive (without the concurrence of the courts) to delimit the scope of international law within the South African municipal context as was done pre-1994.⁸⁸

b.) Branches

As pointed out in Chapter I⁸⁹, the branches of international law overlap to some extent and are not necessarily closed subjects. Therefore, the exercise to determine what branch of international law is referred to by the term international law as used in the different sections of the Constitution, as in the case of such distinction in national law, intends no more than to facilitate

“... reaching a decision as to what remedy if any is available and the jurisdiction of the courts; and also the critical examination of the state of the law.”

and which

“... should be regarded as no more than convenient compartments for the purposes of exposition.”⁹⁰

One of the biggest problems facing the national lawyers and courts in the new dispensation of South Africa is the fact that most lawyers are not sufficiently trained in international law. This as well as the fact that international law (or at least the law emanating from some of the sources thereof), which now greatly forms part of national law, is virtually inaccessible for the normal lawyer, and out of reach for the resources of most courts, tribunals and forums, means that a knowledge of which branch of law is applicable in a specific situation will be of great help in limiting the areas of research in one’s search for the law that became applicable at national level.

Against this background one may now attempt to determine which branches of international law are included in the wide terminology used by the FC. Read in isolation, it would seem that the term “international law” refers to all branches of international law. However, when read in the context in which it is used in the different sections, a different view may be justified.

⁸⁸ See Chapter I *supra* at 25-27 in this regard.

⁸⁹ *Supra* at 27.

⁹⁰ Hahlo and Kahn *The South African Legal System and its Background* (1973) 115. See Chapter I *supra* at 9 for the distinction drawn at national level.

Section 35 (3) (l) of the FC

The predecessor of this section⁹¹ made no mention of international law. This clearly indicates that the drafters of the FC had something special in mind when the term was included in the provision as it now reads. This inference will be taken to task in Chapter VI, *infra*.

The fact that Section 35 (3) (l) of the FC refers to “an offence under ... international law”, clearly indicates, so it is submitted, that it is the branch of international criminal law (ICL), which is referred to. The international requirements for statehood will, for example, have nothing to do with the international law referred to here if it is accepted as a fact (which it should be in the light of what was said in Chapter I, *supra*) that South Africa is a sovereign independent state. Other international law aspects, such as the principles of jurisdiction (an important aspect of sovereignty), international criminal courts, the principle of *nullum crimen sine lege*⁹² and IHRL (because this section is part of the Bill of Rights) will of course also be relevant research areas to determine the scope of international law crimes and their prosecutability in South African courts under this section, subject of course to the arguments advanced, *infra*, whether the “international law” referred to in this section refers to only binding, or also non-binding law. Other branches such as treaty law will, on the other hand, only need to be examined if it has to be resolved whether a specific crime was created by treaty, whether it is binding upon South Africa and whether it was incorporated into South African law. The purpose with which the provision was enacted, namely the granting of jurisdiction to South African courts to try people for having committed international law crimes and their inclusion into South African law for purposes of circumventing the *nullum crimen sine lege* principle, however, clearly indicates that the main branch of international law that was intended to have an effect on national law under this section is ICL.

Section 39 (1) (b) of the FC

By means of comparison, it should be noted that the predecessor of this section, Section 35 (1) of the IC read

“35. (1) In interpreting the provisions of this Chapter a court of law shall promote 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.”⁹³

Because this provision regulates the interpretation of the Bill of Rights⁹⁴, the obvious branch of international law intended to have an effect on national law and jurisprudence here is

⁹¹ Section 25 (3) (f) of the IC.

⁹² Note that Dugard discusses all of these aspects in a single Chapter – *op cit* (n5) Ch 9. These aspects will also be discussed fully in Chapter V *infra*.

⁹³ Italics added.

⁹⁴ See the discussion in Chapter IV *infra*.

IHRL. The supervisor of this dissertation has pointed out that the international law in this section is not limited to IHRL. With reference to the meaning and scope of the term as used in Section 35 (1) of the IC, professor Botha argues convincingly that the words used in the IC limited the international law, referred to there, to IHRL.⁹⁵ Section 35 (1) of the IC read that in interpreting the Bill of Rights a court of law “shall, where *applicable*, have regard to public international law *applicable* to the protection of the rights entrenched in this Chapter.”⁹⁶ Therefore, according to Botha, the only international law “applicable to the protection of the rights entrenched in this Chapter” can be IHRL. However, all this has now changed with the enactment of Section 39 (1) of the FC from which the word⁹⁷ “applicable” has been omitted. By means of comparison to Botha’s submission regarding Section 35 (1) of the IC, it can then be argued that this proves that the drafters of the FC had more branches of international law in mind than just IHRL when using the term “international law” in this section.

However, the first “applicable” used in Section 35 (1) of the IC, clearly intended to convey that IHRL should only have been had regard to where it was relevant to the points in issue. This “applicable” was therefore clearly added *ex abundanti cautela*, because courts in the South African tradition are well versed in their duty to consider only relevant facts, materials and arguments in deciding an issue. The omission of this “applicable from the text of section 39 (1) of the FC is therefore nothing more than an acceptance that the courts know their duty. It is for this reason submitted that other branches of international law than IHRL will, normally, be irrelevant in determining the content of the specific provision in the Bill of Rights that falls to be interpreted. Therefore, Professor Botha’s argument can only be supported in so far as it conveys that the branch of international law which must be considered under this section must have some link (relevance) to the provision that falls to be interpreted.

The fact that sub-section (3) recognises the existence of any other rights or freedoms that are recognised or conferred by common law, customary international law or legislation, to the extent that they are consistent with the Bill, suggests that a possibility exists, that a specific right might be conferred by international law other than IHRL. On the other hand, however, seeing that the South African Bill of Rights can be described as the most up to date, complete and all-encompassing Bill of Rights in the modern world, it is difficult to see that any other right than that enshrined in the Bill can exist. But, such rights can exist, for example the rights

⁹⁵ N Botha *op cit* (n77) at 246.

⁹⁶ Italics added. Note that the word “applicable” was used twice in the same sentence, whilst Professor Botha’s argument revolves around the second one only.

⁹⁷ In fact both the words.

of combatants in time of war (humanitarian law) and rights conferred by international private law. Furthermore, rights conferred by certain indigenous legal systems such as *lobolo* (or customary unions or marriages under the Nguni peoples), are also recognised in as far as they can be reconciled with the Bill. As the whole of section 39 is still part of the Bill of Rights, the interpretation of rights recognised by Section 39 (3) must logically also be done in terms of section 39 (1), and, therefore, other branches than IHRL might prove to be of paramount importance when Section 39 (3) is applicable. It is submitted that in such cases, one will have to judge according to the action and facts at hand, which parts of international law, other than IHRL, need to be considered.

In *AZAPO v President of the RSA*⁹⁸ (*AZAPO- 2*) the constitutionality of amnesty legislation⁹⁹ was challenged on the basis that it infringed, *inter alia*, Section 22 of the IC, which provided that “[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.” In interpreting this basic right of would-be litigants (in this case represented by the applicant organisation), Mahomed DP (as he then was), writing for the court, *inter alia* had regard to the Four Geneva Conventions and the relevant Protocols, which, according to the applicants, made the prosecution of war criminals part of *jus cogens*. He then found that the international law, which he had regard to, was not “applicable to the protection of the rights entrenched in this Chapter” because the applicability of the Four Geneva Conventions and Protocols were not proven to be applicable to the internal strife that prevailed during apartheid.¹⁰⁰ The same result was achieved in a different application before the Cape Provincial Division.¹⁰¹

The correctness of these decisions is belaboured elsewhere in this dissertation¹⁰² and will not be examined here. What is important here though, is the fact that Blake¹⁰³ advances the view that, had *AZAPO-2* been decided under Section 39 (1) of the FC, from which the words “applicable” were omitted, the decision might well have been different because the court would not have been able to choose which parts of international law it had to consider and, in the process, to hide behind the text providing that it need only consider “applicable” law. Although the decision of the Court was not as clear as one would expect from a forum of that

⁹⁸ *Supra* (n45).

⁹⁹ Section 20 (7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 through which provision is made for amnesty from criminal prosecution and civil action for people guilty of gross human rights violations from the past.

¹⁰⁰ At 689 of the Court’s Judgment.

¹⁰¹ *AZAPO-1 supra* (n84) in which the applicant sought an interdict preventing the Commission from providing amnesty pending the Constitutional Courts decision in *AZAPO-2*.

¹⁰² Chapters IV and especially V *infra*.

¹⁰³ *Op cit* (n46).

calibre, this submission by Blake cannot be supported. Even though the Court (wrongly) hid behind the word “applicable” to motivate its judgment and not to consider more international law available on the point, the actual finding by the Court amounted to a finding that the international law, which it did in fact consider in terms of section 35 (1) of the IC, was not applicable to the situation of internal strife that prevailed under apartheid. (Note that the Court did not find that the international law, which it did in fact consider, was not applicable to the right in issue, but that it was not applicable to the situation that prevailed under apartheid.) In other words, the actual finding by the Court was that the international law that it was called upon to consider, was irrelevant to the facts in issue, namely whether amnesty could be granted for gross human rights violations not covered by the four Geneva Conventions and their subsequent Protocols. For this reason, it is submitted that the decision would not necessarily have been different if it had been given under the FC, just because the word “applicable” had been omitted therefrom.

In conclusion, it can therefore be submitted that the obvious branch of international law that has to be considered in terms of section 39 (1) (b) of the FC is IHRL. If, however, other branches of international law might prove to be relevant in determining the scope of a right recognised and protected in the Bill of Rights, they also need to be researched and considered by the court, tribunal or forum called upon to interpret the right /-s in question.

Section 198 (c) of the FC

The same arguments than those advanced under Sections 35 (3) (1) and 39 (1) (b) apply here. The context in which the term “international law” is used here indicates that the relevant branches of international law which have to be considered must have some link to National Security. Naturally, this provision would refer to both the *jus ad bellum* (i.e. the right of states to go to war) and the *jus in bello* (i.e. “the Law of the Hague”¹⁰⁴ and “the Law of Geneva”¹⁰⁵) as did its predecessor, Section 227 (2) (d) and (e) of the IC.¹⁰⁶ Other branches of international law are not, taken literally, excluded, but would normally not be relevant in the adjudication of actions connected to the maintenance of national security by South Africa in its relations with other subjects of international law.

¹⁰⁴ Dealing with the rights and duties of combatants during military operations, and the military hardware that may be used.

¹⁰⁵ Dealing with the protection of civilians and wounded combatants.

¹⁰⁶ CJ Botha “Leashing the dogs of war: the South African Defence Force under the new constitution” (1993-94) 19 *SAYIL* 137. Combined the *jus ad bellum* and the *jus in bello* can be termed the “law of armed conflict” (LOAC). For a most comprehensive article on the position in terms of Section 227 (2) (d) and (e) of the IC, see DJ Devine “The National Defence Force: international operations, aggression, self defence, use of force and conduct in hostilities under the Interim Constitution” (1995) 20 *SAYIL* 182 at 185.

However, the fact that the Chapter under which Section 198 is enacted¹⁰⁷ deals with “Security Services”, which includes the defence force, police service and intelligence services established in terms of the Constitution¹⁰⁸, suggests that this section doesn’t refer to the security of the Republic vis-à-vis other states only, but also to the maintenance of internal security. Therefore, aspects such as jurisdiction and national and international criminal law (resorting under sovereignty) and some parts of IHRL will equally in given situations be relevant in order to judge whether national security was (or is about to be) “pursued in compliance with the law, including international law.” The provision under discussion is, therefore, wide enough to refer, not only the *ius ad bellum* and *ius in bello* in time of war, but also to those branches of international law, including IHRL, that the agencies of the state should observe in the internal maintenance of national security.

Again, the court called upon to examine the legality of the state’s actions in pursuance of the maintenance of national security will, according to these arguments, have to judge what branch of international law is relevant (“applicable”) to the facts in issue. Once this has been ascertained, the research area is limited to what is necessary only, which will prove to be expedient for the adjudication process as the court will not be sidetracked into extraneous issues.

Section 233 of the FC

Again, whilst this on face value “is an exceptionally wide provision, which would appear to mandate all courts, from the highest to the lowest, to test any legislation coming before them against international law”¹⁰⁹, in the same vein as the arguments advanced above it has to be agreed with Botha that it is unlikely that the courts will take so wide a view, and that “[c]ommon sense dictates that before a court will feel obliged to consider section 233, and apply an interpretation from international law, the legislation will have to evidence some ‘international element’.”¹¹⁰ This beautifully illustrates the South African courts’ practice to take only relevant material into account in the adjudication process.

Therefore, it is submitted that the relevant branch / -es of international law applicable to the legislation that falls to be interpreted will have to be determined from the international element in issue. For example, if the legislation deals with extradition, then all international law in the field of extradition might be relevant in order to interpret the legislation in

¹⁰⁷ Chapter 11 of the FC.

¹⁰⁸ See Section 199 (1) of the FC.

¹⁰⁹ N Botha “Treaties after the 1996 constitution: more questions than answers” (1997) 22 *SAYIL* 95 at 102.

¹¹⁰ *Ibid.*

question; but international environmental law would normally have nothing to do with the legislation in question.

2.2.2 “Public” international law or just “international law”

The IC used the term “**public international law**” whilst the FC uses “**international law.**” This is of some importance in establishing the exact meaning of the term international law in the Constitution, and calls for separate discussion. According to Blake (discussing the Constitutional Court’s use of international law in terms of section 39 (1) (b) of the FC) international law is a broader term than public international law, and that, by not limiting the term in this way, the drafters perhaps opened the way for courts, tribunals and forums to examine and apply “**private international law**, or the activities of individuals, corporations and other private entities when they crossed national borders.”¹¹¹

That the term ‘international law’ should be preferred to the term “public international law” has been discussed, *supra*.¹¹² As argued there, international law does not include the phenomenon of **conflict of laws**, also known as private international law. Moreover, as pointed out there, the term “private international law” can easily be mistaken to mean “**international private law**”, whilst these are two essentially different concepts of law – the former refers to conflict of laws; the latter to **the private law leg of international law** which is currently developing. Conflict of laws refers to the different countries’ own and foreign (but national) law and the interaction between those systems, whilst international private law forms part of international (not national) law, which is of course included in section 39 (1) (b) as one of the branches of international law that might need to be considered in the circumstances of a given case as argued above.

Furthermore, the fact that section 39 specifically addresses the concept of foreign law in a separate sub-section - (1) (c) – quoted above, indicates that conflict of laws was not intended to be part of international law as used in sub-section (1) (b). Blake’s assumption can therefore not be correct, except if he had international private law in mind.

The omission of the word “public” from the terminology used in the FC, therefore, has no vital consequences for the determination of the exact meaning and scope of the term.

¹¹¹ Blake *op cit* (n46) at 670, especially his fn 13 – emphasis added.

¹¹² Chapter I *supra* under 2.1.4 at 9-11.

2.2.3 Binding or non-binding (“soft”) and incorporated or unincorporated international law

Although this is, strictly speaking, a problem of application, which is only addressed in each of the following chapters, the question whether the international law that has to be applied refers to only binding or also non-binding law (and whether it refers to only incorporated or also unincorporated law) in the different sections is also relevant in determining the exact meaning and scope of the terminology. This aspect will, accordingly, be addressed in this Chapter with reference to the terminology used in each of the different sections, and the submissions made here will serve to buttress arguments advanced in the following chapters. For reasons that will become apparent, the discussion will not follow the numerical sequence of the sections as they appear in the FC.

Section 39 (1) (b) of the FC – binding or non-binding law

Responding to a suggestion by Dugard¹¹³, the Constitutional Court in *S v Makwanyane* had the following to say regarding the effect that international law may have in Bill of Rights interpretation

‘in the context of s 35 (1) [of the IC¹¹⁴] public international law would include *non-binding* as well as *binding law*.’¹¹⁵

It must be agreed with Dugard and the Court that the drafters intended that international law (especially in the field of human rights) in its widest possible sense should be considered as a comparative¹¹⁶ source of interpretation of the Bill of Rights. The more ideas that are considered in formulating and defining specific rights that are cast in open ended terms (as are most provisions in the Bill of Rights), the better the result that will be achieved. Experience has shown that there is none better than cumulative knowledge and experience to formulate new law. Remembering that the Bill of Rights is the direct result of the pressure exerted by the international community through international law¹¹⁷, the clear purpose of this provision is that national human rights law and jurisprudence should, where possible, conform to international standards and, therefore, that the Bill should be interpreted in the light of all relevant international law. This is a logical conclusion because, in a forerun to the new dispensation, Keightly observed

“[I]n many respects, international standards have been at the forefront of developments in human rights. It seems obvious, therefore, that if human rights are to be afforded full recognition and protection in a future South Africa it will be crucial for the governing authorities to adopt appropriate existing international instruments, as the international

¹¹³ J Dugard in D van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 193-4.

¹¹⁴ Now section 39 (1) of the FC.

¹¹⁵ *S v Makwanyane supra* (n22) at 413G – italics added.

¹¹⁶ See *comparative interpretation* under 1.3 at 53 *supra*.

¹¹⁷ See 1.2 *supra*.

standards will serve to buttress whatever domestic human rights standards are included in a new constitution.”¹¹⁸

A further aspect that must be considered here is that in terms of Section 39 (1) (b) international law need only be considered¹¹⁹, not followed. The instruction to “have regard” to international law in terms of section 35 (1) of the IC, according to the Court in *S v Makwanyane*, means that the courts “can derive assistance from public international law ... but [they] are in no way bound to follow it.” The instruction to “consider” international law in terms of Section 39 (1) (b) of the FC doesn’t differ materially from the instruction the Constitutional Court had to grapple with, and the same argument will therefore prevail. This is all the more reason why, not only binding international law, but also non-binding international law can (the FC uses the word “must”) be considered in interpreting and formulating national human rights law and jurisprudence.

As indicated in Chapter I¹²⁰, “soft” law is also considered one of the sources of IHRL¹²¹, whilst it is not necessarily considered a source of other branches of international law.¹²² Obviously then, for purposes of considering IHRL in terms of section 39 (1) (b), “soft” law is also included.

Section 39 (1) (b) of the FC – incorporated or unincorporated law

As non-binding law, too, has to be considered in terms of Section 39 (1) (b), then obviously the international law referred to here does not refer to only incorporated law. Non-binding law is not usually incorporated into national law. As will be pointed out, *infra*, non-binding customary international law is not declared part of national law in terms of Section 232 of the FC. It is also quite unusual for non-binding treaties to be incorporated into national law, although non-binding UN Resolutions may have been incorporated in this way (no example is, however, available). Although non-binding law is not directly applicable at national level without it first being incorporated, it must, however, in terms of the *Makwanyane* decision, *supra*, be taken into account when interpreting the Bill of Rights. It follows, therefore, that the international law, which must be considered in terms of this provision, need not be incorporated into national law.

¹¹⁸ R Keightley “International human rights norms in a new South Africa” (1992) 8 *SAJHR* 171.

¹¹⁹ In terms of Section 35 (1) of the IC it need only be had regard to.

¹²⁰ *Supra* under 2.3 at 29.

¹²¹ Botha *op cit* (n77) at 249.

¹²² See Chapter I *supra* under 2.2.8 at 24.

Section 233 of the FC – binding or non-binding law

The same cannot be said of the term “international law” as used in Section 233 of the FC. The difference between Sections 39 (1) (b) and 233 is the following: In the case of **Section 39**, international law need only be **considered**, but not necessarily followed or applied; whilst in the case of **Section 233**, international law must be **followed** or **applied**. It was pointed out that the Constitutional Court in *Makwanyane, supra*, ruled that for purposes of Section 35 (1) of the IC (39 (1) (b) of the FC) courts “can derive assistance from public international law ... but [that they] are in no way bound to follow it.” The situation is different under Section 233 of the FC, which, incidentally, had no predecessor in the IC. Under the latter, international law must be followed or applied in that an interpretation of a statute, which is consistent with international law must be preferred above an interpretation which is inconsistent therewith. The directive in Section 233 is therefore much stronger than the one contained in Section 39, because it allows international law to, in certain circumstances as will be indicated in Chapter IV, *infra*, transform national law to conform to international law.

As indicated in Chapter I¹²³, a concept that non-binding rules can actually be called “law” is unheard of in national as opposed to international jurisprudence. The principle of fair warning, especially as applied in criminal law (the *nullum crimen sine lege* principle), always applies at national level. How would one know to regulate his / her actions according to the law if it is not prescribed by the law how he / she should act or refrain from acting? Moreover, how can one be called to book for one’s actions according to either civil or criminal law if the law is not binding? National law, therefore, recognises only binding law as “law”. Furthermore, how can a subject of national law (individual) be bound by international law that doesn’t bind the state in the international sphere? It would therefore be absurd to suggest that national law must be transformed through an interpretation process in terms of section 233 to conform with non-binding international law.

One should remember that the Constitution itself is a piece of national legislation and, therefore, also falls to be interpreted in terms of section 233 whenever the need arises.¹²⁴ It would therefore seem that international law should be treated in preference to the Constitution. Section 2 of the FC, however, declares the FC to be the supreme law of the Republic and that any law (including international law) inconsistent with it is invalid. Almost everywhere in the FC international law is made subject to the Constitution and Acts of

¹²³ *Supra* under 2.1.5 at 11-13.

¹²⁴ This aspect will be canvassed fully in Chapter IV *infra*.

Parliament.¹²⁵ Therefore, South African constitutional law still approaches the relationship question from a dualist perspective. This proves that any suggestion that all legislation (including the Constitution) “must” be interpreted so as to conform to “soft” international law cannot be correct. The *Makwanyane dictum* is, therefore, not applicable to the term international law in this provision.

It is submitted, therefore, that the term “international law”, in the context of Section 233 (just as customary international law in the context of Section 232, *infra*), refers only to binding international law. Another contention will violate the declared supreme status of the Constitution and Acts of Parliament.

Section 233 of the FC – incorporated or unincorporated law

All binding customary international law is automatically declared part of South African law in terms of Section 232 of the FC, and the question doesn’t arise in as far as custom is concerned. However, in the case of treaty law, it is submitted that binding treaties need not be incorporated under Section 231 (4) of the FC before they are available for purposes of interpretation under this section. Neither the language nor the purpose of this provision restricts the meaning of international law to include only incorporated treaties. Therefore, if a binding treaty gave rise to national legislation, but the treaty itself has not been incorporated into national law, the piece of legislation will still have to be interpreted in terms of the treaty that gave rise thereto.

Section 35 (3) (1) of the FC – binding or non-binding law

An argument along the same lines as under Section 233 can now be advanced with reference to the meaning and scope of the term as used in Section 35 (3) (1). A citizen of South Africa can only be charged with a criminal offence (under national law) if the offence has been proscribed by binding criminal law. If that was not required, he / she would not legitimately be liable for punishment. How then can he / she be prosecuted and convicted for an international crime, if the law proscribing such action is not binding on the state of which he / she is a citizen? As will be pointed out in Chapter V, *infra*, international law also recognises the principle of legality (*nullum crimen sine lege*). International law in the context of Section 35 (3) (1) can therefore not be interpreted to include international crimes created through “soft” law, even though IHRL (including “soft” law) must be considered in interpreting the content of the right contained in this provision as pointed out above.

¹²⁵ E.g. Section 231 (4) requiring legislative incorporation and Section 232 declaring customary international law to be excluded from national law if it is inconsistent with the Constitution or an Act of Parliament.

In other words, Section 35 (3) (l) does not authorise criminal prosecution and conviction for international crimes under ICL, which is not binding on South Africa and its citizens, even though IHRL (including “soft” law) must be considered in order to interpret the content of the provision itself. This submission can be explained best with reference to two decisions by the European Court of Human Rights, which are discussed in more detail in Chapter V, *infra*. In *CR v United Kingdom* and *SW v United Kingdom*¹²⁶, the retrospectivity of judicial decisions creating an extension to the crime of rape to include **marital rape**, was challenged in separate applications to the European Court of Human Rights. The Court dismissed these applications in terms of the Court’s interpretation of the *nullum crimen sine lege* principle in international law as contained in Article 7 (1) of the ECHR.

Although there exists no rule of *stare decisis* in international law, and, accordingly those decisions are not binding on South African Courts applying international law¹²⁷, a court, tribunal or forum, which has to interpret Section 35 (3) (l) of the FC in order to decide whether its proposed retrospective effect contravenes international law, will have to consider the *rationes dicendendi* in these decisions in terms of Section 39 (1) (b) as part of the body of non-binding international law on the subject.

However, presuming marital rape has been outlawed in terms of ICL through these decisions (which it didn’t as they merely confirm national court decisions), Section 35 (3) (l) of the FC would not have authorised criminal prosecution and conviction for marital rape in South Africa, had it not been for **Section 5 of the Prevention of Family Violence Act**¹²⁸, which proscribed marital rape in South African law during 1993¹²⁹, simply because it would not have constituted binding international law on the subject. Although this is a bad example because South African law had already proscribed marital rape before Section 35 (3) (l) of the FC was enacted and marital rape is not necessarily an international crime, the principle as explained serves as an example to buttress the submission made, and it is used merely for want of another example at this stage of development in South African law.

¹²⁶ Both being judgments by the European Court of Human Rights delivered on 22 November 1995 – the reference and contents of the judgments obtained from L Johannessen “Foreign Cases: Prohibition of retrospectivity / marital rape: Article 7 (1) of the ECHR” (1996) 12 *SAJHR* at 340-343 because the reports on the matters could not be accessed.

¹²⁷ Even though Decisions of International Courts and Tribunals are regarded as sources of international law in terms of Article 38 of the Statute of the ICJ, they do not necessarily create binding international law which is binding on all states.

¹²⁸ Act no 133 of 1993 as amended.

¹²⁹ It reads “**5. Rape of wife by her husband.** – Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.”

It will, however, be pointed out in Chapter V, *infra*, this submission will not necessarily be a bar to criminal prosecutions and convictions of individuals for the commission of the **international crime of apartheid** committed before 1997 (when the FC came into effect), because that crime is viewed by some as a *jus cogens* emanating from customary international law, which is universally binding on all states, including South Africa, and which can, therefore, not be viewed as non-binding due to a state's persistent objection thereto. In the light of the current political climate, it is in any case dubious whether a court will uphold an argument that the prohibition of apartheid and declaration that it is an international crime was not, pre-1994, internationally binding on South Africa due to its persistent objection under the apartheid regime.

Section 35 (3) (l) of the FC – incorporated or unincorporated law

As in the case of Section 233, nothing in the language or purpose of the provision limits the international law referred to here to international law which has been made part of national law. On the contrary, national law is juxtaposed to international law in this section with the word “or”, suggesting that unincorporated international law may also be applicable. International law is not described as included in national law for purposes of this section. Although it has been submitted that international law in this provision refers to binding law only, it does not mean that the binding law has to be incorporated before it may (or rather should) be applicable. Therefore, so it is submitted, binding but unincorporated treaties creating crimes under ICL will be applicable through this section.

On the other hand, a provision of a non-binding (and unincorporated) treaty, which cannot be viewed as binding customary international law, *jus cogens* or an obligation *erga omnes*, and which declares a contravention of one of the terms thereof an international crime, cannot constitute an offence in terms of Section 35 (3) (l) of the FC, even though the provisions of Section 35 (3) (l) may, in the light of “soft” law considered in terms of Section 39 (1) (b), be found to operate retrospectively.

Section 198 (c) of the FC – binding or non-binding law

For the same reasons as those advanced under Sections 233 and 35 (3) (l), *supra*, it is submitted that international law in the context of Section 198 (c) means binding international law only. It would be absurd to suggest that national security should be pursued in terms of “soft” law if another state attacks the Republic or in deciding whether to forcibly invade another state. Such actions may authorise the invaded state (or to be invaded state) to seek international remedy with the UN's General Assembly, Security Council or the ICJ; or to take legal forceful action in self-defence, with or without allies. Obviously, only binding international law will apply in such a situation. The *Makwanyane dictum* is simply not

applicable because, in this case one deals with the direct application of international law at national level, and not with the interpretation of national law and the creation of a new jurisprudence through Section 39.

Gernandt is of the opinion that international law in terms of this section also refers to non-binding or “soft” law.¹³⁰ He bases his argument exclusively on the *Makwanyane* decision, and doesn’t look into the consequences should “soft” law be made applicable through this section. How can government be obliged to pursue national security in compliance with non-binding international law? How would those in charge know to adapt their actions according to non-binding law, especially when the “soft” law was only intended to be of application at regional level outside of the region in which South Africa falls or where the “soft” law is inaccessible? Moreover, as will be pointed out in the next subsection about whether this section refers to only incorporated or also unincorporated law, “international law” is qualified here as included in national law. That suggests that only binding law is applicable through this section.

Even when exercising jurisdiction through its courts, a state is only obliged to act within binding norms of international law in the maintenance of national security. As will be pointed out in Chapter V, *infra*, the current call for states to exercise **universal jurisdiction** where other states in which international crimes were committed are loathe to prosecute, is not yet considered as binding international law according to which a state can be compelled to exercise such jurisdiction.

Section 198 (c) – incorporated or unincorporated law

It is also important to note that the “international law” referred to in this section is framed as a species of “the law” preceding it in the same section. This implies that only those provisions of international law, which are already part of South African law (in other words customary international law – Section 232 – and incorporated treaties – Section 231 (4)), need to be observed for purposes of this section. Binding but unincorporated treaties are not included in the language used and, to find that unincorporated treaties do apply for purposes of this section, purposeful intra-textual contextualisation will be necessary. Such an interpretation will be advanced under 2.4, *infra*, when Section 199 (5) is compared to Section 198 (c).

2.3 “INTERNATIONAL AGREEMENTS” – SECTIONS 199 (5); AND 231

These sections read as follows

“199. (5) The security services must act, and must require their members to act, in accordance

¹³⁰ L Gernandt *The Protection of Water during Armed Conflict* LLM (Curriculum B) Dissertation Unisa (November 2000) 40-42.

with the Constitution and the law, including customary international law and *international agreements* binding on the Republic.”

- “231. (1) The negotiating and signing of all *international agreements* is the responsibility of the national executive.
- (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 (3).
- (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 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.
- (5) The Republic is bound by *international agreements* which were binding on the Republic when this Constitution took effect.”¹³¹

2.3.1 The loom of language

a.) “International agreement” or “treaty” and Section 231

The looming trap of language, namely to be forced to choose between an obvious interpretation of a term and a value orientated one that presents itself in the open ended provisions of both the IC and the FC¹³² was bound to give rise to controversy, especially in the interpretation of the international law-friendly sections. The drafters of both the IC and the FC, for instance, preferred the inexact terminology “international agreement” as opposed to a more exact term such as “treaty.” None of the post-1994 constitutions provide any definition of what is to be understood under the term “international agreement.”

The importance of this oversight

A treaty is defined by article 2 of the Vienna Convention on the Law of Treaties of 1969 as

“ ... an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

It was pointed out in Chapter I¹³³ that oral agreements between states do not count as treaties in terms of the Vienna Convention because they are not in written form. It has also been said there (at least on a preliminary basis) that “informal international agreements” (or non-binding, or “soft” law international agreements) between states do not count as treaties in terms of the Vienna Convention, because they are not “governed by international law.” This begs the question whether non-binding international agreements have a place in international

¹³¹ The relevant terminology italicised.

¹³² E.g. compare the following words of Kentridge AJ in *S v Zuma and Others supra* (n44) par [17] (*loc cit* (n72)): “I am well aware of the fallacy of supposing that general language must have a single ‘objective’ meaning. Nor is it easy to avoid the influence of one’s personal and moral conceptions.”

¹³³ *Supra* under 2.2.1 at 14.

relations between the states that came to that agreement, what the international consequences thereof are, and whether such agreements are included in the terminology of Section 231 of the FC.

This concerns the modern-day debate whether the term “international agreement” is a wider term than treaty and whether something like an informal (non-binding) agreement can in fact exist in international law.¹³⁴ Schneeberger convincingly argues that in international law, the term international agreement is indeed a wider term than treaty; that a need for the existence of non-binding (informal) agreements exists in modern-day international law; and that such agreements might exist even though they cannot be enforced in terms of the traditional international law remedies.¹³⁵ Schneeberger, discusses the different theories in this regard in detail¹³⁶ and points out that the one school argues that informal international agreements do indeed exist in terms of a need created by modern-day diplomatic relations between states¹³⁷, whilst the other school argues that there can be no such thing as an informal international agreement.¹³⁸

The fact that the Vienna Convention limit treaties to international agreements which are in writing and governed by international law, so it is submitted, clearly indicates that there exists a wider category of international agreements, for example oral agreements and agreements that are not considered as binding in terms of conventional international law. It is therefore agreed with Schneeberger *et alii, supra*, that a need for informal (in the sense of non-binding) international agreements exists in international law and that they in fact do exist in practice.

Dugard’s opinion with reference to Olivier¹³⁹ that “[t]he suggestion that the term ‘international agreement’ is wider than the word ‘treaty’ is neither helpful nor correct”¹⁴⁰

¹³⁴ Although different terminologies exist to describe non-binding agreements between states, the term “informal international agreement” is the one most used and will, for want of an universally accepted term at this stage, be used in this dissertation to describe such agreements.

¹³⁵ J Schneeberger *A LABYRINTH OF TAUTOLOGY The meaning of the term ‘international agreement’ and its significance for South African law and treaty making practice* LLM (Curriculum B) Dissertation UP (April 2001).

¹³⁶ Something that cannot be done within the confines of this dissertation because the topic under discussion here is so much wider.

¹³⁷ Represented by J Fawcett “The Legal Character of International Agreements” (1953) 30 *BYIL* 381; O Schachter “The twilight existence of nonbinding international agreements” (1977) 71 *AJIL* 296; RR Baxter “International law in her infinite variety” (1980) 29 *ICLQ* 550; A Aust “The theory and practice of informal international instruments” (1986) 35 *ICLQ* 787; and M Olivier “Informal agreements under the 1996 constitution” (1997) 22 *SAYIL* 63. Schneeberger *op cit* (n135) 10-14, however, points out that these commentators are not totally in agreement with each other in all respects – e.g. they differ in view as to the nature and content of such agreements, and what their international consequences are.

¹³⁸ Of which the leading exponent is J Klabbbers *The Concept of Treaty in International Law* (Kluwer Law International, The Hague, 1996).

¹³⁹ *Loc cit* (n137).

limits the debate to the South African constitutional context and does not expand on the international debate in this regard. Neither does he supply any cogent reasons for his opinion, which could be applicable, not only in the South African context, but also internationally. His opinion can, therefore, be classified as an oversimplification. However, Dugard's opinion that "[t]he term 'international agreement' in [the context of] section 231 of the Constitution is therefore synonymous with 'treaty'"¹⁴¹ is obviously correct, but not for the reasons advanced by him, namely that the Vienna Convention defines an international agreement as treaty¹⁴², and that the intention of the parties, rather than terminology, is the determining factor.¹⁴³ Interestingly enough, both Olivier¹⁴⁴ (criticised by Dugard) and Schneeberger¹⁴⁵ come to the conclusion that, in the context of Section 231 of the FC, the term "international agreement" is synonymous with "treaty" as defined by the Vienna Convention, and that informal international agreements need not be subjected to the processes of ratification or notification required by sub-sections 231 (2) and (3) of the FC, which will be discussed shortly. Their commentaries involve the international (as opposed to national) repercussions of such agreements and point out that doubt could exist at national level due to the wide terminology employed by the constitutional drafters, but they come to the same conclusion as Dugard regarding the meaning of the term "international law" in the context of Section 231. They, however, supply better reasons than he does. This begs the question whether Dugard's criticism was at all called for, even from a South African perspective. (This does not imply, however, that this dissertation agrees with those commentaries in all respects. As will be pointed out, *infra*, serious doubts are entertained whether "agreement" is the most appropriate terminology to indicate an arrangement of a non-binding nature between states.)

The courts' view –the Harksen saga

The matter has, at least from a South African perspective, been clarified to a certain extent in two judgments in the ongoing *Harksen* saga.¹⁴⁶ The facts governing this saga of court applications can be summarised as follows. Harksen is wanted in the Federal Republic of

¹⁴⁰ *Op cit* (n5) 59.

¹⁴¹ *Ibid.*

¹⁴² As pointed out it is actually the other way round, the Vienna Convention defines "treaty" as a specific kind of "international agreement."

¹⁴³ This is also what most of the exponents of the school that supports the theory that informal international agreements do exist use in argument to support their contentions that such agreements exist – Schneeberger *op cit* (n135) 9-14. Having said this, Dugard admits that the intention of the parties may be that an agreement between them should not be governed by the law of treaties.

¹⁴⁴ *Op cit* (n137).

¹⁴⁵ *Op cit* (n135).

¹⁴⁶ N Botha "Lessons from Harksen: Constitutionality of Extradition" (2000) 33 *CILSA* 274. Schneeberger *op cit* (n135) 27 points out that Botha's article traces the history of the Harksen proceedings since 1994. The two decisions that are relevant for this discussion are *Harksen v President of the RSA and Others* Case A 394/99 (CPD) of 29 September 1999 – unreported at the time of these commentaries - later reported as 2000 (1) SA 1185 (C) [*Harksen II*]; and *Harksen v President of the RSA and Others* 2000 (1) SACR 300 (CC) [*Harksen III*].

Germany on allegations of serious fraud, and Germany had sought his extradition in 1994. Both the governments of Germany and South Africa had consistently maintained that there existed no valid extradition treaty between them, which contention had been fully investigated into (in disregard of an Executive Certificate certifying it as a fact) and upheld by the Cape Provincial Division of the High Court in an earlier decision in this series of applications and appeals.¹⁴⁷ The extradition proceedings of Harksen had been pursued based on Section 3 (2) of the Extradition Act¹⁴⁸ which provides for extradition on an *ad hoc* basis in the absence of a treaty which governs extradition between South Africa and the requesting state.

Section 3 (2) of the Extradition Act reads

“Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign state which is not 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 so being surrendered.”

In the course of 1994 a series of diplomatic notes were exchanged between Germany and South Africa regarding the extradition request for Harksen. In the first diplomatic note Germany merely informed the South African government that it was seeking the extradition of Harksen. The second diplomatic note was a formal extradition request, which indicated the specifics of the alleged offences for which his extradition was sought. It also included certain undertakings regarding the extradition and subsequent trial should extradition be granted. The response of South Africa to both these notes was nothing more than to acknowledge receipt and to inform Germany that the request had been forwarded to the relevant authorities. Pursuant to this exchange of notes, the President, in terms of section 3 (2) of the Extradition Act, consented to the surrender of Harksen for trial in Germany.

This inspired Harksen to challenge the validity of the extradition proceedings instituted against him. In the first application it was alleged that a valid extradition treaty, in terms of which the extradition proceedings should have been brought, existed between Germany and South Africa, and that the proceedings in terms of Section 3 (2) of the Extradition Act was therefore invalid. This application was turned down by the Cape Provincial Division.¹⁴⁹ This aspect is, however, not important for the present discussion.¹⁵⁰ In the second set of application

¹⁴⁷ *Harksen v President of the RSA* 1998 (2) SA 1011 (CPD) [*Harksen I*] which will be discussed more fully in Chapter III *infra* in answering the question whether the “act of state” doctrine survived the new dispensation.

¹⁴⁸ Act no 67 of 1962.

¹⁴⁹ *Loc cit* (n147).

¹⁵⁰ As it will be discussed fully under the heading “Have the ‘act of state’ and ‘executive certificate’ exceptions survived?” in Chapter III *infra*.

proceedings under discussion here, both *a quo* in the CPD and on appeal to the Constitutional Court, Harksen argued

- That the exchange of notes between South Africa and Germany amounted (or gave rise) to a bilateral international agreement, which agreement has been concluded in conflict with the provisions of Section 231 of both the post-1994 Constitutions regarding the required ratification procedures¹⁵¹ and, therefore, invalid (or non-binding) in the international realm and unconstitutional in the South African context.
- In the alternative, it was argued that the agreement to surrender Harksen was therefore not incorporated into South African law as required by Section 231 of the IC. Neither was it formally incorporated in terms of Section 231 (4) of the FC.¹⁵² For this reason, it was argued that the proceedings themselves were invalid according to national law.
- On appeal, a third argument was added during the oral submission in the Constitutional Court based on the doctrine of estoppel. In this argument it was averred that the President had circumvented section 231 of the constitution by (falsely or erroneously) representing to Germany that South Africa was entering into a valid agreement to extradite Harksen. As Article 46 (1) of the Vienna Convention prohibits a state to rely on the fact that the conclusion of a treaty was in violation of its domestic law to invalidate a treaty at international level, unless the violation was manifest and concerned a rule of fundamental importance, the South African government was, in terms of the argument, estopped from denying the existence of such agreement.

The Respondents based their arguments on the following grounds

- Extradition in the context of Section 3 (2) of the Extradition Act is not based on an obligation to extradite arising from treaty (or international agreement), but on a voluntary "act of state" based on comity or reciprocity. Therefore the Presidential consent to surrender Harksen did not amount to the conclusion of an international agreement, but to a one sided domestic "act of state" for which South Africa could not incur international liability in case of either refusal of consent to surrender or non-compliance with its own order once it so consented.
- In the alternative, the Respondents argued (with reliance on Olivier's submission¹⁵³) that the term "international agreement" as it appears in Section 231 of the Constitution is used in the narrow sense of the word to refer only to legally binding treaties. As there was clearly no intention on the side of either party to create an international agreement with enforceable rights and duties as in the case with a treaty, neither the exchange of notes nor the Presidential consent could be classified as an international agreement for the purposes of Section 231.

The Harksen II decision

Van Zyl J, writing for the Court, in the CPD of the High Court dismissed Harksen's main argument that the exchange of notes and Presidential consent amounted to an international agreement. In the first place, the Judge argued, as Section 3 (1) of the Extradition Act explicitly provides for extradition on the basis of a binding extradition agreement in terms of Section 2 (1) - based on *reciprocity* and *specification of offences* as required by a formal extradition treaty¹⁵⁴, Section 3 (2) must by necessary implication provide for extradition in situations where there is no binding extradition agreement in force.¹⁵⁵ The Court stated

¹⁵¹ See the discussion in the next section *infra*

¹⁵² See the discussion of this requirement in Chapter III *infra*.

¹⁵³ *Loc cit* (n137).

¹⁵⁴ See N Botha "The Commonwealth Extradition Scheme and Law Commission Working Paper 56" (1995) 20 *SAYIL* 41 for an opinion that this is actually what is conveyed by Section 2 (1) (b) of the

“The necessary inference to be drawn from this wording is that the Legislature deliberately provided for the case where there would be a request for extradition without the benefit of an extradition agreement. Quite clearly it was not envisaged that such deliberate provision, namely the consent of the President, could nevertheless be regarded as constituting an agreement, albeit of an informal or *ad hoc* nature.”¹⁵⁶

In so doing, the Court used a known canon of statutory interpretation in South Africa, namely that both language and context must be considered in an endeavour to assert the intention of the Legislature.¹⁵⁷

Secondly, the Court found that Section 3 (2) is no more than an enabling provision, which opens extradition in terms of the Extradition Act to requesting states that have no extradition agreements with South Africa. The Presidential consent in terms of Section 3 (2) merely sets the extradition proceedings in terms of the Extradition Act in motion and, at most, creates the potential for an actual extradition. Therefore, the President does not “grant” extradition in terms of Section 3 (2), he / she merely consents that a formal extradition enquiry in terms of the Act may be held in an appropriate court and that, if authorised by that court, the Minister of Justice may take the decision whether to surrender the person (the actual extradition act) in terms of Section 11.

The Court’s acceptance that an informal or *ad hoc* consent by the President in terms of Section 3 (2) does not constitute an extradition treaty with reciprocal rights and duties as in Section 2, however, clearly influenced its decision to find (also by implication) that “international agreement” in Section 231 of the FC equals “treaty”, even though the Court, as will be pointed out, *infra*, accepted that informal agreements might exist alongside and independent of treaties in the international realm.

Although the Court cited the Respondent’s submission with reference to Olivier on what would constitute an international agreement for purposes of section 231¹⁵⁸, it didn’t make any real finding in this regard. Without supplying any reasons, the Court proceeded on the basis that it is **obvious** that for an agreement to constitute the type of agreement intended in Section 231, the documentation must indicate that the parties intended to conclude an internationally

Extradition Act even though reciprocity and the specification of offences are not specifically mentioned in Section 3 (1).

¹⁵⁵ The Court here applied the intra-textual contextualisation method *supra* for interpreting a statute, which has always been recognised even in ordinary statutory interpretation as opposed to constitutional interpretation.

¹⁵⁶ *Harksen II supra* (n146) at par [45].

¹⁵⁷ See *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A); *Protective Mining and Industrial Equipment Systems (Pty) Ltd v Audiolens (Cape) (Pty) Ltd* 1987 (2) SA 961 (A).

¹⁵⁸ At par [42] of the judgment.

binding agreement with reciprocal rights and duties.¹⁵⁹ The Court then goes into an investigation whether a treaty must necessarily be binding to be a treaty within the meaning ascribed to it by the Vienna Convention. Although the intention to be bound is, according to the Court (and Olivier¹⁶⁰), not reflected in the definition of treaty in the Vienna Convention¹⁶¹, it is an indispensable element of a treaty as implied by the definitions of the terms “Contracting State” and “Party”, and by Article 13 which provides that an exchange of instruments can constitute a treaty if that is what the parties intended. The Court then finds that it is this very intention of the parties (contractual consent) to be bound internationally that distinguishes treaties from informal or *ad hoc* agreements. The Court even cites Baxter, Aust and Olivier¹⁶² as authority for the existence in the international sphere of informal (non-binding) international agreements and their nature, as opposed to formal legally binding agreements.¹⁶³

But, because the Court found that a Presidential consent in terms of the Extradition Act does not equal the conclusion of an extradition treaty in terms of the Act, the Court continued to find that, by consenting to surrender Harksen, the President

“was simply giving his country’s co-operation in what may be called an **informal arrangement**. It may indeed in **loose terminology**, also be termed an **informal agreement**, subject thereto, however that it was not internationally enforceable and did not create reciprocal rights and duties. If that had been the intention the parties would have expressed it clearly. No such intention can be derived from any of the relevant documentation.”¹⁶⁴

An interesting spin-off of this part of the *dictum* is that the Court points out (perhaps unwittingly) that “informal agreement” is a misnomer (or, as the court terms it, “loose terminology”) for the specific “act of state” catered for by Section 3 (2), and that “informal arrangement” might be more appropriate terminology. Such a contention is supportable, because in terms of the law of obligations¹⁶⁵, “agreement” implies a relationship of binding nature. It, however, also supports Klabbers’s argument that no such thing as a non-binding international agreement can exist in international law, simply because an understanding between parties that a specific arrangement between them does not give rise to legally enforceable and reciprocal rights and duties cannot, in law, be regarded as an “agreement.”

¹⁵⁹ At par [49] of the judgment. This is an extremely literalist view of the word “agreement”, namely that an agreement can only imply an understanding that the parties intend being bound. The Court did not consider other interpretation methods such as intra- and extra-textual contextualisation.

¹⁶⁰ *Op cit* (n137) at 74-75.

¹⁶¹ In this regard the opinion of Olivier and the Court cannot be supported unconditionally. The requirement that an agreement between states should be “*governed* by international law” in Article 2 of the Vienna Convention - italics added - clearly conveys that “soft” law agreements are not included as a source of international law. Non-binding agreements are not “governed” by international law.

¹⁶² *Op cit* (n137).

¹⁶³ At par [52] of the judgment.

¹⁶⁴ At par [59] of the judgment – emphasis added.

¹⁶⁵ At national or international level.

Perhaps the leading exponents of the school supporting the idea of non-binding international agreements existing next to more formal treaties should, in the light hereof, reconsider and rephrase their terminology along the lines that such “gentleman’s (for want of a better word) agreements” are rather informal “arrangements” or “instruments” as opposed to “agreements.” In this way, so it is submitted, much of the controversy or lack of clarity will be eliminated. Furthermore, the use of terminology such as “informal agreements” in comparison with treaties obscures rather than clarifies the issue, namely whether an agreement or understanding is legally binding. It has also been pointed out in Chapter I¹⁶⁶, that a distinction between “formal” and “informal” treaties is more appropriate when distinguishing between treaties that require ratification and those that do not. This is also the distinction that one of the leading exponents of international law from a South African perspective, Professor Dugard, uses.¹⁶⁷

The Court impliedly, through its judgment, accepted that binding international agreements can be, and frequently are, concluded through an exchange of diplomatic notes, but that, according to the Department of Foreign Affairs’ affidavit to the court, this will usually be stated explicitly in the notes. As pointed out by Olivier

“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. The use or non-use of treaty language is often adapted to accord with the nature of the instrument after a finding on the considerations listed above has been made.”¹⁶⁸

It has to be agreed with Schneeberger that the Court’s decision in this regard is to be welcomed, because “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 basis as the standard method of diplomatic communication”¹⁶⁹, and most of these exchanges of notes do not result in formally binding treaties being concluded. Therefore, had the Court decided against the respondents that the diplomatic notes *in casu* amounted to the conclusion of an international agreement, all diplomatic notes of the kind would have had to go through the slow process of ratification in terms of the Constitution; which might mean that the process of diplomatic communication along these lines will

¹⁶⁶ *Supra* under 2.2.1 at 16 (n86).

¹⁶⁷ Dugard *op cit* (n5) 329-31.

¹⁶⁸ *Op cit* (n137) at 75.

¹⁶⁹ *Op cit* (n135) 33.

virtually come to a standstill as the requisite series of parliamentary approval must first be obtained for each diplomatic note exchanged by the government.¹⁷⁰

With reference to Harksen's alternative submission, that the Presidential consent was invalid for want of compliance with the provisions of Section 231 of the FC, the Court dismissed it as being no real alternative. As it was not proven that the Presidential consent amounted to an international agreement as mentioned in Section 231, Section 231 need not have been complied with.

However, although the CPD found against Harksen on the international law related issues, the second part of the judgment deals with a technical domestic issue. It was alleged that the interpreter was not correctly sworn in and that the magistrate was biased. On this technical issue, the Court found in favour of Harksen. The proceedings in the magistrate's court were set aside and remitted to the Cape Town magistrate's court for a new extradition enquiry before a different magistrate.

Criticism of Harksen II

The significance of the CPD's decision for purposes of this part of the discussion can be summarised in one sentence: For the first time, a court has provided judicial support for the proposition that the term "international agreement", at least in the context of Section 231 of the FC, is synonymous with the traditional term "treaty." However, the Court never said this unequivocally, it is merely a conclusion drawn by inference from a reading of the judgment. It is, in a sense, disappointing that the Court didn't find it necessary to consider in detail why the drafters of the FC decided to use the term "international agreement" if they actually intended it to refer to treaties only; why the constitutional drafters chose to make a distinction between sub-sections 231 (2) and (3) treaties and their significance for determining whether a technical, administrative or executive treaty can be described as an informal treaty or agreement; and whether another terminology than "informal agreement" will be more suitable to describe non-binding arrangements at international law. The Court's treatment of the terminology used in Section 231 is, therefore, very dismissive.

This decision also doesn't settle the international debate whether something like a non-binding agreement can exist in international law decisively, because the Court didn't refer to the Klabbers school of thought. It also didn't consider whether the sanctions for non-compliance with an informal agreement ("arrangement") do not in fact amount to the agreements being considered as, in a sense, binding and enforceable. The Court merely

¹⁷⁰ *Ibid.* The slow nature of the process of ratification will be discussed under the next section *infra*.

accepted, on the basis of the citations from Baxter, Aust and Olivier, and without supplying reasons, that informal (in the sense of non-binding) agreements can and do exist in international law. The debate is therefore still alive and well in the international realm.

The Harksen III decision

The Constitutional Court's decision can be summarised as follows: The first submission on behalf of Harksen was dismissed on two grounds. **Firstly**, the Presidential consent under Section 3 (2) of the Extradition Act amounted to a domestic act ("act of state" if one prefers) only, and not to an international agreement of any kind, not even an informal international agreement as termed by the Court *a quo*. **Secondly**, there is nothing in Section 3 (2) of the Extradition Act, which precludes the application of Section 231 of the FC, and it is unnecessary for legislation to incorporate provisions of the FC. It was therefore not necessary for Section 3 (2) of the Extradition Act (or the Presidential consent, for that matter) to expressly state that Section 231 (2) or (3) should be (or had been) complied with if it did amount to an international agreement. As the Constitution is the supreme law of the land, all legislation must be implemented subject thereto and, therefore, to the extent that Section 231 might be applicable to acts performed under Section 3 (2) of the Extradition Act, those acts must be performed in conformance with the provisions of Section 231 of the FC. Section 3 (2) of the Extradition Act was therefore found to be constitutional. (Why the Court found it at all necessary to add this second "ground" for dismissal of Harksen's argument is not clear. If the specific Presidential consent did not amount to the conclusion of an international agreement, then *cadit quastio*. The Court need not have gone into whether section 3 (2) of the Extradition Act was constitutional, because, in doing so, it is submitted, the Court opened the way for argument that Presidential consents in terms of Section 3 (2) of the Extradition Act may, in some circumstances other than those in Harksen's case, be found to create international agreements of some kind. The point was therefore not yet "ripe" to consider¹⁷¹, and had best been left moot in the circumstances of the case. On the other hand, as will be indicated, *infra*, the Court's treatment of more relevant issues, such as what "international agreements" in Section 231 of the FC means, was disappointingly dismissive.)

With reference to the alternative submission, the Constitutional Court did not dismiss it as being no alternative at all (as did the CPD). The Court found that Section 231 of the FC could only be applicable if there was an international agreement. However, the Court found that

"the judicial determination of an international agreement may require the consideration of a number of complex issues, [and that] the decisive factor [to determine this] is said to be whether the instrument is intended to create international legal rights and obligations between the parties."¹⁷²

¹⁷¹ De Waal *et alii op cit* (n52) 72-74.

¹⁷² *Harksen III supra* (n146) at par [21].

From the rest of this part of the judgment, it appears that the Court accepted, without supplying any reasons (except that it depends on the parties' intention to be bound), that "international agreement" in terms of Section 231 equals "treaty." This is also, as in the Court *a quo*¹⁷³, an extremely literalist view of the word "agreement", namely that the word implies of necessity that an understanding to be legally bound exists. The Court did not apply intra- or extra-textual contextualisation as interpretation method in interpreting the term international agreement as used in this section. Therefore, because the Court, in its dismissal of the first submission, had already explained in detail that Section 3 (2) of the Extradition Act was merely a domestic act which was never intended to create international rights and obligations, the Presidential consent was not an international agreement and, therefore, subject to the ratification and notification procedures in Section 231 of the FC. In fact, the Court found that the Presidential consent did not even amount to an informal agreement, as suggested by the CPD, because Goldstone J continued to say

"It was a domestic act never intended to create international rights and obligations. *It was not an agreement at all: neither an international agreement as maintained by the appellant nor an 'informal agreement' as suggested by the High Court.*"¹⁷⁴

The Court then considered the Applicant's submission of estoppel. The Court, surprisingly, finds it unnecessary to deal with the question whether the Vienna Convention can be described as a codification of customary international law on the law of treaties¹⁷⁵ and therefore both binding in terms of international law and applicable as South African law in terms of Section 232 of the FC. The Court merely assumed in favour of Harksen that Article 46 (1) of the Vienna Convention on which the Applicant relied is declaratory of customary international law and, therefore binding both internationally and nationally. In fact the Court suggests *obiter* that, if the Constitution was applicable in this case, a failure to comply with the provisions thereof would be a manifest violation concerning a national rule of fundamental importance, and, therefore, that Article 46 (1) of the Vienna Convention would not apply. However, again based on the Court's, by now, well worn argument that the Presidential consent amounted to no more than a domestic act which brought the surrender of Harksen for trial in Germany within the ambit of the Extradition Act, the Court rejected this part of Harksen's argument because, for that reason, Germany could not rely on the Presidential consent to establish any enforceable obligation against South Africa, and which South Africa would then be estopped to deny.

¹⁷³ *Supra* (n156).

¹⁷⁴ *Loc cit* (n172) – Italics added.

¹⁷⁵ This aspect of the judgment will be highlighted in Chapter III, *infra*.

Is the position any clearer after Harksen III?

Although it has to be agreed with the Constitutional Court's view that Van Zyl J's labelling of a Section 3 (2) Presidential consent as an "informal international agreement" in the Court *a quo* is not correct, because it "obscures rather than clarifies the issue"¹⁷⁶, a lot of unanswered questions remain. It is disappointing that the Constitutional Court let the opportunity pass to expand explicitly on why it differs from the Court *a quo* and why it found that the Presidential consent did not even amount to an "informal agreement", and therefore of a good opportunity to settle the international debate whether "informal international agreements" might exist, and the local debate whether section 231 applied only to treaties as opposed to international agreement decisively.¹⁷⁷ In support of its contention that the Presidential consent in Harksen's case amounted to no more than a domestic act, the Court considered the nature of the communications between South Africa and Germany in this regard, and observes that South Africa's only response to Germany was to acknowledge receipt of the German request with an indication that the request had been forwarded to the relevant authorities for consideration. This also leaves open the distinct possibility that, as soon as Harksen's remedies had all been worn out and all is set for his extradition, a more formal response by the President (or any Minister or official of the Executive) that South Africa has now agreed to extradite him might be construed to amount to an international agreement. If such would then be construed to be an international agreement as meant in Section 231 of the FC, the ratification or notification procedures mentioned therein will have to be complied with unless the agreement can then be classified as an agreement of an administrative, technical or executive nature. If in such a case Section 231 is not complied with it would most certainly lead to a renewed constitutional challenge.¹⁷⁸

Moreover, the Respondent's arguments in both courts that an *ad hoc* extradition procedure provided for in Section 3 (2) of the Extradition Act can never amount to extradition in terms of treaty (or "international agreement") for purposes of Section 231 of the FC because such consent to surrender would amount to extradition on grounds of comity and not on ground of treaty or reciprocity¹⁷⁹ were not at all considered as they were in the Court *a quo*. It has therefore not been decisively settled whether such extradition might be interpreted to constitute a treaty or non-binding agreement in case of a more formal response by government than a mere acknowledgement of receipt. In fact, if Schneeberger's argument, *supra*, does lead to the practical problem that Section 231 need to be complied with in case of

¹⁷⁶ Botha *op cit* (n146) at 298.

¹⁷⁷ In other words, whether the latter is a wider term than the former.

¹⁷⁸ Schneeberger *op cit* (n135) 39, 41-42.

¹⁷⁹ See in this regard NJ Botha *The History, Basis and Current Status of the Right or Duty to Extradite in Public International and South African Law* – Doctoral thesis UNISA (1992).

a more formal response by the government to extradite a person after all preliminaries had been concluded as initiated by Section 3 (2), then, as pointed out by Botha, it will lead to the untenable situation that each *ad hoc* extradition will have to be viewed as an international agreement in the end, where separate extradition treaties would exist for only one specific crime (or charge) at a time.¹⁸⁰

Furthermore, the technical decision in *Harksen II*, to set aside the proceedings and remit it to the magistrate's court to be heard anew before a different magistrate, *supra*, had a bizarre spin-off. The new magistrate, according to television reports early September 2000, refused the application for Harksen's extradition reputedly due to a lack of evidence that Harksen had committed serious fraud in Germany as alleged in the request. It is yet unknown whether the state is seeking review of the magistrate's decision and, if so, what the current state of those proceedings are. (Unconfirmed reports have it that a new extradition case has been instituted, but postponed.) However, even if the Harksen saga did in fact come to an abrupt end in this bizarre turn of events in the magistrate's court, the situation foreseen by Schneeberger was left unanswered by *Harksen III*, and future extradition proceedings might be subjected to fresh constitutional attacks on the same grounds, while this could have been finally settled by the Constitutional Court.

Finally, as if this is not enough, the slow process of parliamentary ratification or notification as envisaged by Section 231 (2) and (3), will definitely jeopardise the effectiveness of South Africa's extradition relations with other states based on comity if such formal responses to extradition requests are viewed as constituting binding international agreements.

In the light of the arguments above, the Constitutional Court's treatment of the issues is even more dismissive than the CPD's treatment thereof, and the last word on the existence of non-binding as opposed to binding international agreements in international law; what the national and international consequences thereof are; and whether Section 231 may be applicable in Section 3 (2) initiated extradition proceedings in the case of a more formal response after completion of the proceedings has not been spoken from a South African perspective. While it was not strictly necessary to answer these questions, given the Court's (correct) conclusion that the Presidential consent amounted to no more than a domestic act, it has to be agreed with Botha¹⁸¹ that the Constitutional Court's dismissive treatment of international law terminology, debates and trends is disappointing from an international law point of view. Indeed, cases involving basic international law principles and even those involving new

¹⁸⁰ Botha *op cit* (n146) at 293.

¹⁸¹ *Op cit* (n146) at 298-9.

developments in international law seldom go the full route of the South African court system, and one feels that the Highest Court should seize every opportunity to clarify nagging issues and to provide precedent for the benefit of the lower courts. Therefore, even though, it was not strictly speaking necessary for the Court to do so, it would have been better had the Court at least considered the submissions made on behalf of the applicant / appellant and respondents more fully.

One further remark in this regard. Had the two Courts in the Harksen saga not merely interpreted the text in terms of a totally literalist approach, namely that the word “agreement” implies an agreement to be bound, but also applied intra-textual contextualisation as interpretation method, where each text is not viewed in isolation, but in context of the Constitution as a whole, it would not necessarily have been much clearer that Section 231 refers only to binding international agreements. Section 199 (5) of the FC speaks of “international agreements **binding on the Republic.**”¹⁸² Section 231 does not use similar terminology. Moreover, section 231 (2) and (3), on which Harksen’s arguments were based, describes exactly when an international agreement becomes “binding” on the Republic. This suggests that the constitutional drafters accepted as a fact that an “informal international agreement”, which is not binding in the international sphere, between South Africa and another state might exist, at least until the constitutional procedures of section 231 have been complied with.¹⁸³ This goes to show that not any one method of constitutional interpretation discussed above should be singled out as the alpha and omega of interpretation and that, even if one starts with textual interpretation and thereafter go to intra-textual contextualisation, the answer is not necessarily satisfactory. In such a case, one should clearly interpret the provision purposefully, if not generously, and have regard to all extra-textual influences on one’s understanding of the text. This possibility clearly called on both the courts to consider in more detail why Section 231 applied to binding (in a sense of already being binding in the international sphere) treaties only¹⁸⁴ and whether there is room for non-binding treaties in the international realm and, if so, what the national and international consequences thereof would be.

¹⁸² Emphasis added.

¹⁸³ E.g. as pointed out in Chapter I *supra* at 17, although a state is not “bound” (in the formal sense of the word) by a treaty (requiring ratification) which it has signed but not yet ratified, it is still obliged to refrain from acts which would defeat the object/-s and purpose of the treaty until it has made it clear that it is not going to ratify the treaty and that it is not going to be bound thereby. Therefore, although not formally bound by a treaty, the state is at least informally bound not to defeat the treaty until it is rejected. This falls within a definition of a non-binding agreement advocated by all the exponents of the school who advocate the need for and existence of such agreements in international law.

¹⁸⁴ In the Court *a quo* which appeared to be very dismissive in this regard as pointed out *supra*.

Submissions regarding meaning of “international agreements” in Section 231 of the FC
 The fact that section 231 deals expressly with procedures governing treaty law in general¹⁸⁵, and the use of the term “agreement”¹⁸⁶ as opposed to “arrangement” (or “instrument”) suggests that, as far as Section 231 is concerned, the term “international agreement” is synonymous with what is defined by the Vienna Convention as “treaty.” Furthermore, the purpose of the provision, namely to provide for: a statutory enactment of the prerogative power to negotiate and sign treaties; the ratification of / accession to treaties and when to dispose of those requirements; the procedure required to effect ratification / accession; statutory incorporation of treaties into national law; and recognition of continued application of treaties inherited from the previous government, it is submitted, clearly indicates that “international agreement” in the context of Section 231 of the FC equals “treaty.”

It is also submitted that a Presidential consent to extradition in terms of Section 3 (2) of the Extradition Act does not amount to compliance with either a treaty or informal agreement (or arrangement for that matter) as suggested by the CPD, simply because such extradition takes place on grounds of comity, and not in terms of an agreement or reciprocity. As pointed out by both Courts in *Harksen II* and *III*, the Presidential consent only serves to bring the possible extradition within the purview of the Extradition Act. It is therefore no more than a domestic act, which is not subject to Section 231 of the FC. However, as pointed out, *supra*, if the proceedings in the end lead to a real extradition and a more formal response from the Executive, *Harksen III* opens the way for a renewed constitutional challenge (brought either by Harksen or by someone else in similar circumstances) on grounds of possible non-compliance with Section 231. Such a challenge, however, can only succeed if one can convince the court that the more formal response to the extradition request does indeed amount to the conclusion of a treaty with reciprocal rights and duties. If, on the other hand, the submission above, that such extradition is based on comity, and not reciprocity, is accepted, then a renewed constitutional challenge will not succeed.

b.) “International agreement” or “treaty” and Section 199 (5)

Accepting the premise that “international agreement” is a wider term than “treaty”, and that it includes informal (in the sense of non-binding) international agreements, the language of

¹⁸⁵ I.e. The negotiation and signing of treaties - Section 231 (1) - which suggests that the agreements referred to in this section must be negotiated in terms of international law and be in writing; the need for ratification or accession in some circumstances before the Republic can be bound - Section 231 (2) and (3); incorporation of agreements into national law in some circumstances before they can be applied as law - Section 231 (4); and the recognition of the binding nature of past treaties - Section 231 (5).

¹⁸⁶ Which, as pointed out, according to Klabbers - *op cit* (138) - and in terms of the law of obligations, suggests that reciprocal rights, duties and obligations have been agreed upon (otherwise there simply would be no “agreement”) by the parties involved.

Section 199 (5) poses no interpretational difficulty. It provides that the security services must act, and must require their members to act in accordance with the Constitution and the law, including “international agreements **binding on the Republic.**”

The words in bold print clearly indicates that the constitutional drafters intended that only binding international agreements (therefore “treaties”) should be included as “international agreement” for purposes of this section. No other interpretation, so it is submitted, is possible. The connection of the term “binding” to both treaty and customary international law will be discussed, *infra*¹⁸⁷, where it will also be pointed out that the Constitutional Assembly most probably used the words “binding on the Republic” in connection with treaties only, and that it was done in order to de-entrench the Section 231 (4) requirement of legislative incorporation before treaties may be applied at national level for purposes of this provision.

c.) UN Resolutions

In Chapter I it was pointed out that the practice to require legislative incorporation of treaties before they can be applied as national law was extended to UN Resolutions¹⁸⁸, even though they are not treaties.¹⁸⁹ The requirements before UN Resolutions can be applied as law at national level will be discussed in Chapter III, *infra*, but one would have expected that, as the Constitutional Assembly opted to expressly provide for, amongst other, the incorporation of treaties into national law, the drafters would have also specifically provided for incorporation of UN Resolutions. This, however, was not done. It begs the question whether a purposive and generous interpretation of the term “international agreement” in Section 231 of the FC cannot convince a court to include UN Resolutions in that sense for purposes of providing legislative basis for incorporation on the same footing as treaties. This is what can be achieved if a more purposive and generous to constitutional interpretation as discussed, *supra*, is adopted. South Africa is after all a voluntary party to the UN, and through its own and the UN’s constitutional rules, morally bound to accept whatever the majority in the UN General Assembly resolves. In the light of current constitutional interpretation practice, where interpretation must be rooted in and not be totally contrary to the text, it is, however, dubious whether a court will be persuaded to accept such a proposition. As indicated, in international law, UN resolutions do not equal treaties.

On the other hand, some resolutions taken by the Security Council of the UN, might be binding in the international realm. Just as in the case of treaties, as will be pointed out, *infra*,

¹⁸⁷ 2.4 as well as in Chapter III *infra*.

¹⁸⁸ Chapter I *supra* at 32 (n185).

¹⁸⁹ Chapter I *supra* under 2.2.7 at 24.

it amounts to an anomaly to have the state bound at international level, but that state officials' (individuals') actions in contravention of such resolutions are not legally censurable internally because the resolutions were not incorporated into national law and, therefore, not applicable at national level. The courts may therefore refuse to apply internationally binding Security Council resolutions at national level, merely because they are not incorporated into national law. At the same time, however, the state may incur international liability for its refusal to abide by binding resolutions in terms of its internal affairs policy. It is therefore a *lacuna* in the FC not to provide for either automatic or legislative incorporation of UN Resolutions.

d.) In conclusion

The above reasoning serves to prove that even a basic notion such as grammar may bedevil the interpretation process, and that plain textualism should never be adopted in the process of constitutional interpretation. Indeed, if that were to be done, one would limit the Constitution, and it would have to be amended or re-written every time the law is in need of change.

However, for the moment, it seems that it can safely be assumed that the term "international agreement" in the two provisions where the FC uses it, equals "treaty" as defined in Article 2 of the Vienna Convention.

2.3.2 Ratification of / accession to treaties and the prerogative to bind the Republic by treaty

***Separation of powers: Changing the traditional landscape*¹⁹⁰**

The IC ushered in a change to the traditional position where not only the negotiation and signing of treaties, but also the ratification of / accession to treaties were the exclusive province of the Executive through its prerogative powers. Parliament was now, for the first time in history, declared to be the competent branch of government to ratify (or accede to) treaties.¹⁹¹ **Section 231 (2) of the IC** read

"231. (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)."

It, therefore, provided for "international ratification"¹⁹² or accession by Parliament and not by the Executive. The inclusion of Parliament in the treaty-making process by the 1993 Kempton Park negotiators was strongly motivated by considerations of transparency and accountability,

¹⁹⁰ The last part of this heading is borrowed from the title of GN Barrie's article "Human Rights and Extradition Proceedings: Changing the traditional landscape" (1998) I *TSAR* 125.

¹⁹¹ Botha *op cit* (n77) at 255.

¹⁹² Which is something different than "constitutional ratification" provided for in subsection (3) which gives a treaty national application, and which will be discussed in Chapter III *infra*.

and was influenced by the Namibian Constitution.¹⁹³ This was obviously a satisfactory provision, because it brought democracy into the treaty-making process, and was widely welcomed. The voters who voted Parliament into power will, through this provision, at least have a say in whether the country should be bound by treaties entered into by the Executive. The effectiveness of parliamentary control over executive action in a case of an overwhelming majority in the National Assembly is, however, doubtful because the majority party members in Parliament will in any case most certainly be inclined to toe the line of their national leaders in the Executive, which emphasises the existence of the counter-majoritarian difficulty in spheres of government other than the courts.

As with the normal meaning of the terms “international law” and “international agreement”, *supra*, the interpretation of this provision was also not problem-free. **Firstly**, it suggested that **all** treaties signed by the Executive were to be ratified or acceded to by Parliament. This lost sight of the fact that some treaties are intended to come into effect immediately upon signature and without ratification being required. The slow and formal procedure normally associated with all parliamentary activities would, therefore, have posed a threat to the effectiveness of such treaties.¹⁹⁴

In fact, before an agreement could be considered by Parliament, it first had to be scrutinised by the State Law Advisers at the Department of Justice for its consistency with national law. Thereafter it had to be scrutinised by the State Law Advisers at the Department of Foreign Affairs for its compatibility and consistency with South Africa’s international obligations and international law in general. The agreement could only then be considered by Cabinet who would then make a recommendation regarding accession or ratification. The agreement then had to be considered by the relevant portfolio committees of both houses of Parliament. Finally, it had to be considered by Parliament.¹⁹⁵ This process, under the FC, can take anything between six months and a year.¹⁹⁶ Furthermore, the use of the term “Parliament” suggested that ratification or accession had to be approved during a joint session of both houses of Parliament, which is very seldom held.

This prompted the government departments to ignore the letter of the Constitution, and adopt a view that the competence and powers conferred upon Parliament in subsection (2) were

¹⁹³ Dugard *op cit* (n5) 54-55.

¹⁹⁴ M Olivier “The status of international law in South African municipal law: Section 231 of the 1993 Constitution” (1993-94) 19 *SAYIL* 1 at 7-8.

¹⁹⁵ This is the largely the same as the current procedure as provided for in the “Manual on Executive Acts” issued by the Office of the President in May 1999.

¹⁹⁶ Schneeberger *op cit* (n135) 4-5.

nothing more than a mere competence (and definitely not an obligation), and that the need for parliamentary ratification applied only to “formal” treaties.¹⁹⁷ “Formal treaties” as used here intends to mean treaties with major political or other significance, or treaties that have financial consequences (requiring additional budgetary allocation by Parliament over and above that which has already been allocated to a particular department involved in the obligations arising from the treaty) and agreements which affect domestic law. “Less-formal treaties” are the so-called run-of-the-mill treaties, arising from the everyday activities of government departments with their counterparts in other states¹⁹⁸ and, in practice, they were treated as if they became operational upon signature alone. In case of doubt, however, the instructions from the Office of the President were that the treaties had to be submitted to the longer parliamentary route.¹⁹⁹

Secondly, the terminology employed by this section was technically incorrect in providing that a treaty negotiated and signed in terms of the Constitution can be acceded to. The instrument of accession is only available in the case of treaties to which a state, wishing to accede, was not a party. A treaty negotiated and signed by the state cannot be acceded to, simply because the state is already party thereto.²⁰⁰ Technically, this meant that Parliament was not empowered to accede to treaties at all, because in terms of subsection (2) it could only accede to treaties negotiated and signed in terms of the Constitution. Taken literally this means that any accession to a treaty approved by Parliament under the IC was *ultra vires* and invalid. However, such an interpretation would be totally contrary to the purpose of the provision, and, if faced with such a problem, a court would most probably adopt a purposive and generous interpretation method because otherwise the Legislature intended to create an absurdity.

Section 231 (2) and (3) of the FC evidences an attempt to remedy these problems, and in a way, it did. For example, subsection (2) does not mention “ratification” and “accession” separately as did its predecessor. The constitutional drafters chose the terminology “approval” to describe what is traditionally known as either ratification or accession. From the wording

¹⁹⁷ Olivier *loc cit* (n194). See also Dugard *op cit* (n5) 56. In Chapter I *supra* at 16-18 (n86) and *supra* (n166) a distinction was drawn between “formal” treaties and “less-formal” treaties, which is a distinction used by Dugard. It was also pointed out there that this distinction does not intend to include “informal international agreements” (in the sense of non-binding agreements) as used by some of the exponents of the school that advocate the necessity and existence of such agreements in international law and which was discussed *supra* under section 2.3.1. This is one of the reasons why the term “informal (non-binding) agreement” is suspect as implied by the Harksen decision in the CPD.

¹⁹⁸ Booysen *Volkereg en sy verhouding tot die Suid Afrikaanse Reg* 2nd Ed (1989) 410.

¹⁹⁹ Olivier and Dugard *loc cit* (n197). An interesting point to note is that Section 2 (3) (a) and (3) *ter* of the Extradition Act 67 of 1962 was amended in 1996 to provide that all extradition treaties have to follow the longer route of parliamentary ratification.

²⁰⁰ Chapter I *supra* under 2.2.1 at 16-18.

of Section 231 (2), quoted above, it should be clear it provides that, for a treaty to become binding at international level, the (national) constitutional requirement that must be met on the South African side is that it should be “*approved* by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).” This provision not only serves as a warning to the other state party that such treaties must first be ratified or acceded to by the South African Parliament before they will become binding in the international sphere, but also provides for a shortening of the procedure because the Houses of Parliament may approve treaties during separate sessions. This provision also does not (as did its predecessor) limit the power of Parliament to accede to treaties to those negotiated and signed in terms of the Constitution and is, therefore, technically more correct. It also recognises the need for a fast-track procedure in the case of less-formal treaties through the proviso.

Section 231 (2) and (3) of the FC, however, ushered in new problems requiring resourceful interpretation from whoever is faced therewith. **Firstly**, the meaning of the phrase “**technical, administrative or executive**” in subsection (3) is not defined and may provide some difficulty in interpretation. Moreover, the three terms are juxtaposed with “or”, suggesting that three different types of treaties are involved, each constituting a different sub-category.²⁰¹ The approach adopted by the State International Law Advisers to this question may, however, provide assistance to courts faced with the problem of interpreting these terms. They understand these terms to form one joint category of treaties, namely treaties of a routine nature, flowing from the daily activities of government departments.²⁰² This category of treaties “refer[s] to department specific agreements; agreements without major political or other significance; and agreements which have no financial consequences and do not affect domestic law.”²⁰³

Secondly, subsection (3) provides for a clear second category of treaties, namely those that explicitly through their terms do not require ratification or accession in order to become binding at international level. This category of treaties is also juxtaposed with “or” to those of a “technical, administrative or executive nature.” This means that a treaty, although “formal” (not technical, administrative or executive in nature), which expressly states that it becomes binding upon signature, need not be “approved by resolution” in Parliament.

²⁰¹ N Botha “South African Treaty Law and Practice” in Monroe (ed) *National Treaty Law and Practice* (American Society of International Law – forthcoming). An edited version of this contribution has in the mean time been published as “Treaty making in South Africa: A reassessment” (2000) 25 *SAYIL* 69, with the specific issues highlighted here addressed at 75-80.

²⁰² Dugard *op cit* (n5) 56-7; Olivier *loc cit* (n194).

²⁰³ Botha *loc cit* *SAYIL* (n201) at 76; “Manual on Executive Acts” *op cit* (n195).

Thirdly, and this problem is closely connected to the previous one, the FC does not determine who has to make the decision whether treaties will need to be ratified / acceded to in terms of subsection (2) and whether they may become binding in terms of subsection (3). In practice, this decision is conferred on the Executive²⁰⁴ as was the position pre-1994, the wisdom of which is doubted. This would mean that the Minister of State whose department is involved in the conclusion of a treaty may make the decision him- / herself, without consulting with the other members of the Cabinet or taking the voters' choice into account. However, the instruction from the Office of the President is that, in case of doubt, the longer parliamentary route of ratification / accession is to be followed. It would, however, appear that a Minister of State can use this proviso in order to circumvent the need to require parliamentary ratification if he / she deems it expedient in the interests of the parties to the treaty. Hopefully, his / her legal advisers will advise against such action, because it will be undemocratic if the Executive is placed in the same position as it was pre-1994, namely entrusted with the power to bind the state internationally without the voters having any say in the matter.²⁰⁵

Fourthly, the requirement that treaties which become binding without parliamentary approval "must be tabled in the Assembly and the Council within a reasonable time", in practice means no more than that the Executive's decision to enter into treaty relations may be debated by the peoples' elected representatives in the Legislature. Parliament does not have the power to either negotiate or re-negotiate the terms of a treaty.²⁰⁶ However, Chapter 5 of the practice manual²⁰⁷, aimed at guiding state departments in the correct processes for the drafting and submission of documents to the President in terms of the Constitution, provides that the relevant parliamentary portfolio committee does have the power to insist on a reservation before referring the treaty back to the Executive. The responsible members of the Executive will then be wise to either re-negotiate the treaty (in the case of a bilateral agreement) or to enter a reservation against the offending provision (in the case of a multilateral agreement). However, if the treaty has already become operative in the true sense, the Executive might in such a case be faced with a *fait accompli*, because reservations are usually entered either before signing or before ratifying or acceding to a treaty.

In the **fifth** place, the FC does not provide that a Minister or official entering into a treaty needs to consult with Parliament or the rest of the Cabinet before signing it. There is also no

²⁰⁴ *Ibid.*

²⁰⁵ Chapter I *supra* under 2.2.1 at 17-18.

²⁰⁶ Botha *op cit* SAYIL (n201) at 73-75.

²⁰⁷ *Op cit* (n195).

other statutory provision demanding wide-ranging consultation between the Minister or official on the verge of entering into a treaty and the other members of the Cabinet or Parliament. However, although legislation does not formally provide for a process of consultation before a treaty is entered into, some degree of consultation normally does, at least in practice, take place between the members of the Cabinet *inter se*. The practice manual²⁰⁸ requires that inter-departmental consultation must take place, and that the Law advisers of the departments of Justice and Foreign Affairs must scrutinise the treaty for its consistency and compatibility with national and international law and South Africa's international commitments before signature. Thereafter both the responsible Minister and the President must agree to the conclusion of the agreement (by signing and counter-signing a President's minute) before the treaty may be entered into. The effectiveness of this kind of consultation can be questioned because it is only required to take place after the decision to enter into the treaty has already been taken. The consultation, therefore, amounts to no more than a notification of intention and obtaining permission to enter into a treaty which has already been negotiated. Obviously, the colleagues of the Minister and the President will only refuse to authorise the conclusion of the treaty in cases of gross-deviation from governmental policy. Therefore the State Law Advisers have an important role to fulfil in ensuring that the treaty complies with both national and international law before advising the Minister or official to sign a treaty.

Parliamentary involvement in the treaty-making process only arises after the treaty has been entered into and when parliamentary approval in terms of Section 231 (2) is sought, or when the treaty is tabled in terms of Section 231 (3) for purposes of scrutiny and debate of a *fait accompli*. The latter process can, however, hardly be termed "consultation" because in practice such treaties may become binding even if Parliament disapproves of them and it may be too late to enter reservations against or to renegotiate the treaties. However, "[t]his notwithstanding, a growing trend of consultation can be discerned, in particular, in the case of human rights treaties, treaties expected to have a marked domestic impact, or those demanding specific expertise."²⁰⁹

It has to be pointed out that Parliament is afforded wide powers to scrutinise and oversee executive action (therefore, including treaty-making) in terms of sections 42 (3); 52 (2); 92 (2) and 102 of the FC. If these provisions are applied correctly and vigilantly, the Executive might be called to book by Parliament whenever it enters into undesirable treaties. These provisions may, therefore, have the effect that members of the Executive are more careful

²⁰⁸ *Ibid.*

²⁰⁹ Botha *op cit* SAYIL (n201) at 80-82.

when they decide to enter into treaty relations, and when they decide whether a treaty is to be excepted in terms of Section 231 (3), especially when the treaty will have major political, financial or legal implications. It may even move the relevant Minister or official who wants to conclude a treaty to consult with Parliament (or at least the relevant Portfolio Committee) before negotiating or, at least, before concluding the treaty. Whether this is bound to happen where the ruling party has a clear and overwhelming majority in the National Assembly and Council of Provinces (as currently is the case), however remains a matter of speculation. (The current political turmoil surrounding the Heath Commission's involvement in investigating the government's international multi-million Rand arms deal, where prominent ANC members have been removed from parliamentary watchdog institutions for not toeing the line of the party's decisions, suggests that the Executive is currently controlling Parliament – not the other way round as envisaged by the Constitution.)

In the **sixth** place, the bureaucratic procedure which Section 231 (3) treaties have to go through before they are concluded, *supra*, and the process involved for tabling the treaty in both Houses of Parliament within a reasonable time take up a lot of time, which may jeopardise the effectiveness of such treaty. According to Schneeberger “it usually takes approximately three months for an agreement to go through this process” and “[I]t is therefore apparent that even the fast-track procedure for the ‘section 231 (3) agreements’ may not be fast enough to accommodate the exigencies of modern day international relations.”²¹⁰

Lastly, the use of the term “accession” in Section 231 (3) is tautologous because treaties “entered into by the national executive” do not need to be acceded to. Accession is only available to state parties wishing to join a treaty which is already in force between other state parties and in which negotiation and signing it didn't participate. This provides for another wall and corner in the “**labyrinth of tautology**”²¹¹ one finds in the international law terminology used in the post-1994 constitutions.

The procedure

International law lays down no requirements for the way in which ratification or accession is to be effected by a state. Article 11 of the Vienna Convention on the Law of Treaties of 1969 provides

“The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

²¹⁰ *Op cit* (n 135) 6.

²¹¹ Borrowed from the title of Schneeberger's thesis *op cit* (n135).

“Ratification, acceptance, approval and accession” are all lumped together in the definitions article to mean: “the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.”²¹² The actual procedure in terms of which ratification / accession should be effected by a state is therefore not defined by international law. It is left to each state’s own national law to determine the procedure, the terminology and the means that should be used.

Section 231 (2) of the IC defined no procedure according to which ratification / accession had to be effected. It merely declared Parliament competent to “approve” to the ratification of or accession to treaties. Section 231 (3) provided for a procedure according to which a treaty had to be incorporated into national law²¹³, but still no procedure for international ratification / accession. It could mean that anything from a mere motion or resolution to a more formal legislative act was required from Parliament before ratification or accession was deemed to have been approved. Whilst there was little doubt in the minds of those responsible for treaty practice that nothing more than a mere resolution was required, the fact that the term “expressly so provides” in Section 231 (3) was also not defined gave rise to some controversy²¹⁴, because that could also have meant anything from motion or resolution to legislative act by Parliament. The opinion that noting more than a resolution by Parliament and publishing thereof as notice in the *Government Gazette*²¹⁵ was required for both processes apparently prevailed, at least in practice. Moreover, practice indicated that it was quite common for government departments (and Parliament) to invoke the same process to ratify / accede to a treaty and to incorporate it into law. Botha refers to Government Notice 1463 of 27 September 1995, emanating from the Department of Finance²¹⁶, which provides

“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.*”²¹⁷

Therefore, although the procedure required for some initial confusion, those in charge of the practice of treaty conclusion and ratification soon found a way, which, it is submitted, would also have passed constitutional scrutiny under the IC. However, the FC, for the first time ever,

²¹² N Botha “Incorporation of treaties under the Interim Constitution: A pattern emerges” (1995) 20 *SAYIL* 196 at 197.

²¹³ Which will be discussed in Chapter III *infra*.

²¹⁴ *Ibid.*

²¹⁵ As required by Section 15 of the Interpretation Act 33 of 1957.

²¹⁶ *Op cit* (n212) at 200.

²¹⁷ Italics added. This notice refers to the Convention between the Government of the Republic of South Africa and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital, which is then published in full.

defined the constitutionally required procedure for international ratification / accession (or “approval” – the term used by the FC). In terms of Section 231 (2) of the FC, the National Assembly and National Council of Provinces (sitting separately) must express their approval of the treaty by means of “resolution” (which is something less than a legislative act).

The prerogative to negotiate and sign treaties

Section 232 (2) of the IC referred to international agreements negotiated and signed in terms of section 82 (1) (i), which, in turn, provided that the President is vested with the power and function “to negotiate and sign international agreements.”

The general prerogative powers for negotiating and signing treaties that vested in the Executive before 1994 were not constitutionally enshrined in the IC. The fact that Section 82 (1) (i) mentioned only the President as the person (or organ of state) that is conferred with the power of negotiation and signing of treaties, however, created the impression that no other member or official of the Executive had the power to do so. Although the President (as head of the national Executive) always had the power to negotiate and sign treaties, it is almost unheard of that a head of state negotiate and sign treaties in person. This function is normally left in the hands of the Minister of Foreign Affairs, the Minister of State whose department is seized with the matter, or the head of the mission accredited to the other state party to the treaty.²¹⁸ Although consultation between ministries and missions took place during the negotiation and signing processes, and especially before ratification of treaties, the function to negotiate and sign treaties was usually a delegated one.²¹⁹ Although, also, in practice, the President delegated his functions conferred by this section, it was suggested that, for sake of clarity, the final constitution should make it clear that not only the President, but also other members of the Executive are empowered to negotiate and sign treaties.²²⁰

This suggestion was recognised in the FC because Section 231 (1) of the FC clearly provides that the negotiating and signing of all treaties is the responsibility of the national Executive. This is a statutory recognition of a prerogative power that the national Executive always had. The mere fact that a prerogative power is later embodied in a statute (here the Constitution) does not imply that the nature and content of the prerogative power have changed, unless the statute does so in express terms²²¹, which is not the case here. It will however be pointed out in Chapter III, *infra*, that the prerogative powers of the national Executive to perform an “act of state” (including the conclusion of a treaty) did not survive the new dispensation unscathed

²¹⁸ J Dugard “International law and the ‘final’ Constitution” (1995) 11 *SAJHR* 241 at 247-48.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ H Booysen *op cit* (n198) 370-372. See, however, the discussion hereof in Chapter III under 3.3.3 *infra*.

as the courts are now empowered to test and review such actions in the light of the Constitution. This was necessary because, as pointed out, *supra*, the prerogative to bind South Africa through treaty that vested exclusively in the national Executive was somewhat undemocratic because the Executive could freely enter into treaty relations without taking Parliament's views into account.

The need for distinction between "old" treaties, treaties under the IC and those under the FC

The real problem presented by Section 231 (2) of the IC was that it necessitated a distinction between "old" treaties (negotiated and signed before 27 April 1994), and "new" treaties (negotiated and signed thereafter) for purposes of ratification. Furthermore, "old" treaties can be divided into treaties already ratified / acceded to before 1994 and those negotiated and signed before 1994 but which still had to be ratified or acceded to after the IC came into force. Whilst the former became binding in terms of the pre-1994 constitutional rules and procedures where ratification / accession was effected by the Executive, the latter could, according to the plain meaning of the provision, only become binding subject to parliamentary approval as required by Section 231 of the IC.

However, Section 231 (2) of the IC declared Parliament competent to ratify or accede to treaties "negotiated and signed in terms of section 82 (1) (i)" only. Therefore, "old" treaties did not qualify. Moreover, as pointed out, *supra*, it is an anomaly to say that a treaty negotiated and signed by the state can be acceded to by that same state. Accession is only available to those states that did not originally sign a treaty, provided all the original parties accept a state's right to accede or where the treaty makes provision therefore. It would therefore appear that treaties negotiated and signed before the IC came into force could only be ratified or acceded to by the national Executive in terms of its prerogative powers that still existed although it was not included in the IC. Moreover, treaties entered into by other states while the IC was the Constitution, could technically only be acceded to by the national Executive because Section 231 (2), strictly speaking, did not confer that power on Parliament as such treaty was not negotiated and signed in terms of Section 82 (1) (i). It was however pointed out, *supra*, that a court will not necessarily find that a treaty acceded to by Parliament in terms of Section 231 (2) of the IC has not been acceded to if a purposive interpretation method is followed.

The need for distinction created by section 231 (2) and (3) was bound to lead to confusion in the interpretation process. As Olivier points out, "it would have been preferable had an earlier

draft in which the phrase ‘negotiated and signed in terms of section 82 (1) (i)’ didn’t appear, been adopted.”²²² It, therefore, needed to be corrected under the FC.

Although Section 231 (2) and (3) of the FC makes no distinction between treaties negotiated and signed before the IC came into force and treaties negotiated and signed under either the IC or the FC, and, therefore, that Parliament is declared competent to ratify / accede to any treaty not excluded through Section 231 (3), the confusion created by the IC has not been resolved satisfactorily. In order to decide whether a treaty had been legally (and constitutionally) entered into and ratified or acceded to, and, therefore, whether South Africa is bound by a treaty, a court will have to have regard to the process that prevailed when the signing / ratification / accession was purportedly effected. This is due to Section 231 (5), which provides that “[t]he Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.” It will, however, be argued under the next section that this subsection merely states the obvious in terms of international law, and could have been left out of the FC.

2.3.3 Succession to and termination of treaties

The usefulness of “succession provisions” and providing for unilateral termination of treaties

The inclusion of a “typical succession provision” – Section 231 (1) of the IC – in the Constitution led to controversy. It read

“231. (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 under this Constitution, unless provided otherwise by an Act of Parliament.

Although South Africa experienced such a fundamental change of government and constitutional dispensation that few would recognise the old in the new, the state itself did not cease to exist. Still less was it replaced by another state in the international sphere. This would have been the case, even if the name of the state had been changed to, for example, Azania. Therefore, “succession” to existing treaties to which South Africa is a party does not arise in the true sense of the word. It is submitted that “continuation in force” or “continued application” of existing treaties entered into by the “old” in the “new” South Africa is a more appropriate phrase.²²³ It could (or rather should), however, have been left to the courts to resolve the problem in terms of the general principles of international law when the need arose, and there was no pressing need to include this provision in the Constitution.

²²² Olivier *op cit* (n194) at 9.

²²³ Chapter I *supra* under 2.2.1 at 17-18.

That apart, the biggest problem with the provision was its potential to cause international conflict. Botha argues that the apparent granting of power to Parliament to unilaterally terminate treaties, without following the route prescribed by the treaty itself (or by international law on the subject), holds the potential to cause international conflict. Therefore, and also because the provision served no useful purpose, he argues, the provision should have been scrapped when drafting the final Constitution.²²⁴

Some commentators, however, do not share his view that this provision should be compared to a typical (and, in the circumstances, unnecessary) succession provision. They argue that its justification should rather be sought in the lack of legitimacy of the previous government, which often embodied aspects of its apartheid policy in regional treaties, or concluded treaties with other pariah states.²²⁵ The reason behind this move by the constitutional drafters was, according to these commentators, clearly to allow the new Parliament to legislatively provide that a treaty inherited from the deplorable past under the old regime will not be viewed as binding where it contains traces of a policy not supported by the new regime. Although Olivier also suggests that it was never the intention of the drafters to enable Parliament to contravene international law provisions governing the unilateral termination of treaties, and that the Vienna Convention will still have to be observed if Parliament wished to denounce treaties from the past²²⁶, this doesn't mean that Parliament would necessarily have taken cognisance of the original intention of the constitutional drafters. In any case, treaties that contain traces of, for example apartheid, will, for that reason, mostly be in conflict with international law and considered null and void by the international community, which negates the necessity of unilateral termination of such treaties. The only treaties that would, therefore, have been in danger of illegal unilateral termination, are treaties that are still considered as valid by the international community at large. They would not have been subject to termination on grounds of *rebus sic stantibus* in terms of the Vienna Convention. If the government did terminate a treaty illegally, it would, no doubt have led to conflict with the other parties who wanted to continue with the relations created by that treaty. Therefore, the warning sounded by Botha, was appropriate, and was apparently recognised by the drafters of the FC because this part of the section was omitted from its successor, Section 231 (5) of the FC.

²²⁴ Botha *op cit* (n77) at 253-54.

²²⁵ Olivier *op cit* (n194) at 4; DJ Devine "Some problems relating to treaties in the Interim South African Constitution and some suggestions for the definitive constitution" (1995) 20 *SAYIL* 1 at 6-7.

²²⁶ *Ibid.*

Although Dugard is of the opinion that a clause such as this can have a useful symbolic effect to emphasise South Africa's commitment to its treaty commitments from the past, he, just like Botha, is of the opinion that the apparent power granted to Parliament to terminate treaties unilaterally without following the procedures of international law was an "unfortunate feature" of the IC.²²⁷ He, therefore, agrees only partially with Botha, but advocates the view that the Provision is not totally useless. It is, however, submitted that "symbolic effect" on its own is not enough reason to include such a provision in the constitution of a country, unless it conveys a symbolic break with the past wrongs. However, for attaining the mentioned symbolic effect, Dugard suggested that the FC's provision should have been changed to something like

"All rights and obligations under international agreements which immediately before the commencement of the Constitution were vested in or binding on the Republic, shall be vested in or binding on the Republic under this Constitution."

It seems that the Constitutional Assembly chose to follow Dugard's suggestion because Section 231 (5) of the FC corresponds essentially to his suggestion, except that the reference to "rights ... vested in ... the Republic" was omitted. Whether this is to be afforded any special meaning is doubted.

Apart from any symbolic effect, and though it has no real value in the international sphere, it is submitted that this provision can provide useful ammunition for individuals who might want to challenge the constitutionality of the government's possible future decision not to honour existing treaties for whatever reason.

This provision, it is therefore submitted, does no more than to constitutionalize a trite principle of international law regarding the continuation in force of existing treaties in event of a change in government and, thereby, symbolises the country's commitment to honour its inherited treaty commitments; and provides a constitutional basis for a challenge of the constitutionality of an act of state or legislation should the new government refuse or fail to abide by them.

Treaty-making powers of the TBVC states

Although Olivier didn't have any real problem with the usefulness of the provision, she had a real problem with the fact that the State Law Advisers, during a so-called technical refinement process after the draft had already been agreed upon, added the words "**within the meaning of the previous Constitution**" in order to define "international agreements ... vested in or

²²⁷ Dugard *op cit* (n218) at 245-46.

binding on the Republic” in Section 231 (1) of the IC, which didn’t form part of the draft.²²⁸ She argued that such agreements would include treaties between South Africa and the former TBVC states and that it could give rise to the anomalous situation that, although the TBVC states ceased to exist (and were never in fact recognised by the international community as having treaty-making capacity²²⁹), the agreements would, constitutionally speaking, remain binding on the Republic, subject to parliamentary recall. As, however, the TBVC states were, constitutionally speaking, reincorporated into South Africa on 27 April 1994²³⁰, it would seem that Devine’s proposition that this, at least in practice, signifies no more than that the TBVC states ceased to exist and that, according to normal principles applicable in the case of the demise of one of the parties to a bilateral agreement, all treaties between them and other states terminated at this point²³¹, is to be preferred. The difficulty foreseen by Olivier would therefore not have been problematical in the normal run of things. Fortunately, however, the FC’s provision replacing Section 231 (1) of the IC (Section 231 (5) of the FC) does not contain similar wording.

Can there be Parliamentary involvement in the termination of treaties?

Botha²³² submits that, having involved Parliament in the ratification/accession process, Parliament would be required to play an equivalent role in the termination of treaty commitments. This is a logical concomitant to the rule that Parliament rather than the Executive should ratify/accede to treaties. A distinction will therefore have to be made between treaties concluded by the Executive alone²³³, and treaties where Parliament was involved in the ratification/accession process. Likewise, the termination of “new” treaties that became operational without parliamentary approval will have to be tabled in Parliament within reasonable time in order to debate the need and consequence of their termination, merely because they had to be tabled within reasonable time after their being entered into force as provided for in Section 231 (3). Moreover, where a treaty has been incorporated into national law by means of legislation (under the pre-1994 or FC position) or resolution (under the position governed by the IC)²³⁴, such a treaty’s operation will have to be excised from national law by the same means in case of termination.

²²⁸ Olivier *op cit* (n194) at 5-6.

²²⁹ Chapter I *supra* at 38-40.

²³⁰ See Dugard *op cit* (n5) 453-55.

²³¹ *Loc cit* (n225).

²³² *Op cit* SAYIL (n201) at 85.

²³³ I.e. “old” treaties and treaties not requiring parliamentary ratification/accession under either the IC or the FC.

²³⁴ To be discussed in Chapter III *infra*.

The courts' view

As this provision was relatively novel (and because it was not in place for long before being replaced by the FC) there is no case law on the issue of succession and termination of treaties under Section 231 (1) of the IC. Neither is there a large body of case law on the issue of succession to and termination of treaties in general post-1994. In fact, the only matter that seized the courts up to now in this regard is *Harksen I.*²³⁵ To recap, the Court was faced with a challenge regarding the substantial validity as well as constitutionality of the President's decision to accede to a request by the Federal Republic of Germany that one J Harksen be extradited to Germany for serious fraud. He did so in terms of Section 3 (2) of the Extradition Act, which provides for the surrender for trial of persons to states with which no extradition treaty exists. One of the points argued was that there was a binding extradition treaty between South Africa and Germany in terms of which the applicant could have been extradited, which meant that the state should have observed the treaty and its requirements in terms of Section 3 (1), and that, accordingly, the President could not have consented to extradition in terms of Section 3 (2). Alternatively, it was argued that Section 3 (2) was unconstitutional because it authorises the President to enter into a treaty without observing the requirements of Section 231 of the IC requiring involvement of Parliament for purposes of ratification and incorporation into national law before a treaty could be binding.

The CPD, ignoring an Executive certificate in this regard²³⁶, embarked on a thorough examination of extradition treaty relations between South Africa and Germany, and of the law on the subject, from which it concluded that no valid treaty exists in terms of which Harksen could have been extradited. The Court, *inter alia*, accepted that an outbreak of hostilities between two countries does not abrogate an extradition treaty that is in force between them, but that it is merely suspended, and that the suspension is terminated on and in accordance of a peace treaty signed between them afterwards.²³⁷ The Court, however, found that Germany had lacked the competence to revive the 1872 treaty without the approval of the Allied High Commissioner before 1955. It could only do so thereafter. Germany did not obtain this permission in 1954 for the revival of the treaty. On this ground, as well on the ground that the exchange of notes between the countries contained a proposal and counter proposal, which did not constitute an agreement between states, the court concluded that no binding extradition treaty existed in terms of which Harksen could have been extradited.

²³⁵ *Supra* (n147).

²³⁶ As will be pointed out in Chapter III *infra*.

²³⁷ At 1023 A-B of the judgment.

2.4 “CUSTOMARY INTERNATIONAL LAW” – SECTIONS 199 (5) AND 232

a.) Binding or non-binding customary international law

It has been decided to deal with the situation created by Section 232 first because in that section the term “customary international law” stands alone. In Section 199 (5), on the other hand, the term is juxtaposed to “international agreements” with the word “and”, suggesting that both sources of law have to be applied. Furthermore, Section 232 is the provision which “transforms” customary international law into national law in general, subject only to the Constitution and (constitutional) Acts of Parliament. It is therefore clearly more important than another section referring to customary international law that has to be applied as part of national law.

Section 232 of the FC

As indicated in Chapter I, a state which persistently and publicly objects to a practice becoming a binding rule of custom cannot be bound thereby, simply because in such a case the requirement of *opinio juris* is not met.²³⁸ The predecessor to Section 232 of the FC, Section 231 (4) of the IC, however, read

“231. (4) 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.”²³⁹

Section 232 of the FC, on the other hand, omitted the words “binding on the Republic” and reads

“232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

It is immediately apparent that Section 232 of the FC is, in general, grammatically more acceptable. For example, it provides that customary international law “is law in the Republic”, whereas Section 231 (4) of the IC provided that it “shall ... form part of the law of the Republic.” The former is a much clearer formulation than the latter. However, the omission of the words “binding on the Republic” gave rise to some controversy in the light of *S v Makwanyane*²⁴⁰ where the Constitutional Court found that, in the context of Section 35 (1) of the IC²⁴¹, the term “international law” would include binding as well as non-binding international law.

²³⁸ Chapter I *supra* under 2.2.2 at 20.

²³⁹ Italics added.

²⁴⁰ *Supra* (n22).

²⁴¹ Section 39 (1) (b) of the FC.

Keightley²⁴², submits that in the light of the overall significance accorded to public international law in both the IC and the FC, as well as the Constitutional Court's approach in *Makwanyane*, the omission of the words "binding on the Republic" means that, in the context of Section 232 of the FC, "customary international law" should be interpreted to include, not only binding custom, but also "soft" law. She refers to Botha's submission regarding Section 231 (4) of the IC that the words were being used tautologously because a persistent objector cannot be bound by a rule of international custom²⁴³, but concludes that, in the light of the above, the omission of those words wasn't simply an attempt by the constitutional drafters at streamlining the grammar.

Dugard, on the other hand, rejects the viewpoint advocated by Keightley and supports Botha's view that the word "binding" was unnecessary and, indeed, tautologous in the context of Section 231 (4) of the IC or, for that matter, Section 232 of the FC.²⁴⁴ It has to be agreed. The purpose of Section 231 (4) of the IC (Section 232 of the FC) is clearly to regulate the application of customary international law at national level, and, indeed, to declare it part of the law of the land, save in so far as it is inconsistent with the Constitution or (constitutional) Acts of Parliament. It is therefore a much stronger provision than Section 35 (1) of the IC, in terms of which the Court found that it had to have regard to non-binding law, but that it is in no way bound to follow it.

As indicated in Chapter I, *supra*, the idea of "soft" law is foreign to a national system of law. Therefore, the South African legal system does not generally recognise non-binding (political, moral or religious as opposed to legal) rules as "law" or a source of law as does, for example, IHRL. Law from a South African perspective comprises only binding legal rules and principles, otherwise they cannot be legally enforced. And, because the current Constitution follows a dualist instead of a monist approach²⁴⁵, it would amount to an absurdity to suggest that non-binding law at international level become binding law at national level. If international custom does not bind a state due to its persistent objection, why should its citizens be bound? Binding customary international law in itself is a non-exact elusive concept to determine and indeed quite inaccessible for the normal citizen. Non-binding customary international law is, therefore, even more inaccessible for the man on the street. How can a citizen know whether his / her actions are legal or illegal if he / she doesn't know what the law prescribes? In the light hereof, it would indeed be anomalous to suggest that the

²⁴² R Keightley "Public international law and the Final Constitution" (1996) *SAJHR* 405.

²⁴³ Botha *op cit* (n77) at 255.

²⁴⁴ *Op cit* (n5) 54.

²⁴⁵ See Chapter III *infra*.

Republic might not be bound at international level, but that internally the courts are bound to apply the rule as part of national law.²⁴⁶ In fact, except where legal rules are formed through custom, only the Legislature²⁴⁷ or the Judiciary²⁴⁸ can create new binding law, and if the Constitution doesn't do so expressly or by logical implication, then "soft" law is not included in South African national law.

It is therefore submitted that a purposive interpretation of the section as a whole will dictate that only binding customary international law was intended by the constitutional drafters to be part of the law of the land. The omission of the words "binding on the Republic" was, therefore, only an attempt of the constitutional drafters at streamlining the grammar in order to convey what the concept should mean from a South African perception. Borrowing part of the title of Schneeberger's thesis²⁴⁹, the drafters merely attempted to eliminate a tautologous use of terminology from the "labyrinth of tautology" that surrounds international law terminologies in the post-1994 constitutions.

Section 199 (5) of the FC – binding or non-binding law

Although already quoted above, the quote of this section is repeated here to emphasise the point under discussion

"199. (5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including *customary international law* and international agreements *binding on the Republic*."²⁵⁰

As it is not grammatically possible to "divorce" the phrase "binding on the Republic" from the term "customary international law" and make it applicable to "international agreements" only, the constitutional drafters must logically have intended to use it in connection with customary international law. As pointed out under Section 232's discussion, the use of the

²⁴⁶ Interestingly enough, Devine was of the opinion that the words "binding on the Republic" as used in Section 231 (4) of the IC was a "satisfactory formulation" because, "in the absence of such formulation one could arrive at the anomalous situation where the Republic might not be bound by a customary rule at international level but that the courts would be bound to apply the rule as part of South African law. In such a case the executive and judicial branches of the state would in effect be speaking with two different voices on a particular rule of international law." - DJ Devine "The relationship between international law and municipal law in the light of the Interim South African Constitution" (1995) 44 *ICLQ* 1 at 12. Whilst Botha's opinion that the words' use was tautologous is to be preferred to any opinion that it was a satisfactory formulation, the crux of Devine's opinion can serve as basis for an argument that it would be anomalous to suggest that non-binding international law is made part of national law, without subjecting it to a judicial interpretation process where it can be valued against existing law before accepting it – e.g. in terms of Section 39 (1) (b) and *Makwanyane supra* (n22).

²⁴⁷ Through legislation.

²⁴⁸ Through judicial activism in terms of the interpretation sections *supra* in the style of the Indian Judiciary – PN Bhagwati "Judicial activism and public interest litigation" (1985) *Columbia Journal of Transnational Law* 561.

²⁴⁹ *Op cit* (n135).

²⁵⁰ Italics added.

term “binding on the Republic” in connection with customary international law where it is sought that international custom be applied as part of national law is tautologous. The same goes for this section. The question can therefore be asked: Why did the Constitutional Assembly recognise Botha’s argument that, for purposes of Section 232 the term was being used tautologously and, therefore, omitted it, but not for purposes of Section 199 (5)? The only logical explanation therefor that can be thought of, is that the two sections were either reviewed and drafted by two separate committees working independently and without consulting each other, and / or that the committee responsible for the rephrasing of Section 199 (5) simply forgot to bring the two provisions in line with each other.

With reference to this provision’s predecessor, section 227 (2) (d) and (e) of the IC, Dugard remarked as follows

“Although the rules of customary international law on the subject of aggression are wide enough to cover both the prohibition of force contained in Art 2 (4) of the Charter and the General Assembly’s Resolution on the definition of Aggression of 1974, the prohibition of force contained in the Charter of the United Nations remains the principal rule of law on this subject. Moreover South Africa is party to both the United Nations Charter and the 1928 General Treaty for the Renunciation of War (also known as the Pact of Paris or the Kellogg-Briand Pact). It would therefore seem wise to reformulate s 227 (d) as follows:

‘The National Defence Force shall ...

(d) not breach any treaty or rule of customary international law binding on the Republic relating to aggression.”²⁵¹

It would, therefore, seem that the Constitutional Assembly decided to heed Dugard’s suggestion by formulating this section in the way it did. (Note, however, that Dugard’s use of the “binding on the Republic” in connection with customary international law is tautologous although he, in his latest textbook decided to support Botha’s view that the term, at least in the context of Section 232’s predecessor, is tautologous and had, therefore, correctly been omitted from Section 232 of the FC.²⁵² He, therefore, so it is submitted, had a change of heart on this aspect as well. As this article was published before his textbook, this suggestion by him cannot be used in support of an argument that the term in Section 231 (4) of the IC was not tautologous and that its omission from Section 232 of the FC intended the use of non-binding law as well.)

A further point to be made here, is that the international law terminologies used in this section was added *ex abundanti cautela*, at least in as far as customary international law and incorporated treaties are concerned. They are already, through the Constitution, part of South African law, and to include them in the definition of “the Constitution and the law” was unnecessary. The only purpose that the term “binding on the Republic” in this text can

²⁵¹ Dugard *op cit* (n218) at 243-44.

²⁵² *Loc cit* (n244).

possibly have, is to make binding (but unincorporated) treaties applicable at national level in the context of this section without of necessity being legislatively incorporated in terms of Section 231 (4).²⁵³ In other words, the Constitutional Assembly, in using the words in connection with treaties, probably intended to de-entrench the need for legislative incorporation of treaties before they have to be applied at national level for purposes of this section. This result could, however, have been achieved in grammar that is more pure. The section could, therefore have read something like

“199. (5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law; provided that, for purposes of the recognition and application of international law in this section, international law shall include international agreements binding on the Republic even though they have not been incorporated into law in terms of section 231 (4).”

It is, therefore, submitted that, this section was sloppily drafted even though the Constitutional Assembly did recognise the fact that the predecessor to this and other sections in the FC, Section 227 (2) (d) and (e) used the incorrect grammar for customary international law as pointed out by Dugard and attempted to rectify it.²⁵⁴ That section used a grammatically incorrect sequence of words to describe the term, namely “**international customary law.**” As pointed out in Chapter I, *supra*²⁵⁵, the incorrect sequence of words may lead to confusion of two closely connected terms like **private international law** (conflict of laws) and **international private law** (a developing branch of international law involving “private law” aspects). This criticism by Dugard, however, smacks of a purist’s grammatical nit-picking. As there is no closely connected terminology to customary international law, this grammatically incorrect sequence of words would not have led to any real interpretational difficulties for the courts, and this criticism may, therefore, be described as mistaking the wood for the trees. Whatever, the Constitutional Assembly did recognise the grammatical error in the section’s predecessor and, therefore should also have attempted to remove a tautologous term, lest someone may argue (through intra-textual contextualisation) that the omission of the term in one section, but not in the other, means that non-binding law was intended where it was omitted. Such an argument might strengthen Keightley’s argument, *supra*, that the omission of the word binding from Section 232, whilst it was used in its predecessor, means that the Assembly chose to include non-binding international law as well. But, as pointed out there, Keightley’s argument is wrong in law when a purposive interpretation method is followed.

²⁵³ This aspect will be dealt with in Chapter III, *infra*.

²⁵⁴ Dugard *op cit* (n218) at 244.

²⁵⁵ Chapter I *supra* under 2.1.4 at 10.

Section 198 (c) and 199 (5) of the FC – incorporated or unincorporated law

Furthermore, it is submitted that this section represents an example of sloppy drafting because it contains virtually the same directive (albeit in more specific terms) to the security forces that is already contained in **Section 198 (c)**, *supra*. The only difference is that Section 198 (c) is a directive towards the state in general about how to maintain national security, while **Section 199 (5)** is a more specific directive to the state's agencies in charge of the maintenance of national security. In this sense it is anomalous that Section 198 (c) requires the state to observe only applicable international law, in other words, as far as treaty law is concerned, only international treaty law emanating from incorporated treaties, but that Section 199 (5) requires the security forces to act in terms of binding, but unincorporated treaties as well.

However, accepting that the Constitutional Assembly intended to de-entrench the need for legislative incorporation of treaties for purposes of Section 199 (5), an intra-textual contextualisation and purposeful interpretation will, probably, lead to an interpretation that, in order to qualify as “international law” in terms of Section 198 (c), binding treaties need not be incorporated into national law as required by Section 231 (4).

Section 199 (5) of the FC – to whom this section is addressed

Lastly, although this is more applicable to the discussion of the application of international law, which is to follow in the next Chapter, it must be observed that Section 199 (5) the FC doesn't restrict the directive to the defence force as did its predecessor Section 227 (2) (d) and (e) of the IC. In other words, the directive to act in observance to international law in the maintenance of national security is aimed at all the branches and agencies of the national Executive and not only to the defence force. The inclusion of the police service in this directive to the security services is also indicative of the fact that this section, just like Section 198 (c), is not limited to the maintenance of national security vis-à-vis other subjects of international law, but also applies to the internal maintenance of national security.

b.) Codifications of international custom

It was pointed out in Chapter I²⁵⁶, that, due to the normal uncertainties regarding the existence and scope of rules of customary international law, resort is nowadays taken to codification of custom. It was also pointed out there that the Vienna Convention on the Law of Treaties of 1969 is generally accepted to be a codification of international custom regarding treaty law. Although this can be accepted as trite law, even from a South African perspective, the

²⁵⁶ *Supra* under 2.2.5 at 22.

Constitutional Court in *Harksen*²⁵⁷ did not appear very convinced of that issue. The Court, *inter alia*, declared

“Although the extent to which the Vienna Convention reflects customary international law *is by no means settled*, I shall presume in favour of the appellant that the provisions of article 46 (1) do reflect customary international law.”²⁵⁸

The Court then sidestepped this issue by finding that, even so, if the prescriptions of Section 231 of the Constitution were applicable in this case, a failure to comply therewith would be a manifest violation of a national rule of fundamental importance and that, therefore, Article 46 (1) of the Vienna Convention would not apply in aid of appellant’s argument based on estoppel.²⁵⁹ However, the Court then said

“... I prefer to dispose of this submission of the appellant on other grounds and leave open the interpretation and binding effect in our law of article 46 of the Vienna Convention.”²⁶⁰

Based on the Court’s earlier opinion, that the President’s consent to surrender Harksen for trial in Germany in terms of Section 3 (2) of the Extradition Act amounted to no more than a domestic act, Goldstone J, writing for the Court, then continued to find that there was accordingly no representation of a valid international agreement on which Germany could rely to establish any enforceable obligation against South Africa, and which South Africa would then be estopped from denying. Given the eminence of the Court’s knowledge on international law, and especially that of the Judge who wrote the judgment²⁶¹, one would have expected a more satisfactory *obiter dictum* regarding the status of the Vienna Convention in international law. Van Zyl J’s treatment of this aspect in *Harksen II*²⁶² was much more appreciative of the international status of the Convention. He used the definition of “treaty” in the Vienna Convention as part of customary international law and, therefore, part of South African law in terms of Section 232 of the FC.²⁶³

One should also bear in mind Dugard’s opinion, *supra*, that the prohibition on the use of force contained in Article 2 (4) of the Charter and the general Assembly’s Resolution on the Definition of Aggression of 1974 constitutes codifications of customary international law.²⁶⁴ Customary international law in the context of Section 199 (5) of the FC is, therefore wide

²⁵⁷ *Harksen III supra* (n146).

²⁵⁸ At par [26] of the judgment. Italics added.

²⁵⁹ *Supra* under 2.3.1 a.) at 83.

²⁶⁰ At par [27] of the judgment.

²⁶¹ Goldstone J once was a Prosecutor of the International Criminal Court in The Hague before returning to the Constitutional Court’s bench and, therefore, not a stranger to international law.

²⁶² *Supra* (n146).

²⁶³ At par [31] of the judgment.

²⁶⁴ *Loc cit* (n251) referring to *The Nicaragua Case – Military and Para military Activities in and against Nicaragua (Nicaragua v USA) Merits* 1986 ICJ Reports 14 at 98-100 and Resolution 3314 (XXIX) of 14 December 1974.

enough to include the prohibition on the use of force and the definition of aggression. However, in the light of the Constitutional Court's treatment of a codification of customary international law in *Harksen, supra*, it remains to be seen whether a court will be swayed to accept Dugard's opinion in this regard.

c.) Proof of customary international law

The post-1994 constitutions, however, did not change the South African perspective of the law regarding proof of customary international law. South African courts will, therefore, probably still accept that customary international law requires proof of both the requirements of *usus* and *opinio juris* on the basis that they did pre-1994²⁶⁵ before it can be applied as part of national law in terms of Section 232. This would, by necessary implication, mean that the courts will still recognise the persistent objector phenomenon as a bar to a rule of custom becoming binding law for the state which persistently and publicly objects to the rule becoming law.

It will, however, be interesting to see how the courts address the issue of a persistent objector when discerning whether certain alleged parts of international custom²⁶⁶, fiercely and persistently objected to in the past²⁶⁷, constitute binding customary international law rules today (and whether they were perhaps binding pre-1994, regardless of whether the apartheid government persistently, but arguably wrongly, objected thereto).²⁶⁸ Will the courts approach the question on the basis that the rule of customary international law was not binding pre-1994, but that, since South Africa's persistent objector status has now changed to a supporter status, the rules are considered binding since 27 April 1994? Will the courts find that South Africa's persistent objections were morally and politically wrong, and may therefore be ignored regarding some rules of custom such as those regarding the crime of apartheid? Will the courts find that some of those rules actually constituted *jus cogens* or obligations *erga omnes* to which the persistent objector exception does not apply²⁶⁹?

The new constitutional dispensation has certainly set the stage for judges to shake off their slavish acceptance of what the previous government felt and to be extremely resourceful (if not creative) and international law-friendly in their judgments on these questions should the

²⁶⁵ Chapter I *supra* under 2.2.2 at 19-21.

²⁶⁶ E.g the international crime of apartheid.

²⁶⁷ Booysen *op cit* (n198) 178-187; CW Van Wyk *Die Misdaad van Apartheid in die Volkereg* LLM thesis UNISA (1979).

²⁶⁸ The position between brackets is apposite with reference to the discussion of the application of international law in terms of Section 35 (3) (I) of the FC in Chapter V *infra*.

²⁶⁹ Chapter I *supra* under 2.2.6 at 23.

opportunity arise. Some of these issues will be discussed in more detail in Chapter V, *infra*, when application of international law via Section 35 (3) (I) is taken to task.

2.5 “PRINCIPLES OF INTERNATIONAL LAW REGULATING THE USE OF FORCE” - SECTION 200 (2)

a.) *That language problem again*

Binding or non-binding law

With reference to Dugard’s suggestion regarding the successor of Section 227 (2) (d) of the IC, *supra*²⁷⁰, it is starkly evident that, although the Constitutional Assembly included his suggestion in Section 199 (5)’s directive to the security services, it opted once again to use more inexact terminology in this specialised declaration (or identification) of the defence force’s obligation to observe international law in the maintenance of national security against other states. It declares

“200 (2) 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 law regulating the use of force.*”²⁷¹

Once again, it poses the question what was intended by this section. Did the Constitutional Assembly have in mind that not only binding international law relating to the use of force was to be understood hereunder, or also that “soft” law on the subject was to be included. It is submitted that, as the word “principles” is more often used to indicate a higher order of law than “rules”, rather than as synonyms²⁷², the Constitutional Assembly most probably did not have in mind that “soft” law should be included in this term. Furthermore, the qualification borne by the word “regulating” is indicative that the Constitutional Assembly had “hard” law in mind here, and not “soft” law. Non-binding provisions cannot “regulate” the use of force between states internationally because, in order to be regulative, rules must be binding. “Soft” law rules might, as indicated in Chapter I, lead to binding rules and principles, but they are not binding rules or principles in themselves.

²⁷⁰ *Loc cit* (n251).

²⁷¹ Italics added.

²⁷² E.g. the International Law Association “Statement of Principles Applicable to the Formation of General Customary International Law” (2000) Final Report by the Committee on Formation of [General] Customary International Law – London Conference 2000 at 10-11 states: “Some commentators draw a distinction between ‘principles’ and ‘rules.’ Their definitions vary, but the general idea is that principles operate at a higher level of generality than rules. So, for example, one may speak of the ‘principle’ of the freedom of the high seas, but of the ‘rule’ that submarines, in passing through the territorial sea, must navigate on the surface and show their flag.” This conception is, however qualified immediately as follows: “However, in ordinary (legal) usage the two terms are often used interchangeably...”. It is, however submitted that ‘principles’ are, in normal language, perceived to indicate something more basic than ‘rules.’ ‘Principles’ can be regarded as the *grundnorm*, whilst ‘rules’ can be regarded as either ‘norms’ of a basic nature -(principles) - or derivatives from principles - ‘normal rules.’

The argument advanced regarding other international law friendly provisions, *supra*, to establish that only binding law is included, can be used here as well. Obviously, the defence force may, in terms of international law, only be used to exert force against another state in terms of the exceptions to the general prohibition of the use of force, which prohibition is regarded as *jus cogens*.²⁷³ The defence force may not (although it can) legally be utilised in breach of international law. International law can only be breached by a state if it is binding on it. On the other hand, there is no legal sanction that can be imposed against a state for its non-observance of “soft” law. It makes no sense to constitutionally authorise the defence force to utilise “soft” law as justification for the use of force, especially where that use of force will be in contravention of binding international law, because that will inevitably lead to international conflict. Other states, not bound by the “soft” law, might even feel obliged under binding international law to act against the offending states.

Therefore, if, for example, South Africa teams up with Zimbabwe in terms of a “soft” law agreement to attack Zambia without internationally recognised justification, other states may legally intervene forcefully. That will most probably be the case where other states have a financial, political or strategic interest in the state being attacked or under threat²⁷⁴, although that is not necessarily a requirement (or justification) for intervention. In the light of the solemn undertaking in the Preamble to the FC to demonstrate a certain predilection for the law of nations, *supra*, the thought that the Constitution might authorise the use of force in contravention of binding international law seems absurd.

Incorporated or unincorporated law

As in the case of Section 199 (5), *supra*, it would appear that, although the Constitutional Assembly intended that only binding international law must be observed for purposes of this section, the law need not specifically be incorporated into national law. Nothing in the language or purpose of the section demands incorporation of treaty law before it can be applicable to the situations envisaged by this provision. Therefore, treaties to which South Africa is a party, but which have not been incorporated into national law, such as the four Geneva Conventions of 12 August 1945 and their relevant protocols, will have to be observed and complied with by the SANDF during any use of force against another state or subject of international law.

²⁷³ Dugard *op cit* (n5) 413.

²⁷⁴ E.g. The USA's attack of Iraq for its threat against Kuwait in order to protect its own financial and strategic interests. This was, however, done with the cognisance (“authorisation”) of the UN.

Sources

As the crux of this term lies in the wider term “international law”, it can again safely be accepted that the Constitutional Assembly here had in mind that the “principles” it refers to in this section, can emanate from any source whatsoever (be it treaty, custom, general principles of law recognised by civilised nations, text writings or legal precedent) provided they are viewed as “principles.” As indicated, “principles” are generally conceived to operate on a higher level of generality than rules. Therefore, it is submitted, the Constitutional Assembly, quite possibly, intended that only rules in the nature of *jus cogens* or obligations *erga omnes* be included in this provision. However, even if that were not the case, then, surely, the term refers only to binding international law emanating from whatever source. (As in the case of sections 198 (c) and 199 (5), treaties need not be incorporated in terms of Section 231 (4) of the FC before they are applicable and to be observed in striving towards the declared objective of the defence force.)

Branches

The most obvious branch of international law to be observed by the defence force in striving towards its declared objective in this section is the *jus ad bellum*. In the case of war, however the *jus in bello* will also have to be observed in striving towards the declared objective of the defence force. It is only obvious that the totality of the LOAC must be applicable in determining the scope of the declared primary objective of the SANDF. It would be absurd to suggest that the SANDF is, in terms of this section, only required to observe the *jus ad bellum* before engaging in battle, but that it is not part of its objective to observe the *jus in bello* in case of armed conflict.

Certain principles of IHRL, in as far as they have not yet been included in the Bill of Rights (as the Bill of Rights must in any event be observed by the armed forces), may also be applicable, provided that they amount to binding “principles” of international law regulating the use of force. Although “soft” law is a source of IHRL, non-binding IHRL will clearly not be applicable for purposes of this provision. Other aspects, such as sovereignty, recognition of other states, governments, *de facto* regimes and NLMs may equally be of importance to judge whether the defence force was (or is about to be) utilised in terms of its declared objective to observe the “principles of international law regulating the use of force.”

b.) To whom this directive is addressed

Devine states that Section 227 (2) (d) of the IC – and by analogy Section 200 (2) of the FC – raises difficult problems.²⁷⁵ He gives the example of where the President (or the government)

²⁷⁵ Devine *loc cit* (n106).

orders the SANDF to invade or attack another state, or to conduct a cross border raid, it may be clear that the operation is conducted contrary to Article 2 (4) of the UN Charter, since it does not amount to self-defence and, where is undertaken without authorisation of the Security Council, it is therefore illegal. He argues that such order will be unconstitutional and illegal. If the SANDF carries it out, it would be acting contrary to international law and the Constitution.

He quite correctly points out that the international prohibition on the aggressive use of force is one that mainly applies to governments and not to their armed forces.²⁷⁶ It has therefore to be agreed with Devine that it is rather peculiar to address the constitutional prohibition to use force to the SANDF and not the government, which is ultimately responsible for deploying the defence force. According to the FC, only the President may authorise the “employment” of the defence force²⁷⁷, and that is made subject to the authority of Parliament and the Executive working in tandem.²⁷⁸

However, it should be borne in mind that this provision merely declares what the primary objectives of the defence force in terms of international law are. It, therefore, serves as a reminder (directive if one prefers) to the government agency authorised to deploy the defence force not to strive for an unauthorised objective. On the other hand, under Section 199 (6) of the FC, “[n]o member of any security service may obey a manifestly illegal order.” Therefore, the directive contained in Section 200 (2) can also serve as basis for the defence force to legally refuse to obey an order if it seems to be manifestly illegal in terms of the international law principles regulating the use of force. It is submitted that the defence force (or the Generals in charge thereof) has no discretion in this regard, as none of its members may obey a manifestly illegal order. This is an absolute prohibition and must be observed once that it is clear that the President’s order is illegal. Although peculiar, this provision therefore has an important role to fulfil in the new constitutional order.

2.6 “INTERNATIONAL OBLIGATION” – SECTION 201 (2) (c)

a.) *Binding or non-binding law and incorporated or unincorporated law*

This subsection reads as follows

“201. (2) Only the President, as head of the national executive, may authorise the employment of the defence force –

²⁷⁶ Devine *op cit* (n106) at 186.

²⁷⁷ Section 201 (2) *infra*.

²⁷⁸ Section 198 (d) of the FC reads: “National security is subject to the authority of Parliament and the national executive.” Parliament is also charged to oversee and scrutinise all executive action in terms of sections 42 (3), 52 (2), 92 (2) and 102 of the FC. The President’s discretion is therefore not an absolute and exclusive one.

- (a) in co-operation with the police service;
- (b) in defence of the Republic; or
- (c) in fulfilment of an *international obligation*.²⁷⁹

The word “obligation”, it is submitted, means “legal obligation” and, accordingly, that only binding international law applies in terms of this section. If it meant “moral” as opposed to “legal” obligation, it would give the President *carte blanche* to utilise the defence force in support of another state’s illegal use of force, merely because his / her party shows solidarity with the politics of that state. In the light of the international abhorrence of the use of force²⁸⁰, it is submitted that this was clearly not the purpose for which the President’s prerogative in this regard was enacted in the Constitution.

As in the case of Sections 199 (5) and 200 (2), and by analogy, Section 198 (c), *supra*, there is no indication in this section, the context in which it has been enacted, or the purpose thereof, that only incorporated international law is intended. As long as the international law imposes a binding obligation (or where an obligation is accepted, a binding one is created), the obligation will have to be fulfilled in order to escape international action or reprisal.

b.) The nature of the prerogative

This is a statutory regulation of a prerogative power that the President, as head of the national Executive, always had. The mere fact that a prerogative is embodied in a statute (here the Constitution) does not mean that the nature and content of the prerogative power have changed.²⁸¹ However, according to this section it is only the President, and no one else, who may authorise the employment of the defence force. Although, obviously, he / she may act upon advice of his / her Cabinet Ministers (especially the Minister of Defence), generals or other advisors, the discretion remains the President’s, and it is dubious whether it can be delegated in the light of the word “[o]nly”, which introduces this subsection.

²⁷⁹ Italics added.

²⁸⁰ E.g. see The General Treaty for the Renunciation of War of 1928; Article 2 (4) of the Charter of the UN for prohibitions on the use of force. In 1986, the prohibition on the use of force in Article 2 (4) of the Charter was accepted by the ICJ as a rule of customary international law in the *Nicaragua Case supra* (n264) at 98-100. According to Dugard *loc cit* (n273), this prohibition is recognised by the international community as *jus cogens*, although some states violate it covertly or seek to justify their action under one of the exceptions to the use of force, such as self defence, hot pursuit etc. See the remarks made in Chapter III *infra* under 3. with reference to such practices by the pre-1994 security forces.

²⁸¹ *Supra* at 99 especially (n221).

c.) The nature of the obligation

Theoretically there is no difference between an obligation **imposed** by international law²⁸² and one **accepted**²⁸³ for purposes of its binding effect at international level, except where the accepted obligation is in contravention of international law, in which case the argument advanced in *a.)*, *supra*, will prevail. However, if one supports the school of thought that advances argument that an “informal (in the sense of non-binding) international agreement” is both needed and may, indeed, exist internationally alongside “formal treaties”²⁸⁴, it is possible that an informal agreement may be reached between the President and another state or entity to employ the national defence force of the Republic. In such a case, it is submitted, the state cannot be forced internationally to employ its defence force when the President later, whether on external advice, influence or otherwise, decides not to honour his / her initial agreement. This is one of the reasons why it was submitted under *a.)*, *supra*, that non-binding obligations are not intended in the term used in this section.

Furthermore, although the discretion whether to use a state’s defence force is one of the most basic manifestations of sovereignty, and a directive by the international community to use the defence force might be interpreted to be an interference in domestic affairs, a directive by the Security Council of the UN in terms of Article 25 of the Charter, or a rule that has developed into *jus cogens* or obligation *erga omnes*, will constitute a binding obligation to use the defence force.

It is, however, dubious whether a national court would direct the President at national level to utilise the defence force in fulfilment of such an obligation, because it may lead to an impression that the state is “speaking with two voices”, the Executive saying one thing and the Judiciary another. For the same reason it is dubious whether a court would direct the President to utilise the national defence force in terms of an “informal agreement.” On the other hand, however, if the President decides to honour such obligation, which is binding in terms of international law, it is submitted that a court will not interdict his / her decision for reason of this provision. However, where the agreement is not a binding one, and the President decides to oblige, it is quite possible that a court will interdict the President from

²⁸² E.g. under direction of the Security Council of the UN in terms of Article 25 of the Charter to use force in order to maintain international peace or in accordance with regional arrangements authorised by the Security Council in terms of Article 53. See Dugard *op cit* (n5) Ch 21, who makes it clear that the obligation can, however, also arise from treaty, customary international law, *jus cogens*, obligations *erga omnes* and other sources.

²⁸³ A state may, therefore, e.g. through treaty (or informal agreement) agree to (or accept) a request to intervene forcefully – e.g. for purposes of humanitarian intervention, collective self-defence, civil strife and internationally recognised wars of national liberation – as long as it does not contravene the prohibition against the use of force.

²⁸⁴ See the discussion under 2.3.1 *supra*.

ordering the utilisation of the defence force in the light of the courts' wide powers of review which will be discussed in the next Chapter, *infra*.²⁸⁵ This is a further reason why it was argued under *a.) supra*, that this section refers to legally binding international obligations only.

Lastly, it should also be borne in mind that "[a] state cannot plead provisions of its own law or deficiencies in that law in answer to a[n international] claim against it for an alleged breach of its [binding] obligations under international law."²⁸⁶ This provision, therefore, should serve as an important reminder that South Africa might be obliged under (binding) international law to use its defence force against other states, and that it may face an international claim (or other legal action such as reprisal or sanctions) in case of refusal. It is also an indication of South Africa's undertaking towards international society to honour its obligations. This section, therefore, also has a symbolic effect of the same kind as the "typical succession provision" of Section 231 (5), *supra*.

3. CONCLUSION

Although the international law-friendly approach of (and concomitant use of international law terminologies in) the post-1994 South African constitutions has been widely welcomed,²⁸⁷ its meaning and scope from a South African perspective is sure to remain controversial. This is starkly evident at very basic level as indicated, *supra*, where even grammar may bedevil the interpretation process.

This will prove to be especially cumbersome for the courts because most lawyers are not sufficiently trained in international law. Indeed, "[a] way must be found to reach the lost generations of international lawyers – judges, advocates, magistrates, attorneys, students and law teachers" in order "not only to reconceptualise our notions of international law as such, but also to reassess the very basis from which our legal system operates."²⁸⁸

It is, however, in the light of the above submitted that, having regard to the principles of international law, a literal interpretation of the term "international law" (or the relevant derivatives or branches thereof) in the context of the Constitution as a whole and, in the case

²⁸⁵ Although this whole paragraph is about the application of international law at national level, and will therefore be discussed in Chapter III *infra*, it was used here as an illustration why it is important to decide what kind of obligation was intended by the Constitutional Assembly and in terms of the purpose for which this section was enacted.

²⁸⁶ I Brownlie *Principles of Public International Law* 5th Ed (1998) 34.

²⁸⁷ All the commentaries mentioned, *supra*.

²⁸⁸ Botha "The coming of age of public international law in South Africa" (1992-93) 18 *SAYIL* 36 at 48.

of doubt, a purposive interpretation of the section will usually suffice in explaining the meaning that should be attached to the term. If that does not prove satisfactory, a more generous (even text-altering) interpretation will be necessary. It is submitted that following the above interpretations and suggestions will lead to an understanding of what exactly was intended by the post-1994 constitutions; what the national and international repercussions thereof are; and what amendments might be necessary to improve the South African legal perceptions in this regard.

The symbolic affirmation of the harmonising effect of international law on national law, which is sought to be affirmed by the Preamble of the FC, should be clear from all the provisions referring to international law. All the international law friendly provisions in the FC discussed, *supra*, serve the twofold purpose advocated by Dugard

“First, they inform politicians, lawyers and the public of South Africa that the new constitutional state, unlike the apartheid state, aims to conform to the prescriptions of the international legal order. Secondly, they inform the international community of South Africa’s new commitment to international law and give notice of the manner in which South Africa will bind itself in future relations with states.”²⁸⁹

However, whether the rest of the Constitution honours the undertakings in the Preamble to full effect, will only become apparent when the application of international law in terms of the FC at national level is examined. A discussion of the application of international law at national level in terms of the specific sections in the FC mentioning or involving international law may, therefore, now be attempted.

²⁸⁹ Dugard *op cit* (n218) at 241.

CHAPTER III

DIRECT APPLICATION OF INTERNATIONAL LAW THROUGH THE
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4. INTERNATIONAL LAW AND NATIONAL SECURITY

4.1 INTRODUCTION

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CHAPTER III

DIRECT APPLICATION OF INTERNATIONAL LAW THROUGH THE “APPLICATION SECTIONS” OF THE FC

1. INTRODUCTION

1.1 GENERAL

The previous chapter represents an endeavour to determine the meaning and scope (content) of international law from a South African perspective in the present constitutional dispensation with specific reference to the international law terminologies in the FC. This chapter will focus on the provisions governing substantive application of international law (more specifically the law emanating from treaty and customary international law) in terms of which that international law is recognised and to be applied as law at national level. As the position regarding national application of international law still differs mainly according to which of the two main sources of international law is in issue, with certain exceptions in the maintenance of national security, this chapter will deal with the issue under three headings, namely:

- *Treaty law* – dealing with the national application of treaty law in a post-1994 South Africa;
- *Customary international law* – dealing with the effect of the constitutional inclusion of customary international law; and
- *National Security* – dealing with the application of international law in terms of the provisions regulating the maintenance of national security.

Because the post-1994 constitutions do not deal with it expressly in all cases, the issue of recognition and application of **prerogative powers** will be dealt with simultaneously under the mentioned headings. Where necessary, the effect of statutory regulation of prerogative powers, as well as the non-inclusion of a provision on general prerogative powers will also be considered.

However, before going into the details of the relevant provisions, it is necessary to determine the nature of the relationship/application theory chosen by the constitutional drafters and the effect of international law on national law that the Constitutional Assembly envisaged.

1.2 THE RELATIONSHIP/APPLICATION THEORY CHOSEN BY THE CONSTITUTIONAL ASSEMBLY

From a South African perspective, it should be clear that the FC does not accept or promote a purely monistic view of international law vis-à-vis national law. It clearly caters for both as

separate systems of law.¹ It caters for a system of legislative incorporation of treaties into South African law before they can be treated as law.² Although customary international law is declared to be part of the law of the land (by formally applying the practise required by the theory of “transformation”³), it is still made subject to the Constitution and Acts of Parliament.⁴ The current Constitution, therefore, approaches the relationship between national and international law from a dualistic rather than monistic viewpoint.

The IC, on the other hand, leaned heavily towards acceptance of the theory of monism. Treaties were more readily recognised as forming part of the law of the land than is the position under the FC.⁵ In one of the first “big” decisions by the newly founded Constitutional Court (and certainly one of the - if not the - best international law-friendly decisions to date) the Court in *S v Makwanyane*⁶ accepted Dugard’s view that, in the interpretation of the Bill of Rights in terms of Section 35 (1) of the IC, the international law required to be taken into consideration includes non-binding (“soft”) law.⁷ However, the Court also found that the court could derive assistance from international law but that it is by no means bound in terms of this section to follow it, which dealt the total acceptance of monism a blow. At least, however, the IC evidenced such a predilection for the law of the nations, that greater harmonisation than ever before was promoted between the two systems.

Some commentators⁸ argue that the debate between Booysen and Dugard (about the “partness” of customary international law with South African national law⁹) has been settled finally by including Section 232 in the FC (Section 231 (4) in the IC), which will be discussed, *infra*. When the constitutional “transformation” of international custom into national law is discussed, *infra*, and when the application of international criminal law (ICL) is discussed in Chapter V, *infra*, it will, however, become apparent that the debate is far from settled.

¹ E.g. Section 35 (3) (l) of the FC clearly differentiates between national and international law.

² Section 231 (4) of the FC.

³ Chapter I *supra* under 2.4.2 b.) at 35.

⁴ Section 232 of the FC.

⁵ It will be argued *infra* that Section 231 (3) of the IC did not require legislative incorporation and, had the final draft of the IC not been tampered with by the Law Advisers from the old regime, no formal action of incorporation would have been required before treaties could have been applied at national level.

⁶ 1995 (3) SA 391 (CC).

⁷ At 413G of the judgment. See also Chapter II *supra* under 2.2.3 at 68-69.

⁸ CJ Botha “Leashing the dogs of war: the South African National Defence Force under the new constitution” (1993-94) 19 *SAYIL* 137 at 143; N Botha “International Law and the South African Interim Constitution” (1994) *SA Public Law* 245 at 254.

⁹ Chapter I *supra* under 1. at 4 (nn21,22) and under 2.4.2 b.) at 34-36.

1.3 THE ENVISAGED INFLUENCE OF INTERNATIONAL LAW ON NATIONAL LAW

As pointed out in Chapter II¹⁰, the Constitutional Assembly created a solemn undertaking in the Preamble to the FC that the new constitutional order will evidence a certain predilection for the law of the nations. To a certain extent, this is evident from the international law-friendly provisions of the FC. For example, the drafters of both the IC and the FC clearly had in mind that international law, especially IHRL, should play a significant role in the interpretation, development and formulation of national human rights law. This is true especially in the provision regulating the interpretation of the Bill of Rights and the development and formulation of the common law in order to give effect to the spirit, purport and objects of the Bill of Rights.¹¹ But also with interpretation of the Constitution as a whole and all other legislation¹², as well as the development of criminal law¹³, the object of the Constitutional Assembly was clearly to have international law play a greater role than ever before in influencing national law. Furthermore, regardless of which of the Booysen or Dugard schools of thought¹⁴ is subscribed to; by declaring customary international law part of the law of the land through Section 231 (4) of the IC and Section 232 of the FC, the drafters clearly wanted to see it having an effect on stagnating national law. This is even clearer from the fact that customary international law is no longer subject to the judicial precedent and “act of state” exceptions as will be pointed out, *infra*. Even in the sections regulating the maintenance of national security, *infra*, it is evident that the constitutional drafters were serious about promoting greater harmonisation between the two systems of law than ever before.

However, not all the provisions of the FC regulating the national application of international law can be described as “international law-friendly.” Whilst Section 231 (3) of the IC catered for an easier process of incorporation of treaties into national law as was the position pre-1994¹⁵, Section 231 (4) of the FC evidenced a return to the pre-1994 position.¹⁶ Although

¹⁰ *Supra* under 2.1 at 54-56.

¹¹ Section 35 (1) and (3) of the IC; Section 39 (1), (2) and (3) of the FC – to be discussed in Chapter IV *infra*.

¹² Section 233 of the FC – to be discussed in Chapter IV *infra*. Note that the IC had no similar provision, which means that the FC took a step in the right direction. Also note that the Constitution itself is included in the wording “any legislation.”

¹³ Section 35 (3) (l) of the FC – to be discussed in Chapter V *infra*. Note that here also the IC contained no directly equivalent provision.

¹⁴ *Loc cit* (n9).

¹⁵ In fact, as will be pointed out *infra*, had the final draft not been tampered with by Law Advisers from the old South Africa, the IC would have catered for automatic incorporation of treaties.

Section 232 of the FC declares customary international law part of South African law, the legal character of international custom is still made subject to, not only the Constitution, but also Acts of Parliament. Section 233, as argued in Chapter II, *supra*, refers only to binding international law, which can (or rather, must) be used to interpret national legislation. These qualifications on the application and influence of international law at national level strike a discordant note against the symphony of the international law-friendly undertakings in the Preamble.

Before moving on, one should probably mention the fact that the international law-friendliness created by the FC is not necessarily good in the eyes of everyone. As will be pointed out in Chapter V, *infra*, the Constitutional Assembly has through Section 35 (3) (1) of the FC presented a can of worms, just waiting to be opened. Whether or not this effect was envisaged by the Constitutional Assembly, one will probably never know, but the ancient Chinese curse: *May you live in interesting times*, seems apposite in this case. Although this provision is extremely international law-friendly in its possible effect on national law, not all citizens will welcome it when its effect becomes apparent.

2. TREATY LAW

2.1 RESTATING THE PRE-1994 PRINCIPLE

In order to avoid having the reader alternating between chapters to control the reasoning, *infra*, a brief restatement of the pre-1994 principle is necessary. As indicated in Chapter I¹⁷, treaties generally did not form part of South African national law, unless they were incorporated (or translated) into national law by means of legislation (subject to four exceptions, which will be discussed again, *infra*, to ascertain their post-1994 applicability).

This principle was enunciated in the Appellate Division of the Supreme Court in *Pan American World Airlines Incorporated v South African Fire and Accident Insurance Co Ltd*¹⁸ (The *Pan Am* – case). It is called the “principle of transformation”¹⁹ (or “translation”²⁰) and has been extended to resolutions of the General Assembly and the Security Council of the

¹⁶ With the exception of self-executing treaties which were ratified or acceded to by Parliament in terms of Section 231 (2).

¹⁷ *Supra* under 2.4.2 a.) at 32-34.

¹⁸ 1965 (3) SA 150 (A) at 161B-D quoted in Chapter I *supra* under 2.4.2 a.) at 32. This dictum was confirmed in a number of subsequent cases but most recently in *AZAPO v President of the Republic of South Africa* 1996 (4) SA 671 (CC) at 688 (par [26]); and *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 327C-G.

¹⁹ Dugard *International Law: A South African Perspective* 2nd Ed (2000) 49.

²⁰ DJ Devine “The relationship between international law and municipal law in the light of the Interim South African Constitution” (1995) 44 *ICLQ* 1 at 5.

United Nations (or of other international organisations for that matter).²¹ Although such resolutions are not treaties, they are included in this dissertation to point out that a *lacuna* exists in the present constitutional provisions regulating the status of international law vis-à-vis national law.

Three principal methods were pre-1994 employed by the Legislature to transform treaties into national law

- The treaty is embodied in the text of an Act²²;
- The treaty is incorporated as a schedule to an Act²³; or
- An Act which provides that the President may incorporate a treaty by means of Proclamation (delegated legislation).²⁴

As Parliament was regarded as supreme, courts could not test legislation incorporating treaties against either international or national law. The only function of the courts was to ascertain the intention of the lawmaker and to give effect thereto.²⁵

2.2 THE CHANGES BROUGHT ABOUT BY THE POST-1994 CONSTITUTIONS

2.2.1 Under the IC

The relevant provision

Section 231 (3) of the IC provided

“231. (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.”

Incorporation of treaties under the IC

The **original text** adopted by the Negotiating Council provided that an international agreement ratified or acceded to by Parliament would **automatically** form part of South African national law, unless it was inconsistent with the Constitution or was excluded by an

²¹ *Binga v Administrator General, South West Africa and Others* 1984 (3) SA 949 (SWA) at 968E. See also Dugard *loc cit* (n19) as well as the discussion, *infra*, that resolutions of this kind is not included in the language used in the treaty provisions of both the IC and the FC.

²² E.g. the Civil Aviation Offences Act 10 of 1972 incorporates the Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft of 1963, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 in this way.

²³ E.g. the Diplomatic Immunities and Privileges Act 74 of 1989 incorporates some provisions of the Vienna Convention on Consular Relations of 1961, and the Vienna Convention on Consular Relations of 1963 by means of a schedule to the Act.

²⁴ E.g. Section 2 (3) (a) and (3) ter of the Extradition Act 67 of 1962 before the amendment brought about by Act 77 of 1996.

²⁵ H Booysen *Volkereg en sy verhouding tot die Suid Afrikaanse Reg* 2nd Ed (1989) 109-115.

express provision in an Act of Parliament.²⁶ Therefore, the clear object of this subsection was to provide for automatic incorporation (or translation) of treaties into national law without the need for legislation.

As indicated in Chapter I²⁷, the need for legislative incorporation of treaties before becoming national law arose from the separation of powers doctrine – prescribing that the Executive may not legislate in lieu of Parliament. However, now that Parliament has been directly involved in the ratification/accession process (at least with reference to treaties negotiated and signed in terms of the IC), the need for legislative incorporation has dimmed considerably. As will be pointed out, *infra*, this does not necessarily hold true under the FC, although, so will it be argued, the post-1994 need for legislative incorporation remains questionable.

The **State Law Advisers**, however, “refined” the draft referred to them and came up with the text quoted, *supra*. For some unknown reason²⁸ they inserted a provision that, before a treaty can become part of national law, **Parliament has to “expressly so provide”**, a result clearly not intended by the drafters of the original text. Once again, the State Law Advisers succeeded in going against the clear will of the negotiators charged with drafting the new Constitution that had to rule the country.

The terminology used, namely “expressly so provides” almost immediately gave rise to controversy. The term could mean anything from mere endorsement or resolution to a more formal legislative act.²⁹ The opinion that it meant nothing more than a resolution taken by Parliament, and published as Government Notice in the *Government Gazette*³⁰, apparently prevailed, at least in practice. Moreover, practice indicated that it was quite common for government departments (and Parliament) to invoke the same process to ratify/accede to a treaty and to incorporate it as law. Botha³¹ refers to Government Notice 1463 of 27 September 1995, emanating from the Department of Finance, which provides

“It is hereby notified that *Parliament has in terms of section 231 (2) of the Constitution ratified the following Convention* which hereby published for general information, and has

²⁶ M Olivier “The status of international law in South African municipal law: Section 231 of the 1993 Constitution” (1993-94) 19 *SAYIL* 1 at 10.

²⁷ *Supra* under 2.2.4 b.) at 36-37.

²⁸ Perhaps for reason of the “resistance to change” phenomenon. Or was it due to plain incompetence?

²⁹ See the difference in opinion between N Botha “Incorporation of treaties under the Interim Constitution: A pattern emerges” (1995) 20 *SAYIL* 196 at 197 and DJ Devine “Some problems relating to treaties in the Interim South African Constitution and some suggestions for the definitive constitution” (1995) 20 *SAYIL* 1 at 6-7 – the former being of the opinion that a resolution was enough to incorporate treaties under the IC, whilst the latter advocates the opinion that the phrase meant that a legislative act of incorporation was required.

³⁰ As required by section 15 of the Interpretation Act 33 of 1957.

³¹ *Op cit* (n29) at 200.

furthermore expressly provided in terms of section 231 (3) of the Constitution that the Convention shall form part of the law of the Republic.”³²

Therefore, although the procedure required provided for some initial confusion, those in charge of the practice of treaty conclusion and ratification soon found a way to incorporate treaties, which, it is submitted, would also have passed constitutional scrutiny under the IC. If a court had to interpret the phrase “expressly so provides”, international lawyers would, presumably in the light of Olivier’s criticism, *supra*, have been quick to point out that the original draft didn’t include the phrase, and that it was initially intended that all binding treaties would automatically be incorporated. Furthermore, if the constitutional drafters wanted to provide that treaties had to be legislatively incorporated, they would presumably have said so in no uncertain terms rather than using the phrase “expressly so provides.” Therefore, it is submitted, a textual coupled with a historical interpretation method³³ would have led to the method employed by the government to incorporate treaties having been found to conform to the Constitution if the opportunity arose.

A need for distinction between “old” treaties and “new” treaties

The new incorporation procedure provided for in subsection (3), applied only to treaties approved by Parliament in terms of subsection (2). Incorporation of “old” treaties, namely treaties entered into force before 1994, therefore, still had to be effected by means of national legislation.

2.2.2 Under the FC

The relevant provision

Section 231 (4) provides

“231. (4) 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.”

Incorporation of treaties under the FC

Section 231 (4) constitutes a return to the pre-1994 position by requiring legislative incorporation of treaties before they can be applied nationally. It does, however, contain a proviso which declares that “a self-executing provision of an agreement that has been approved by Parliament” automatically becomes law in the Republic “unless it is inconsistent with the Constitution or an Act of Parliament”, therefore somewhat softening the pre-1994 requirement that all treaties had to be legislatively incorporated.

³² Italics added. This notice refers to the Convention between the Government of the Republic of South Africa and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital, which is then published in full.

³³ Chapter II *supra* under 1.3 at 53.

Self-executing treaties

The introduction of the concept of “self-executing” treaties, however, presents another point of concern. The meaning and scope of the term is undefined and bound to pose interpretation problems for the courts. This is an American concept, which has troubled the courts of the United States for many years. Dugard refers to different decisions in the American courts and quotes from a commentary by Professor Myres Mc Dougal in order to illustrate the difficulty imposed by and the undesirability of this concept.³⁴ He further suggests that courts will only find that a treaty or provision thereof is self-executing when existing law is adequate enough to enable the Republic to carry out its international obligations in terms thereof. If it is not, legislative incorporation will be necessary.³⁵ Professor Botha, with reference to a commentary by Van der Vyver, commented

“This provision, which was taken over – unwisely it is submitted – from United States jurisprudence with no regard to its suitability in the South African context, has not yet been tested by the courts but can be expected to raise considerable problems when it does.”³⁶

However, the inclusion of the exception is certainly not objectionable from the government’s point of view. As indicated in Chapter II³⁷, the Parliamentary ratification procedure to make treaties operative on the international plane, can take anything between six months and a year, which may have resulted in a clogging of the system hadn’t a fast track procedure been created in the FC.³⁸ The same problem would have presented itself in accepting a requirement that all treaties first had to be legislatively incorporated before they could be applied at national level as binding upon the state and individuals in the national sphere. The time it takes Parliament to legislate was bound to have an adverse effect on the effectiveness of treaties that were intended to operate at international as well as at national level, such as conventions for the avoidance of double taxation and prevention of fiscal evasion of the kind referred to, *supra*³⁹ (which is most probably one of the kinds of treaty intended by the use of the term “self-executing”). There was therefore clearly a need to cater for a procedure where treaties can become part of national law immediately when they become operative in the international realm.

³⁴ *Op cit* (n19) 58.

³⁵ *Ibid.*

³⁶ Botha “Treaty making in South Africa: A reassessment” (2000) 25 *SAYIL* 69 at 91. This article is an edited version of a contribution on South African Treaty Law and Practice in L Monroe (ed) *National Treaty Law and Practice: Vol III* (American Society of International Law – forthcoming.)

³⁷ *Supra* under 2.3.2 at 92.

³⁸ However, as pointed out in Chapter II *supra* at 97, even the fast track procedure catered for by Section 231 (3) of the FC may take up to three months before a treaty not requiring Parliamentary ratification can become operative in the international plane.

³⁹ At 129-130 (nn31, 32).

Whether the addition of the proviso will have the effect of speeding up the procedure considerably, is however dubious. The exception of self-executing [provisions of] treaties from the requirement of legislative incorporation is applicable only to those treaties “that [have] been approved by Parliament.” Accordingly it refers to section 231 (2) treaties only⁴⁰, and treaties that become binding internationally without parliamentary involvement in terms of section 231 (3) are excluded from this rule. Therefore, even self-executing provisions of section 231 (3) treaties⁴¹ will not be considered law in the Republic, unless they are legislatively incorporated. As indicated, the ratification procedure required in terms of Section 231 (2) in itself can take anything up to six months and a year to complete. This qualification on self-executing treaties becoming law, coupled with the undefined and inexact nature of the terminology (which lends itself to be tested in the courts), will, therefore, surely have an adverse impact on the effectiveness of the treaty making process.

This proviso also puts a further qualification on self-executing treaties automatically becoming law. They do not become law if they are “inconsistent with the Constitution or an Act of Parliament.” In the light of the comment in the previous paragraph, it is submitted that this qualification would have been enough to obviate the need to require that self-executing treaties must be approved by Parliament before they may become operative at national level.

Furthermore, the exception of self-executing treaties from the requirement of legislative incorporation, falls under the fourth exception in terms of which unincorporated treaties could pre-1994 have become applicable at national level.⁴² As the “act of state” doctrine has not survived the new constitutional order unscathed, which will be discussed, *infra*, the government’s decision to enter into a self-executing treaty relationship may under appropriate circumstances be challenged for alleged unconstitutionality. This aspect will be discussed under 2.3, *infra*. This will also hamper the effectiveness of treaty relations in terms of such agreements.

Methods of incorporation, supra, in a post-1997 South Africa

As Section 231 (4) of the FC now specifically requires that treaties have to be incorporated by means of “national legislation” (most probably meaning “Acts of Parliament”), it is dubious whether delegated legislation like a ministerial or presidential Proclamation in the *Gazette* would be enough to incorporate treaties in a post-1994 South Africa, unless those treaties are

⁴⁰ As will be pointed out under the next sub-heading, however, even treaties ratified under Section 231 (2) of the IC, but which have been left unincorporated, may, arguably now fall under this exception if they contain self-executing provisions because they “[have] been approved by Parliament.

⁴¹ I.e. treaties of a technical, administrative or executive nature, and treaties, which do not require ratification or accession.

⁴² Chapter I *supra* under 2.2.4 a.) at 33, and the continued existence of which will be discussed *infra*.

to be regarded as self-executing in terms of the proviso. However, it may still be argued that this Section makes it possible for enabling national legislation to delegate powers to the President or relevant Minister to incorporate treaties by means of Proclamation in the *Gazette*. But then, the enabling legislation would have to be unequivocal and unambiguous in this regard. Section 231 (4) of the FC could, however, have been formulated more clearly as to whether “national legislation” means “Acts of Parliament” or delegated legislation.

A need for distinction between “old” treaties, treaties under the IC and treaties under the FC

The see-saw like change in the position of the requirement of legislative incorporation of treaties evidenced by the post-1994 constitutions is bound to create problems. In order to decide whether a treaty has been correctly and constitutionally incorporated into national law, one will also have to distinguish between treaties incorporated pre-1994, treaties incorporated under the IC and treaties incorporated under the FC. Pre-1994, a legislative act and nothing less was required. Under the IC, a mere resolution was enough. Under the FC, a legislative act is once again required, except where it is a “self-executing provision” of a treaty “that has been approved by Parliament”, and which is not “inconsistent with the Constitution or an Act of Parliament.” Unless the incorporation process followed was in accordance with the procedure required at the time, a treaty cannot be treated as part of national law.

Furthermore, treaties dating from before 1994 or from the period under the IC, which have not yet been incorporated, will have to be incorporated in terms of Section 231 (4) of the FC. This can pose a problem where it can be argued that a specific treaty contains a self-executing provision. If such treaty dates from before 1994, it hasn’t been approved by Parliament and will not be deemed to have become law in terms of the proviso in subsection (4). If such treaty dates from the interregnum, it will have to be determined whether it has been approved by Parliament in terms of Section 231 (2) of the IC. If it has, then it can be deemed to be incorporated in terms of Section 231 (4) of the FC. If not, then legislative incorporation will be required.

This need for distinction in order to assess both the binding nature of treaties at international level, *supra*, and whether they are to be applied at national level, is a forced one created by unsatisfactory provisions in both the IC and the FC, and complicates matters extremely. In the light of the arguments that will be advanced under 2.5, *infra*, the requirement of legislative incorporation, and with it the need to distinguish between treaties concluded at different periods, should have been dropped.

UN Resolutions

As was pointed out, *supra*, the common law position that treaties must be translated (or incorporated) into national law before they can be applicable at national level was in practice extended to Resolutions of the General Assembly and the Security Council of the United Nations.⁴³ Before a national court can give effect to such resolutions at national level the resolutions must be made part of the law of the land by means of legislative incorporation. That was the historic position. The Constitution now expressly regulates the position of treaties in section 231, but not that of UN Resolutions. One would have expected the drafters of the constitution to regulate the status of such resolutions vis-à-vis national law expressly on the same basis as they did in respect of treaties. In fact, one would have expected them to do so in the IC, especially in the case of legally binding resolutions.

It is clear that the language of section 231, namely “international agreement” does not cater for the position of either binding or non-binding Resolutions by International Organisations of which South Africa is a member.⁴⁴ Resolutions by International Organisations are not treaties⁴⁵, because they do not constitute agreements between states or between states and International Organisations. Such organisations have no legislative powers and resolutions are therefore normally not binding on member states.⁴⁶

It is submitted that even purposive and generous interpretational methods will not be able to assist a court in finding that such resolutions - because South Africa is a voluntary party to the treaty in terms of which such organisation was established and, therefore has agreed to abide by its resolutions - constitute “international agreements” for purposes of this section. Therefore, a lacuna exists in the FC regarding the status of such resolutions.

How should this issue be addressed? Professor Botha has the following to say

“After the enactment of the Interim Constitution, South Africa was accepted back into the international fold and the need to regulate this issue was recognised when the country wished to meet its obligations under Security Council Resolution 757 (1992) placing an embargo on the supply of arms to the former Yugoslavia. The Application of Resolutions of the Security Council of the United Nations Act [172 of 1993] was adopted to allow for the incorporation of Security Council resolutions into municipal law and for their implementation under South African law by presidential proclamation in the *Government Gazette*. However, this Act has never been brought into operation. ... These agreements are apparently not regarded as treaties ... The fact that the above Act has not been brought into operation suggests that the system proposed in terms of which the President could incorporate the treaty by proclamation was based largely on the Interim Constitution, where the conclusion of treaties was vested in the President rather than the executive and reflects a practice from which the country would

⁴³ Chapter I *supra* under 2.4.2 a.) at 32. See also *supra* at 128 (n21).

⁴⁴ N Botha *op cit* (n36) at 89-90.

⁴⁵ Dugard *op cit* (n19) 59.

⁴⁶ *Ibid.* Resolutions by the Security Council of the UN adopted under Chapter VII of the Charter are, however, binding. See also Booysen *op cit* (n25) 57-58; 106-8.

appear to be moving away. The need for the regulation of the decisions of international organisations is, however, recognised and in all likelihood a system approximating that for treaties and showing greater involvement of the national executive in the decision on whether or not to comply with the decisions of international organisations, and of the legislature in their municipal application will emerge.”⁴⁷

However, it would seem that the common law position, that such resolutions (like treaties) must be legislatively incorporated before becoming law in South Africa, would have to prevail until the situation is either constitutionally or legislatively remedied. In any event, the position with treaties under the FC is just about the same as what it was before 1994 with reference to incorporation, except for self-executing treaties that will be discussed, *infra*.

2.3 EXCEPTIONS: THE USE OF UNINCORPORATED TREATIES IN A POST-1994 SOUTH AFRICA

The regular courts' practice regarding the use of unincorporated treaties

As pointed out, *supra*, there were four exceptions to the general rule that treaties do not become national law without being legislatively incorporated. That all those exceptions are still to be recognised unqualified today, received a relatively short-lived support in the Transvaal Provincial Division's recent decision in *Swissborough Diamond Mines v Government of the Republic of South Africa*.⁴⁸ In this case, the applicant, a company registered in Lesotho, but controlled by South African shareholders, sought to obtain discovery of documents relating to an alleged conspiracy between the South African and Lesotho governments to dispossess the applicant of its rights to diamond leases in Lesotho. The Court, *inter alia*, had to decide whether the agreement between South Africa and Lesotho was justiciable. Referring to Dugard's previous textbook⁴⁹, Joffe J found that the following exceptions exist to the requirement of legislative incorporation of treaties before they can be applied nationally

“**Firstly**, a municipal court may have recourse to an unincorporated treaty in order to interpret an ambiguous statute. **Secondly**, an unincorporated treaty may be taken into account in the challenge of the validity of delegated legislation on grounds of unreasonableness. **Thirdly**, if an unincorporated treaty provides evidence of a rule of customary international law it may be applied as customary rule – but not as a treaty. **Fourthly**, an exception arises in the case of treaties that fall solely within the purview of the executive prerogative.”⁵⁰

As indicated in Chapter I⁵¹, in a pre-1994 South Africa the first two exceptions applied to treaties to which South Africa was a party through signature or accession, whilst the third

⁴⁷ Botha *loc cit* (n44).

⁴⁸ *Supra* (n18).

⁴⁹ *International Law: A South African Perspective* 1st Ed (1994) 51-57.

⁵⁰ *Swissborough Diamond Mines supra* (n18) at 327H-J. Emphasis added. Here the Court refers to Dugard's 1st Ed *loc cit* (n49) and, therefore, to the position that existed before the new constitutional dispensation really took hold.

⁵¹ *Supra* under 2.4.2 a.) at 33.

exception applied to treaties (regarded as codifications of international custom) regardless of whether South Africa was a party thereto. The fourth exception applied to treaties in which the Legislature (and the courts) had no say for it to become law. Examples of such treaties are those declaring war or peace, those recognising states, and those about the acquisition of new territory or boundaries.⁵² For instance, a court would not have refused to find that a state of war (or peace) exists for purposes of national law, if a binding treaty said that the state is at war (or peace). It would likewise not have refused to take cognisance of territorial boundaries created by treaty. Such treaties, therefore, became national law without the need of prior legislative incorporation. However, this was due to the “act of state” doctrine, which, as will be pointed out, *infra*, has not survived the new constitutional order unscathed.

With no mention of South Africa’s new constitutional rules, and with a full investigation of the law in the USA and the UK as well as the pre-1994 South Africa, Joffe J accepted that the “true agreement” between South Africa and Lesotho “belongs” to “international law”, which was “not an area for the judicial branch of government” and, therefore “a matter in respect of which this court should exercise judicial restraint”, otherwise the Court would find itself “in judicial no-man’s land.”⁵³

However, as will be indicated under 3.3.3, *infra*, the courts are under the FC endowed with the power to test so-called “acts of state” (actions falling in the exclusive purview of the executive prerogative) against the Constitution, and, although the courts may still show considerable deference to prerogative actions as indicated from the quote, *supra*, courts are at large to intervene when such actions are unconstitutional.⁵⁴ Dugard, in the latest edition of his textbook⁵⁵, still regards the first three exceptions as true exceptions to the principle in a post-1997 South Africa, but in different words and in a different sequence. He states

“While a court must consider treaties to which South Africa is not a party in interpreting the Bill of Rights, no such rule exists in respect of treaties to which South Africa is not a party where the Bill of Rights is not in issue. A treaty to which South Africa is not a party is *res inter alios acta* and may not be considered *qua* treaty, although it may be considered as evidence of a customary rule.

Different considerations apply in respect of a treaty to which South Africa is a party but has not been incorporated into municipal law. In the first instance, a municipal court may have recourse to an unincorporated treaty in order to interpret an ambiguous statute. Secondly, an unincorporated treaty may be taken into account in a challenge to the validity of delegated legislation on grounds of unreasonableness.”⁵⁶

⁵² Booysen *op cit* (n25) 98-105.

⁵³ At 334 of the judgment.

⁵⁴ See the seminal recent decision of the Constitutional Court in *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (2) SACR 66 (CC) (*Mohamed and Another*) for an example where the Court did exactly that. See also now *Kolbatschenko v King NO and Another* 2001 (2) SACR 323 (CPD) at 336-342. These decisions will be discussed in more detail under 3.3.3 *infra*.

⁵⁵ *Op cit* (n19).

⁵⁶ *Id* 61-62. Reference to footnotes omitted.

It is noteworthy that he left the fourth exception out of his commentary regarding the application of unincorporated treaties in terms of the FC, most probably due to his opinion that “acts of state” have become justiciable in terms of the new dispensation.⁵⁷ Although the Court’s treatment of the international law position in the United States and England represents a fair reflection of the legal position in these two jurisdictions, and although the Court’s treatment of the “act of state” doctrine is a fair reflection of the legal position in South Africa pre-1994, Joffe J totally disregarded South Africa’s transition from parliamentary sovereignty to constitutional supremacy. The Court didn’t investigate whether courts in a post-1994 South Africa may scrutinise and test “acts of state” in the light of the constitution and, if so, in what circumstances a court should do so and in what circumstances a court should rather exercise judicial restraint. The Court’s decision in *Swissborough* can, therefore be regarded as decidedly out of step with the Constitution and modern interpretation trends.⁵⁸

The Constitutional Court’s practice regarding the use of unincorporated treaties

From the above it is clear that the courts have not had much opportunity to pronounce on this subject post-1994. The Constitutional Court has yet to express itself in unequivocal terms as did the TPD on the issue whether unincorporated treaties may be applied at national level and, if so, under what circumstances. However, in a recent case, *Hoffmann v South African Airways*⁵⁹, the Constitutional Court said that the need to eliminate discrimination against certain classes of individuals⁶⁰ does not arise from Chapter 2 of the FC (Bill of Rights) only, but also out of international obligation. The Court refers to section 231 (2)⁶¹ in saying that a treaty becomes binding (and, therefore, obligatory) on South Africa as soon as it is ratified in terms of the Constitution. The Court then continues to refer to the obligations created by articles 1 and 2 of the African Charter on Human and Peoples Rights (Banjul Charter) and the International Labour Organisation (ILO) Convention 111 Discrimination (Employment and Occupation) Convention 1958 to illustrate the obligation imposed by international law to eradicate discrimination of any kind, but especially that found in a labour environment. Interestingly enough, the Court here apparently applied unincorporated treaties as if they had legal effect because of their binding nature. This suggests that the Court will, when considering international law in terms of sections 39 (which apparently was done here) or

⁵⁷ *Id* 67-70.

⁵⁸ See N Botha “The foreign affairs prerogative and the 1996 Constitution” (2000) 25 *SAYIL* 265 – *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (TPD) at 271-72 for a similar opinion.

⁵⁹ 2000 (11) BCLR 1211 (CC).

⁶⁰ In this case, the Court found that an airline steward, who is HIV positive, was unfairly discriminated against and dismissed from the SAA, and that he had to be re-instated.

⁶¹ At par [51] of the judgment.

233, be inclined to follow binding treaty law even though it has not yet been incorporated into national law in terms of section 231 (4). This has, however, not been decided unequivocally, and it is merely a conclusion based on an inference (albeit an emphatic inference) drawn from the judgment.

Evaluating the future possibilities regarding application of unincorporated treaties

In summary, therefore, the first three exceptions mentioned, *supra*, where unincorporated treaties may play a role in the formulation and interpretation of national law, will apparently still apply today in the light of *Swissborough Diamond Mines*.⁶² The first two exceptions namely, the use of unincorporated treaties (to which South Africa is a party) to interpret an ambiguous statute and to challenge the validity of delegated legislation are mentioned by Dugard⁶³, and treated as if still applicable. The third exception namely, the use of a customary rule from a treaty, which codifies international custom, naturally, still applies today, especially because section 232 of the IC declares customary international law part of the law of the land. (This will be discussed under section 232, *infra*.)

The fourth exception, namely the use of treaty law which falls exclusively in the purview of the Executive, will also, in all probability, still apply today, because the courts will not lightly interfere with the powers of other branches of government afforded by the doctrine of separation of powers, unless the exercise of those powers are unconstitutional. However, if the actions of either the Executive or Legislature (or other organs of state) can be challenged on basis of unconstitutionality, treaties emanating from unconstitutional actions will not be regarded as part of national law in terms of this exception.⁶⁴

As can be seen from the quote from Dugard, *supra*, the FC provides for **further exceptions** to the rule of legislative incorporation before a treaty can influence national law. In the light of the *Makwanyane* decision⁶⁵, **Section 39 (1) (b)**⁶⁶ enjoins a court to also consider non-binding international law when interpreting the Bill of Rights. In terms of **subsection (2)**, all the international law that has to be considered for purposes of subsection (1) has to be considered when interpreting any legislation and/or when developing the common law or customary law to conform to the spirit, purport and objects of the Bill of Rights.⁶⁷ **Therefore,**

⁶² *Supra* (n18).

⁶³ *Op cit* (n19) 61-2.

⁶⁴ E.g. *Mohamed supra* (n54).

⁶⁵ *Supra* (n6).

⁶⁶ Which will be discussed in Chapter IV *infra*.

⁶⁷ Subsection (2) provides that every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Subsection (1) (b) is part of the Bill of

unincorporated treaties, to which South Africa is not a party, must also be considered in the interpretation process of determining the meaning and scope of rights in the Bill of Rights or other laws if their subject matter is relevant to the right in question.

However, although it seems that courts are in terms of section 39 (2) enjoined to interpret all legislation and to develop all common law and indigenous customary law in the light of binding as well as non-binding international law, it is dubious whether the courts will take so wide a view. It is submitted that the subject matter of a case will have to evidence some connection with the Bill of Rights (so that the court is in a position to promote the spirit, purport and objects thereof) before a court will oblige to this injunction. As indicated, *supra*, Dugard suggests that, where the Bill of Rights is not in issue, “[a] treaty to which South Africa is not a party is *res inter alios acta* and may [or rather should] not be considered *qua* treaty, although it may be considered as evidence of a customary rule”⁶⁸, which will then be applicable in terms of section 232.

Whether unincorporated treaties to which South Africa is not a party may (or must) be used in the interpretation of statutes in terms of **Section 233**; and the fact that Section 233 seems to either duplicate or contradict section 39 (2) to a certain extent, will be discussed in Chapter IV, *infra*. **It is however submitted that, as such a treaty is *res inter alios acta*, it would be absurd to suggest that it must be used in terms of section 233 to interpret statutes.**

It was argued in Chapter II, *supra*, that section 233 applies only to treaties to which South Africa is a party, in other words, binding treaties. It does not, however, matter whether they are incorporated or unincorporated. They must be applied at national level for purposes of the interpretation process envisaged by Section 233. On the other hand, a treaty to which South Africa is not a party is *res inter alios acta* and definitely not binding on the country.

In another vein, it is submitted that the **second exception**, *supra*, that a treaty may be taken into account in a challenge of the validity of delegated legislation **is no longer limited to delegated legislation** as argued by Dugard.⁶⁹ Treaties to which South Africa is a party but have been unincorporated may, therefore, also be taken into account in a constitutional attack

Rights. Therefore, all law (including binding and non-binding international law) that may or must be considered in interpreting the Bill of Rights, have to be considered for purposes of subsection (2).

⁶⁸ Dugard *op cit* (n19) 61.

⁶⁹ In terms of Sections 2 read with 1, 8 (1), 169 and 167 (5) all Acts of Parliament may be scrutinised for its constitutionality and invalidated in case of inconsistency with the Constitution or the Bill of Rights by an appropriate court.

levelled against an Act of Parliament. This aspect has, however, now been constitutionally entrenched in Section 233 of the FC, which will be discussed in Chapter IV, *infra*.

2.4 INTERPRETATION OF TREATIES

As indicated in Chapter I⁷⁰, there are three approaches to the, interpretation of treaties namely: **textual, teleological and intention of the parties**, and they are all recognised by the Vienna Convention.⁷¹ The problem, however, was whether, in the light of the “translation theory” as applied in the *Pan Am* - case⁷², interpretation of an incorporated treaty was to be approached as normal statutory interpretation (because it now forms part of normal statutory law), or as treaty interpretation according to international law. Booysen⁷³ favours the opinion that in such a case one deals with normal statutory interpretation. Others take a different view.⁷⁴ This issue is still very relevant when the interpretation of treaties under the new Constitutions is at stake⁷⁵, and, as it hasn't been resolved satisfactorily by the Constitution, it is sure to give rise to some controversy.

Because some treaties became law under the IC (and because at least self-executing treaties can now under the FC become law) without legislative incorporation, it is only logical to assume that the question of interpretation of treaties will now be answered on the basis that they have to be interpreted as international instruments in terms of international legal principles, and not as national legislation in terms of national law principles. Therefore all three interpretation methods recognised by articles 31 and 32 of the Vienna Convention, namely: textual, teleological and intention of parties, will have to be utilised by courts when faced with the task of interpreting treaties.

Only one recent case on the interpretation of treaties (in this case, an extradition treaty) could be found to discuss here. In *Abel v Minister of Justice and Others*⁷⁶, the applicant brought an application to the Cape Provincial Division of the High Court for the review and setting aside of the Minister of Justice's decision to accede to the request of the USA to extradite him. It was on an allegation that the applicant, a South African former-attorney, attempted to murder one E Kahn in San Diego, California on 23 February 1996 that the request for extradition was made. However, according to the facts alleged, the applicant, earlier in February 1996, and in South Africa, conspired with an individual named Nebiolo to murder Kahn. The conspiracy

⁷⁰ *Supra* under 2.4.2 a.) at 34.

⁷¹ Articles 31 and 32. See the discussion by Dugard *op cit* (n19) 338-41.

⁷² *Supra* (n18).

⁷³ *Op cit* (n25) 110.

⁷⁴ E.g. see the discussion by N Botha *op cit* (n8) in this regard.

⁷⁵ *Ibid.*

⁷⁶ 2000 4 All SA 63 (CPD).

consisted of recruiting Nebiolio, providing him with an airline ticket and accommodation in California, and with travel money for his trip. On the facts alleged, therefore, the conspiracy took place in South Africa, but the actual attempted murder in the USA. The USA applied for applicant's extradition in a diplomatic note dated 8 August 1996 addressed to the SA Department of Foreign Affairs, stating that on these facts, the District Court for Southern California had issued a no-bail warrant for his arrest on charges under 18 USC 1958(A) and 924(C). This request was forwarded to the Minister of Justice who, after exchange of further information and diplomatic notes, issued a further notice in terms of Section 5 (1) of the Extradition Act.⁷⁷ A warrant was issued, Abel was arrested and subsequently released on bail.

The application was based, initially on five grounds, which were condensed in final argument into two issues: whether the treaty between South Africa and the USA and, therefore, Section 5 of the Extradition Act apply to the facts alleged; and whether the minister and magistrate applied their minds adequately to the application, with specific reference to the facts and the law, and, specifically that the extradition would violate applicant's constitutional rights, most notably his right as a South African citizen to remain in the Republic (Section 21 (3) of the FC).

Regarding the first ground, it was argued for Abel that the treaty should be interpreted strictly using a textual (literalist) approach. This, it was submitted, would mean that the only possible interpretation of the treaty was that the offence for which extradition is sought must have been committed solely within the state requesting extradition and not "*in the other country.*"⁷⁸ Traverso J, in dismissing this argument, referred to the traditional cases dealing with the intention of the legislature⁷⁹, and found that the articles of the treaty should not be read *in vacuo*, which would give an "unrealistically narrow interpretation" to both the treaty and the Extradition Act.⁸⁰ In fact, the Court found that both language and context must be considered and that this includes a consideration of "the matter of the statute, its apparent scope and purpose ... and the history of the statute, with particular reference to the presumption against any further alteration of the current law than that clearly conveyed by the statute under consideration."⁸¹

⁷⁷ Act 67 of 1962.

⁷⁸ At par [20] of the judgment – original italics.

⁷⁹ I.e. *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A); *Protective Mining and Industrial Equipment Systems (Pty) Ltd v Audiolens (Cape) (Pty) Ltd* 1987 (2) SA 961 (A).

⁸⁰ At par [22] of the judgment.

⁸¹ *Ibid.*

It is submitted that the result achieved, in that a totally literalist approach should be rejected, is correct and in step with current interpretation trends.⁸² The judgment does not, however, cover the debate whether a treaty (whether incorporated or unincorporated) should be interpreted in terms of international law provisions, most notably the provisions of the Vienna Convention, *supra*, or rather in terms of national canons for interpretation. The same result could have been achieved in this case by using the approach suggested by the Vienna Convention (which, arguably, constitutes a codification of customary international law and is, therefore, part of South African law in terms of Section 232 of the FC⁸³) in interpreting the treaty and by using normal South African canons of interpretation in interpreting the Extradition Act.

In this case it made no difference what canons were used. However, some courts may rather prefer to use a totally literalist approach in cases where the treaty or the act is seemingly unambiguous but still capable of interpretation in terms of both intra- and extra-contextualisation, as well as teleological (“purposive”) interpretation methods recognised by the Vienna Convention, as the latter methods of interpretation are still novel in South African practice. It may be, therefore, that another court, in a related case, may decide to read the articles of a treaty *in vacuo* and without consideration of its apparent scope and purpose. Under these circumstances, it is submitted, Traverso J should rather have seized the opportunity to delve into international law on the subject, the interrelationship of international and national law in terms of the FC and “the interpretive inter-dependency of international and municipal law.”⁸⁴ It, therefore, has to be agreed with Botha that the Vienna Convention “would have provided a sounder basis for rejecting Abel’s claims than the municipal interpretation process followed by the court.”⁸⁵

2.5 THE DISTINCTION DRAWN BETWEEN TREATY AND CUSTOM

Traditionally, as pointed out in Chapter I⁸⁶, customary international law was treated differently with reference to its status and application at national level. Whilst treaties had to

⁸² See the discussion of The Role of Constitutional Interpretation in Chapter II *supra* under 1.3 at 48-54. Although it is constitutional interpretation which is discussed there, the same principles apply to modern interpretation of statutes, especially because all statutes are subject to the constitution and, logically therefore, must be interpreted in the same way as one should approach constitutional interpretation (even though the Constitution is not a normal statute as pointed out in *S v Acheson* 1991 (2) SA 805 (NmHC) at 831B and *S v Makwanyane supra* (n6) at par [15]). See now *Govender v Minister of Safety and Security* 2001 (2) SACR 197 (SCA) at par [11] for confirmation of this view.

⁸³ But see the discussion in this regard *infra*.

⁸⁴ This phrase borrowed from N Botha “Extradition on the basis of a treaty: section 5 of the Extradition Act 67 of 1962 considered” (2000) 25 *SAYIL* 245 – *Abel v Minister of Justice and Others* 2000 (4) *All SA* 63 at 249.

⁸⁵ *Ibid.*

⁸⁶ *Supra* under 2.4.2 *b.*) at 36-38).

be specifically incorporated into national law, no such need existed for customary international law in order to become law. Regardless whether the Booysen or Dugard approach⁸⁷ is adopted regarding the status of customary international law vis-à-vis South African law, and regardless whether the “adoption”, “transformation” or “incorporation” theory is accepted for purposes of expounding the English position pre-1994, in South Africa there existed no need for statutory incorporation before international custom could become law. The courts could at least recognise and apply customary international law as *lex fori* without statutory incorporation, subject to the exceptions of supremacy of common law, legislation, judicial precedent and “act of state.”⁸⁸ It was also pointed out in Chapter I that the apparent reason for this distinction was to prevent the Executive from legislating for the citizens of the state through the conclusion of a treaty with a foreign state without Parliament being involved.⁸⁹ It will, therefore, offend against the principle of separation of powers⁹⁰ if the executive, through conclusion of a treaty, were enabled to legally bind subjects without (the democratically elected) Parliament legislating that citizens are to be bound.

However, as indicated, *supra*⁹¹, the pre-1994 courts evidenced great deference to the prerogative powers of the Executive so as not to offend against this principle, resulting therein that some treaties became law at national level without Parliament or the courts having had any say in the matter. This reason for the distinction supplied by Brownlie, therefore, could not supply a consistent explanation for the distinction being drawn from a South African perspective. If the Executive decided to make a treaty applicable at national level, there was nothing that Parliament or the Judiciary could do to prevent it from becoming law. The distinction between the powers of the Legislature, the Executive and the Judiciary could, therefore, have been subjected to the whims and fancies of the ruling party through the Executive.

The lines of distinction between the three pillars of government, however, became almost indistinguishably thin as a direct result of the post-1994 constitutions. In *South African*

⁸⁷ See Chapter I *supra* under 1. at 4; and under 2.4.2 b.) at 35.

⁸⁸ Chapter I *supra* under 2.4.2 b.) at 34-38.

⁸⁹ I Brownlie *Principles of Public International Law* 5th Ed (1998) 46. See also Dugard *op cit* (n19) 47, 49; N Botha “Interpreting a treaty endorsed under the 1993 Constitution” (1993-94) 19 *SAYIL* 148 at 152; and T Maluwa “International human rights norms and the South African Interim Constitution” (1993-94) 19 *SAYIL* 14 at 32.

⁹⁰ Where a clear distinction is drawn between the powers of the Legislature, the Executive and the Judiciary for purposes of democracy.

⁹¹ Chapter I *supra* under 2.2.10 at 25-27; 2.4.2 b.) at 36; and *supra* under 2.3 at 135-139.

*Association of Personal Injury Lawyers v Heath and Others*⁹² (*Heath*), the Constitutional Court had the following to say in this regard

“There is a clear **though not absolute** separation between the legislature and the executive on the one hand and the courts on the other ...”⁹³

In *S v Dodo*⁹⁴ the Court said the following, with reference to *De Lange v Smuts*⁹⁵ and *Heath*⁹⁶

“[16] This Court has therefore clearly enunciated that the *separation of powers under our Constitution* –

16.1 although intended as a means of controlling government by separating or diffusing power, **is not strict**;

16.2 embodies a system of checks and balances designed to prevent an over-concentration of power in any one arm of government; **it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another**; this engenders interaction, but does so *in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.*”⁹⁷

The text and purpose of the FC bears this out. For example, the Judiciary may now review all actions of the Legislature, the Executive and even inferior legs of the Judiciary⁹⁸ in the light of the Constitution and, especially the Bill of Rights, including (even “soft”) international law.⁹⁹ If, therefore, the Executive enters into a treaty (or decides to honour a treaty or other undertaking towards a foreign government), which is unconstitutional, the Judiciary may be called upon to test and nullify the “act of state.”¹⁰⁰

Apart from the Judiciary being afforded greater powers, which, in a sense, offends against the principle of strict separation of powers as indicated, Parliament now also received the powers to oversee ratification of and accession to (at least some) treaties, an action formerly within the sole domain of the Executive.¹⁰¹ As indicated in Chapter II¹⁰², Parliament may even debate the Executive’s decision to enter into undesirable treaty relations where ratification or

⁹² 2001 (1) SA 883 (CC).

⁹³ At par [23] of the judgment – italics and further emphasis added.

⁹⁴ 2001 (1) SACR 594 (CC).

⁹⁵ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC).

⁹⁶ *Supra* (n92).

⁹⁷ Italics and further emphasis added.

⁹⁸ The review of judicial decisions is of course restricted to decisions of courts lower than the High Court in the hierarchical structure of courts. Decisions of High Courts and the Supreme Court of Appeals (the latter on constitutional matters only) are not subject to review in the technical sense of the word, only appeal. However, in *S v Twala (HRC Intervening)* 2000 (1) BCLR 106 (CC) at par [11] the Constitutional Court found with reference to article 14 (5) of the ICCPR that the terms “appeal” and “review” in the Constitution are not terms of art with specific technical meanings, and that they both mean no more than “appropriate reassessment” by a higher court.

⁹⁹ See section 8 (1) of the IC; Sections 2, 8 (1), 34, 39 (1), 232 and 169 read with 167 of the FC.

¹⁰⁰ See *Mohamed and Another supra* (n54) for an example where the Constitutional Court did just that.

¹⁰¹ This aspect was examined thoroughly in Chapter II *supra* under 2.3.2 at 91-97.

¹⁰² *Supra* under 2.3.2 at 95-97.

accession is not required. In some instances, Parliament is even afforded the power to insist on a reservation before referring the treaty back.¹⁰³

Moreover, in terms of section 92 (2) of the FC, the members of the Executive are accountable collectively and individually to Parliament for the exercise of their powers and in pursuance of their functions. Furthermore, the National Assembly has the duty, not only to choose the President, who appoints the rest of the Executive, but also to oversee and scrutinise **all executive action** in terms of sections 42 (3) and 55 (2) of the FC. The National Assembly may even cause the President to resign or the Executive to dissolve by passing a vote of no confidence in terms of section 102. This means that, if Parliament is dissatisfied with an executive act (including an act of concluding a treaty), the Executive (or the President / or Minister thereof) may be called to book therefor. Whether such a situation will ever be reached with the ruling party occupying almost two thirds of the seats in the National Assembly is dubious for the moment, but the fact is that Parliament is afforded a watchdog role over all executive action, and the Executive can be called to book if treaties entered into are contrary to the democratic will of the people. If the imminent conclusion of an undesirable treaty comes to the knowledge of Parliament, invoking these provisions may even stop the conclusion of such a treaty. Effectively, this borders on legislative action. Furthermore, to require legislative incorporation would in any event be a mere formality with the ruling party occupying the clear majority of seats in Parliament.

These assertions beg the question whether a need still exists for the legislative incorporation of treaties to prevent the Executive from legislating *in lieu* of Parliament. Coupled with the notion of judicial control over executive action, it would, therefore, seem that the FC provides enough checks and balances so as to ensure that none of the three pillars of democracy (and, in this case, especially the Executive) abuses its powers at the cost of the others or of democracy.

It would therefore seem that the powers of the three branches of government are not as distinctly separated, as they were pre-1994. In a sense, this negates the essence for the rule that a distinction should be drawn between treaty law and international custom for determining its status.

Although the principle and effectiveness of parliamentary and judicial control over executive action is under pressure due to the lack of counter-majoritarian measures, it still is control

¹⁰³ *Ibid.*

enough to warrant automatic incorporation of treaties without the need for formal legislative action.¹⁰⁴ It is in any event doubtful whether the need for parliamentary legislation will effectively counter wrong decisions by the Executive to enter into international agreements. The members of the ruling party in the National Assembly and Council of Provinces are bound to be loyal to the President and his/her Cabinet members' decisions. After all, they are the national leaders of the ruling party. With a clear and overwhelming majority in Parliament as is currently the case, the passing of legislation will prove to be no more than a formality. In the meanwhile, the effectiveness of some treaties may be jeopardised.

It has also been pointed out above¹⁰⁵ that for want of counter-majoritarian measures, even the Constitutional Court might, in given circumstances, decide to toe the line of the majority party. This possibility has, however, dimmed somewhat in the light of *Mohamed and Another*¹⁰⁶ where the current Court – not constituted much differently from before – went against a clear political decision by the Executive to hand over Mohamed to the USA to be tried for a capital offence, without first obtaining assurances that the death penalty would not be imposed or carried out.

Whilst it is true that the relevant line Minister and Law Advisers have very wide powers to decide on the nature of a treaty (in the sense whether ratification should be required, and whether it can be regarded as self-executing – at least until the courts say otherwise) and that they may therefore legislate in lieu of Parliament as it were, it is still submitted that the need for statutory incorporation should be abandoned. As indicated, *supra*, the lines of distinction between the three branches of government have dimmed considerably. Parliament is afforded wide powers to oversee and scrutinise all executive action. The courts may in any event be called upon to decide on the constitutionality of all acts of state (including the decision to enter into a specific treaty relation). Therefore, there is still some form of control without requiring legislative incorporation.

Moreover, it seems anomalous to have a treaty binding between the parties in the international sphere but non-binding regarding the relations between the respective states and individuals in the national sphere if, in given circumstances, it means that one of the states cannot honour its agreement due to non-enforceability at national level unless it is also specifically incorporated into national law by Parliament. Indirectly, the state will be speaking with two

¹⁰⁴ As pointed out *supra* at 128-9, this was the vision of the Kempton Park negotiators, and would have been the position under the IC had the Law Advisers not refined the draft to provide for incorporation.

¹⁰⁵ Chapter II *supra* under 1.2 at 44-45 Specifically (n7) and at 47 (n19).

¹⁰⁶ *Supra* (n54).

voices if this should happen; the Executive saying: "The Republic of South Africa undertakes to do ..."; but the Judiciary saying: "The Republic of South Africa refuses to honour the undertaking by the Executive because it has not been legislatively incorporated." It is for these reasons that it is submitted that the need for legislative incorporation of treaties could have been abandoned.

Therefore, the wisdom to return to the pre-1994 position with the requirement of legislative incorporation should be questioned. Although the Constitutional Assembly might have had a variety of reasons for opting for a return to the earlier procedure¹⁰⁷, now that parliamentary involvement in the ratification/accession process has been firmly established, the need for legislative incorporation of new treaties has dimmed considerably. It is only in the case of the section 231 (3) exceptions that the Executive would be afforded the (limited) authority to "legislate" for the subjects without involving Parliament if all treaties were allowed to automatically become law upon signature or, where required, ratification or accession. But, with the requirement of tabling such treaties in Parliament for debate, and with the powers afforded to Parliament to oversee and scrutinise all executive action in terms of sections 42 (3), 52 (2), 92 (2) and 102 of the FC, such an authorisation is not an absolute one. Parliament can still insist on a reservation being entered and, conceivably, it may authorise institution of a constitutional challenge to the validity of such treaties if it appears that the Executive (or line Minister) abused its power. It may even pass a motion of no confidence in terms of section 102, causing the culprit/-s to resign. These possibilities, in turn, would hopefully restrain the members of the Executive from entering into undesirable treaty relations as indicated in Chapter II.

According to Dugard, the decision by the Constitutional Assembly to return to the pre-1994 position "represents an abandonment of the idealism of 1993 that sought 'to bring international law and domestic law in harmony with each other'."¹⁰⁸ It is also strange that customary international law, in which forming process very few national parliaments have played a role (e.g. through practise or persistent objection), and which is much less clear and accessible, is incorporated automatically through section 232, whilst treaties, to a large extent subject to parliamentary scrutiny, and therefore much clearer and accessible, have to be incorporated through the cumbersome legislative process.

¹⁰⁷ E.g. in order to try and avoid the thorny issue of having to distinguish between treaties concluded before 1994 and thereafter.

¹⁰⁸ Dugard *op cit* (n19) 56. See also R Keightley "Public international law and the Final Constitution" (1996) *SAJHR* 405 at 412. The improvement suggested by Devine - *op cit* (n20) at 16 – that the distinction between "old" and "new" treaties should merely have been dropped, would have made more sense. It would then have been easier to incorporate treaties than what is now the case.

The subjection of the incorporation process to the formal and slow process of national legislation is sure to be felt, and the effect of many treaties might be jeopardized. A constitutional change to this position somewhere in future, to bring the incorporation of treaties at par with that of customary international law, will surely be welcomed by all those who want to see greater harmonisation between national and international law.

2.6 CONCLUSION

Although the status of treaty law in the pre-1994 period was considered as the easier of the two branches of international law¹⁰⁹ to ascertain and to apply at national level¹¹⁰, first the Kempton Park negotiators and then the Constitutional Assembly succeeded in making it much more difficult as can be seen from the above.

Although some aspects, like parliamentary involvement in the ratification/accession process, are to be welcomed as putting democracy back where it belongs, other aspects such as legislative incorporation are clearly repugnant to a lot of modern day international law jurists, especially those who advocate monism or harmonization as relationship or application theories. In the light of the arguments advanced, *supra*, the need for legislative incorporation of treaties could have been (and may possibly still be) scrapped.

The drafters of the post-1994 constitutions could also have been more careful when circumscribing certain concepts (such as treaties of a “technical, administrative or an executive nature” and “self-executing provision of an agreement”). Regarding the unsatisfactory nature of some of the provisions in the IC, Olivier has the following to say

“When assessing the relevant provisions in the constitution, it is important to bear in mind the loaded political atmosphere prevailing during its drafting. The status of public international law is dealt with in the final chapter of the constitution, which meant that it was debated by the Negotiating Council at the eleventh hour when successful finalisation of the constitution was a matter of urgency both within South Africa and abroad.”¹¹¹

Although this was said of the IC, the FC also evidences serious technical and conceptual shortcomings as pointed out, *supra*. These may need to be amended before they cause too much confusion. As it currently reads, section 231 is not promoting the greater harmonization between international and national law envisaged by the international lawyers involved in the

¹⁰⁹ The other one being customary international law.

¹¹⁰ E.g. N Botha “The coming of age of international law in South Africa” (1992-93) 18 *SAYIL* 36 at 41.

¹¹¹ *Op cit* (n26) at 3.

drafting of the Constitution, and it can hardly be termed an asset for sound international law jurisprudence.

3. CUSTOMARY INTERNATIONAL LAW

3.1 RESTATING THE PRE-1994 PRINCIPLE

As in the case of treaties, *supra*, it is deemed necessary briefly to revisit the position of customary international law vis-à-vis South African national law pre-1994.

a.) The nature and formation of customary international law

The fact that customary international law is asserted from the observation of two main requirements namely, **settled practice** (*usus*) and **the acceptance of an obligation to be bound** (*opinio juris sive necessitates*), has been discussed, *supra*.¹¹² Reference was also made to the fact that resort is often taken to codification due to the normal uncertainties regarding the existence of and exact meaning and scope of customary rules¹¹³, and the fact that Resolutions by International Organisations cannot normally be regarded as sources of international law, save in so far as they might be binding or represent evidence of a customary rule (codification).¹¹⁴ Likewise, reference has been made to the effect of the persistent objector phenomenon on the formation of customary international law. As it is difficult to prove *opinio juris*, Brownlie suggests that it will generally be presumed when there is proof of general practice in support of the rule being customary law.¹¹⁵ Dugard¹¹⁶, however, points out that the judgments of the ICJ in the *North Sea Continental Shelf Cases*¹¹⁷ and the *Nicaragua Case*¹¹⁸ do not support the existence of such a presumption.

As pointed out in Chapter I, the International Law Association's Committee on Formation of Customary [General] International Law recently¹¹⁹ brought out its Final Report¹²⁰ on this very subject. In summary, this eloquent document deals with all the aspects of formation of customary international law (through *usus* – such as the nature of the acts required, definition of “states” and state actions through which *usus* can be identified; *opinio juris* – like whether *opinio juris* is still a necessary requirement; and codification - through treaties, UN Resolutions or otherwise). It also deals with the effect of persistent objections to the

¹¹² Chapter I.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Op cit* (n89) 7-9. See also Judge Tanaka's dissenting opinion in *North Sea Continental Shelf Cases* 1986 ICJ Reports 3 at 176 and *ad hoc* Judge Sørensen's dissenting opinion at 246-7.

¹¹⁶ *Op cit* (n19) 32.

¹¹⁷ *Supra* (n115).

¹¹⁸ *Nicaragua Case – Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) Merits* 1986 ICJ Reports 14.

¹¹⁹ International Law Association *London Conference 2000*.

¹²⁰ “Statement of Principles Applicable to the Formation of General Customary International Law.”

formation of customary rules, and the role of resolutions of the UN General Assembly and International Conferences in the formation and codification thereof. It also points out that there is a softening in the international mood regarding the requirements for the foundation of customary rules. A rule may, for example, be formed very quickly, even upon acceptance of a single UN resolution. A rule may come into existence between two states only, and need, therefore, not be universally accepted and acted upon by all states. *Usus* may result from mere omissions, and *opinio juris* is not necessarily required. The contents of this document (save in so far as it has already been discussed in Chapter I, *supra*) fall outside the ambit of this dissertation, but it could be of great value to courts, lawyers and academics in the "new" South Africa. It represents the most up to date opinion on the nature and formation of customary international law.

Excursus

A great cause of concern for South African international jurists and courts, has always been the fact that customary international law is virtually non-accessible and unascertainable (for its lack of codification and the difficulty in proving both *usus* and *opinio juris*). It is especially in this area that the document mentioned in the previous paragraph and future international conferences may prove to be of great value. Courts will basically always have to rely on extrinsic evidence and the subsidiary means for determining rules of international law¹²¹ regarding the existence of a customary rule where no proof of codification exists. The difficulty of such an exercise (and the general reluctance of courts to recognise rules of customary international law - even today) will be illustrated, *infra*. This is one of the main reasons why the vigilant and constant recognition and national application of customary international law as required by Section 232, *infra*, is under pressure.

b.) National application of customary international law

Reference has been made a number of times¹²² to the difference of opinion regarding the status of customary international law vis-à-vis South African national law pre-1994. Professor Booysen, on the one hand, felt that customary international law did not automatically form part of the law of the land, although it was available for use by the courts under certain conditions (and subject to certain exceptions) as *lex fori*. Professor Dugard, on the other, advocated customary international law automatically forming part of the law of South Africa and therefore being available to courts, subject only to certain exceptions. From case law, it

¹²¹ I.e. General principles of (national) law recognised by civilized nations, judicial precedent and text writings by renowned publicists – Chapter I *supra*.

¹²² Chapter I and II *supra*.

appears that South African courts accepted, at least in theory, that customary international law is part of national law, subject to certain exceptions as suggested by Dugard.¹²³

c.) The need to recognise the difference between the requirements for formation and those for national application

It is important from a South African perspective to differentiate between the requirements which have to be met for the foundation of custom in the international plane and those required before international custom may (or should / or must), in given circumstances be applied at national level. As will be pointed out, *infra*, the pre-1994 courts haven't been consistent in this regard, suggesting that, from a South African point of view, more stringent requirements were set for the foundation of a rule of international custom than international law itself requires.

3.2 THE POSITION IN TERMS OF THE POST-1994 CONSTITUTIONS

The relevant provisions

The provisions in both Constitutions read essentially the same. Section 231 (4) of the IC provided

“(4) 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.”

Section 232 of the FC provides

“232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

The changes

The two provisions clearly attempt to settle the dispute whether customary international law forms part of South African law referred to, *supra*, but do so ineffectively. As will be argued, *infra*, they cater only for the position as from 27 April 1994 when the new constitutional dispensation became effective. Whatever the position was before that is still left to the courts to determine because the Constitution does not operate retrospectively.¹²⁴ The FC does try to remedy this by providing that “[c]ustomary international law *is* law” whilst the IC declared “customary international law *shall ... form part* of the law”, but that still does not address the issue of retrospective application of the Constitution with reference to the legal position before then. The Constitution, in other words, did not choose between the two viewpoints.

¹²³ *Ibid.*

¹²⁴ J De Waal *et alii* *The Bill of Rights Handbook* (1998) 53-59.

The omission of the word binding from section 232 of the FC whilst it was used in section 231 (4) of the IC, has been discussed, *supra*.¹²⁵ Suffice it to say at this stage that customary international law can normally only be part of the law of the land in as far as it has become binding on a country (in other words, in as far as it has not been persistently and openly objected to).¹²⁶ If it were not so binding, it would be anomalous to suggest that it is binding at national law level between legal subjects (state and / or individuals) of the country that is not bound at international level due to its persistent objection.

This assertion should, however, be qualified in that, to a large extent, it depends on the nature of the rule whether the persistent objector phenomenon can prevent a rule from becoming binding custom. If a rule of custom has become so widely accepted, that it is regarded to have a higher status than normal custom, so that it can be regarded on the same footing (or virtually the same footing) as a rule of *jus cogens* or an obligation *erga omnes*, for example apartheid¹²⁷ or torture¹²⁸, then it will become binding against the state in the international sphere regardless of its persistent objection. As Brownlie¹²⁹ puts it: “the specific content of norms of this kind involves the irrelevance of protest, recognition, and acquiescence: prescription cannot purge this kind of illegality.”

However, in terms of the arguments advanced in Chapter II in this regard, it is submitted that only binding customary international law may (or rather must) be observed and applied as national law in terms of this section. “Soft” law cannot bind the state. Therefore, neither should it bind the state in its relations with individuals and individuals *inter se*.

Dualism dealt a blow

Dugard¹³⁰ points out that common law rules are now subordinate to international law. Common law rules that are inconsistent with international custom will therefore be unconstitutional and invalid. Furthermore, as customary international law is only made subject to the Constitution and Acts of Parliament, it is no longer subject to delegated legislation. It is also submitted that customary international law is only subject to valid (constitutional) Acts of Parliament. An Act of Parliament promoting apartheid would, for example, be unconstitutional and invalid in terms of the spirit and tenor of the Bill of Rights

¹²⁵ Chapter II *supra* under 2.4 at 106-8.

¹²⁶ In other words – in as far as the country has not been a persistent objector to the rule becoming customary international law.

¹²⁷ Dugard *op cit* (n19) 31.

¹²⁸ In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97 (HL) the House of Lords accepted that the prohibition on torture is a peremptory norm with the status of *jus cogens*.

¹²⁹ *Op cit* (n89) 517.

¹³⁰ *Op cit* (n19) 52.

and the Constitution as a whole, and cannot be rated above customary international law. This constitutes a giant leap towards monism. It has, however, been indicated, *supra*, that the Constitution in general supports dualism as the relationship / application theory although a clear attempt is made at harmonization of the two systems. It will be pointed out, *infra*, that binding as well as non-binding international law are to be considered for interpretational purposes in terms of section 39. The same can, however, not be said of section 232.

3.3 RECOGNITION, APPLICATION AND EXCEPTIONS – THE PRACTICE

3.3.1 An early appraisal of the courts' possible practise of recognition, acceptance and application of custom

Dugard¹³¹ submits that, as Section 232 of the FC is not a complete statement on the subject of customary international law in South Africa, “[i]t will still be necessary to turn to judicial precedent to decide *which* rules of customary international law are to be applied and how they are to be proved.”¹³² There does not exist a large body of case law on the subject post-1994. Therefore, pre-1994 court decisions in this regard will have to be considered in more detail than what was necessary in Chapter I.

The pre-1980 South African case law suggested that South African law requires a more stringent test for both the international recognition and acceptance and the national application of international custom than what international law itself demands. In *Du Toit v Kruger*¹³³ De Villiers CJ stated

“The modern authorities, to which this court has been referred, on the rights of capture during war do not afford much assistance for the decision of the appeal. *The rules* which are laid down by some writers for exempting the private property of an enemy from capture *have not been so **universally accepted** [usus] and acted upon [opinio juris] as to justify this court in treating them as binding principles of law.*”¹³⁴

By saying “so universally accepted” the learned Chief Justice allowed for degrees of universality, which is contrary to the nature of the term. The learned Chief Justice also did not say whether the phrase “as to justify this court in treating them as **binding principles of law**” referred to South Africa’s perception of the international recognition and formation of the rules, or to South Africa’s acceptance of them for purposes of their application at national level. However, it appears that this *dictum*, was later interpreted to mean that, for international custom to be recognised as law in South Africa, it has to be either “universally accepted [usus] and acted upon [opinio juris]” or to be accepted as binding by South Africa

¹³¹ *Ibid.*

¹³² Original italics.

¹³³ (1905) 22 SC 234.

¹³⁴ At 238 of the judgment. Italics and extra emphasis added.

(“[received] the assent of this country”). This is what Rumpff CJ had to say in *Nduli v Minister of Justice*¹³⁵

“It was conceded by counsel for appellants that according to our law *only such rules of customary international law are to be regarded as part of our law as are either universally accepted or have received the assent of this country.*”¹³⁶

By adding the words “or have received the assent of this country”, he indicated that for a rule to be recognised as law in South Africa, it would either have to be “universally accepted” by the global community at large or to “have received the assent of this country.” This is a very strange formulation of the test, because even where a rule is not universally accepted and acted upon, and not even acted upon by South Africa, but merely acknowledged, a rule would constitute binding custom against South Africa for purposes of its national application. Furthermore, although he is discussing whether customary rules (“such rules”) are part of South African law (“our law”), the learned Chief Justice created the impression that, from a South African perspective, it is required that a rule must be “universally accepted” before it will be recognised as binding in the international realm.

The term “universally accepted” is clearly stricter than the standard demanded by international law itself.¹³⁷ Margo J in *Inter-Science Research and Development Services (Pty) Ltd v Rerpublica Popular de Mocambique*¹³⁸, corrected this possible wrong interpretation of Rumpff CJ’s dictum by saying the following

“The concept of universal recognition in this context is obviously not an absolute one, despite the ordinary meaning of the word ‘universal’, for, ‘if a custom becomes established as a general rule of international law, it binds all states which have not opposed it, whether or not they themselves played an active part in its formation’.”¹³⁹

In *S v Petane*¹⁴⁰ the court had to consider the question whether the 1977 1st Protocol to the Geneva Conventions of 1949 had become part of customary international, and, therefore, national law. Conradie J examined resolutions of the General Assembly of the UN, state practice in general and the writings of jurists. He reiterated Margo J’s interpretation of the term “universally accepted”¹⁴¹ and stated that customary international law can be formed very quickly (in other words, prolonged *usus* is not required), but, before it will be accepted by

¹³⁵ 1978 (1) SA 893 (A).

¹³⁶ At 906D. Italics added.

¹³⁷ For a rule to become custom, it must receive “general” or “widespread” acceptance – *Fisheries Jurisdiction Case* 1974 ICJ Reports 3 at 23-6. “Universal” acceptance is not necessary – *North Sea Continental Shelf Cases supra* (n115) at 229 *per* Lachs J.

¹³⁸ 1980 (2) SA 111 (T).

¹³⁹ At 125A-B.

¹⁴⁰ 1988 (3) SA 51 (C).

¹⁴¹ At 56-7.

national law as being incorporated, the customary rule “would at the very least have to be *widely accepted*.”¹⁴²

The real problem with Conradie J’s judgment, however, is that it cast doubt on the validity of the view that certain provisions of the Universal Declaration of Human Rights adopted by the UN’s General Assembly in 1948, had become rules of customary international law. His reasoning was that it was difficult to discern a customary rule in the Universal Declaration when it is contradicted by state practice, which constituted a flagrant violation of its provisions.¹⁴³

The decision in *Filartiga v Pena-Irala*¹⁴⁴ where the United States Second Circuit Court of Appeals held that the prohibition of torture in the Universal Declaration has become part of customary international law (even though some states still practice torture in flagrant violation of the rule) is to be preferred. Furthermore, as indicated, *supra*¹⁴⁵, the House of Lords in *Ex Parte Pinochet Ugarte* found that the prohibition against torture is a peremptory norm in the nature of *jus cogens*. It would seem, therefore, that foreign courts are far more lenient in deciding whether a rule enunciated in a treaty or international document, has become a customary rule than South African courts would do.

However, even though the international mood towards the nature of the requirements seems to be softening, South African courts will probably still accept that customary international law requires progressive proof of both the requirements of *usus* and *opinio juris*.¹⁴⁶ In *S v Petane*, Conradie J found that, in order to constitute *usus*, it is “practice” (in the sense of state actions) and not “preaching” that counts¹⁴⁷, whilst the ILA Report¹⁴⁸ suggests that even a verbal statement and omissions may constitute *usus*.¹⁴⁹ The South African case law referred to, *supra*, also endorses the requirement that *opinio juris* should be proved in addition to *usus* before it can be established that a customary rule has come into existence, whilst the ILA Report suggests that proof of the existence of *opinio juris* “is not always, and probably not even usually” necessary to establish proof of a customary rule.¹⁵⁰ Courts in the tradition of South Africa are loath to deviate from existing precedent. There is nothing discernable in the

¹⁴² At 57H-I. Italics added.

¹⁴³ At 58G-J.

¹⁴⁴ 1980 ILM 966.

¹⁴⁵ (n128).

¹⁴⁶ The *Nduli*, *Inter-Science* and *Petane* cases *supra* (nn 135, 138, 140).

¹⁴⁷ *Supra* (n140) at 56-7 of the judgment.

¹⁴⁸ *Op cit* (nn119, 120).

¹⁴⁹ At 14-15 of the Report.

¹⁵⁰ At 31 of the Report.

current mood and spirit of the South African Judiciary to indicate that the courts will accept this international move towards softening of the established requirements.

As indicated, *supra*, if the country can be classed as a “persistent objector” to a specific rule of international custom, that rule cannot be binding on the country. It will, however, be interesting to see how the courts address this issue when discerning whether international custom (e.g. the recognition of apartheid as international crime), fiercely and persistently objected to in the past¹⁵¹, constitutes binding customary rules today (and whether they were perhaps binding pre-1994, regardless of whether the apartheid government persistently, but wrongly, objected thereto).¹⁵²

As indicated earlier, some treaties may provide proof of customary international law. Whether such proposition will be accepted by the courts is, however, not as clear-cut as theory would have it be. In *Harksen III*¹⁵³ the Constitutional Court, although it accepted in favour of the appellant that article 46 (1) of the Vienna Convention reflects customary international law and that, by virtue of section 232 of the FC¹⁵⁴, it is to be considered as part of the law of the land, the Court did not appear very convinced of the fact. The Court declared, *inter alia*,

“Although the extent to which the Vienna Convention reflects customary international law *is by no means settled*, I shall presume in favour of the appellant that the provisions of article 46 (1) do reflect customary international law ...”¹⁵⁵

and

“However, I prefer to dispose of this submission of the appellant on other grounds and leave open the interpretation and binding effect in our law of article 46 of the Vienna Convention.”¹⁵⁶

Regardless of the opinion of academics referred to, *supra*¹⁵⁷, it would, therefore seem that a party might still have a hard time in convincing a court that certain parts of the Vienna Convention or Resolutions by International Organizations contain (or provide proof of) rules of customary international law which must be applied at national level in terms of Section 232 of the FC. However, Van Zyl J in the *a quo* decision¹⁵⁸ used the definition of treaty in the Vienna Convention as part of customary international law and, therefore of South African law in terms of section 232.

¹⁵¹ See Booyesen *op cit* (n25) 178-187; CW van Wyk *Die Misdaad van Apartheid in die Volkereg* LLM Dissertation UNISA (1979).

¹⁵² The position between brackets is apposite with reference to the discussion of section 35 (3) (l) in Chapter V *infra*.

¹⁵³ *Harksen v President of the RSA and Others* 2000 (1) SACR 300 (CC) *Harksen III*.

¹⁵⁴ Although this decision considered the position under the IC.

¹⁵⁵ At par [26]. Italics added.

¹⁵⁶ At par [27]. See also the discussion in Chapter II *supra* under 2.4 b.) at 111-3.

¹⁵⁷ Chapter I *supra* under 2.2.5 at 22 especially (n124).

¹⁵⁸ *Harksen v President of the Republic of South Africa* 2000 (1) SA 1185 (C) *Harksen II*.

3.3.2 Survival of the “legislation” exception

Whilst it is understandable that the Constitution provides that customary international law which is inconsistent with the Constitution is not recognised as part of national law¹⁵⁹, it is not as understandable why it also provides that international custom, which is inconsistent with an Act of Parliament is not so recognised. This makes Parliament supreme over customary international law and may impact negatively on the aspiration towards greater harmonization between international and national law as envisaged by the Constitution as a whole.

Professor Botha criticised the similar provision of the IC by stating that there are sufficient Acts still operational with discriminatory overtones to sustain a fear that good customary international law could be unfairly ousted thereby.¹⁶⁰ Keightley opined similarly in criticising the inclusion of this doctrine in the provision of section 232 of the FC.¹⁶¹ Such legislation would, however, in any event conflict with the Constitution and may be struck down when challenged. Therefore Botha’s and Keightley’s arguments are to a great extent invalid. On the other hand, however, such legislation will remain in place and (seemingly) valid until it is challenged for its unconstitutionality. Until it is struck down, the legislation will in other words continue to have oppressive and discriminatory effect. The same argument would apply to new discriminatory legislation, which is passed after the new Constitution came into effect. Although it might be unconstitutional, it will practically oust good international law until it is struck down as invalid.

Whilst the wisdom of the retention of this doctrine is to be doubted because apartheid legislation might still impact negatively on the recognition of customary international law (at least until it is constitutionally challenged), it is foreseen that litigants will be wide awake to such possibilities and that such legislation will not pass constitutional scrutiny, especially where a right enshrined in the Bill of Rights is at stake. Most of that legislation will, hopefully soon meet the fate of being struck down.

Dugard¹⁶² points out that international law is no longer subject to subordinate or delegated legislation, but only to Acts of Parliament. Customary international law can therefore be regarded as a higher law than delegated legislation (including Presidential or Ministerial

¹⁵⁹ Because the Constitution is the supreme law of the land – section 2 – and does not recognise international law as supreme (monist view).

¹⁶⁰ N Botha *op cit* (n8) at 254-55.

¹⁶¹ *Op cit* (n108) at 407.

¹⁶² *Op cit* (n19) 51-52.

Proclamation in the Government Gazette). If the latter is inconsistent with international custom, it will be unconstitutional and invalid.

Whilst it is conceivable that Parliament might (try to) pass legislation overruling international custom without it being unconstitutional, that possibility is distinctly remote in the light of the powers and functions of the Human Rights Commission which will be discussed, *infra*, and the courts' wide-reaching powers of review.

3.3.3 Have the "act of state" and "executive certificate" doctrines survived?

a.) The "act of state" doctrine

The regular courts' practice

Professor Booysen discusses the first of these questions in the light of the IC and concludes that the "act of state" doctrine, at least in as far as "domestic" ("internal") acts of state are concerned, did not survive the constitutional change unscathed.¹⁶³ Indeed, all actions of the Executive became subject to judicial scrutiny for their constitutionality.¹⁶⁴ Moreover, as indicated, *supra*, sections 42 (3); 52 (2); 92 (2) and 102 of the FC clearly subject all executive action (including the prerogative to conduct foreign affairs) to parliamentary scrutiny and censure. Therefore the act of state doctrine enunciated in the decision of *Van Deventer v Hancke and Mossop*¹⁶⁵ did not survive the new dispensation. Referring to the courts' newly found powers to apply rules of customary international law and section 34 of the FC, Dugard says

"In these circumstances the question is not whether, but how much of the executive's decision-making in foreign relations is non-justiciable. *Courts will, correctly, refuse to intervene in such matters in most cases* but that they now have the power to review acts of state in foreign relations seems beyond doubt."¹⁶⁶

The italicised portion of the quote suggests that courts might still (correctly) exercise a great measure of deference to executive acts of state, and, although the Constitutional Court in its early stages has already indicated that it will not hesitate to test executive action for

¹⁶³ H Booysen "Has the act of state doctrine survived the 1993 Interim Constitution?" (1995) 20 *SAYIL* 189. He, however, concludes that the internal doctrine has survived, but with some modification in that it is now subject to judicial scrutiny and control. Surprisingly in the light of his textbook – *op cit* (n25) 401 (see also Chapter I *supra* under 2.2.10 at 26) – he assumes without more that the foreign doctrine is, and always was, part of South African law, and that it has survived the new dispensation.

¹⁶⁴ See sections 2, 8 (1), 83-102 and 165-173 of the FC, regulating *inter alia* the justiciability of all actions of the Executive in the light of the Constitution and, especially the Bill of Rights.

¹⁶⁵ 1903 TS 401.

¹⁶⁶ *Op cit* (n19) 68-69. Italics added. He also adds in his fn 132 that it is difficult to see how the *doctrine* of separation of powers can, in the new dispensation, "override sections 232, 34 and, possibly, 39 (1) (if human rights are involved)". This also supports the contention *supra* that the lines of distinction between the powers of the Executive, Parliament and the Judiciary drawn by the doctrine of separation of powers have become indistinguishably thin in the new dispensation.

constitutionality¹⁶⁷, fears were voiced that the “act of state” doctrine (or “judicial restraint” policy - as it is also known in England) is poised for reintroduction in a different guise, namely the “political question” doctrine (as it exists in both the USA and England).¹⁶⁸ This is because Goldstone J, writing for the Court in *Hugo*, qualified his initial assertion, that the court is obliged to test the constitutionality of all impugned executive action, by suggesting that the courts may sometimes still feel constrained to make an *a priori* determination of the reviewability /justiciability of the impugned conduct, having regard to “the nature of the [prerogative] power, and the manner of its exercise.”¹⁶⁹ In doing so, the Court didn’t demonstrate a clear commitment to decision-making in this regard. Lehmann continues to point out that the Constitutional Court’s attitude towards the “act of state” and “political question” doctrines as reflected in cases both prior and subsequent to *Hugo* is in some respects even more ambiguous.

The *Swissborough Diamond Mines* case¹⁷⁰ provides an example of a court refusing to intervene in the Executive’s decision-making in foreign relations. It was found that the acts of foreign governments (and, especially the contents of their treaties with South Africa) are non-justiciable.¹⁷¹ Joffe J found that the relationship between South Africa and Lesotho (part of the subject matter in this case) belonged to international law and that it was, therefore, “a matter in respect of which this court should exercise judicial restraint”.¹⁷² However, he arrived at this decision by first asserting as follows

“The basis of the application of the act of state doctrine or that of judicial restraint is just as applicable to South Africa as it is to the USA or England. The comity of nations is just as applicable to South Africa as it is to other sovereign states.”¹⁷³

It has been argued, *supra*, that the *Swissborough* decision is decidedly out of step with the Constitution and modern interpretation trends.¹⁷⁴ This is because the Court did not take cognisance of South Africa’s constitutional rules under the IC or FC. This neglect is also criticised by Dugard¹⁷⁵ because, according to him, neither the “act of state” doctrine nor the

¹⁶⁷ *President of South Africa v Hugo* 1997 (4) SA 1 (CC) (*Hugo*).

¹⁶⁸ K Lehmann “The act of state doctrine in South African law: Poised for reintroduction in a different guise” (2000) 15 *SAPR/PL* 337.

¹⁶⁹ At par [28] of the judgment.

¹⁷⁰ *Supra* (n18). The facts and decision are covered extensively *supra* at 137-139.

¹⁷¹ Contrast Booysen *op cit* (n 25) 401-5. See also Chapter I *supra* at 26-27 (nn149-151) that courts have reserved the right in certain circumstances to test Acts of State performed by foreign states.

¹⁷² *Swissborough Diamond Mines supra* (n18) at 334.

¹⁷³ *Ibid.*

¹⁷⁴ *Supra* at 135-7.

¹⁷⁵ *Op cit* (n19) 69-70.

doctrine of “judicial restraint” are rules of international law¹⁷⁶ and, although South African courts may decide to follow the judicial policies of either the USA or England, they may only do so in terms of their own constitutional rules. Dugard also points out that the Anglo-American courts’ decisions regarding the doctrine of judicial restraint in this respect are not to be regarded as enunciating rules of international law, and that the desirability thereof has been criticised by scholars and courts in England – “most recently in the House of Lords decision on the immunity of Augusto Pinochet.”¹⁷⁷

There may be clear-cut instances where the courts will interfere with “own” international acts of state. For example, Barrie¹⁷⁸ points out that extradition treaty law is made subject to most states’ ideas on IHRL. Therefore, many states, for example refuse to extradite persons where the death penalty might be imposed. South Africa’s Constitutional Court outlawed the death penalty. It was therefore, at the time of Barrie’s article dubious whether South Africa would extradite a person to a country where the death penalty might be imposed and, if it does, whether a court will sanction such act of state.¹⁷⁹ This, however, refers to “own” state actions in the international sphere, and not necessarily “foreign” state actions.¹⁸⁰ Whether national courts in South Africa will judge decisions and acts of foreign governments (especially in the field of IHRL in its dealings with South Africa) is, therefore, still to be seen and largely a matter for debate.

One should, however, point out that the court in *Harksen I*¹⁸¹ followed a different approach to the matter than the court in *Swissborough*. It was alleged that the President’s decision in terms of section 3 (2) of the Extradition Act¹⁸² was invalid because there existed an extradition treaty between South Africa and the Federal Republic of Germany in terms of which Harksen could have been extradited in accordance with section 3 (1). It was more specifically alleged that a treaty between the United Kingdom and Germany from 1872, extended to South Africa during the colonial era, and which was suspended during World War II, had been revived by an exchange of notes between South Africa and Germany in 1954. Ignoring an “executive certificate” in this regard, which stated that no valid treaty exists between South Africa and Germany, the court embarked on a thorough examination of extradition treaty relations

¹⁷⁶ With reference to IA Shearer (ed) *Starke’s International Law* 11th Ed (1994) 100-101; R Jennings & A Watts (eds) *Oppenheim’s International Law* 9th Ed (1992), vol I, 369; *Banco Nacional de Cuba v Sabatino* 376 US 398 (1964) at 427-8.

¹⁷⁷ *Loc cit* (n175).

¹⁷⁸ GN Barrie “Human rights and extradition proceedings: Changing the traditional landscape” (1998) 1 *TSAR* 125.

¹⁷⁹ This doubt found expression in *Mohamed and Another supra* (n54), which will be discussed shortly.

¹⁸⁰ See the discussion in Chapter I *supra* under 2.2.10 and especially at 26-7 for the difference.

¹⁸¹ *Harksen v President of the RSA* 1998 (2) SA 1011 (CPD) – *Harksen I*.

¹⁸² *Supra* (n24).

between South Africa and the Federal Republic of Germany, and the law on the subject, from which it concluded that no valid treaty exists in terms of which Harksen could have been extradited. The court, *inter alia*, accepted that an outbreak of hostilities between two countries does not abrogate an extradition treaty that is in force between them, but that it is merely suspended, and that the suspension is terminated on and in accordance of a peace treaty signed between them afterwards.¹⁸³ The court, however, found that Germany had lacked the competence to revive the 1872 treaty without the approval of the Allied High Commissioner before 1955. It could only do so thereafter. Germany did not obtain this permission in 1954 for the revival of the treaty. On this ground, as well as on the ground that the exchange of notes between the countries merely contained a proposal and counter proposal, which did not constitute an agreement between the states, the court concluded that no binding extradition treaty existed in terms of which Harksen could have been extradited.

A more recent example where a court didn't hesitate to express its willingness to interfere with and test an act of state for constitutionality is found in *Kolbatschenko v King NO and Another*¹⁸⁴. The first respondent (the then Judge President of the CPD) granted an order at the request of the second respondent (the local Director of Public Prosecutions) in terms of Section 2 (2) of the International Co-operation in Criminal Matters Act¹⁸⁵, that "a letter of request in which assistance from a foreign State is sought to obtain such information as stated in the request for use in an investigation related to an alleged offence" be sent to the Principality of Liechtenstein, requesting information to be used in an investigation against the applicant for, *inter alia*, fraud, racketeering, money laundering and drug trafficking committed in South Africa. Thereafter the letter of request was sent to the relevant authorities in Liechtenstein. The Princely Regional Court in Vaduz, Liechtenstein, apparently acted on the request, and granted an order for the search for and confiscation of certain documents and records of three entities, namely Corlis Aktiengesellschaft, Spetabile Erix Familiestiftung and Round Timber and Timber Products Establishment, with which applicant allegedly has certain nefarious links, as well as an order against Verwaltings und Privat Bank AG to hand over all documents and records pertaining to Corlis. This came to the attention of the applicant towards the end of July 2000, who then approached the CPD for an order, *inter alia*, rescinding the order of the first respondent. The first respondent did not oppose the application. The second respondent, however, opposed the application but, before delivering opposing affidavits on the merits, he raised two questions of law, which, he requested, should be entertained by Court before the application on the merits is decided and that, if the

¹⁸³ *Harksen I supra* (n181) at 1023A-B.

¹⁸⁴ *Supra* (n54).

¹⁸⁵ Act 75 of 1996.

questions of law are decided against him, he requested leave to file opposing affidavits at a later stage. The two questions of law were

- Whether the applicant had *locus standi in judicio* to bring the application; and
- Whether the application was justiciable in that the requests made to Liechtenstein were acts of state.

The Court answered both questions of law in favour of the applicant and postponed the application in order to grant the second respondent the opportunity to deliver opposing affidavits on the merits. Only the Court's treatment of the second question of law is relevant for purposes of this dissertation.

Thring and Van Heerden JJ took all recent submissions and case law (excluding *Mohamed and Another*¹⁸⁶) into account and found as follows

“Thus, even if one were to accept that the Executive retains certain discretionary non-statutory powers to enable it to conduct foreign relations (such as, for example, the recognition of foreign states and governments or the determination of the existence of treaties between South Africa and foreign states), it would appear that such powers are no longer *per se* beyond the scrutiny of the South African Courts (see, in this regard, Dugard *International Law: A South African Perspective* 2nd ed (2000) 64-9). ***Whether or not a court will, in any particular case, sit in judgment upon and, if necessarily [sic], interfere with a decision or action of the Executive depends, in our view, on the nature and subject-matter of the decision or action concerned.*** In the words of Watkins LJ in *R v Secretary of State for the Home Department, ex parte Bentley* [1993] 4 All ER 442 (QB) at 452-3:

‘... the powers of the court cannot be ousted merely by invoking the word ‘prerogative’. The question is simply whether the nature and subject-matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so?’¹⁸⁷

The Court further found

“As the requirement of accountable, responsive and transparent government is one of the founding values of our constitutional democracy (see, for example, s 1 (d) of the Constitution), it is in our view only in highly exceptional cases that a court will adopt a ‘hands-off’ approach where a discretion has been exercised or an executive or administrative decision made which directly affects the rights and interests of an individual applicant.”¹⁸⁸

In motivating its judgment, the Court said that, although judicial restraint is appropriate in certain areas of Executive action¹⁸⁹, the requests made by the Executive (of which the first and second respondents were apparently agents for purposes of the requests) are not “matters

¹⁸⁶ *Supra* (n54).

¹⁸⁷ At 339i-340c of the judgment. Italics in bold added.

¹⁸⁸ At 340e-g of the judgment.

¹⁸⁹ For example “administrative decisions concerning affairs of budgetary policy and questions involving the allocation of scarce social and economic resources among competing claims” – at 340g-j; and those “which falls four-square within the political arena, ... such as the making, or the determination of the existence of treaties between South African and foreign states, the declaration of war and the making of peace” – at 341a-e.

of a 'high executive nature' directly impacting upon or affecting the relationship between South Africa and the foreign state *as states*."¹⁹⁰

Finally the Court found

"In truth, both requests concern primarily the relationship between the South African state and an individual, the applicant, as a person who is suspected of having committed various offences in the Republic."¹⁹¹

A few comments should be made regarding this decision by the CPD. **Firstly**, it is only in highly exceptional cases that the courts will adopt a hands-off approach to acts of state where individual constitutional rights are in jeopardy. This, obviously, refers to domestic as well as international acts of state, although it would appear that the *dictum* refers only to "own" international acts of state. In this regard, the CPD reached a totally different decision than what the TPD did in *Swissborough*. **Secondly**, the Court, in an *obiter dictum*, expressed another opinion than the Court in *Harksen I* regarding the justiciability of treaty-relations and, especially, the determination of the existence of treaties. Whilst the Court in *Harksen I* ignored an Executive certificate and launched a full investigation into treaty relations and the law on the subject to find whether a valid treaty existed in South Africa, the Court in *Kolbatschenko* (albeit *obiter*) was of the view that "the determination of the existence of treaties between South Africa and foreign states"¹⁹² is an example of a decision which falls four-square within the political arena, in which the courts should generally follow a hands-off approach.¹⁹³ As the Court in *Harksen I* was not too clear on the subject of justiciability of acts of state and whether a court should still act as if bound by an Executive certificate, the matter is, therefore, not yet finally determined. **Thirdly**, otherwise than what the Constitutional Court was prepared to do in other decisions, which will be discussed, *infra*, the Court was willing to accept that the Executive retains certain discretionary non-statutory powers (prerogative powers), but that they are subject to judicial scrutiny and control for their compliance with the Constitution and, especially the Bill of Rights.¹⁹⁴ It will be submitted, *infra*, that this approach is to be preferred above the approach adopted by the Constitutional Court that the Executive has only those prerogative powers as afforded by the Constitution or other statutes. In the **fourth place**, when the sphere of application of international law involves the relationship between the state of South Africa and an individual, the courts will treat international acts of state on the same level as domestic acts of state, and will apply national law (of which the Constitution is the *grundnorm*) to those situations to determine

¹⁹⁰ At 341i-j of the judgment. Original italics.

¹⁹¹ *Ibid.*

¹⁹² At 339i of the judgment. See also 341d-e where the Court refers to "the making, or the determination of the existence of, treaties between South African and foreign states" in the same vein.

¹⁹³ At 341a-e.

¹⁹⁴ At 339i-340c as quoted *supra*.

whether the acts of state conform to the constitutional values.¹⁹⁵ In the **fifth place**, the Court left open the question whether a court will interfere in political matters such as the determination of the existence of treaties and decisions whether to honour them, therefore not indicating whether the “political question” doctrine applies in South Africa. **Lastly**, this is the first decision by one of the South African regular courts about the justiciability of acts of state in the light of the new constitutional rules (which differs materially from the approach followed in *Swissborough*, where no mention was made of the constitutional rules of the new dispensation), and where the points were argued logically and lucidly by the judges with reference to other case law and the Constitution. It can, therefore, be regarded as a seminal judgment, which is likely to have a profound effect on the future development of the law regarding the justiciability of (own) international acts of state.

The Constitutional Court's practice

In *Mohamed and Another*¹⁹⁶, the first applicant, Khalfan Khamis Mohamed, sought urgent leave to appeal against a judgment in the CPD refusing declaratory and mandatory relief against the Government arising out of his arrest in Cape Town on 5 October 1999, his subsequent detention and interrogation there by South African immigration officers and his handing over to the FBI of the USA for interrogation and removal two days later to New York to stand trial on capital offences related to the bombing of the USA Embassy in Tanzania during 1998. It was argued on behalf of Mohammed that the proceedings were all part and parcel of a disguised extradition in breach of the law, notably the Aliens Control Act¹⁹⁷ and Mohamed's constitutional right to life¹⁹⁸, to dignity¹⁹⁹, to freedom and security of his person and, therefore, not to be subjected to cruel, inhuman or degrading punishment.²⁰⁰ It was argued for the respondents that his handing over to the FBI amounted to no more than a deportation, as he was an illegal alien who has obtained leave to stay in South Africa under false name and pretences, which needn't have been to the state of his origin (“repatriation”), and which was mandated by the Aliens Control Act. In this regard it was argued that, if the Court did afford Mohamed the relief sought, it would mean that criminals from foreign countries can seek refuge in South Africa and that they will receive protection from the Constitution and the courts to escape justice in other countries. It was further contended that he had been duly apprised of his rights and that he freely elected to accompany the FBI

¹⁹⁵ This is what can be inferred from the Court's classification of the specific act of state as one which concerns the relationship between South Africa and an individual as opposed to the relationship between South Africa and other states *as states*, and its treatment of such acts of state at 341i-342c.

¹⁹⁶ *Supra* (n54).

¹⁹⁷ Act 96 of 1991.

¹⁹⁸ Section 11 of the FC.

¹⁹⁹ Section 10 of the FC.

²⁰⁰ Section 12 of the FC.

without delay to the USA, there to stand trial with his comrades. Finally, so the Government contended, a Court had no power to issue the *mandamus* sought due to the “act of state” doctrine effectively ousting the courts’ jurisdiction, and that such a *mandamus* would in any event have no efficacy due to the surrender of Mohamed being a *fait accompli*.

The Court rejected all arguments advanced on behalf of the Government, except for acknowledging the fact that the surrender was a *fait accompli* and that the Court had no jurisdiction to order the USA Judiciary not to impose the death penalty in case of conviction, or the USA Executive not to carry out the penalty if it is imposed. The Court, however, directed that a copy of its judgment be delivered to the Director or equivalent administrative head of the Federal Court of the Southern District of New York as a matter of urgency in the hope that the USA authorities will either not impose the death sentence in case of conviction or, if imposed, will not carry out Mohamed’s execution. The Court further stated that its judgment would not have been in vain, even if the applicants were not favoured by it²⁰¹, because there are important issues of legality and policy involved, which can act as a directive to Government not to breach the law and, especially, the Constitution in the future surrender of individuals for trial on capital offences in foreign countries. This decision was based on three grounds.

(i) In an eloquent and seminal judgment, the Court had regard to its earlier decision in *Makwanyane*²⁰², in which it outlawed the death penalty in South Africa.²⁰³ The Court also considered international law on the subject of capital punishment, torture and cruel and inhuman punishment anew.²⁰⁴ It concluded, without reference to *Barrie*²⁰⁵, that an extradition or deportation, which may result in a trial for a capital offence, without first obtaining assurances from the requesting state that the death penalty will not be imposed (or, when imposed, that it will not be inflicted), will be unconstitutional and invalid because of the fact that the death penalty had been outlawed in South Africa.

(ii) The real problem with the Court’s decision in *Mohamed and Another*, however, has nothing to do with its assessment of the constitutionality of capital punishment in the light of international law, but with the fact that the Court’s decision in actual fact

²⁰¹ According to press reports, Mohamed were sentenced to life imprisonment without parole on 18 October 2001 after the jury could not agree on whether the death penalty should be imposed.

²⁰² *Supra* (n6).

²⁰³ At paras [38] – [61] of the judgment.

²⁰⁴ *Ibid.* This part of the judgment will be discussed further in Chapter IV *infra*.

²⁰⁵ *Op cit* (n178).

led to it exercising a political, executive choice and the state speaking with two voices on a question of international law and politics. In this case, the question was whether an individual could legally have been extradited to another state where the death penalty may still be imposed and executed. In so doing, the Court, so it is submitted, actually utilised South African national law (the Constitution and the Bill of Rights), its formulation of national law and its interpretation of international law, to dictate to both the Executive of South Africa, and the USA, that extraditions in terms of international agreements will not be tolerated where no assurance is first obtained from the other state that the death penalty will not be imposed or, if imposed, that it will not be executed. Indirectly, therefore, as the head of the judicial branch of government, the Court indicated to the USA that the South African government will not honour its existing extradition treaties in terms of international law in such cases in future, which means that the Constitutional Court actually took a stand in the formulation of modern-day international law and politics on extraditions.²⁰⁶ Before the decision was given, the existing extradition agreement between South Africa and the USA did not have a reservation as to the imposition of the death penalty. South Africa also has extradition treaty relations with other states, where capital punishment is still allowed, and which have not yet been subjected to judicial scrutiny and control as was done in Mohammed's case - the notorious case of Mariëtta Bosch in Botswana being one of the most recent examples. Even though the Court, not being an elected branch of government, was not, so it is submitted, suitably equipped and qualified to deal with so politically loaded an issue to decide whether South Africa should honour

²⁰⁶ In the light of the dreadful attacks on the USA on 11 September 2001, where two hijacked planes crashed into the two towers of the World Trade Centre, New York, one into the Pentagon, Washington, and one that crashed without attaining its goal in Pennsylvania, in the process killing thousands of people, the question may well be asked whether the Constitutional Court and Government of South Africa would, in the light of the precedent set by *Mohamed and Another*, still be as willing to refuse to extradite members of al-Qaida and Osama Bin Laden to the USA if they were to enter South Africa as illegal immigrants in the way Mohamed did. [This hypothetical situation is not too far fetched bearing in mind that Mohamed was also a compatriot of Osama Bin Laden's al-Qaida, and that he came into South Africa under false pretences and without leave of the state before his extradition/deportation.] News flashes have it that Afghanistan refused (and still does refuse) to extradite them to the USA. The USA has already started with military attacks against Afghanistan for that reason, and has indicated that it would do so against any other state which harbours international terrorists, and especially those involved in the planning and execution of these horrific deeds. Will the Constitutional Court and, therefore, the Executive, through its possible refusal to extradite such persons in the light of *Mohamed and Another*, be prepared to have the state of South Africa dunked in a state of war with one of the (if not the) most powerful countries in the world today if such a situation manifested? This question should, however, be qualified in that the USA has hitherto not yet expressly, under threat of war insisted that Bin Laden and his compatriots be extradited for trial on capital offences, without its having to provide any reciprocal undertakings that might be required by the national law and Executive of the extraditing state that the death penalty will not be imposed or, if imposed, that it will not be carried out. It is therefore a matter of speculation whether the precedent set by *Mohamed and Another* will lead to South Africa having to contend with a threat of war with the USA if extradition is refused on these grounds.

its international agreements in such exceptional circumstances, the Court acted as if it was the Executive.

However, the courts now have a duty, imposed by the Constitution, to interpret all law and to control all executive action, especially those which impinge upon human rights, in line with the Constitution. The Court was therefore not only entitled, but compelled by law to do so. In terms of modern-day IHRL, it is also the rule in extradition (as opposed to the exception) that extradition is not granted by states (which have outlawed capital punishment) where capital punishment may be imposed, unless the requesting state gives an undertaking that it wouldn't do so or, where imposed, that it wouldn't carry the sentence out.²⁰⁷ The situation where the USA is currently waging war against Afghanistan for its refusal to extradite Osama Bin Laden and members of al-Qaida who participated in the planning and execution of the attacks of 11 September 2001²⁰⁸ can, therefore, be regarded as highly exceptional, and has to be seen against the background, *inter alia*, that Afghanistan still practises capital punishment nationally, and that it, therefore, couldn't really refuse extradition on those grounds. Afghanistan's refusal to extradite may, therefore, be interpreted as an act of conspiracy with international terrorists, which may give rise to war.

(iii) Just as important for this part of the discussion, however, is the fact that the Court found that the deportation in the present case was not authorised by the Aliens Control Act and, accordingly, invalid.²⁰⁹ According to the Court, Government has only those powers to deport as mandated by the Aliens Control Act and, therefore, Government had no remaining (residue) prerogative power to deport other than that authorised by the Act. The reason being that such power is not included in Section 84 (2) of the FC.²¹⁰ Section 84 lists the powers of the President as Head of State and head of the national executive. With reference to *Hugo*²¹¹ the Court found that the powers of the President contained in Section 82 (1) of the IC (and by analogy in Section 84 of the FC) have their origin in the prerogative powers exercised under former constitutions by former heads of state, and that those powers are limited to those mentioned in the Constitution.²¹²

²⁰⁷ *Barrie loc cit* (n178).

²⁰⁸ *Supra* (n206).

²⁰⁹ At paras [29] – [37] of the judgment.

²¹⁰ At par [36] of the judgment.

²¹¹ *Supra* (n167).

²¹² At par [32] of the judgment.

This part of the judgment effectively torpedoed arguments advanced elsewhere in this dissertation, namely that the mere fact that a prerogative power is later embodied in a statute does not necessarily imply that the nature and content of the prerogative power have changed and that where prerogative powers are not specifically enshrined in the Constitution it doesn't mean that they have been repealed.²¹³ It has been decided, however, not to retract those arguments, but to argue instead that the Constitutional Courts' decision in this regard is wrong. Not all prerogative powers have a statutory basis.²¹⁴ For example, neither the IC nor the FC confer powers on the President or the Executive in matters such as the recognition of foreign states or governments, the determination of the existence of treaties between South Africa and foreign states and whether to honour them, etcetera. Although the continued validity of such non-statutory prerogative powers is **questionable** in the light of *Hugo* and other cases²¹⁵, it is submitted that it will bring the country nowhere if those powers are **denied** the Executive, as without them it could not effectively carry out the country's foreign relations. It will, however, amount to something totally different if the courts were to **grant** (or, at least, **recognise** the possible existence of) such powers, subject to judicial scrutiny and control for the constitutionality thereof, which is, so it is submitted, what the Court should have decided in *Hugo*, *Fedsure*, *Sarfu 3*, *Pharmaceutical Manufacturers* and in *Mohamed and Another*. It is therefore submitted that the CPD's approach in *Kolbatschenko*, *supra*, is to be preferred.

(iii) The Court further doubted whether a person in Mohamed's position could validly consent to being removed to a country in order to face a criminal charge where his life is in jeopardy.²¹⁶ However, accepting in favour of Government that it might be possible to consent to extradition or deportation in such circumstances due to the lack

²¹³ E.g. Chapter II *supra* under 2.3.2 at 99 and under 2.6 *b.*) at 118 and *infra* where Section 201 (2) (c) is discussed.

²¹⁴ As have for instance immunities conferred on foreign diplomats (Section 7 (3) of the Diplomatic Immunities and Privileges Act 14 of 1989, Section 84 (2) (h), (i) and (j) of the FC); immunities conferred on heads of state and government (Section 17 of the Foreign States Immunities Act 87 of 1981, Section 84 (2) (h), (i) and (j) of the FC); The Aliens Control Act *supra* (n185) etc.

²¹⁵ *Hugo supra* (n167) at paras [8]-[9]. See also G Carpenter "Prerogative Powers in South Africa – Dead and Gone at Last?" (1997) 22 *SAYIL* 104. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (*Fedsure*), *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (*Sarfu 3*) and *Pharmaceutical Manufacturers' Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*) at paras [20] and [41], where the Court reached similar conclusions regarding the existence of prerogative powers.

²¹⁶ At par [62] of the judgment. See especially the impressive list of authority cited by the Court in footnote 55 to make this point.

of thorough argument and debate, the Court found that Mohamed was not sufficiently made aware of all his constitutional rights in order to make an informed decision in this regard.²¹⁷

b.) The “executive certificate” doctrine

Having regard to the courts’ duty to uphold international legal principles and to harmonise national law with international law and the courts’ willingness to test executive state actions, it is hard to see that the “executive certificate” doctrine will still apply. An executive certificate in a pre-1994 South Africa served the sole purpose to inform the court of the Executive’s action and / or opinion and to hold the court bound thereby. As indicated, *supra*, in the case of *Harksen I*²¹⁸ the Court found it unnecessary to decide whether a certificate by the Minister of Justice regarding the status of South Africa’s treaty relations with the Federal Republic of Germany is binding on the court and, indeed, ignored it. The court in fact proceeded on the basis that the certificate is not binding and embarked on a thorough investigation of treaty relations between Germany and South Africa and the law on the subject in order to make its finding. Dugard, after discussing the legal position characteristically *de lege ferenda*²¹⁹, ends his discussion on this matter with “The court in *Harksen* was therefore correct in declining to accept the Minister’s certificate as binding upon it and in making its own determination of the question of customary international law before it.”²²⁰ However, as indicated, *supra*, the CPD in *Kolbatschenko* was *obiter* of the opinion that the determination of the existence of treaties may still be treated as an unjusticiable act of state, which implies that, at least in some circumstances, the courts will still accept an Executive certificate and consider themselves bound thereby, unless the certificate refers to a situation which can readily be determined in terms of the law and legal principles as was the case in *Harksen I*. It would therefore appear that the reason for courts exercising judicial restraint in some cases of a political or social nature is to be found in the proposition that the courts are ill-equipped to deal with questions of that nature (polycentric issues) and because they cannot be readily be determined by the application of legal rules and norms as the Court stated in *Kolbatschenko*, *supra*. (The answer to this question is not easily determined, but, shouldn’t the issues of the making, the determination of the existence and decisions whether South Africa will honour its extradition treaties rather be left in the hands of elected politicians who are suitably equipped to compute the sentiments of the nation as a whole

²¹⁷ At paras [62] – [69] of the judgment.

²¹⁸ *Supra* (n 181) at 1020.

²¹⁹ *Op cit* (n19) 64-67.

²²⁰ *Op cit* (n19) 67.

regarding its international relations as the CPD suggested in an *obiter dictum* in *Kolbatschenko*?)

c.) The future

In the light of the precedent and arguments, *supra*, it can be concluded that the Executive's prerogative powers have been severely curtailed in the new constitutional order. Although the courts are sure to exercise some degree of deference due to the doctrine of separation of powers, any exercise of such powers in contravention of the Constitution will undoubtedly be tested in (and struck down by) a competent court at the request of interested persons. It is, however, not possible at this stage to identify the circumstances under which, and how the courts will exercise their review powers in respect of acts of state (be they domestic or international, and be they own or foreign acts of state). One can therefore not come to any general conclusion on the "act of state" doctrine as a generic term.

However, having regard to the case law thus far, one can safely assume that each constituent type of act of state (e.g. recognition of foreign states and governments, entering into and respecting treaty relations, declaration of a state of emergency or war, invasion and / or annexation of territory, creating territorial boundaries, making of peace, claiming of jurisdiction, entering into and respecting diplomatic relations etc.) will be subjected to constitutional scrutiny on its own merits when the need arises, as did the courts in *Harksen I*, *Mohamed and Another* and *Kolbatschenko* on the questions of executive certificates, determination of the existence of extradition treaties, extradition for capital offences and requests to foreign states for assistance and information relevant to criminal investigation in South Africa. The law on this doctrine will, therefore, presumably have to be developed on a case-by-case basis in the light of the new constitutional rules and the courts' view of the doctrine of the separation of powers.

In the light of *Harksen I*, *Mohamed and Another* and *Kolbatschenko*, it can be concluded that the courts will not hesitate to interfere with own international acts of state where constitutional rights of individuals over which South Africa has jurisdiction are involved. Although the Court in *Kolbatschenko* still drew a distinction between unjusticiable acts of state²²¹ where the doctrine of judicial restraint is appropriate, and justiciable acts of state where the courts will not shy away from their duty to uphold the Constitution and the

²²¹ I.e., budgetary policy and international policy regarding relations between states in the international realm (being either "polycentric" issues, involving calculations of social, economical and political preference, which are more suited to decision by elected representatives than by the Judiciary, or "political questions" which are often "so 'political' in nature" that the courts have no "judicial or manageable standards" by which to judge them) – at p 340g-341e of the judgment.

constitutional values of an open, democratic society based on freedom, equality and dignity of all persons in their relations with each other and the state, the line of distinction is not as clear as one would ideally have it be. One could, therefore, safely assume that, in appropriate circumstances, acts of state that were previously regarded as unjusticiable will be attacked by individuals for their alleged lack of constitutionality and, if the protection of constitutional rights of individuals over which South Africa has jurisdiction are involved, the courts will not hesitate to test such actions. Therefore, even acts of state done in terms of prerogative powers described by the Court in *Kolbatschenko* as “polycentric” or “political questions”, which are normally (even in the new constitutional dispensation) regarded as unjusticiable may, in appropriate circumstances, be subjected to judicial scrutiny and control.

3.3.4 Has the “precedent” exception survived?

In terms of Section 232 of the FC, customary international law is no longer subject to judicial precedent. Its recognition and application is only subject to the Constitution and (constitutional) Acts of Parliament. Does this have any import for the South African system of law and courts?

Dugard points out that international law “knows no doctrine of *stare decisis*, but that, in practice there is a natural tendency for courts to follow their own previous decisions or other decisions of international tribunals.”²²² He also argues that, due to the fact that the recognition and application of customary international law is now only made subject to the Constitution and Acts of Parliament,²²³ customary international law is no longer subject to common-law rules and judicial precedent. Therefore South African law now accords with the *dicta* in *Kaffraria Property Co (Pty) Ltd v Government of Zambia* and Lord Denning’s judgment in the *Trendtex* case.²²⁴

However, Dugard states that, since section 232 is not a complete statement on the subject of customary international law in South Africa, it will still be necessary to turn to judicial precedent to decide *which rules* of customary international law are to be applied and *how they are to be proved*.²²⁵ The courts will, therefore still be called upon to interpret and define rules of customary international law and how they are to be proved in the light of precedent.

²²² *Op cit* (n19) 38.

²²³ *Viz* section 232 of the FC *supra*.

²²⁴ *Op cit* (n19) 52. The citations of the case law can be gotten from there.

²²⁵ *Ibid.*

Naturally, in South Africa with its hierarchical structure of courts, the lower courts will still have to bow to binding legal precedent laid down by superior courts, with the Supreme Court of Appeals and the Constitutional Court at the top. A deviation from a decision of one of those courts will only be permitted in exceptional circumstances, even when the decision is about international law, which knows no rule of *stare decisis*, because this principle is, to an extent, irrelevant to the question of municipal precedent. Therefore, if a higher court in the hierarchy has decided a certain issue of international law, lower courts will be bound to that decision even if it is satisfied that the decision is wrong in (national or international) law, unless that higher court retracts its decision or it is set aside on review or appeal to an even higher court.

3.3.5 The significance of sections 39 (2) and 233

Section 39 will be discussed in Chapter V, *infra*, but it should be stated here that customary international law is part of the law of the land in terms of section 232 and is therefore to be applied directly as law. It is therefore not part of the subject matter that has to be “considered” in terms of section 39 (1) (b). Therefore, customary international law, which is already part of South African law, cannot be used to “develop” common law and customary law in terms of section 39 (2) – it has to be applied as law in any event. Moreover, section 39 (2) in any event most probably refers to indigenous law when it refers to customary law that can be developed, and not to customary international law, which is already included through section 232.

Section 233 constitutionally enshrined the presumption of statutory interpretation that the legislator is presumed not to violate international law. It enjoins courts to, in the case of inconsistency between legislation (including the Constitution) and international law (including customary international law), prefer “any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” Customary international law is therefore not only supreme over common-law principles and judicial precedent, but it can also be used to trump national legislation (even the Constitution). It seems to create a contradiction in terms though, because the Constitution is in section 2 of the FC declared to be the supreme law of the Republic and that any law or conduct inconsistent with it is invalid, whilst section 233 implies that the Constitution (included in “any legislation”), in case of inconsistency, must be interpreted in the light of (and possibly subject to) international law. Therefore it is submitted that, in order to preserve the supreme status of the Constitution, section 233 must be interpreted to enjoin courts to read down legislation (including the Constitution) to conform with international law, only when the text is ambiguous and, therefore, capable of more than one interpretation. This proposition will be dealt with in more depth in Chapter IV.

3.3.6 Resurrection of the Booyesen – Dugard debate

It is generally accepted that the Constitution does not apply or operate retrospectively.²²⁶

What is the position now of customary international law transgressions from the apartheid era (which were not previously known as exceptions where international custom could not be applied)? Booyesen's supporters might argue that customary international law was never part of South African national law, and that to apply customary international law to cases emanating from before 1994 would result in retrospective application of section 232. Dugard's supporters on the other hand might argue that customary international law was always part of the law of the land, and that, because it was not expressly excepted from application in the previous dispensation, it can be applied, and, therefore, that it does not amount to retrospective application of section 232.

This issue will be extremely relevant when the (envisaged) effect of international law on South African Criminal law is discussed in Chapter V, *infra*, with reference to section 35 (3) (l) of the FC. Suffice it to say at this stage that the debate seems to be far from over.

3.4 CONCLUSION

The express incorporation of customary international law into the law of South Africa (subject only to the Constitution and [constitutional] Acts of Parliament) is to be welcomed. It goes a long way towards harmonizing the two legal systems. The fact that it is expressly made part of the law of the land might, however cause problems, especially in the lower courts, tribunals and forums for want of training in international law and the virtual non-accessibility of customary international law. Nevertheless, this provision is to be welcomed so that South Africa can claim its rightful place in the international community as envisaged in the Preamble of the FC.

Although some problems are foreseeable, especially in ascertaining the contents of customary rules and their application, this provision in the Constitution creates considerably fewer problems than the treaty provision discussed, *supra*. Except for lack of clarity regarding its retrospective application and whether Booyesen or Dugard is supported, the provision is relatively straightforward and unambiguous.

²²⁶ J de Waal *et alii op cit* (124) 53-55.

4. INTERNATIONAL LAW AND NATIONAL SECURITY

4.1 INTRODUCTION

This section will consider specific problems that might be encountered in the directions that international law should be applied as law in the maintenance of national security. Having regard to the different textbooks, commentaries and case law, and by comparing the positions that prevailed pre-1994, under the IC and under the FC, certain submissions will also be made, aimed at resolving these problems.

From the introductory remarks in Chapter I, *supra*, it should be clear that Parliament, the Executive, the security forces (and even the courts) under apartheid were not as aware of and as willing to act (and to judge) according to human rights and humanitarian principles enunciated by international law as was expected of them by the international community. The 1948-1990 era abounds with examples of atrocities by the security forces. If it weren't for those, there would have been no need to create a Human Rights Commission and the Truth and Reconciliation Commission.²²⁷ Indeed, there would have been no need for amnesty, which will be discussed, *infra*.

The atrocities perpetrated by the security forces reached a climax during the notorious cross-border raids under the auspices of "self-defence" or "hot pursuit", internal actions under emergency legislation, and cross-border arrests for purposes of trial in South African courts. (A detailed discussion of those situations falls outside the ambit of this dissertation, and they are mentioned merely to make the point that a constitutional obligation of the security forces to act according to human rights principles became very important within the new dispensation.)

That situation has now changed under the post-1994 Constitutions of South Africa. In this area of law, the new Constitutions now make extensive reference to the recognition of international legal rules and principles and their application at national level.

4.2 THE POSITION IN TERMS OF THE POST-1994 CONSTITUTIONS

4.2.1 Under the IC

Section 227 (2) (d) and (e) of the IC 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

²²⁷ Both institutions to be discussed in Chapter V *infra*.

law and treaties binding on the Republic.”

These were, however, not the only national security provisions in the FC with international dimension. The other relevant provisions did not necessarily employ clear international law terminology, but some evidenced an undertaking to recognise and apply international legal principles. They are

- Section 227 (1) (a) – which provided that the defence force may be deployed in the defence of the Republic, for the protection of its sovereignty and territorial integrity; and
- Section 227 (1) (b) – which provided for the use of the defence force for service in compliance with the international obligations of the Republic with regard to international bodies and other states.

Jus ad bellum – Section 227 (2) (d) of the IC

Section 227 (2) (d) dealt with the *jus ad bellum*²²⁸ embodied in the 1928 General Treaty for the Renunciation of War²²⁹, United Nations Charter²³⁰ and the General Assembly’s Resolution on the Definition of Aggression of 1974.²³¹ This provision, therefore, related to the Defence Force’s obligation to observe customary international law regarding the use of force, and was to serve as an important reminder that any transgression thereof might render the state liable on the international plane.

Although this was a very satisfactory provision in general²³², it was suggested elsewhere that it should be reformulated in the FC so as to include reference to “any treaty or rule of customary international law binding on the Republic relating to aggression” in order to eliminate doubt as to whether treaty law also applies for purposes of this section.²³³ The poor grammatical sequence of words chosen namely “international customary law” was discussed in Chapter II, *supra*, and need not be addressed again here.

A further problem with this provision was that it was a directive addressed at the defence force not to transgress the rules according to which force can be exerted. The directive was not addressed at Government. Devine²³⁴ pointed out the following meanings attributable to this provision, which, so he submitted, and it is agreed, evidenced certain shortcomings:

- In terms of this provision read with Section 227 (1) (a), *supra*, and subsection (2) (f), the defence force may under the IC have been deployed for defensive purposes only. Therefore,

²²⁸ The law that regulates the use of force by states – the right to go to war.

²²⁹ Also known as the “Pact of Paris” or the “Kellogg-Briand Pact.”

²³⁰ Article 2 (4) thereof prohibiting the use of force subject to the exceptions in articles 51 (self-defence) and 52 (under authority of the Security Council).

²³¹ Resolution 3341 (XXIX) of 14 December 1974.

²³² CJ Botha *op cit* (n8).

²³³ J Dugard “International law and the ‘final’ Constitution” (1995) 11 SAJHR 241 at 242.

²³⁴ DJ Devine “The National Defence Force: international operations, aggression, self-defence, use of force and conduct in hostilities under the interim Constitution” (1995) 20 *SAYIL* 182.

the defence force's actions were limited to actions in self-defence against armed attack in terms of Article 51 of the UN Charter.²³⁵ This posed a further problem. Whilst the rules of humanitarian law (*jus in bello, infra*) impose restrictions on belligerent conduct in the interests of humanity and civilisation, the rules governing the necessities of war²³⁶ once a state is at war contain no similar restrictions and authorise belligerents to take positive action aimed at overcoming the enemy. In situations of self-defence, even in recognising the principles of using only the necessary and proportionate force to repel aggression against the Republic, a situation may, therefore, be reached where the bounds of self-defence have to be exceeded, which is prohibited.

- In terms of this provision read with Section 227 (1) (b), *supra*, the defence force may under the IC have been deployed for service in compliance with the international obligations of the Republic with regard to international bodies and other states. This includes a direction by the Security Council in terms of Art 25 (Chapter VII) of the UN Charter to use force in the maintenance of international peace and security; and obligations arising from regional arrangements to which South Africa is a party to maintain peace and security in the region as authorised in terms of Section 53 of the UN Charter. However, recommendations by the Security Council in terms of Chapter VI of the Charter and a peace-keeping operation in the absence of a UN Force set up under Article 43 of the Charter²³⁷ would not have imposed an obligation in terms of international law under this section. In such situations Devine argued that the defence force might not have been utilised, unless an agreement was concluded between South Africa and the other states or the Security Council to send forces into such action. However, it is submitted that theoretically there is no difference between an obligation *imposed* by international law and one *accepted* for purposes of its binding effect at international level, because international law is largely consensual in nature in any event. However, Devine submitted that this provision actually loses its *raison d'être* and that Section 227 (1) (b) should have been formulated so as not to refer to obligations only.²³⁸ However, in the light thereof that Government may easily through agreement have *accepted* an obligation in terms of which it agreed to deploy its defence force, this argument of Devine is not entirely agreed with.
- Lastly, the fact that the directive that the defence force may not breach international law relating to aggression seemed wrongly addressed, because it has always been governments who decide whether to use force and, if so, whether it should utilise its defence force agency, and not the defence forces themselves. Defence forces are the governments' agencies to maintain peace, and not the other way round. It would therefore have been better had this section been addressed to government, rather than the defence force. Moreover, Devine pointed out, this direction meant that the defence force may not breach binding customary international law relating to the use of force and that, if the Executive ordered the defence force to invade another country in other circumstances than those authorised by international law, the defence force would have been obliged to refuse to obey the order in terms of this section.²³⁹

Jus in bello – Section 227 (2) (e) of the IC

Section 227 (2) (e) addressed the issue of *jus in bello*²⁴⁰, as regulated by “the ‘Law of the Hague’ (dealing with the rights and duties of combatants during military operations, and the military hardware that may be used), and the ‘Law of Geneva’ (dealing with the protection of

²³⁵ *Id* at 182-4, 187-8.

²³⁶ G Schwarzenberger & ED Brown *A Manual of International Law* 6th Ed (1976)171; M Akehurst *A Modern Introduction to International Law* 6th Ed (1987) 278.

²³⁷ Dugard *op cit* (n19) 401-2, 407-9.

²³⁸ *Op cit* (n234) at 184.

²³⁹ *Id* at 184-187.

²⁴⁰ The law governing the rules according to which war must be waged and the treatment of combatants and civilians in time of war – humanitarian law.

civilians and wounded combatants).²⁴¹ Although South Africa is a party to all major conventions on the subject of international humanitarian law, this section did not incorporate those conventions into national law, which Dugard argued might pose a problem.²⁴²

However, it can be argued that those conventions constitute codifications of customary international law and that they were, therefore, through section 231 (4) of the IC included in the provision even though they were not expressly incorporated. Moreover, the mention of “treaties binding on the Republic” implied that such treaties did not need to be incorporated into national law in terms of section 231 before they should have been observed and applied for purposes of this provision.²⁴³ All binding (even unincorporated) treaties on the subject were therefore included in the provision. This portion of the criticism by Dugard was, therefore, unfounded. However, the suggestion by Dugard that legislation should make it clear that the principles of humanitarian law should be included in the education and training of the Defence Force’s members²⁴⁴ is supportable and did receive expression in the FC as will be indicated, *infra*.

The problem with these provisions (poor grammar and lack of clarity apart) was, however, that they only addressed the actions of the Defence Force in time of war. Although wide enough to cover police actions in time of war, they did not address the actions of the defence force and other branches of the security services²⁴⁵ in times of peace or during internal strife, which could not be classified as war. This had to be remedied by the FC.

4.2.2 Under the FC

a.) Section 198 (c) – Directive in respect of the maintenance of national security

Section 198 (c) provides

“198. (c) National security *must be pursued in compliance with the law, including international law.*”²⁴⁶

The issues

The first question that comes to mind is whether this section refers to binding international law only, or also to non-binding (“soft”) law. It has been argued in Chapter II that this directive refers to binding law only.²⁴⁷ (This contention is also advanced for all the other

²⁴¹ CJ Botha *op cit* (n8) at 145.

²⁴² Dugard *loc cit* (n233).

²⁴³ See the discussion and arguments in this regard in Chapter II *supra* under 2.4 a.) at 109 with reference to similar language regarding treaties employed in Section 199 (5) of the FC.

²⁴⁴ *Ibid.*

²⁴⁵ I.e. Police and Intelligence Services.

²⁴⁶ Italics added.

²⁴⁷ Chapter II *supra* under 2.2.3 at 73-4.

provisions regulating the maintenance of national security that refers to international law, and will not be repeated when they are discussed, *infra*.) It should also be noted that the provision uses the widest possible terminology to define what (binding) international law should be taken into account in the pursuance of national security. As indicated in Chapter II, *supra*, “international law” in this provision includes treaty law, customary international law, general principles of law recognised by civilised nations, judicial precedent, text writings, *jus cogens* and obligations *erga omnes*.

The term international law is also not limited to one or two of the branches of international law; it includes all branches of international law (such as *jus ad bellum*, *jus in bello*, IHRL etc.). However, although non-binding international law (included in IHRL) must be considered in interpreting the Bill of Rights, it has to be stressed that this section does not convey that non-binding IHRL must be observed in the pursuance of national security. It is not necessary for a court to follow non-binding international law when considering it in terms of Section 39 (1) (b). The only injunction there is to **consider** non-binding law, not to **follow** it. It is only after a court, tribunal or forum has, in terms of section 39 (1), decided to follow non-binding international law in formulating a specific right in the Bill of Rights that such principles will form part of the law of the land that has to be observed in the legal actions by the state and individuals in and outside the country and, therefore, in the maintenance of national security. In other words, only those provisions of “soft” international law that have already become part of South African law through a process of constitutional interpretation are to be observed for purposes of this provision. This contention is strengthened by the fact that “international law” in this section is described as a species of the national law of South Africa (“... the law, *including international law*.”), which, as pointed out in Chapters I and II knows no such thing as “soft” law.

Secondly, and this is where application of international law comes into play, this provision is wide enough to address, not only the observance of international law in time of war, but also the obligation of Government and its security services to act according to international and national legal principles (including binding IHRL and national human rights law) in times of peace.

Lastly, this directive is not addressed directly to any part of government or its agencies in particular (as was Section 227 (2) (d) of the IC, *supra*). It is addressed to any part of government, government agency or department involved in the maintenance of national security. Naturally, it is for the three legs of government, the Legislature, Executive and Judiciary to decide when, where and how national security is to be maintained, and by which

part of government or by which agency, as long as it is done within the framework of the Constitution. It was pointed out in the discussion of Section 199 (5) in Chapter II, *supra*, that the maintenance of national security is not limited to defence force operations vis-à-vis other states or international organisations in and outside of South Africa, but that the maintenance of internal stability and law and order is also included.

The courts' practice

As far as could be determined, a South African court to date hereof has not yet referred to this section. Neither could any evidence be found that it has been necessary for a court to do so.

b.) Section 199 (5) – Directive to Security Services

Subsections 199 (1) and (5) provide

- “199. (1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
- (5) The security services *must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.*”²⁴⁸

The issues

The first point that has to be observed is that, unlike the IC, section 199 (5) involves all branches of the security services, and not only the defence force. This extension of the applicability of international legal norms is to be welcomed because history has shown that it is very often members of the police and intelligence services who violate human rights²⁴⁹ and the state's international obligations.²⁵⁰

The second point worth mentioning is that this section, like section 198 (c), is wide enough to direct that the actions of the security forces should comply “with the Constitution and the law, including customary international law and international agreements binding on the Republic” not only in time of war, but also in times of peace.

Thirdly, except for the express use of the word “binding” in connection with international law, it should be clear that this provision, like section 198 (c), requires compliance with the law, including treaties and customary international law. This clearly indicates that only

²⁴⁸ Italics added.

²⁴⁹ R Keightley *op cit* (n108) at 417.

²⁵⁰ E.g. cross-border arrests resulting in abductions from a neighbouring country – *S v Ebrahim* 1991 (2) SA 553 (A). Although the Court made it clear that its decision is based on Roman-Dutch law and not international law (probably to avoid the issue whether international law formed part of national law), Dugard *op cit* (n19) 173-77 points out that policing in foreign states contravenes international law.

binding international law was intended for purposes of this provision. The same argument as raised under section 198 (c), therefore applies here. The main question at this stage is, however, why the word “binding” was included in this provision, because it clearly refers to both customary international law and treaties. As indicated in Chapter II, *supra* under section 232 of the FC, the word binding is tautologous when used in connection with customary international law, and that fact has been recognised by the omission thereof from section 232. It is therefore only logical to assume that, if the word binding was intended to define customary international law, it is because the committee responsible for the drafting thereof did not take cognisance of the omission thereof from section 232 and the reason therefor, or that it simply forgot to bring the two sections in line with each other.

Technically and linguistically, therefore, the word binding in this section should refer only to international agreements, because if used in connection with customary international law, its use will be tautologous. Customary international law to which South Africa persistently objects will simply not bind the country or its security forces, and need not be complied with as argued in Chapter II, *supra*. It also follows logically then that all binding treaties, and not only those that are incorporated into national law, are included in this directive. Treaties to which South Africa is a party, but which have not been incorporated into national law, such as the four Geneva Conventions of 12 August 1949 and their Protocols of 1977, will, therefore have to be observed and complied with by the security forces, even though they have not yet been incorporated into national law.

Lastly, it is also important to note that Dugard’s submission²⁵¹, that legislation should include a direction that the directive to act in accordance with international law should be included in the education of the members of the security forces, was heeded. The italicised portion of the section, *supra*, bears this out. Members of the security forces, and their overseers and trainers should exercise great care in the observance of these instructions, because, in the light thereof they will probably not be able to plead ignorance of the law in case of non-observance of international law principles.

The courts’ practice

As far as could be ascertained, no South African court has to date referred to this section.

Neither has it been necessary.

²⁵¹ *Loc cit* (n 233).

c.) Section 200 (2) – Declaration in respect of Defence Force

This section reads

“200. (2) 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 law regulating the use of force.*”²⁵²

The issues

At first glance, Section 200 (2) addresses only the issue of *jus ad bellum*²⁵³ as this section is clearly intended to constitutionalise the observance of international law regulating the use of force between states. In a sense, it amounts to duplication because the *jus ad bellum* is already addressed by sections 198 (c) and 199 (5). However, as pointed out in Chapter II²⁵⁴, in the case of war, the *jus in bello* will also have to be observed in striving towards the declared objective of the defence force, namely to heed all applicable laws and rules regulating the use of force. For obvious reasons, however, this section refers to the defence force only, and the other branches of the security forces are not included. It implies that other branches of the security forces should (or rather may) not be employed in the use of force between states.

Secondly, at stake, here are the “*principles of international law regulating the use of force*” which have to be observed by the defence force when force is used against other states. As indicated in Chapter II, *supra*, the term “principles” is often used to indicate a higher level of law (and depicts something wider) than “rules.” This indicates that only binding “principles” of law is included in the terminology of this section. South Africa is party to both the United Nations Charter and the 1928 General Treaty for the Renunciation of War²⁵⁵, regulating the use of force between states.²⁵⁶ It is also generally accepted that the General Assembly’s Resolution on the Definition of Aggression of 1974 constitute binding (if not peremptory) principles of international custom, which all states should heed. They are therefore all included in the terminology of this section.

Thirdly, this section’s predecessor²⁵⁷ merely stated that the Defence Force may not breach “international customary law binding on the Republic relating to aggression.” Dugard suggested that, although the wording of the IC was wide enough to cover all known instruments on the subject, the FC should include express reference to treaties regulating the

²⁵² Italics added.

²⁵³ *Supra* (n228).

²⁵⁴ *Supra* under 2.5 a.) at 115-6.

²⁵⁵ Also known as the *Pact of Paris* or the *Kellogg-Briand Pact supra* (n229).

²⁵⁶ J Dugard *op cit* (233) at 244.

²⁵⁷ Section 227 (2) (d) of the IC.

use of force.²⁵⁸ The terminology used here, however includes not only treaties and customary international law on the subject, but also *jus cogens*, obligations *erga omnes* and all other “principles of international law regulating the use of force” that may exist. Although the term “principles” tends to restrict the meaning of international law in the sense indicated above, this section employs much wider terminology than its predecessor.

In the fourth place, for purposes of this section, treaties also need not be legislatively incorporated into national law in order to qualify as a principle of international law on the subject. South Africa need not even be a party to a treaty on the subject before it may qualify as a principle that should be observed and complied with by the Defence Force. As long as the treaty embodies what is generally accepted to be a principle of international law, it qualifies as a principle for purposes of this section. It will therefore seem that unincorporated treaties aimed at regulating the use of force between states, and to which South Africa is not a party, but which are accepted to be codifications of customary international law, *jus cogens* or obligations *erga omnes*, will qualify as principles of international law, which have to be observed by the SANDF.

Lastly, it was pointed out in Chapter II²⁵⁹, the fact that the defence force is specifically mentioned here, does not pose the same problem as was the case with Section 227 (2) (d) of the FC. This provision isn’t specifically addressed to the SANDF, but it is rather a statement of what the primary objective of the SANDF is, which objective will have to be observed when the President decides to utilise the defence force. It may also serve as basis for the SANDF or its members legally to refuse to carry out an illegal order to invade another country.

The courts’ practice

This provision is still relatively new to South African international law jurisprudence and, because judges, advocates, magistrates, attorneys, students and some law teachers are not yet suitably trained in it, it is still largely unsure what the courts will make thereof. Reference to this provision²⁶⁰ has been made in at least one recent decision, *South African Defence Union v Minister of Defence and Another*²⁶¹, although not in a satisfactory way because the principles of the *jus ad bellum* and the *jus in bello* were not really apposite in order to determine

²⁵⁸ *Loc cit* (n238).

²⁵⁹ *Supra* under 2.5 b.) at 116-7.

²⁶⁰ Section 200 (2).

²⁶¹ 1999 (2) SA 735 (TPD) at 741-42 and 751.

whether the legislation hampering trade unionism in the defence force was constitutional.²⁶² In this case, the applicants applied to the Transvaal Provincial Division of the High Court for a declaratory order that Section 126B (1), certain parts of subsections (2) and (3), as well as subsection (4) are unconstitutional and invalid. In essence, the offending subsections prohibited members of the SANDF to become members of any trade union as defined in the Labour Relations Act 28 of 1956 and to take part in a strike or any act of public protest, at the same time declaring it a punishable crime in the case of contravention of one of them. The order was granted by Hartzenberg J to a certain extent, and this order was in broad terms confirmed by the Constitutional Court. In reaching a decision, the two courts largely took into account, labour law and relations in terms of the Constitution (in the Constitutional Court reference was also made to international labour law) and weighed those principles against the contention of the respondents that a disciplined defence force cannot be maintained without the impugned provisions. The end result is that it is still illegal to perform certain labour acts or practices (such as to strike – in armed forces one normally speaks of “mutiny”), but that members of the SANDF are now free to join trade unions and to participate in legal protest actions.

In *Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others*²⁶³, reference was made to a decision concerning applicable IHRL principles²⁶⁴ regarding the way in which a court martial should be constituted. It is, however, not clear whether reference to IHRL was made in terms of this provision or in terms of section 39 (1) (b). The latter seems the better explanation for the reference, but bears with it the question whether the mention of only one source of IHRL on this point was enough to satisfy the court’s duty in terms of that section.

Apart from these, no other decisions could be traced in which the international law provisions regarding the defence force have been discussed.

²⁶² The Constitutional Court reconsidered this decision in 1999 (4) SA 469 (CC). The Court didn’t refer to section 200 (2) but to section 39 directing it to consider international law (at par [25]). The Court then considered conventions and recommendations of the International Labour Organisation in order to ascertain the scope of the right to associate in order to determine the constitutionality of an act preventing trade unionism in the defence force. The Court also referred to section 200 (1) (at par [32]) in order to emphasise that a defence force should be disciplined, and the compatibility of trade unionism with that fact. In a separate concurring judgment Sachs J referred to section 198 (a) (at par [47]), although, regrettably, leaving out the reference to international law. However, this was a much more satisfactory use of the international law provisions, than how the issue was dealt with by the court *a quo*.

²⁶³ 1999 (2) SA 471 (CPD).

²⁶⁴ At 483 – referring to *Findlay v United Kingdom* 24 EHRR 221 at 244-45.

d.) Section 201 (2) – Declaration in respect of the President’s prerogative

This subsection provides

- “201. (2) Only the President, as head of the national executive, may authorise the employment of the defence force –
- (a) in co-operation with the police service;
 - (b) *in defence of the Republic*; or
 - (c) *in fulfilment of an international obligation.*”²⁶⁵

Firstly, it has to be mentioned that Botha²⁶⁶ pointed out that the IC contained no reference to the common law prerogative to declare war. Devine²⁶⁷ suggested that it must be inferred that the change in terminology from the power “to declare war” to the power “to declare a state of national defence” meant that the substantive character of the prerogative power was changed and that the emphasis falls on defensive rather than offensive military action. The same is true of the FC. Except for this mention of the President’s prerogative to employ the defence force, no general prerogative is contained in either Section 84 of the FC or in any other provision thereof, to declare war or peace.

In the light of *Hugo*²⁶⁸, the other cases referred to, *supra*²⁶⁹, and *Mohamed and Another*²⁷⁰, the Constitutional Court is of the opinion that the President’s (and the Executive’s) powers are confined to those mentioned in the Constitution and that there is no residue of prerogative powers besides that. It was argued, *supra*²⁷¹, that the Court was wrong, but, for the mean time it can be argued that the Court’s decision will apply if the same question crops up in the High Courts, which are bound to the Constitutional Court’s decisions. This is, however, not necessarily the case because as pointed out, *supra*, the CPD in *Kolbatschenko*²⁷² proved that the same result can be obtained without declaring that the Constitution regulates prerogative powers exhaustively and that no residual, non-statutory power exists, if it can be shown that a provision of the Constitution expressly or impliedly limits the discretionary powers of the Executive, be they conferred on a statutory basis or not.

Here, for instance, the President is given the discretion and power to authorise the employment of the defence force, *inter alia*, “in defence of the Republic” and “in fulfilment of an international obligation.” This is a statutory regulation of a prerogative power that the President, as head of the national Executive, has always had. The mere fact that a prerogative

²⁶⁵ Italics added to highlight the international dimension of the subsection.

²⁶⁶ CJ Botha *op cit* (n8) at 139.

²⁶⁷ *Op cit* (n234) at 183 fn 2.

²⁶⁸ *Supra* (n167) at paras [8]-[9].

²⁶⁹ (n215).

²⁷⁰ *Supra* (n54) at par [36] of the judgment.

²⁷¹ At 167-8.

²⁷² *Supra* (n54).

is embodied in a statute (here the Constitution) does not necessarily imply that the nature and content of the prerogative power have changed unless it appears expressly or impliedly that the nature and content of the power is changed.²⁷³ However, in terms of this provision, the President's discretion is expressly limited and, therefore, the substantive character of the prerogative power to wage war was changed so that it refers to defensive rather than offensive military action. It would therefore be illegal for the President to order the defence force to invade another country, except if it is necessary within the bounds of self-defence, or where it is necessary to honour the state's obligations in terms of international law.

In the second place, it must also be noted that only the President, and no one else, may authorise the employment of the defence force. Although, obviously, he/she may act upon advice of his/her Cabinet Ministers, generals or other advisors, the discretion remains the President's, and it cannot be delegated. The prerogative to employ the defence force can therefore not be delegated as can other prerogatives such as the prerogative to negotiate and sign treaties.

Thirdly, the word "obligation" implies a relationship of a binding nature. Therefore "international obligation" in this section refers to a binding legal obligation²⁷⁴ imposed by international law.²⁷⁵ It should be borne in mind that theoretically there is no difference between an obligation *imposed* by international law and one *accepted* for purposes of its binding effect at international level, as international law is largely consensual in nature. Although the discretion whether to use a defence force is one of the most basic manifestations of sovereignty, and a directive by the international community to use the defence force might be interpreted to be interference with domestic affairs, a directive by the Security Council in terms of article 25 or a rule that developed into *jus cogens* or obligation *erga omnes*, will constitute a binding obligation to use the defence force.²⁷⁶ Therefore, if binding international law should impose an obligation on all Southern African states to intervene forcefully, for example, in Zimbabwe for its repressive laws, ground reform policies and negation of human rights, such as the rights to freedom of the press, protest, to gather and to form an opposition, South Africa would be obliged to follow according to international law.

²⁷³ Booyesen *op cit* (n25) 370-372.

²⁷⁴ To be distinguished from "moral" or "political" obligation.

²⁷⁵ E.g. under direction of the Security Council of the UN in terms of article 25 of the Charter to use force in order to maintain international peace or in accordance with regional arrangements authorised by the Security Council in terms of article 53. See Dugard *op cit* (n19) Ch 21, who makes it clear that the obligation can, however, also arise from treaty, customary international law, *jus cogens*, obligations *erga omnes* and other sources. A state may also agree to (or accept) a request to intervene forcefully – e.g. for purposes of humanitarian intervention, collective self-defence, civil strife and wars of national liberation – as long as it does not contravene the prohibition against the use of force.

²⁷⁶ *Ibid.*

It should also be borne in mind that “[a] state cannot plead provisions of its own law or deficiencies in that law in answer to a[n international] claim against it for an alleged breach of its obligations under international law.”²⁷⁷ This provision, therefore, serves only as an important reminder that South Africa might be obliged under international law to use its defence force against other states, but that the President retains the discretion (prerogative) whether or not to act under risk of an international claim (or other action such as reprisal) in case of refusal. As indicated in Chapter I, *supra*, although international law may be weak in character, and the sanctions for refusing to comply with binding international law might not be very threatening or effective, the possibility of international law enforcement remains.

It is, however, dubious whether a national court would direct the President at national level to utilise the defence force in fulfilment of such obligation if he/she decides not to oblige, because that may lead to the state “speaking with two voices.”²⁷⁸ Therefore, although the courts have wide powers of review regarding acts of state, the courts are sure to allow at least some margin of appreciation towards the executive’s discretionary (prerogative) powers, especially when the exercise of one of the most basic manifestations of sovereignty is at stake. On the other hand, however, if the President decides to oblige, and such international obligation exists, a court will not interfere with his/her discretion because of this section. In such a case it cannot be said that the president’s decision to oblige is unconstitutional, simply because he/she is authorised by the Constitution itself to do so.

4.3 CONCLUSION

These provisions are most significant from a policy point of view, because they act as guiding principles for the forces (and people in charge thereof) on how to act. There is no doubt that the constitutional reference to specified principles of international law in the provisions defining the powers and functions of the security forces will, together with the other provisions referring to international law, serve the twofold purpose advocated by Dugard²⁷⁹

“First, they inform politicians, lawyers and the public of South Africa that the new constitutional state, unlike the apartheid state, aims to conform to the prescriptions of the international legal order. Secondly, they inform the international community of South Africa’s new commitment to international law and give notice of the manner in which South Africa will bind itself in future relations with states.”²⁸⁰

²⁷⁷ I Brownlie *op cit* (n89) 34.

²⁷⁸ Lord Atkin in *Government of the Republic of Spain v SS ‘Arantzazu Mendi’* [1939] AC 256 (HL) said at 264: “[o]ur state cannot speak with two voices ... the judiciary saying one thing, the executive another.” – *Per Dugard op cit* (n19) 65. See also *Swissborough Diamond Mines supra* (n18) at 327C-G and *Dugard op cit* (n19) 68-9. See also the discussion of the survival of the “act of state” doctrine in a post-1994 South Africa *supra*.

²⁷⁹ *Op cit* (n233).

²⁸⁰ At 241.

These provisions will also serve as an important reminder to members of the security forces and their overseers that their non-conformity to international legal principles declared part of the law might, apart from the state incurring international liability, lead to possible criminal and civil liability in local, foreign or international courts or tribunals.²⁸¹ Moreover, the members of the security forces are now to be instructed and educated according to international legal standards, and a failure to do so might lead to action against the offending force or member.

The inclusion of international legal principles in these provisions are, therefore, most welcome from the perspective of international law. It will surely lead to greater harmonisation between national and international law. However, it still remains to be seen whether lawyers and the courts will make ample use thereof in national litigation. As indicated, the courts' scant reference to some of these provisions in cases was somewhat out of place and uncalled for. What is disconcerting, however, as pointed out above, is the fact that the international law terminologies used are sometimes vague and confusing with reference to what exactly is expected from the security forces in general and the defence force in particular. One cannot establish clearly, and without a great measure of difficulty when and what international law should be applied. This is bound to create interpretation problems for the courts.

²⁸¹ To be discussed in Chapter V *infra*.

CHAPTER IV

INFLUENCE (INDIRECT APPLICATION) OF INTERNATIONAL LAW IN A
POST-1994 SOUTH AFRICA
(INTERPRETATION)

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2. BILL OF RIGHTS INTERPRETATION

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CHAPTER IV

THE INFLUENCE (INDIRECT APPLICATION) OF INTERNATIONAL LAW IN A POST-1994 SOUTH AFRICA (INTERPRETATION)

1. INTRODUCTION

The previous chapters dealt with the meaning and scope of international law overall in the present constitutional dispensation¹, as well as with the specific provisions governing substantive application of international law in terms of which international law is applied as law.²

This chapter will focus on the interpretational role of international law vis-à-vis national law in South Africa as specifically authorised by the FC. More specifically, the attempted harmonization of international law with national law will be the key issue addressed in this chapter. This will be dealt with under two headings namely:

- **Bill of Rights interpretation** – dealing with the influence that international law is mandated to have on the interpretation, formulation and development of national law regarding human rights protection through an interpretation provision – Section 39.
- **Interpretation of statutes** – dealing with the influence that international law is mandated to have on legislation in general through another interpretation provision – Section 233.

2. BILL OF RIGHTS INTERPRETATION

2.1 INTRODUCTION: PRE-1994

In the pre-1994 period, there was no constitutionally enshrined Bill of Rights that had to be interpreted in the light of international law and, more specifically, IHRL. Moreover, although international law was available to the courts to recognise and to apply in certain circumstances – regardless of which school of thought on the relationship between international and national law is supported – the courts were generally reluctant to let themselves be influenced by IHRL.³ For this reason, a blind eye and deaf ear were normally turned when IHRL violations were alleged. Except for criminal prosecution for known crimes in terms of criminal law (which generally didn't include international law crimes) and civil actions for wrongs that were recognized at common law and statute law, no real remedy was available for victims of gross IHRL transgressions not recognised as crimes or civil wrongs.⁴

¹ Chapter II *supra*.

² Chapter III *supra*.

³ J Dugard "The South African judiciary and international law in the apartheid era" (1998) 14 *SAJHR* 110.

⁴ E.g. racial discrimination as a species of the international crime of apartheid.

Moreover, as indicated in Chapter I⁵, the positivist maxim *iudicis est ius dicere sed non dare [facere]* reigned and judges were reluctant to make any real effort at judicial activism in order to break the chains of formalism that held them (or at least their philosophy) bondage. The doctrine of Parliamentary sovereignty made the judiciary forget (or ignore) that it is one of the pillars of state, and that its function is not only to protect individuals against other individuals, but also to protect individuals from the abuse of power by the other pillars of government. Although the pre-1994 courts accepted that national law could be developed in terms of international trends⁶, there was no real possibility that common (or statute) law could be developed in accordance with the IHRL developments in international law. The development of common law was left to Parliament, which had a reputation of ignoring the calls from the international arena.⁷

As a result, the rift between the two systems of law widened, leaving little, if any, scope for the harmonization of international with national law. There was simply no way in which the development of common law could stay abreast with developments in international law.

This fact, as well as the fact that the new Constitution was to incorporate a Bill of Rights for the first time in this country, meant that measures had to be devised to allow concomitant development of South African Bill of Rights and common law jurisprudence with international law on the subject. Greater harmonization between the two systems was idealized and visualized by the Assemblies who were in charge of drafting the IC and the FC. This paved the way for the formulation of section 35 (1) and (3) of the IC, and, thereafter, section 39 (1) (b), (2) and (3) of the FC with reference to the role of international law in the interpretation of the Bill of Rights and in developing common law.

2.2 THE POST-1994 CONSTITUTIONS

2.2.1 The relevant provisions

Section 35 (1) and (3) of the IC read

“35. (1) 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.

...

(3) In the interpretation of any law and the application and development of the

⁵ *Supra* at 2.

⁶ E.g. In *Inter Science Research and Development Services v Republic Popular De Mocambique* 1980 (2) SA 111 (T) and *Kaffraria Properties v Government of the Republic of Zambia* 1989 (2) SA 709 (E) the courts specifically followed *Trendtex Trading Corporation v Central Bank of Nigeria* (1977) QB 529 (CA) in advocating that courts could develop common law in terms of international trends.

⁷ Dugard *loc cit* (n3).

common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.”

Section 39 of the FC now reads

- “39. (1) When interpreting the Bill of Rights, a court, 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.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

2.2.2 Is there any real difference?

The forum obliged to consider international law

The differences between the two provisions are not many, but they are quite fundamental. The first difference is that the IC made mention of “*a court of law*” faced with the problem of interpreting the Bill of Rights. Although constitutional scrutiny and the striking down of laws (especially statutes) were reserved for the Constitutional Court under the IC, this provision empowered any court of law – from the chieftains’ courts and magistrates courts to the Constitutional Court – to determine and interpret the extent of the Bill of Rights according to the directives given by section 35 (1) and (3).⁸ The FC now makes mention of the duties of “*a court, tribunal or forum*” faced with interpreting the Bill of Rights. The interpretational role of international law is therefore also extended to actions and disputes in courts, tribunals and forums other than “courts of law” in which the Bill of Rights falls to be interpreted.⁹ It can therefore be inferred that the drafters of the FC intended a much greater role for international law in South African society as a whole than we were used to.

Therefore, even lower courts, chieftains’ courts and administrative tribunals, when asked to interpret a right from the Bill of Rights, must adhere to the directives of section 39. However, the effectiveness of this provision is under pressure for the lack of training of those who preside and litigate in such *fora* and the virtual inaccessibility of international law (especially “soft” law) for such presiding officers. Because records of proceedings from chieftains’ and lower courts and some administrative tribunals and forums are rarely, if ever, accessible; and rarely, if ever, reflect the questions of law that were decided, it cannot be assessed whether they are competent to use international law as directed.

⁸ N Botha “International law and the South African interim Constitution” (1994) 9 *SA Public Law* 245 at 246.

⁹ R Keightley “Public international law and the Final Constitution” (1996) 12 *SAJHR* 405 at 415.

Peremptoriness of the language

Secondly, the directive to use international law as interpretational tool, although still using peremptory tones, differs in the language used. The IC directed courts of law as follows: “a court of law ... *shall*, where applicable, *have regard* to public international law applicable to ...”.¹⁰ The FC curtly states: “a court, tribunal or forum *must consider* international law”.¹¹ Even though different language is used, the two sections have essentially the same import. It amounts to no more than a directive to “have regard to” or “consider” international law when interpreting the Bill of Rights and formation of Human Rights jurisprudence in South Africa. Whether to “follow” international law, however, remains discretionary.¹²

Omission of “where applicable” and “public”

The omission of the words “where applicable” and “public” as occurring in the IC, from the FC has been discussed elsewhere¹³, and need not be repeated here.

Interpretation and development of other law than the Bill of Rights

Section 35 (3) of the IC and section 39 (2) of the FC reads essentially the same, except for the change from “a court” to “every court, tribunal or forum” (which has been discussed, *supra*); and the fact that section 35 (3) of the IC referred to the interpretation of “any law” whilst section 39 (2) refers to the interpretation of “any legislation” and development of common law. Obviously, “any law” is a wider concept than “any legislation”, and it is therefore clear that the drafters of the FC had only statutory interpretation in mind with the term “any legislation”. Furthermore, common law and customary law cannot be read down (interpreted to mean something other than the text or provision conveys) to conform to international law as is possible with legislation. It must be developed (altered) to conform to international law. Therefore this section provides for **statutory interpretation**, but **development of common and customary law** in pursuance of the spirit, purport and objects of the Bill of Rights. As will be indicated, *infra*, subsection 39 (2) of the FC seems to contradict section 233 with reference to statutory interpretation.

Recognition of other rights

Section 39 (3) of the FC had no equivalent in the IC. It provides that the existence of any other rights or freedoms¹⁴ recognised by common law, customary law¹⁵ and legislation¹⁶ is not

¹⁰ Italics added.

¹¹ Italics added.

¹² Botha *loc cit* (n8); Keightley *loc cit* (n9); and *S v Makwanyane* 1995 (3) SA 391 (CC) at 415 where the Court said “[w]e can derive assistance from public international law ... but we are in no way bound to follow it.”

¹³ Chapter II, *supra* under 2.2.1 b.) at 62-65 and under 2.2.2 respectively.

¹⁴ Other than those enshrined in the Constitution.

denied by the Bill of Rights, to the extent that they are consistent with the Bill. Courts, tribunals and forums confronted by an accused person's (or plaintiff's) claim to a right or freedom not enshrined in the Bill of Rights are, therefore, authorized to recognize and invoke the protection of such rights and freedoms, provided they are not inconsistent with the Bill itself.

2.2.3 What international law?

Binding or non-binding law and relevant law

In Chapter II, *supra*, it was established that the term "international law" in this provision refers to both binding and non-binding law, but that only relevant international law needs to be observed for purposes of this section. Those arguments need not be repeated.

Transformed treaty and customary international law

It should, however, be borne in mind that incorporated (and unincorporated self-executing) treaties will in any case be applicable as law in South Africa through section 231. The same goes for customary international law, which is declared to be part of South African law in terms of section 232. Therefore, relevant international law arising from such treaties or from international custom has to be applied directly as law rather than merely being considered in terms of section 39 (1). Section 39 (1), therefore, has reference only to international law that is not yet part of South African law. International law that is transformed into South African national law has to be *applied as law* in any event, and cannot play a role in the *interpretation* of the law.

Interpretation and development of law other than the Bill of Rights

It is clear that the same applies to section 39 (2). Binding, as well as non-binding international law (excluding incorporated treaties and binding international custom, which must be applied as law) must, therefore be considered by every court, tribunal or forum when interpreting any legislation and when developing common or customary law, whilst at the same time promoting the spirit, purport and objects of the Bill of Rights. How is one to interpret legislation or develop common or customary law with this charge in mind? Professor Botha¹⁷ refers to the trend adopted by the Constitutional Court to seek "not the 'formalism' of the written word", "but the nebulous 'spirit' behind the paper" in interpreting the Bill of Rights. He states

"It is here that the emerging trend would appear to be essentially internationalist. Chaskalson, for example, introduces the essentially eclectic international approach to

¹⁵ As customary international law is already made part of South African law in terms of section 232, customary law here presumably refers to indigenous customary law.

¹⁶ Including international treaty law (or resolutions of international organisations) incorporated into South African law by legislative act.

¹⁷ N Botha "International law in the Constitutional Court" (1995) 20 *SAYIL* 222 at 230-231.

interpretation through *travaux préparatoires*; reference is found in a number of the judgments to the 'civilised international community standards'; Langa talks of a 'more mature society, which relies on moral persuasion rather than force'.

It is, however, in Mokgoro's judgment that this trend emerges most clearly where she equates the spirit of *ubuntu* with the provisions of the ICCPR thereby linking the 'spirit of the constitution' to the 'spirit of international law'. The underlying values of a free and democratic society are the universal values of international law. The purport of Sachs J's judgment in *Mhlungu* is similar. Here too, the entire constitution is infused with the human rights/*ubuntu* culture which, as has been shown, is 'internationally flavoured'.¹⁸

2.2.4 The consideration of IHRL and other international law

The body of rules and principles that together make up IHRL has been set out in Chapter I and need not be repeated. A few additional observations have to be made regarding the applicability of international law (especially IHRL, because it is so apposite to interpretation of the Bill of Rights) as an interpretational tool.

Firstly, although decisions of national courts interpreting analogous Bills of Rights within their own jurisdictions are, strictly speaking, part of each country's national law, they form, as indicated, an essential part of IHRL. Therefore, the reference to foreign law that "may" be considered in terms of section 39 (1) (c), seems somewhat tautologous.¹⁹ However, foreign law might be less accessible than international instruments. It, therefore, makes sense that a court, tribunal or forum is *enjoined* to take cognisance of comparable instruments of international law, but is only *authorized* to take cognisance of comparable foreign law. It would be impossible for a court, even one with the resources of the Constitutional Court, to take all foreign law on each right or freedom that has to be interpreted into account. Moreover, the "foreign law" in section 39 (1) is not restricted to "foreign case law" as in the case of section 35 (1) of the IC, making the foreign law that can be considered that much wider.

Furthermore, it is clear that principles of international law underlie the Constitution. As indicated, *supra*, they are part of the "spirit, purport and objects" of the Bill of Rights. On the other hand, foreign law is no more than a pointer to how the foreign country sees an international provision. It does not in itself constitute international law, although it is considered to be part of IHRL (at least as a subsidiary source). Therefore, international law *must* be considered, whilst foreign law *may* be considered. Against this background it is very important to note that section 39 distinguishes between the two. Courts should therefore exercise great care in recognising and applying this distinction in the interpretation process. Professor Botha points out that, whilst the Constitutional Court is very consistent in

¹⁸ At 231.

¹⁹ Botha *op cit* (n8) at 247.

recognising this distinction²⁰, the other courts do not always distinguish foreign law clearly from international law.²¹

Secondly, rules of soft law (in the sense of non-binding law) have become extremely important in determining rules of IHRL, because

“One of the best examples is the development in the status of the Universal Declaration of Human Rights of 1948. Originally conceived as a statement of principles devoid of any legal obligatory character, it has developed into a universal yardstick for measuring the respect governments show towards the protection of human rights.”²²

Thirdly, although it is not easy to discern customary rules of IHRL, it is sometimes argued that certain (even non-binding) instruments, like the Universal Declaration, are to be regarded as codifications of customary international law.²³ Some provisions of non-binding instruments, like the prohibition of torture in the Universal Declaration, have already been interpreted as presenting rules of customary international law concerning human rights.²⁴ On the other hand, not all provisions of the Universal Declaration can be considered to be part of customary international law. Dugard²⁵ does not accept the Proclamation of Teheran’s suggestion that all the rights contained in the Universal Declaration have acquired the status of customary international law. Neither does he accept Conradie J’s opinion in *S v Petane*²⁶ that it is dubious whether any of the rights in the Universal Declaration can be regarded as customary international law. He states

“The truth lies closer to the centre of the spectrum. Some of the more basic principles of the Universal Declaration, such as that of non-discrimination, the right to a fair trial, and the prohibition on torture and cruel, inhuman or degrading treatment, undoubtedly belong to the *corpus* of customary law today despite the fact that they may not always be observed. Their status as custom is assured by both *opinio juris* and *usus*.”

Professor Botha²⁷, referring to *Filartiga v Pena Irala*²⁸ states that it is clear that the development of customary IHRL will take place on a right-by-right basis. He goes on to

²⁰ *Op cit* (n17). The most recent example is *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (2) SACR 66 (CC) which will be discussed more fully *infra*.

²¹ N Botha “Riding the tide: South Africa’s regular courts and the application of international law” (1996) 21 *SAYIL* 174. See also now *Govender v Minister of Safety and Security* 2001 (2) SACR 197 (SCA) for a more recent example where some of the other courts than the Constitutional Court, in this case the Supreme Court of Appeals, seems to be somewhat perplexed at the application of this provision and recognising the inherent distinction included therein. This decision will be discussed in more detail, *infra*, under 2.2.5.

²² HA Strydom *et alii International Human Rights Standards Vol I* (1997) 3-4.

²³ E.g. E Schwelb “The Influence of the Universal Declaration of Human Rights on International and National Law” (1959) *Proceedings of the American Society of International Law*.

²⁴ *Filartiga v Pena Irala* 1980 ILM 966; N Botha “Human rights, torture, customary international law” (1980) 6 *SAYIL* 150.

²⁵ J Dugard *International law: A South African Perspective* 2nd Ed (2000) 241.

²⁶ 1988 (3) SA 51 (C) at 58G-J.

²⁷ *Op cit* (n8) at 252.

²⁸ *Supra* (n24).

question the value of international custom within a Bill of Rights structure where basic rights are already entrenched. However, he refers to the following statement by Lillich to indicate that customary international law can still play a role

“ '[C]ustomary international human rights law has not been rendered redundant. In the first place, it can be used both to inform and flesh out various provisions in the Bill of Rights. Secondly, it can be invoked as an independent rule of decision in situations where the Bill of Rights offers no or less protection.' ”²⁹

It would appear that this is exactly the role that the framers of section 39 (1) (b) of the FC [section 35 (1) of the IC] had in mind for customary IHRL, namely that all international law, including customary international law and especially non-binding instruments should be considered in order “to inform and flesh out” the various provisions in the South African Bill of Rights which were markedly framed in open ended terms.³⁰ And, although the South African Bill of Rights, compared to other IHRL instruments and foreign Bills of Rights, can be regarded as the most progressive and complete in the world, it is not inconceivable that some of the rights are not protected well enough according to international standards; and that some rights at IHRL are not at all protected in the Bill of Rights. As pointed out, *supra*, section 39 (3) recognises this possibility by authorising courts to recognise rights stemming from other laws than the Constitution in so far as they are not inconsistent with the Bill of Rights.

On the other hand, however, as pointed out, *supra*, customary international law already forms part of South African law through section 232 in so far as it is not inconsistent with the Constitution or an Act of Parliament. According to section 39 (3), all rights not entrenched in the Bill of Rights, including rights recognised under customary IHRL, are recognised by South African law in as far as they are not inconsistent with the Bill. Therefore, customary IHRL that is consistent with the Constitution has to be applied directly, rather than being “considered” in terms of section 39 in order to inform and flesh out entrenched Rights in the

²⁹ RB Lillich “Sources of human rights law and the Hong Kong Bill of Rights” (1990-91) 10 *Chinese Yearbook of International Law and Affairs* 27 at 48ff.

³⁰ E.g. “the right to life” in section 9 of the IC (now section 11 of the FC) which contained no express reference to whether the death penalty is either authorized or outlawed; whilst other human rights instruments makes specific reference to circumstances under which the death penalty may be imposed, or that it is outlawed completely. Chaskalson P was not entirely correct in *S v Makwanyane supra* (n12) at par [36] when he stated: “Capital punishment is not prohibited by public international law, ...” The ICCPR contains a prohibition to the imposition of the death sentence in the case of persons under 18 or pregnant women – Art 6. The 1989 Second Optional Protocol to the ICCPR outlaws the death penalty completely. Although it was accepted by only a few states to date, and South Africa was (and still is) not a party thereto, it remained at least non-binding international law, which outlawed capital punishment that could’ve (or rather should’ve) been mentioned. However, see now *Mohamed and another supra* (n20) at paras [38]-[61] for a complete re-assessment of both foreign and international law (including IHRL) regarding the legality of the imposition and execution of the death penalty with specific reference to the practice of states to refuse to extradite individuals where they might face capital punishment.

Bill. Professor Botha, therefore, correctly questions the value of customary international law in interpreting the Bill of Rights in the South African context.

Fourthly, although the South African Bill of Rights “is strongly reminiscent of and most closely analogous to the ICCPR”³¹, it is impossible to say which rights contained therein came from which source. Some rights enshrined in the Bill occur in all international human rights documents, although their content may differ.³² Other rights in the Bill are unique and may prove to be of influence in updating international instruments (at least on regional level).³³ The South African Bill of Rights contains both *first-generation rights*³⁴, and *second-generation rights*³⁵, as provided for in most of the universal documents. It also contains *third-generation rights*³⁶, which features strongly in the African Charter on Human and Peoples’ Rights. Therefore it can be considered as the most up to date Bill of Rights in the world today.³⁷

Lastly, most international instruments dealing with IHRL provide for courts, forums or tribunals to which states and/or individuals can go for declaratory orders and protection.³⁸ Some bodies are yet to be implemented.³⁹ Decisions by these bodies provide for a useful guide to development of a national human rights jurisprudence, and South African courts can surely benefit from taking them into account. Therefore, Section 39 (1) (b) enjoins courts to do so.

³¹ Botha *op cit* (n8) at 250. South Africa has also ratified the ICCPR in 1998.

³² E.g. “the right to life”. Although South Africa’s Constitutional Court already declared the death sentence to be unconstitutional, and although the Constitutional Assembly had quite a few concept drafts to choose from, it was once again, like in the IC, chosen to leave the right to life undefined. The American Convention on Human Rights of 1969 specifically denotes that the right to life commences ‘from the moment of conception’ – Art 4 (1). The ICCPR contains certain provisions with specific reference to the imposition of the death penalty – Art 6 prohibits the imposition of the death penalty in the case of persons under 18 years of age and pregnant women and the 1989 Second Optional Protocol outlaws the imposition of the death penalty completely. The United States of America entered a reservation to article 6 (5), which prohibits the imposition of the death sentence for crimes committed by persons below 18 years of age – (1995) AJIL 109. See, however, *Mohamed and Another supra* (n20) where the Constitutional Court reaffirmed its decision in *Makwanyane supra* (n12).

³³ E.g., “academic freedom” provided for in section 16 (1) (d) as part of freedom for expression - previously in section 14 (1) of the IC providing for freedom of religion.

³⁴ I.e. “civil and political rights.”

³⁵ I.e. “economic, social and cultural rights.”

³⁶ I.e. “people’s or collective rights”, such as the rights to development, self-determination and a satisfactory environment.

³⁷ Botha *op cit* (n8) at 249.

³⁸ Such as the Human Rights Committee (under the ICCPR); and the European Court of Human Rights and the European Commission on Human Rights (which has been merged recently) and the Committee of Ministers of the Council of Europe (under the ECHR); and the African Commission on Human and Peoples’ Rights (under the Banjul Charter).

³⁹ Such as the African Court on Human Rights, approved in the 1997 protocol, which has yet to come into force.

2.2.5 The courts' practice

Specific trends

It is impossible, within the confines of this dissertation, to examine all available case law in order to establish any exact trends in the different courts' practice with reference to section 39, especially the injunction in subsection (1) (b) to consider international law. It has become commonplace for the Constitutional Court and other courts to refer to international law in their judgments where they interpret anything in the Bill of Rights. Academic writings have already attempted to examine and criticise the use of international law by the courts.⁴⁰ As far as those commentaries have not been mentioned or criticised elsewhere in this dissertation⁴¹, they are generally agreed with. This dissertation is more concerned with establishing the meaning and scope of international law terminologies in the Constitution, and to determine the basis and extent of the national application of international law in terms of the new dispensation, than to establish any specific trends in the courts' willingness or reluctance to consider relevant international law and to allow themselves to be influenced thereby. Where necessary, reference has already been made in other sections of this dissertation to the practice of the courts regarding establishing the meaning and scope of the terminologies and the national application of international law.

However, in the first few years after the constitutional dispensation changed so dramatically, where courts are enjoined to consider international law in formulation of a Bill of Rights jurisprudence, most of the "regular" courts seemed somewhat perplexed at the new direction. Their reference to international law in interpreting the Bill of Rights was, with the exception of one or two, not all as satisfactory as evidenced in the judgments of the Constitutional Court.⁴²

The most recent example is that of *Govender v Minister of Safety and Security*⁴³ where the Supreme Court of Appeals was called upon to decide whether Section 49 (1) of the Criminal

⁴⁰ E.g. Botha *op cit* (n17); Botha *op cit* (n21); J Dugard "The influence of international human rights law on the South African Constitution" (1996) 49 *Current Legal Problems* 305; J Dugard "International law and the South African Constitution" (1997) 8 *EJIL* 77; E de Wet "The place of public international law in the new South African constitutional order: With special reference to international human rights law and humanitarian law" (1998) 1 *Recht in Afrika* (African Law Association); RC Blake "The world's law in one country: The South African Constitutional Court's use of public international law" (1998) 115 *SALJ* 668; and J Dugard "The role of treaty-based human rights standards in domestic law: The Southern African experience" in P Alston & J Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (2000).

⁴¹ E.g. *supra* under 2.2.3 - Botha *loc cit* (n17); and the discussion of the *AZAPO* decisions in Chapter V *infra*.

⁴² See the two articles of Botha *op cit* (nn17, 21) and the discussions elsewhere in this dissertation.

⁴³ *Supra* (n21).

Procedure Act⁴⁴, providing for exculpatory homicide where a policeman kills a fugitive under circumstances where the person could not be arrested or stopped from fleeing in another way, is constitutional in the light of the FC. In terms of either Section 39 (1) and (2) or Section 233 of the FC (or both), the Court had to take international law on the subject into account, but had a choice whether it wanted to take foreign law into account. The Court was not clear on the point whether the interpretation of the impugned legislation in the light of international law was done in terms of Section 39 (2), Section 233 or both sections of the FC. The Court also took only two sources of (non-binding) international law into account in referring to a decision by the European Court of Human Rights, *McCann and Others v UK*⁴⁵, and the *United Nations' Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, whilst it referred to other foreign decisions in the same paragraph.⁴⁶ The Court did not specify that it was taking foreign law and international law into account in terms of section 39 (1), neither did it clearly distinguish between international and foreign law as should be done.⁴⁷

In general, however, the courts' practice since the landmark decision of *Makwanyane*⁴⁸ has evidenced at least steadfast and satisfactory improvement regarding their consideration of (and their willingness to be influenced by) international law. This is not to say that the Constitutional Court's use of international law has been entirely satisfactory up to now.⁴⁹ As will be indicated, *infra*, under "Recent examples", the Court in *Mohammed and Another*, approached the matter on whether (binding or "soft") international law prohibits the death penalty in a much more satisfactory way than it did in *Makwanyane*.

The extent of the courts' practice in this regard has been summarised elsewhere.⁵⁰ The following recent examples can be added to this.

Recent examples

As pointed out in Chapter IV, *supra*, the court *a quo* failed adequately to take international law into account in *South African Defence Union v Minister of Defence and Another*⁵¹, but this was soon remedied by the Constitutional Court's judgment reviewing the court *a quo*'s

⁴⁴ Act no 51 of 1977.

⁴⁵ [1996] 21 EHRR 97 at par 192.

⁴⁶ At par [18] of the judgment.

⁴⁷ Botha *loc cit* (n21).

⁴⁸ *Supra* (n12).

⁴⁹ See the criticisms by A Cockrell "Rainbow jurisprudence" (1996) 12 *SAJHR* 1; Z Motale "The Constitutional Court's approach to international law and its method of interpretation in the 'Amnesty decision': Intellectual honesty or political expediency?" (1996) 21 *SAYIL* 29.

⁵⁰ See Dugard *op cit* (n25) 265-267 for a brief summary of the most important decisions in this regard.

⁵¹ 1999 (2) SA 735 (TPD) at 741-42.

decision.⁵² The Court considered conventions (treaties) and recommendations of the International Labour Organisation (all being “soft” law) to ascertain the scope of the right to associate, in order to determine the constitutionality of an Act preventing trade unionism in the defence force.

In *Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others*⁵³ the Court referred to a decision concerning applicable IHRL principles⁵⁴ in ascertaining the way in which a court martial should be constituted in order to guarantee fair trials. Unfortunately the Court did not specifically say that it was taking IHRL into account upon direction of section 39 (1) (b), although it seems that this was the reason for the Court’s doing so. The Court also did not say whether more international law on this point exists, or that it endeavoured to ascertain that no other IHRL existed. This raises the question whether the mention of only one source of IHRL on this point was sufficient to satisfy the court’s duty in terms of section 39 (1) (b).

In *KvK*⁵⁵ Van Heerden AJ, after finding that the Hague Convention on the Civil Aspects of International Child Abduction⁵⁶ was not applicable to the case where a child was abducted from the USA and brought to South Africa more than a year before the Act incorporating the treaty into South African law came into operation, continued to examine national precedent as well as IHRL⁵⁷ to determine the extent of the law without the Convention. He came to the conclusion that the order to be made must be in “the best interests of the child”⁵⁸, and that this principle was recognised by both national and international law in the absence of a specific convention directing otherwise. Although the Hague Convention was found not to be applicable in this case, the result reached would have been exactly the same under it. The Court ordered the return of the child to the USA so that the York County Family Court, South Carolina could deal with the issues of custody and care of and access to the child, because it was in the best interests of the child to do so.

In *S v Kwalase*⁵⁹, Van Heerden J took the following binding and soft-law regarding IHRL into account in order to decide on the constitutionality of a sentence of imprisonment imposed on a juvenile under 18 years of age

⁵² 1999 (4) SA 469 (CC). These decisions have been discussed in more detail in Chapter III *supra*.

⁵³ 1999 (2) SA 471 (CPD). This decision has also been discussed in more detail in Chapter III *supra*.

⁵⁴ *Findlay v United Kingdom* 24 EHRR 221 at 244-45.

⁵⁵ 1999 (4) SA 691 (CPD).

⁵⁶ Incorporated into national law by Act 72 of 1996, which came into operation on 1 October 1997.

⁵⁷ *Inter alia* Article 3 (1) of the 1989 UN Convention on the Rights of the Child.

⁵⁸ Sometimes called the “welfare principle.”

⁵⁹ 2000 (2) SACR 135 (CPD) at 138-140.

- The 1989 UN Convention on the Rights of the Child (binding law);
- The 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) – (non-binding law);
- The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (non-binding law); and
- The 1990 UN Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”) – (non-binding law).

In *S v Twala*⁶⁰, the Constitutional Court considered the reference to review proceedings in article 14 (5) of the ICCPR, which has been ratified by South Africa, in order to bolster a finding that the terms “appeal” and “review” are not terms of art with specific technical meanings, and that they mean no more than “appropriate reassessment” by a higher court.

In *Mohamed and Another*⁶¹, the Constitutional Court was faced with a challenge of the constitutionality of Government officials’ decision to extradite / deport Mohamed to the USA to face trial for capital offences.⁶² Mohamed had already been handed over to the USA when the applicants approached firstly the CPD of the High Court (unsuccessfully) and thereafter the Constitutional Court for a declaratory order on the legality of the Executive’s decision. The Court, after a thorough investigation of foreign and international law (including “soft” law) concluded that the decision was unconstitutional because it ignored (or failed to take into account sufficiently) Mohamed’s constitutional guarantee of his right to life and his right not to be subjected to torture or inhumane and cruel forms of punishment.⁶³ Therefore, the Court further found, Mohamed should not have been extradited / deported to the USA authorities, and that a refusal to do so would have been compatible to both foreign and international law (including “soft” law) on the subject.⁶⁴ Through this decision the Court, however, continued to differentiate between foreign law and international law as it is enjoined to do in terms of Section 39 (1) (b) and (c) as it was known to do before. Although the Court re-considered its earlier decision in *Makwanyane* on the subject of the constitutionality of the death penalty, it did so in much more satisfactory terms. In *Makwanyane*, Chaskalson P erroneously said that “[c]apital punishment is not prohibited by international law”⁶⁵, because there clearly existed “soft” international law on the point⁶⁶. In *Mohamed and Another*, that and other international

⁶⁰ (*Human Rights Commission intervening*) 2000 (1) BCLR 106 (CC) at par [11].

⁶¹ *Supra* (n20).

⁶² I.e., the bombing of the USA Embassy in Tanzania during 1998 by the al-Qaida terrorist network, under leadership of one Osama Bin Laden.

⁶³ At paras [38]-[61] of the judgment.

⁶⁴ The Court, however, did not refer to GN Barrie “Human Rights and extradition proceedings: Changing the traditional landscape” (1998) 1 *TSAR* 125 in this regard.

⁶⁵ At par [36] of the judgment.

⁶⁶ Art 6 of the ICCPR and the 1989 Second Optional Protocol to the ICCPR.

law on the subject was considered in detail, and the judgment evidenced an almost complete re-assessment of international law and sentiment on the subject of capital punishment⁶⁷, even though the constitutionality of the death penalty in South African national law was not subject to any further arguments for or against.

However, as indicated in Chapter III, *supra*, the real problem with the Court's decision in *Mohamed and Another*, is not found in its assessment of the constitutionality of capital punishment in the light of international law, but in the fact that the decision actually lead to the state speaking with two voices. However, as pointed out there, the Court has a duty in terms of the Constitution to scrutinise and control all executive action in line with the Constitution and the rights entrenched therein, even though that may lead to the state speaking with two voices.

The recent cases of *Govender*⁶⁸ and *Kolbatshenko*⁶⁹ have already been dealt with, *supra*, and need not be reconsidered here. Suffices it to say that the courts in those cases also considered international law on the legal questions involving fundamental rights which they had to determine as they are enjoined to do, although, as indicated, *supra*, the Supreme Court of Appeals did not satisfactorily distinguish between foreign case law and international law on the issue in *Govender* and did not refer to either Section 39 or Section 233 of the FC. In *Kolbatschenko*, the Court had to deal with an issue that was basically an international law issue, namely whether an own international act of state involving individual rights is justiciable, and, therefore, its referral to international law on the point came as no surprise, even though the Court did not expressly refer to Section 39.

Accessibility and attempted harmonization

Although there is a steady move towards allowing international law to play the role the drafters of the Constitution intended it to do through section 39 (1) (b), the virtual non-accessibility of international law for, especially, inferior courts and other tribunals or forums with their limited resources poses a serious threat to the final stages of development of a sound Bill of Rights jurisprudence in this country as envisaged by section 39.⁷⁰ It is also foreseen that if lawyers, and/or the parties in criminal, civil, administrative and other matters

⁶⁷ At paras [38]-[61] of the judgment.

⁶⁸ *Supra* (n21).

⁶⁹ Chapter III *supra* under 3.3.3 at 163 *et seq.*

⁷⁰ Author hereof is presently a presiding officer in the Regional [magistrates'] Court for the Northern-Transvaal Regional Division, where more than 90% of four Provinces' more serious criminal cases are heard, and can speak authoritatively on this aspect. The current resources in Magistrates' Court Houses are all but adequate in this regard and, the present attempts by the Department of Justice to cut on budgetary expenditures in sub-offices do no more than to worsen the position.

in whatever courts, tribunals or forums in South Africa, do not direct the courts' attention to relevant international law when the court is called upon to interpret the Bill of Rights, the purpose of section 39 (1) (b) will be seriously jeopardized. Especially in the lower courts, where more than 90% of the country's population has their only contact with the law and the Bill of Rights, the courts' workload simply does not allow for presiding officers on their own to access sources of international law and to examine them even though the Constitution enjoins them to do so. Moreover, the current training of law students in international law is far from adequate. The effectiveness of the provision is therefore under pressure.

Concluding remarks

Logistical problems and the lack of effectiveness aside, section 39 (1) is a satisfactory attempt at harmonizing international with national law, and it is certainly one of the most far reaching provisions in the new Constitution through which international law is certain to have its most profound effect on the interpretation, formulation and development of national law.

Regarding its predecessor, section 35 (1) of the IC, Professor Dugard had the following to say

“Section 35 (1) should be retained in its present form. It is a jewel in the Constitution; a provision which should serve as a model to other states that seek to promote a human rights culture.”

It is submitted that, in the light of the above, Section 39 (1) (b) of the FC is now even a bigger jewel (or a more highly faceted one) than was Section 35 (1) of the IC.

3. STATUTORY INTERPRETATION

3.1 INTRODUCTION: PRE-1994

Before the advent of the new constitutional dispensation, interpretation of statutes in South Africa followed more or less a positivist and formalistic path. Courts were allowed to interpret ambiguous statutes according to well-defined principles only. The intention of the legislature was to be ascertained by applying certain rules, but the ordinary meaning of ordinary and general language was of paramount importance. It was only where the interpretation of the legislative intent according to this principle was impossible, that alternative methods of interpretation could be utilized. Then still, the rest of the statute had to be borne in mind in ascertaining the true meaning of an ambiguous provision. Although purposive interpretation could play a role, the general trend was to interpret all legislation restrictively.⁷¹ There was little place for generous interpretation, which sought to construe rights more broadly than a literal reading of the restrictive language of the statute. This meant that international law, too, had scant opportunity of influencing national law.

⁷¹ LC Steyn *Die Uitleg van Wette* (1985).

In Chapter I⁷² it was explained that, although the courts accepted in theory that customary international law may be applied as part of South African law, there were so many exceptions that practically no international law remained to be applied unrestrained. All this now changed due to section 232 of the FC.⁷³ Customary international law is now unequivocally declared part of South African law and subject only to the Constitution and (constitutional) Acts of Parliament. Now that customary international law is considered part of South African law, it is hard to see that it will have any use in interpreting legislation (even in terms of section 233), simply because it has to be applied as law anyway. On the other hand, however, legislation outlawing the validity of (or that is inconsistent with) customary international law, will, in all probability lend itself to being interpreted in terms of section 233, even though customary international law is made law through Section 232. The courts will have to investigate the relevant international law and endeavour to reconcile the offending legislation therewith. Only in the case of an irreconcilable conflict will (constitutional) Acts of Parliament (or the Constitution) prevail.⁷⁴

As far as treaty law was concerned, unincorporated treaties could be used to interpret ambiguous legislation or to challenge the validity of statutes for their unreasonableness.⁷⁵ Incorporated treaties could, however, only be used to interpret the legislation incorporating them, because a statute could be interpreted in the light of its source.⁷⁶ It was also controversial whether South African law knew the presumption of statutory interpretation that the legislature intends to comply with rather than violate the country's international obligations. Booysen⁷⁷ points out that there is no evidence in South African law that this presumption formed part of national law. According to him, an ambiguous statute could only be interpreted in the light of its source. If a treaty gives rise to legislation, and that legislation is ambiguous, it can be interpreted in the light of the treaty, but then one has to work with the normal rules of statutory interpretation, *supra*. According to Booysen, therefore, incorporated treaties could have only limited effect in interpreting ambiguous statutes.

In such a case, the incorporated treaty itself sometimes has to be interpreted. However, the interpretation of incorporated treaties themselves was also controversial. It was not at all sure whether interpretation of incorporated treaties amounted to normal statutory interpretation

⁷² *Supra* under 2.4.2.

⁷³ Discussed in Chapter III *supra*.

⁷⁴ Dugard *op cit* (n25) 63-64, discussing the *AZAPO II* decision.

⁷⁵ Chapter III *supra* under 2.1.4, 2.2.7 and 2.3.7.

⁷⁶ Booysen *Volkereg en sy verhouding tot die Suid Afrikaanse reg* 2nd Ed (1989) 114.

⁷⁷ *Ibid.*

and whether the principles of international law regarding treaty interpretation should be followed.⁷⁸

Some of the traditional authors on the subject of statutory interpretation do not deal with this presumption at all.⁷⁹ Others do.⁸⁰ In the light of these authorities, commentators on international law are of the opinion that the presumption indeed formed part of South African law regarding the interpretation of statutes.⁸¹

3.2 UNDER THE IC

The position under the IC did not change much in this regard.⁸² Section 35 (3) of the IC did, however provide that “[I]n the interpretation of *any law* ... a court shall have due regard to the spirit, purport and objects of this Chapter.” This meant that, where a law (including a statute) had to be interpreted for purposes of ascertaining the meaning and scope of rights entrenched therein, the spirit, purport and objects of the Bill of Rights had to be kept in mind. Indirectly, this meant that the international law that had to be considered in terms of section 35 (1) could also have been used in order to interpret statutes in this way. Non-binding international law could, therefore, technically have been used to interpret all statutes. In the previous chapter it was, however argued that it is unlikely that the courts would take so wide a view. With reference to section 35 (3)’s counterpart in the FC, section 39 (2), courts are only enabled to promote the spirit, purport and objects of the Bill of Rights when the interpretation of rights is in issue. Therefore, before a court will feel obliged to interpret a statute in terms of section 39 (2) of the FC, the text to be interpreted must have some connection with a recognised right and, obviously, there must be some relevant international law on the issue.

No mention was, however, made in the IC to the presumption that existed pre-1994. This meant that the existence of the presumption was neither denied nor confirmed. Devine identified this shortcoming in the IC and suggested the following in order to create “international-law-friendliness”

“Another example could be that where there are two possible interpretations of an Act of Parliament (or of the Constitution for that matter), one of which would lead to a conflict with international law while the other would not, a court should adopt the interpretation which

⁷⁸ See the discussion in Chapter III *supra* under 2.1.7 and 2.2.6.

⁷⁹ Steyn *op cit* (n71).

⁸⁰ GE Devenish *Interpretation of Statutes* (1992) 118 with reference to *Hajaree v Ismael* 1905 TS 451. See also GM Cockram *The Interpretation of Statutes* 3rd Ed (1983) 131-140.

⁸¹ E.g. N Botha “Interpreting a treaty endorsed under the 1993 Constitution” (1993-94) 19 *SAYIL* 148 at 149-50; DJ Devine “The relationship between international law and municipal law in the light of the Interim South African Constitution” 1993 (1995) 44 *ICLQ* 1 at 5-6; and Keightley *op cit* (n9) at 415.

⁸² Botha and Devine *loc cit* (n81).

accords with international law. In other words, the 'international-law-friendliness' of the Constitution should lead to strong presumptions that neither the Constitution itself nor Parliament intends to violate international law."⁸³

3.3 UNDER THE FC

3.3.1 The relevant provision

Apart from the interpretative influence authorised in terms of section 39 (2)⁸⁴, Section 233 of the FC provides

"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."

3.3.2 General comments

The presumption constitutionalised

Section 233 gives constitutional effect to the existing presumption that legislation is intended to comply with international law.⁸⁵ It is also submitted that it does not only give constitutional effect thereto, but also that the presumption is made stronger than it was before. The pre-1994 position was that legislation was presumed not to have intended violation of international law, which implied that the presumption could still be rebutted if it was shown that an alternative interpretation measured up to the legislature's intention. However, the courts are now mandated to, where there are two or more possible interpretations of a statute, prefer an interpretation that is consistent with international law even if other indications exist that the legislature intended to violate international law, which is a stronger directive than was conveyed under normal canons of interpretation. It would, therefore, seem that the suggestion by Devine, *supra*, that "the 'international law friendliness' of the Constitution should lead to strong presumptions that neither the Constitution itself nor Parliament intends to violate international law" was heeded.

Ambiguity of the legislation

This directive would have far reaching consequences if section 233 were to be interpreted to mean that all legislation should be interpreted in the light of comparable international law, and that international law should be treated with preference even where the legislation unambiguously provides that something should be done in breach of international law. If legislation (which includes the Constitution) is to be read down to conform to international law where it unambiguously states otherwise, it cannot be said that the Constitution is the supreme law and that any other law inconsistent therewith is invalid as provided in section 2.

⁸³ Devine *op cit* (n81) at 17.

⁸⁴ Already discussed in the previous section.

⁸⁵ Keightley *loc cit* (n9).

Moreover, such a contention will denounce the fact that the legal character of treaty and customary international law is made subject to the Constitution and Acts of Parliament in terms of sections 231 and 232. Sections 2, 231 and 232, as well as the fact that the Constitution constantly differentiates between national and international law by mentioning the two systems separately⁸⁶, imply that the Constitution follows a dualist approach. If international law were allowed to trump even unambiguous legislation, it would mean that monism is advanced. It has, however, been pointed out in Chapter II, under the role of constitutional interpretation, *supra*, that a purposive and generous interpretation of the text is still possible where the language is not totally unambiguous, as long as it doesn't result in emasculating the clear meaning and purpose of the legislation. If that were to be allowed, the result would be "divination" and not "interpretation."

It is therefore submitted that section 233 implies that only ambiguous legislation should be interpreted in the light of international law, and that, only where more than one interpretation is possible in the light of the clear meaning and purpose of the impugned provision, the interpretation favouring international law should prevail. Unambiguous legislation would simply not offer an alternative interpretation, except if the plain language of the text was ignored, but then it would amount to "divination", not interpretation.⁸⁷ Put differently, the need for interpretation of a statute simply does not arise when the meaning and purpose of the statute is unambiguous.

This contention is shared by some academics. Strydom⁸⁸ states

"It seems that section 233 was included to provide the courts with the opportunity to harmonise legislative provisions with applicable international law *only in cases where the legislative text is ambiguous*. In that sense it is a constitutional restatement of a canon of interpretation already known to South African law. In unambiguous cases the legislative text will remain unchallenged by international law and in such cases section 233 seems to favour the validity of the legislative text despite any inconsistency with international law. This conclusion seems warranted, for if the opposite interpretation had been intended one could expect the drafters to have selected a clear and commensurate formulation."⁸⁹

The question may well be asked whether, if a piece of apartheid legislation – which is clear and unambiguous – is introduced, this piece of legislation will be valid to the extent that it may not be interpreted to conform to international law. The short answer thereto does not lie in ascertaining the ambiguous or unambiguous nature of the legislation, but in the

⁸⁶ E.g. sections 35 (3) (l); 39 (1) (b) and (c).

⁸⁷ *S v Zuma* 1995 (2) SA 642 (CC) at par [20].

⁸⁸ HA Strydom "The international law "openness" of the South African Constitution" in G Carpenter (ed) *SUPREMA LEX Essays on the Constitution presented to MARINUS WIECHERS* (1998) 87.

⁸⁹ At 90. Italics added.

constitutionality thereof. Apartheid legislation will simply not pass the constitutional test in the light of the declared spirit, purport and objects of the Bill of Rights and the Constitution as a whole and will therefore be invalid in terms of Section 2 of the FC. The fact that Section 233 is not applicable in reading down such legislation will, therefore, not mean that such legislation will pass constitutional scrutiny.

Although, as indicated in Chapter II⁹⁰, more purposive and generous interpretation methods sound attractive, it is doubted whether the courts would, in the light of the above, ignore plain, unambiguous text for an interpretation favouring international law. On the other hand, it has to be agreed with Strydom that, given the solemn undertaking to demonstrate a certain predilection for the law of the nations as evidenced by the Preamble and other provisions in the Constitution, “the limited function assigned to the courts in terms of section 233 does strike a discordant note.”⁹¹

The status of the Constitution

The Constitution is also a piece of national legislation. In case of ambiguity, the Constitution must therefore be interpreted in the light of international law and, from the two or more interpretations available, the one that is consistent with international law would have to be preferred. However, where the relevant provision of the Constitution is unambiguous, the need for interpretation in terms of either section 39 (2) or section 233 does not arise as indicated in the preceding paragraphs. It is for this reason that it is argued elsewhere⁹² that the suggestion by Professor Botha, that the *AZAPO II* decision might have been decided differently had it been subject to section 233 of the FC⁹³ cannot be supported. (This argument is, however based on the *de lege lata* position enunciated by the courts regarding constitutional interpretation. And, because the *de lege ferenda* arguments regarding constitutional interpretation, *supra*, sound very attractive, this argument could fail if the latter is at a later stage accepted by the courts.)

What legislation?

Although section 233, on face value “is an exceptionally wide provision which would appear to mandate all courts, from the highest to the lowest, to test any legislation coming before them against international law”⁹⁴, it has to be agreed with Professor Botha that it is unlikely that the courts will take so wide a view, and that “[c]ommon sense dictates that before a court

⁹⁰ *Supra* under 1.3.

⁹¹ Strydom *op cit* (n88) 91.

⁹² Chapter V *infra* under 2.1.2 (ii).

⁹³ N Botha “Treaties after the 1996 constitution: more questions than answers” (1997) 22 *SAYIL* 95 at 102.

⁹⁴ *Ibid.*

will feel obliged to consider section 233, and apply an interpretation from international law, the legislation will have to evidence some 'international element'.⁹⁵ Another view would be supporting a monistic approach whilst, as pointed out, *supra*, the FC follows a dualistic (but harmonizing) approach. Once again, courts in South Africa will traditionally not take cognisance of facts or law that are irrelevant in determining the issue before them.⁹⁶ If that were to be done, most actions would never come to an end.

The use of unincorporated treaties

It was argued elsewhere that section 233 "holds the potential for the application of unincorporated treaties, albeit indirectly, in that in determining whether an interpretation is consistent with international law, the interpretation accorded treaties possibly not part of South African law by international law (international courts, tribunals, etcetera) may (or possibly must) be considered by the court."⁹⁷

This contention is of course correct as far as it refers to treaties to which South Africa is a party. This does, however, not necessarily hold true in the case of treaties to which South Africa is not a party, because a treaty to which South Africa is not a party "is *res inter alios acta* and may not be considered *qua* treaty, although it may be considered as evidence of a customary rule."⁹⁸ Whilst section 39 (2) implies that binding as well as non-binding international law "must" be "considered" in interpreting any legislation⁹⁹, section 233 does not contain a similar injunction with reference to non-binding law. That does not mean that treaties to which South Africa is not a party will never be applicable in South African law. Treaties providing proof of international custom will be applicable through Section 232 of the FC, and, only where legislation unambiguously declares such rules of custom invalid, and passes the test of constitutionality, will such treaties not be applicable. Legislation arising out of treaty to which South Africa is not a party will, however, be interpretable in the light of such treaty in terms of this provision.

It may be argued that unincorporated treaties to which South Africa is not a party, are still part of international law and, therefore available for interpretation in terms of this section. Such argument will, however, be contrary to the dualist application theory advanced by the FC. As indicated, *supra*, Section 231 (4) of the FC requires specific incorporation of a treaty

⁹⁵ *Ibid.*

⁹⁶ Strydom *loc cit* (n91).

⁹⁷ Botha *loc cit* (n93).

⁹⁸ Dugard *op cit* (n25) 61.

⁹⁹ Because, in order to promote the spirit, purport and objects of the Bill of Rights, the directive in subsection 39 (1) should be complied with when interpretation in terms of subsection 39 (2) is done.

before it is recognised and before it may be applied as law in South Africa. As Section 233 provides for the application of international law in interpreting any legislation, it would amount to the Constitution contradicting itself if unincorporated treaties to which South Africa is not a party were to be applied notwithstanding the provisions of Section 231. This would lead to an anomalous absurdity. There is a well-known presumption of interpretation of statutes that the legislature did not intend to create an absurdity. Such treaties will, therefore, not be available for application in terms of this provision.

Binding or non-binding international law

In Chapter II, *supra*, it was submitted that section 233 probably intends that only binding international law should be used in the interpretation process because courts are directed to “*prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*” The difference between sections 39 and 233 is: In the case of section 39, international law need only be *considered*, whilst in the case of section 233, international law must be *followed* or *applied*, where such interpretation is possible. The directive in section 233 is therefore a much stronger one than the one contained in section 39 because it allows international law to, in certain circumstances, transform national law to conform to international law. To preserve the supreme status of the Constitution above international law, one simply cannot interpret section 233 to mean that any legislation, including the Constitution, must be interpreted in the light of and according to principles of non-binding international law. For this reason, it is submitted Professor Botha goes too far when he says that “[s]uch an interpretation [the interpretation accorded treaties possibly not part of South African law by international law] ‘must’ then [in terms of section 233] be preferred/applied”¹⁰⁰, at least in so far as his contention also refers to non-binding treaties.

3.3.3 The courts’ practice

This is a new provision and, as far as could be ascertained, the Constitutional Court made mention of section 233 in only one decision to date. In deciding on the constitutionality of legislation aimed at curbing family violence, Sachs J in *S v Baloyi*¹⁰¹ refers to section 233 in order to make the point that an interpretation that conforms to the international legal obligations of South Africa has to be preferred. He considers¹⁰², *inter alia*, the relevant international obligations imposed by the Universal Declaration on Human Rights¹⁰³, the

¹⁰⁰ *Op cit* (n93) at 103.

¹⁰¹ 2000 (1) BCLR 86 (CC).

¹⁰² Obviously in terms of section 39 (1) (b), although he does not expressly say so.

¹⁰³ Note that the Universal Declaration on Human Rights is generally considered to be non-binding international law and that the Court’s consideration thereof might seem to torpedo the argument advanced above that only binding international law is applicable through Section 233. However, the

Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and Peoples Rights (Banjul Charter) on South Africa to curb family violence (and especially violence against women and children) in order to find that the legislation, although offending against certain of the rights enshrined in the Bill of Rights, is constitutionally sound.¹⁰⁴

As pointed out, *supra*¹⁰⁵, the Supreme Court of Appeals was not clear in *Govender v Minister of Safety and Security*¹⁰⁶ on whether the interpretation of the impugned legislation in the light of international law was done in terms of Section 39 (2), Section 233 or both sections of the FC. It can, therefore, not be used as precedent to present arguments for or against the submissions advanced above. As far as could be ascertained, the courts have not yet been called upon to pronounce on the validity of any of the arguments advanced by any of the commentators mentioned in this dissertation, *supra*. It is therefore still highly speculative what the courts' view would be when confronted with the issue of interpretation according to section 233. However, in the light of the Constitutional Court's reluctance in the *Makwanyane* decision¹⁰⁷ to be obliged to follow international law for purposes of section 35 of the IC (section 39 of the FC); and in the light of the declared supremacy of the Constitution and (constitutional) Acts of Parliament over international law, it is difficult to see that the courts will now, as a result of section 233, adopt a monistic view of international vis-à-vis national law by finding that (even non-binding) international law can be used to trump unambiguous portions of the Constitution, unless the courts decide to follow a more purposive and generous interpretation method resulting in emasculation of the clear meaning of the provision.

4. CONCLUSION

These provisions clearly intend greater harmonization between international and national law and, if the provisions discussed in this Chapter are applied correctly, international law is sure to have a most profound effect on the interpretation, formulation and development of the national law of South Africa even though the Constitution still follows a dualistic approach.

fact that Sachs J here refers to the Universal Declaration to indicate that South Africa has "obligations" in terms thereof, clearly indicates that he views the relevant provisions as binding on South Africa. It has also been pointed out in Chapters I and III *supra* that some provisions of the Universal Declaration may be regarded as part of customary international law and even part of the *jus cogens* in some cases. Therefore, although the Court is not clear in this regard, and although the binding provisions of the Universal Declaration is applicable as custom through Section 232 rather than 233, such argument will not succeed in nullifying the contention that only binding international law is applicable through the latter. It is submitted that, if someone did err here, it was Sachs J, and that the argument that only binding international law is applicable through section 233 is sound at law.

¹⁰⁴ At par [13] of the judgment.

¹⁰⁵ At 199.

¹⁰⁶ *Supra* (n21).

¹⁰⁷ *Supra* (n12).

However, as pointed out, *supra*, a number of problems regarding the interpretation and application of these provisions remain.

The most important problem that will have to be ironed out is when international law is, in terms of these sections, to be applied as part of national law and when it should only be used as an interpretative guide. Must a totally monistic view be adopted? Or is the current situation where a dualistic view is accepted as basis, provided that the two systems are harmonized to the maximum through the provisions of the FC (especially sections 39 and 233), satisfactory enough to provide for the challenges symptomatic of the contemporary political climate? Both possibilities are feasible depending upon which interpretation method is adopted. As pointed out¹⁰⁸, however, it is difficult to see that the courts would, in the light of past practice and early decisions under the post-1994 constitutions, prefer an interpretation method favouring a purposive and generous interpretation above the plain meaning of the text where it appears to be unambiguous.

On the other hand, there is certainly room for a view that the Constitution should be regarded as a living organism, the meaning of which could change if necessary (according to political and moral change) without having to change the text.¹⁰⁹ The change to a new constitutional dispensation has been traumatic enough so as to try and avoid another change within the next decade to a half-century. The literal approach to constitutional interpretation¹¹⁰ can definitely (and the compromise approach¹¹¹ possibly) be discarded as old-fashioned and without significance for the challenges that the interpretational provisions in the FC pose. Although the Constitutional Court (and other courts) will not lightly dispose of the notion that the plain meaning of the text is of paramount importance¹¹², it has been done once before¹¹³ and such a contention is certainly not impossible.

¹⁰⁸ Chapter II *supra* under 1.3.2.

¹⁰⁹ DM Davis "The underlying theory that informs the wording of our Bill of Rights" (1996) 113 *SALJ* 385; DM Davis "The twist of language and the two Fagans: Please sir may I have some more literalism!" (1996) 12 *SAJHR* 504; RK Greenstein "Text as tool: Why we read the law" (1995) *Washington&Lee LR* 105; S Woolman & D Davis "The last laugh: Du Plessis v De Klerk, classical liberalism, Creole liberalism and the application of fundamental rights under the interim and final Constitutions" (1996) 12 *SAJHR* 361. See also H Botha "Democracy and Rights: Constitutional interpretation in a post realist world" (2000) 63 (4) *THRHR (JCRDL)* 561.

¹¹⁰ Chapter II *supra* under 1.3.

¹¹¹ *Ibid.*

¹¹² *S v Zuma supra* (n87) par [20].

¹¹³ *S v Mhlungu* 1995 (3) SA 391 (CC). See, however, the criticism against this decision by Z Motala "The Constitution is not anything the Court wants it to be: The Mhlugu decision and the need for disciplining rules" (1998) 115 *SALJ* 141.

Overall it should be clear that the drafters of the new Constitutions (the IC and the FC) intended to allow international law to play an unprecedented role in the interpretation, formulation and development of national law. Although monism and globalism might seem no more than an ideal at this stage, and although dualism and regionalism seem to be the order of the day¹¹⁴, the FC goes such a long way in harmonizing the two systems that, given the right political and moral influences on the bench, it may soon spell *mene mene tekel ufarsin*¹¹⁵ for the dualistic view from a South African perspective.

¹¹⁴ Chapter I *supra*.

¹¹⁵ Literally "you have been weighed but found incompetent."

CHAPTER V

MISCELLANEOUS

1. INTRODUCTION

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2.1.2 Under the Interim Constitution (IC)

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(i) *The HRC*

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CHAPTER V

MISCELLANEOUS

1. INTRODUCTION

The post-1994 constitutional dispensation heralded an awareness of human rights unprecedented in the country. To promote and preserve this new awareness and adequate protection of human rights, a body empowered to evaluate legislation and government action and to take the necessary steps to eradicate human rights transgressions was required. The heterogeneous nature and cultural diversity of the South African population furthermore demanded that a plan for peaceful transition be devised. This was realised through the provisions of the IC governing amnesty legislation. Although the Final Constitution (FC) does not specifically provide for amnesty legislation, it will be argued, *infra*, that the question whether amnesty legislation conforms to South Africa's international obligations remains as relevant today as it was under the IC. As will be pointed out, *infra*, it is also important for criminal courts to note that the principle of legality was re-written in the FC to make specific reference to crimes under international law. These issues will now be discussed.

2. MISCELLANEOUS PROVISIONS

2.1 THE HUMAN RIGHTS COMMISSION AND AMNESTY LEGISLATION

2.1.1 Pre-1994

Jacques Maritain said

“On the level of national interpretations, on the speculative or theoretical level, the question of rights of man brings into play the whole system of moral and metaphysical (or anti-metaphysical) certainties to which each individual subscribes. As long as there is no unity of faith or unity of philosophy in the minds of men, the interpretations and justifications will be in mutual conflict.”¹

In South Africa, with its heterogeneous population and diverse cultures this thesis was definitely (and probably still is) also the case. Therefore, South African authorities, courts and theorists shied away from the idea that universally recognised fundamental human rights exist and that they can (or should) be constitutionally enshrined.

Under the influence of Dicey and his thesis of “Rule of Law” in English constitutional law (with no written constitution), Verloren van Themaat, writing on South African constitutional law, found that in countries like South Africa and Great Britain, fundamental human rights

¹ J Maritain “Human Rights – Comments and Interpretations” *UNESCO* (1949) 79.

can be just as (if not more) effectively protected under common law as under a written constitution.²

However, as early as 1894 the courts in South Africa had already recognized the importance of upholding international law where the relationship between the state and an individual is in issue, although international human rights law (IHRL) as we know it today did not then exist.

“[A]s put by Sir Henry Maine, ‘that the state which disclaims the authority of international law places herself outside the circle of civilized nations’. It is only by a strict adherence to these recognised principles that our young state can hope to acquire and maintain the respect of all civilized communities, and to preserve its own independence.”³

This sentiment was, however, not apparent in court judgments during the rule of the Nationalist Party from 1948-1990. Atrocities against citizens and non-citizens alike abounded in the apartheid years, and there was nothing the courts could do (or would do) to recognise, uphold and protect basic human rights. When courts showed an interest in doing so (or in fear of their claiming review powers), the government passed emergency legislation, which included so-called “ouster clauses” that prevented the courts from judging parliamentary or executive action. Verloren van Themaat’s assurance that human rights can be just as effectively protected under the common law as under a written constitution rang hollow indeed.

A definition of what is conceived to be the nature and extent of the concept of human rights might serve to highlight the necessity of recognising human rights at international and national level. It will also serve to explain why a separate branch of international law, namely international human rights law (IHRL), came into being to ensure protection of the rights of man at international and national level.

“Human rights are universal: they belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development. To call them “human” implies that all human beings have them, equally and in equal measure, by virtue of their humanity – regardless of sex, race, age; regardless of wealth or poverty, occupation, talent, merit, religion, ideology, or other commitment.* [* *Original footnote* - A person may have additional rights in a given society by virtue of such extraneous qualities, or of others, such as citizenship, residence, or having been elected to office, but those are not everybody’s ‘human rights’.] Implied in ones humanity, human rights are inalienable and imprescriptible: they cannot be transferred, forfeited, or waived; they cannot be lost by having been usurped, or by one’s failure to exercise or assert them.”⁴

² Verloren van Themaat *Staatsreg* 2nd Ed (1967) 129. Own translation.

³ Per Kotze CJ in *CC Maynard et alii v The Field Cornet of Pretoria* (1894) 1 SAR 214 at 223.

⁴ L Henkin *The Age of Rights* (1990) 2-3. On the development of IHRL as a separate branch of international law and the sources thereof, see in general T Maluwa “International human rights norms and the South African Interim Constitution” (1993-94) 19 *SAYIL* 14; “Democracy and Human Rights – The Significance of Human Rights Law to Developing Countries” (1995) 6 (1) *ALR* 24 at 24-9.

In the light of this kind of international sentiment, and in the light of the notorious human rights transgressions in South Africa, international (and internal) pressure on the country to recognize and protect human rights emerged and kept on growing. In 1981, Verloren van Themaat reflected a different approach⁵, probably because he did not write this edition.⁶ He stated, *inter alia*

- A South African textbook on constitutional law without, at least, preliminary reference to the recognition and protection of human rights and fundamental freedoms suffers from scientific anaemia.⁷
- A South African student in constitutional law without, at least, basic knowledge of human rights recognition and protection will be totally lost when attempting comparative research in constitutional law.⁸
- If the South African legal system is tested against the body of substantive and procedural human rights recognised internationally, the result is deplorable.⁹
- The recognition and protection of human rights and freedoms in South Africa will only be satisfactory once the Constitution contains an entrenched Bill of Rights.¹⁰

Pressure, both internal and international continued until 1990, when State President FW De Klerk announced a new direction for the country. For the first time, the South African Constitution included constitutionally enshrined fundamental or human rights.¹¹ A Bill of Rights and courts empowered to review legislation and other acts of government are, however not enough to promote a new spirit of human rights protection against a background of diversity of cultures, standpoints and strife. Something had to be done to end the atrocities of the past, to reconcile estranged peoples and to promote peace and unity in the new dispensation. Moreover, a type of legislative and executive “watchdog” was also needed to forewarn against undue inroads into human rights. With this in mind, the Human Rights and Truth and Reconciliation Commissions were born from national legislation authorised by the new Constitution.

2.1.2 Under the Interim Constitution (IC)

(i) *The Human Rights Commission (HRC)*

Sections 115-118 of the IC authorised the establishment of a Human Rights Commission (HRC). Section 116 specifically circumscribed its powers and functions. In section 116 (2) the Commission is, for instance, charged as follows

⁵ Verloren van Themaat *Staatsreg* 3rd Ed (1981).

⁶ The third edition of the work was extensively edited and re-written by Professor M Wiechers.

⁷ At 143. Own translation/interpretation.

⁸ At 144. Own translation/interpretation.

⁹ At 151. Own translation/interpretation.

¹⁰ At 156. Own translation/interpretation.

¹¹ Both the IC (Chapter 3) and the FC (Chapter 2) contain Bills of Rights.

“(2) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature.”¹²

International law scholars especially welcomed this provision, because it recognized the independent existence of international human rights law (IHRL) as a separate branch of international law.¹³ This provision established a mechanism through which future national legislation could be brought into line with South Africa’s international human rights obligations, assigning to the Commission the role of legislative watchdog.¹⁴ As the legislation¹⁵, which gave birth to the Commission under authority of the IC, was adopted only a short while before that dealing with amnesty¹⁶, the Commission did not warn Parliament that the latter might be ignoring South Africa’s obligations to observe IHRL. It was, so to speak, still suffering teething problems when the amnesty legislation saw the light of day.

The Human Rights Commission Act further regulates the composition, functions and powers of the Commission. This Act, however, fails to refer to the Commission’s legislative watchdog role in express terms, as did the IC. It refers only to “the powers, duties and functions conferred on or assigned to it by section 116 of the Constitution.”¹⁷ This shortcut, as will be pointed out in the next section, can give rise to some controversy after the FC replaced the IC, in that the FC does not contain the same references to the powers, duties and functions of the Commission as did the latter.

What are the powers and functions of the HRC? Section 116 of the IC reads

- “116. (1) The Commission shall, in addition to any powers and functions assigned to it by law, be competent and be obliged to-
- (a) promote the observance of, respect for and the protection of fundamental rights;
 - (b) develop an awareness of fundamental rights among all people of the Republic;
 - (c) make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and this Constitution, as well as appropriate measures for the further observance of such rights;
 - (d) undertake such studies for report on or relating to fundamental rights as it considers advisable in the performance of its functions; and
 - (e) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental rights.

¹² Italics added.

¹³ N Botha “International law and the South African Interim Constitution” (1994) 9 *SA Public Law* 245 at 246-48.

¹⁴ R Keightley “Public international law and the Final Constitution” (1996) 12 *SAJHR* 405 at 416.

¹⁵ The Human Rights Commission Act 54 of 1994 (The HRC Act).

¹⁶ See (ii) *infra*.

¹⁷ Section 7 of the HRC Act.

- (2) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature.
- (3) The Commission shall be competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it shall, as far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum.”

The last subsection ensures that the HRC is not a toothless watchdog, and that it may take the necessary action to either promote human rights awareness and protection or to avoid human rights transgressions (or to secure redress where rights were transgressed). As it will be argued, *infra*, section 116 still applies today. It is therefore also submitted that the HRC has standing in terms of section 38 of the FC to approach a competent court in order to exercise its powers and functions adequately.

(ii) *Amnesty legislation*

Although international law terminology was not employed in the provision of the IC providing for amnesty¹⁸, the courts' refusal to be led by principles of international law in deciding upon the constitutionality of the amnesty legislation was severely criticised by international law scholars. As will be indicated, it was argued that the amnesty provisions offended against *jus cogens*, and that the courts should have applied international law principles through section 35 (1) in order to strike down amnesty legislation. It is also argued that the courts might have come to a different conclusion if the issue were decided under the FC. This warrants a separate discussion in this dissertation and, although it could just as well have been dealt with in the preceding chapter, it was decided that it should be dealt with here together with the discussion on the other miscellaneous provisions, which include reference to international law.

In the spirit of reconciliation the Epilogue to the IC read, *inter alia*, as follows

“The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, *amnesty shall be granted* in respect of acts, omissions and offences associated with political objectives and committed in

¹⁸ I.e. the Epilogue of the IC.

the course of conflicts of the past. To this end, *Parliament* under this Constitution *shall adopt a law* determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and *providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with* at any time after the law has been passed.”¹⁹

This in turn led to Parliament adopting the Promotion of National Unity and Reconciliation Act²⁰ (the Act) under which, especially through section 20 (7) thereof, provision is made for amnesty from criminal prosecution as well as civil action. The constitutional validity of this legislation under the IC was challenged in the Constitutional Court.²¹ This forum was chosen as under the IC the Provincial Divisions of the Supreme Court lacked jurisdiction to pronounce on the constitutional validity of Acts of Parliament. However, because the Amnesty Committees had the power to grant amnesty before the issue could be suitably addressed by the Constitutional Court, the applicants in that issue, in the mean time, sought an interdict in the Cape Provincial Division of the Supreme Court to restrain the respondents from granting amnesty to any person under the Act, pending the outcome of the proceedings in the Constitutional Court.²²

The challenge was basically made on argument that the Act infringed, *inter alia*, section 22 of the IC, which provided that “[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.” In support of this challenge, it was argued on behalf of the applicants that the state was obliged by international law, particularly the Geneva Conventions of 12 August 1949 and the relevant Protocols, to prosecute those responsible for gross human rights violations during apartheid. Alternatively it was argued that the amnesty mentioned in the Epilogue to the IC referred only to amnesty from criminal liability (but preferably only after conviction and sentence) and not also from civil liability incurred.

In a decision dated 9 May 1996, the Cape Provincial Division, Friedman JP and Farlam J, found that the applicants had not established a clear right entitling them to an interdict. The Constitutional Court delivered its judgment on 25 July 1996. Mahomed DP (as he then was), writing for the majority of the court, and Didcott J, in a separate concurring judgment, found that section 20 (7) of the Act was entirely constitutional and valid. The *rationes dicens* in

¹⁹ Italics added.

²⁰ Act 34 of 1995.

²¹ *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) – AZAPO-II.

²² *Azanian People's Organisation (AZAPO) v Truth and Reconciliation Commission* 1996 (4) SA 562 (C) – AZAPO-I.

both courts' decisions amounted to virtually the same rejection of arguments advanced on behalf of the applicants:

- Both courts found that, although the Act infringes provisions of the Bill of Rights in the IC, and more particularly section 22, the infringement was authorized by the Epilogue to the IC which, according to section 232 (4) thereof, is as much part of the Constitution as any of its other provisions.
- Both courts doubted the applicability of the Four Geneva Conventions and the relevant Protocols to the South African conflict during apartheid.
- Both courts were not persuaded that the offending legislation constituted any breach of obligations owed by the state in terms of the instruments of public international law relied on by the applicants.
- Both courts found that "amnesty" included amnesty for both criminal and civil liability and that amnesty could be granted prospectively.

Criticism against these decisions, especially *AZAPO-II*, was fierce and widespread. While certain of the criticism may be regarded as emotional rather than academic²³, other was more academic.²⁴ Other, still, was merely philosophical.²⁵

Professor Motala's criticism was to be expected, because his argument in an earlier article²⁶ that

"... in suspending and cancelling any civil action the victims of war crimes may bring against alleged offenders, *the Act violates a peremptory norm of international law* which provides rights to individual victims of war crimes regardless of the attitude of the State."²⁷;

and

"[T]he Act, to the extent that it grants amnesty to war crimes, *violates a cardinal rule of international humanitarian law*, namely that there can be no amnesty for war crimes."²⁸,

was rejected (or, at least, not accepted) by the Court in *AZAPO-I*, and also, by implication in *AZAPO-II*. The flaws in Motala's arguments will be pointed out, *infra*.

Although the Court in *AZAPO-I* was clearly mistaken when it stated *obiter* that the Constitution itself would seem to "enable Parliament to pass a law even if such law is

²³ Z Motala "The Constitutional Court's approach to international law and its method of interpretation in the 'Amnesty decision': Intellectual honesty or political expediency" (1996) 21 *SAYIL* 29.

²⁴ J Dugard "Is the Truth and Reconciliation Process compatible with international law? An unanswered question" (1997) 13 *SAJHR* 258. See also RC Blake "The world's law in one country: The South African Constitutional Court's use of public international law" (1998) 115 *SALJ* 668 at 672-73 and 680-84.

²⁵ C Braude and D Spitz "Memory and the spectre of international justice: A comment on *AZAPO*" (1997) 13 *SAJHR* 269; and D Moelendorf "Amnesty, Truth and Justice: *AZAPO*" (1997) 13 *SAJHR* 283.

²⁶ Z Motala "The Promotion of National Unity and Reconciliation Act, the Constitution and International Law" (1995) 28 *CILSA* 338. Italics added.

²⁷ At 339. Italics added.

²⁸ *Ibid.*

contrary to the *jus cogens*²⁹, there was clearly doubt as to whether “the situation in South Africa prior to the cessation of the ‘armed struggle’ against the apartheid regime”³⁰ was indeed covered by the Geneva Conventions and Protocols, and whether it therefore constituted an exception to the peremptory rule against amnesty in relation to war crimes.³¹

Motala accused the Constitutional Court of accepting the theory of dualism whilst in a previous decision³² it had affirmed the monistic view of international law.³³ This bland assertion is not correct because the Court in *Makwanyane* clearly said that “[w]e can derive assistance from public international law ... but we are in no way bound to follow it.”³⁴ This clearly means that international law is not regarded as higher law and that, if national law (as expounded by the courts) is in conflict with international law, the court is not bound to follow international law. This amounts to a dualistic rather than monistic approach.

Still lamenting, Motala alleged elsewhere³⁵ (criticising the Court’s decision in *Mhlungu*³⁶) that the Constitutional Court was inconsistent in *AZAPO-II* in that it had interpreted the word “shall” (as used in section 35 (1)) as discretionary, whilst in the very same decision it interpreted “shall” (as used in the Epilogue) as peremptory.³⁷

This assertion is also incorrect. The Court did not interpret “shall” in section 35 (1) as discretionary with regard to what it was required to do, namely “have regard to public international law.” Although Motala has a point in that the Court had not considered the international law position of amnesty sufficiently³⁸, the court did consider international law as it was required to do.

The word “shall” in the context of section 35 (1) of the IC³⁹ has no obligatory tones with reference to the **application** of international law, but only with reference to the **consideration** thereof. It says that a court, in interpreting the Bill of Rights “... *shall*, where applicable, *have*

²⁹ *AZAPO-I supra* (n22) at 574. See J Dugard *International Law: A South African Perspective* 2nd Ed (2000) 42 for criticism.

³⁰ *AZAPO-I supra* (n22) at 574.

³¹ *Ibid.*

³² *S v Makwanyane* 1995 (3) SA 391 (CC).

³³ Motala *op cit* (n23) at 36.

³⁴ *Supra* (n32) at 415.

³⁵ Z Motala “The Constitution is not anything the Court wants it to be: The Mhlungu decision and the need for disciplining rules” (1998) 115 *SALJ* 141.

³⁶ *S v Mhlungu and Others* 1995 (3) SA 867 (CC).

³⁷ Motala *op cit* (n35) at 147-8.

³⁸ The body of international law considered by the Court was not exactly impressive. As Motala points out, there existed much more international law that could have been taken into account.

³⁹ Interpreted in *Mhlungu supra* (n36).

regard to public international law applicable...”⁴⁰ “Shall have regard” clearly does not mean “shall apply” or “shall enforce” in this context. On the other hand, the Epilogue to the IC⁴¹ uses “shall” in peremptory fashion with reference to the provision of amnesty. It says “... amnesty *shall be granted* ...”; and “... Parliament ... *shall adopt* a law ...”.⁴² Contextual, coupled with grammatical interpretation (and even purposive interpretation)⁴³, would therefore have provided the answer to the difference in result reached with reference to the same word in the different provisions. In other words, the word “shall,” can never be judged in isolation but must be interpreted in the light of what it is intended to render peremptory. (It is also interesting to note that Motala underwrites a purposive and generous (political) approach to constitutional interpretation when he feels emotionally involved – viz the Amnesty legislation in *AZAPO-II* – but a grammatical and contextual approach when his emotions are not engaged – viz the procedural matters in *Mhlungu*.⁴⁴)

Although the Constitutional Court’s use of language is sometimes ambiguous and unsatisfactory⁴⁵, the *ratio dicens* in *AZAPO-II* was clearly that the Epilogue to the IC “trumped” section 22 of the IC and that, therefore, it need not apply international law unless it is peremptory. Also, because it was not persuaded that section 20 (7) of the Act offended against any “obligations of this country”⁴⁶, the need to interpret section 22 of the IC (as well as the Epilogue) in the light of international law was obviated.

For this reason the Court relied on section 35 (1) of the IC, which enjoined it only to “‘have regard’ to public international law *if it is applicable* to the protection of rights entrenched in the chapter.”⁴⁷ Blake’s interpretation of the decision⁴⁸ is, therefore, correct. However, the same cannot be said of his assertion that, as a result of the omission of the words “where applicable”⁴⁹ from the FC, a decision under section 39 of the FC might have been different. Courts in the tradition of South Africa will always only take cognisance of rules and facts that are “applicable” to the subject matter they are seized with, because arguing around collateral and irrelevant matters might tend to sidetrack the real issues in judgments.

⁴⁰ Italics added.

⁴¹ Interpreted in *AZAPO-II supra* (n21).

⁴² Italics added.

⁴³ Chapter II *supra* under 2.2.

⁴⁴ Contrast his two articles *op cit* (n23) and *op cit* (n35).

⁴⁵ See Dugard *op cit* (n24) at 266-67; and *op cit* (n29) 62-4.

⁴⁶ *AZAPO-II supra* (n21) at par [32].

⁴⁷ At par [27] of the judgment – italics added.

⁴⁸ *Op cit* (n24) at 671-73.

⁴⁹ At 672-73 and 680.

The Court in *AZAPO-II* did not find international law as such to be irrelevant or inapplicable. It found that the specific international law that it did in fact consider was irrelevant to the situation that prevailed under apartheid. Once again, although the Court can be criticised for not sufficiently considering all international law on the subject⁵⁰, and although the court's decision was not very clear on this point⁵¹, the Court did consider international law on the subject. The Court was also not necessarily wrong in finding that the four Geneva Conventions and relevant protocols did not create binding obligations for South Africa to prosecute individuals for human rights transgressions, because they were not applicable to the form of strife that raged under apartheid.

The omission of the words “**where applicable**” and “**applicable**” as used in section 35 (1) of the IC from section 39 (1) (b) of the FC was, therefore, it is submitted, only an attempt at streamlining the grammar used in the provision. It is submitted that those words were merely used *ex abundanti cautela* in section 35 (1) of the IC, and that courts, even under the FC, will only interpret a right in the Bill of Rights against relevant (or “applicable”) international law as they are enjoined to do.⁵² However, as indicated in Chapter II, *supra*, the omission of the second “applicable” has the effect of broadening the type of international law that must be considered for purposes of section 39 of the FC. All relevant international law, and not only IHRL as under the IC, must be considered in interpreting the Bill of Rights.

The suggestion by Professor Botha⁵³, that *AZAPO-II* might have been decided differently had it been subject to section 233 of the FC, because such a finding might have been “any reasonable interpretation ... consistent with international law”⁵⁴, is, with respect, not correct. Section 233 of the FC entrenches an established statutory presumption that the legislature did not intend to violate international law.⁵⁵ It did make it stronger, though, because it enjoins a court to choose any reasonable interpretation of the statute, which is consistent with international law; but only, so it was argued in the previous chapter, if the legislation to be interpreted (in this case, the Constitution) is capable of more than one interpretation. The Constitutional Court was, however, aware of this presumption, and took it into account⁵⁶, but held that, because it wasn't proven that section 20 (7) of the Act transgressed an international

⁵⁰ See the impressive array of sources of international law on the subject cited by Motala *op cit* (n26).

⁵¹ Dugard *op cit* (n29) 62-64.

⁵² See in general the discussion of this proposition in Chapter IV *supra* under 2.2.4.

⁵³ N Botha “Treaties after the 1996 constitution: more questions than answers” (1997) 22 *SAYIL* 95.

⁵⁴ At 102. This submission is repeated in N Botha “Treaty making in South Africa: A reassessment” (2000) 25 *SAYIL* 69 at 93.

⁵⁵ Dugard *op cit* (n29) 48-9 and 64. See also Keightley *op cit* (n14) at 415 and the discussion in Chapter IV *supra*.

⁵⁶ *AZAPO-II supra* (n21) at par [26].

obligation of South Africa to prosecute war criminals, the international treaties could not be of assistance to the applicants.⁵⁷ Therefore, an interpretation consistent with international law would not have presented itself as a “reasonable” interpretation in the circumstances.

In any event, the Epilogue’s provision with regard to amnesty was not only, not in conflict with the international law that was in fact considered by the Court, but also unambiguous in that amnesty has to be provided in certain given circumstances. As indicated in Chapter V, before a text (including a constitutional text) will be regarded capable of being interpreted, it must be **ambiguous** (or, at least, capable of being interpreted in more than one way).⁵⁸ Moreover, because the Constitution and (constitutional) Acts of Parliament are declared to be higher law than international law in sections 2, 231 and 232, unambiguous portions of the Constitution can trump international law, at least at national level.

It has to be agreed with Professor Dugard⁵⁹ that in law⁶⁰ and in policy, the conclusion reached by the Constitutional Court was correct. The Epilogue to the IC clearly trumps section 22 thereof. However, it is submitted that the court had no need to indulge in an examination whether the rules of international law in question⁶¹ amounted to *jus cogens*, because it doubted (correctly) whether the rules in question applied to the specific situation that prevailed under apartheid in South Africa. Even if the rules that were in fact considered by the Court⁶² were to be regarded as *jus cogens*, it does not mean that the *jus cogens* applied to the situation that prevailed under apartheid. The courts, especially the CPD, were at pains to indicate that the situation that prevailed in South Africa could not be equated with the definition of “war crimes” in the Geneva Conventions.

Moreover, although the rules against war crimes, crimes against humanity and genocide may be termed as *jus cogens*⁶³, the rules regarding the prosecution and punishment thereof (including procedural rules and rules of jurisdiction) at both international and national levels are not necessarily classified as *jus cogens*. The principle of *nullum crimen sine lege* might, for instance, constitute a bar to criminal prosecution of international crimes in a national

⁵⁷ At paras [29]-[32] of the judgment.

⁵⁸ HA Strydom “The international law ‘openness’ of the South African Constitution” in G Carpenter (ed) *SUPREMA LEX Essays on the Constitution presented to MARINUS WIECHERS* (1998) 87 at 90-91.

⁵⁹ *Op cit* (n24) at 267.

⁶⁰ With “the law” is meant the law that prevailed at the time the decision was given. It is, however submitted that this argument will also hold true under the FC.

⁶¹ I.e. those rules which require that those responsible for war crimes be prosecuted and punished.

⁶² The four Geneva Conventions of 1949 and the two Additional Protocols of 1977.

⁶³ Chapter I *supra* under 2.2.6.

court.⁶⁴ Moreover, as Brownlie puts it: “[m]any problems remain: more authority exists for the category of *jus cogens* than exists for its particular content”; and “[y]et even here many problems of application remain ... If a state uses force to implement the principle of self-determination, is it possible to assume that one aspect of *jus cogens* is more significant than another?”⁶⁵

Furthermore it is submitted that the TRC’s Amnesty Committees can be described as “another independent and impartial [tribunal or] forum” as envisaged by section 22 of the IC (section 34 of the FC) in which a dispute can be heard. Therefore amnesty legislation, technically, did not breach section 22 of the IC. Both the Cape Provincial division and the Constitutional Court, however, did not consider this possibility, and it seems that all the critics, *supra* also overlooked it.

On the other hand, however, it has to be agreed that a more thorough enquiry into the compatibility of the Epilogue with both conventional and customary international law might have proven to be more satisfactory to lawyers and victims of apartheid.⁶⁶ Had the courts considered all the available international law mentioned by Motlala, and not only the sources mentioned in the judgments, the judgments might have been unassailable. The biggest criticism against the Amnesty judgments is therefore that the courts did not consider sufficient international law in reaching their decisions.

2.1.3 Under the Final Constitution (FC)

(i) *The HRC*

The FC contains no specific reference to the Commission’s duty to report impending contraventions of “international human rights law which forms part of South African law” and “other relevant norms of international law” in proposed legislation to the relevant legislature as section 116 (2) of the IC did. Instead, section 184 (2) merely states

⁶⁴ Dugard *op cit* (n29) 142. Whether this is still true in South Africa, will, however be addressed *infra*.

⁶⁵ I Brownlie *Principles of Public International Law* 5th Ed (1998) 516-17.

⁶⁶ Dugard *loc cit* (n51). It has to be noted that the International Law Association’s Committee on International Human Rights Law and Practice recently in its “Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences” (London Conference 2000) questioned the practice of domestic courts – with specific reference to *AZAPO-II* – of providing for amnesty with reference to international crimes. It agreed with certain articles by Dugard - e.g. *op cit* (n24) - that the *AZAPO-II* decision cannot be faulted at international law for the result reached. The Committee’s opinion was, however, that amnesty provided for at national level has no extra-territorial effect, and that other states may still exercise universal jurisdiction (at 15). The opinion (not yet binding – it’s still very “soft” law) was that domestic amnesty does not amount to an acquittal within the meaning of Article 14 (7) of the ICCPR and that a person can still be brought to another country for trial. Domestic amnesty, therefore does not apply, and has no binding effect internationally (At 15-16, 21). This document will be discussed in detail under 2.2.3 *infra*.

“The Human Rights Commission has the powers, as regulated by national legislation ...”

National legislation in this regard, however, also does not refer specifically to this duty. Section 7 of the HRC Act⁶⁷ merely states that the Commission has the powers, duties and functions conferred or assigned to it by section 116 of the IC. This is a lacuna in the legislation (including the Constitution) dealing with the powers, duties and functions of the Commission. Because the IC was replaced by the FC, it arguably no longer exists. This also proves disconcerting to international law commentators.⁶⁸

However, the HRC Act is in force; it is constitutionally sound (because it was passed under direction and authorisation of the IC and it is not in conflict with any provision of either the IC or the FC); and (albeit indirectly) keeps the words of section 116 of the IC alive even though it was replaced by the FC. Section 184 (2) of the FC effectively declares that the HRC Act is lawful and constitutional (to the extent that it is not subjected to a valid challenge for unconstitutionality) by stating that the HRC “has the powers as regulated by national legislation.” The importance of the HRC and its powers is stressed by the Preamble of the FC, which states that one of the functions of the Constitution is “to establish a society based on democratic values, social justice and fundamental human rights.” It is therefore inconceivable that the HRC Act could be found to be unconstitutional. It is for this reason that it is submitted that section 116 of the IC, through the HRC Act, indirectly remains in force even though it has been replaced by the FC. Therefore, even if the law is not changed as suggested⁶⁹, the duty of the Commission regarding such legislation remains the same. It would be best, however, if the HRC Act were changed in this regard in order to avoid confusion.

(ii) Amnesty legislation

Unlike the Epilogue to the IC, the FC contains no similar provision on Amnesty legislation. However, the same argument as under (i) applies here. The legislation passed under the IC is valid⁷⁰ (because it was passed under direction and authorisation of the IC). It is also not in conflict with any part of the FC. It was pointed out, *supra*, that sections 39 (1) (b) and 233 of the FC do not change the situation, and the judgment of the Court in *AZAPO-II*, it is submitted, would have been the same had the IC contained similar provisions. Therefore, the inclusion of these provisions in the FC would not avail organisations such as AZAPO to push for a revised judgment under the FC.

⁶⁷ *Supra* (n15).

⁶⁸ Keightley *op cit* (n14) at 416.

⁶⁹ *Ibid.*

⁷⁰ Schedule 6, Item 2 of the FC.

2.1.4 Conclusion

(i) *The HRC*

The creation of a legislative watchdog and monitor of human rights observances in South Africa is to be welcomed against the background of strife and the atrocities that prevailed under apartheid. The HRC has the power effectively to address impending transgressions of human rights (and, especially IHRL) in all spheres of government, without it being necessary for individuals to approach the courts for protection. It creates margin enough for judicial activism by the Commission and commissioners in the style of Indian judges⁷¹ in order to assist those that cannot afford to go to court. It is much better to try to avoid suspect legislation being passed and to forewarn against it, than to wait for an appropriate court to declare an act unconstitutional.

On the other hand, whether the Commission will prove an effective monitor of human rights observances in South Africa, and whether it will live up to expectations with regard to its legislative watchdog role, remains to be seen. The counter-majoritarian difficulty may remain to pose a problem. As there isn't enough evidence at this stage to formulate any concrete conclusion in this regard, it is still much too early to tell.

The specific observance of IHRL and other norms of international law in section 116 (2) of the IC was heartening, and its omission from the FC not entirely satisfactory, but, as submitted, *supra*, current legislation still keeps section 116 (2) alive and well for purposes of informing the Commission and others of its powers and functions. A change in legislation would, however, be welcomed.

(ii) *Amnesty legislation*

Generally, the constitutional regulation of amnesty can be regarded as satisfactory, because it is doubted whether (almost) peaceful transition from apartheid to a more human rights friendly environment would have been at all possible without it. In general, it also seems that the international community at large is not against provision of amnesty in order to assure peaceful transition. No state or international organisation has, to date, called for sanctions against South Africa for this arrangement, or for the public trial of those that perpetuated crimes and atrocities under the old regime even after they received amnesty. The criticism against the procedure is one-sided and individualistic, and seems to disregard the necessity of these arrangements to ensure peaceful and orderly transition. As the courts in AZAPO-I and – 2 pointed out, the principle of amnesty is widely accepted internationally. They cited ample

⁷¹ PN Bhagwati "Judicial Activism and Public Interest Litigation" (1985) *Columbia Journal of Transnational Law* 561.

authority from international law to prove that amnesty is recognised in the international world. The International Law Association's view on the effect of amnesty with reference to universal jurisdiction will be discussed in the next section.

It is, therefore, only the courts' unwillingness to delve deeply into the principles of international law, and to solve the issue of the compatibility of the Constitution with international law in a way that would satisfy victims from the past, that can rightly be criticised.

2.2 THE PRINCIPLE OF LEGALITY IN NATIONAL AND INTERNATIONAL CRIMINAL LAW

2.2.1 The relevant provision

Section 35 (3) (l) of the FC provides

“35. (3) *Every accused person has a right to a fair trial, which includes the right –*
 (l) *not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.*”⁷²

Section 35 (3) (n), in addition, declares that every accused person shall have the right to the benefit of the least severe of the prescribed punishments available for an offence if the prescribed punishment has been changed between the commission of the offence and sentencing.

2.2.2 The principle of legality defined

National criminal law

South African criminal law, like most domestic systems of criminal law (as well as international law⁷³), recognises the principle of legality, which, inherited from South African common law is also known as the *nullum crimen sine lege*⁷⁴ principle. At national level, this principle “provides that in order to attract punishment, conduct must be expressly defined as a crime by the ordinary law of the land.”⁷⁵ Joubert⁷⁶ points out that this is essentially a formalistic definition of legality because, strictly speaking, the legislature may proscribe any conduct as criminal even though basic human rights are ignored. He argues, in the light of the

⁷² Italics added.

⁷³ Article 11 (2) of the Universal Declaration of Human Rights; article 15 (1), (2) of the International Covenant on Civil and Political Rights (ICCPR) – quoted in Annexure 2 - and article 7 (1) of the European convention on Human Rights (ECHR). In general see H Booysen *Volkereg en sy verhouding tot die Suid Afrikaanse reg* 2nd Ed (1989) 183-185.

⁷⁴ Literally “there exists no offence unless proscribed by law.”

⁷⁵ JM Burchell (formerly Burchell & Hunt) *South African Criminal Law and Procedure Vol I* 3rd Ed (1997) 28.

⁷⁶ JJ Joubert *Die Legaliteitsbeginsel in die Strafprosedure* Doctoral Thesis UNISA (1995) 108 - 129.

IC, that a more substantive (material) view of the principle of legality will have to be adopted in the new dispensation.⁷⁷

The principle emerged as a reaction to (the prospect of) government oppression, especially as it emerged in Europe.⁷⁸ Another author on the subject of South African criminal law,

Professor Snyman, introduces his discussion of this principle as follows

“The modern state has expanded its powers to such an extent that today, more than ever, it became necessary to protect the freedom of the individual. The principle of legality plays an important role in this regard. ... In the field of criminal law the principle fulfils the important task of preventing the arbitrary punishment of people by state officials, and of ensuring that the determination of criminal liability and the passing of sentence correspond with clear and existing rules of law.”⁷⁹

According to Snyman, the principle of *nullum crimen sine lege* is acknowledged by South African criminal law to embody the following rules (or aspects)

- An accused person may only be convicted of *an offence* (act or omission transgressing a criminal standard or norm) *that is recognised by the law* (not created by the courts) *as a crime* - the *ius acceptum* principle.
- The offence *must already have been recognised as a crime at the time it was committed*. Therefore, criminal behaviour must not be proscribed and visited with punishment retroactively. (It is argued that judge-made law always operates retrospectively. Therefore, it is the legislature, and not the courts, that should develop common law and proscribe new crimes) - the *ius praeivium* principle.
- Crimes should not be formulated in vague and ambiguous terms. It must in other words be clear and accessible to the ordinary citizen so that he or she can regulate his or her conduct accordingly in order to avoid prosecution and punishment - the *ius certum* principle.
- A court should rather interpret the definition of a crime restrictively (*in favorem libertatis*) than in broad terms. Therefore, analogous or extensive interpretation of crimes is prohibited - the *ius strictum* principle.⁸⁰

This is the principle that section 35 (3) (1) of the FC addresses. However, the latter two rules (or aspects) of the principle are not addressed by the provision. Section 35 (3) (1) provides only for the *ius acceptum* and *ius praeivium* principles. The rules of *ius certum* and *ius strictum* were apparently left for criminal law itself to determine. Why the Constitutional Assembly found it at all necessary to address only the first two aspects of the principle in the Constitution is unclear, but bears directly on the problem that will be discussed, *infra*, namely whether a person can be prosecuted and punished for an international law crime, notably the

⁷⁷ *Ibid.*

⁷⁸ Burchell *loc cit* (n75). See also J de Ville “Die legaliteitsbeginsel in die staats- en administratiefreg onder ‘n nuwe grondwetlike bedeling: ‘n vergelykende toekomspektief” (1993) 8 *SA Public Law* at 68-85 for a discussion of this principle and the need for allowing the courts to test executive action and parliamentary legislation for compliance therewith.

⁷⁹ CR Snyman *Criminal Law* 3rd Ed (1995) 34.

⁸⁰ *Id* 35. See also CR Snyman “Enkele opmerkings oor die legaliteitsbeginsel in die strafreg” (1991) 54 *THRHR (JCRDL)* at 629-35.

crime of apartheid, which was not recognised by South African law, and which had been committed pre-1994.

To a great extent, the *ius acceptum* and *ius praeivium* principles, *supra*, provide for an essentially formalistic (positivist) view of legality.⁸¹ As long as the right procedures are followed in the proscribing process, virtually all conduct can be proscribed as criminal, even though it may violate basic human rights in the process. The fact that the *ius praeivium* principle prohibits retroactive proscription does have a ring of substantivity in the recognition of the principle, but it is essentially the other two aspects of the rule (not provided for in the Constitution) that recognise the need for a substantive rather than formalistic approach.

The clear purpose of the principle is to protect individuals from arbitrary punishment by the state by ensuring that the rules determining criminal liability and the nature of sentences that may be imposed are clearly formulated, in such a way that they are accessible to the ordinary citizen so that he/she may know how to act or not to act in order to avoid criminal liability and prosecution.⁸² How would a citizen know whether specific acts are criminal if the definition of crimes are not accessible and comprehensible, and how will he or she be able to regulate his or her conduct accordingly? It would amount to an iniquity if a state were afforded the right arbitrarily to proscribe criminal action, and to punish individuals whilst the definition of criminal behaviour remains unclear and inaccessible.

There is also a direct link between the principle of legality and the penal theory of deterrence: a person cannot be deterred from acting in a specific way if that action was not recognised as a punishable crime when it was performed.⁸³ Likewise, there is a link between the principle of legality and the idea of democracy: the content and extent of the law should be determined by a democratically elected body such as Parliament, and not by the judiciary, which is not democratically constituted.⁸⁴ However, this link between legality and democracy presupposes a democratically elected parliament, which represents the whole population and not only part thereof⁸⁵ as was the case under apartheid. It was for these reasons that the principle of legality was formulated as a matter of policy to protect individuals from arbitrary punishment by the state.

⁸¹ Joubert *loc cit* (n76).

⁸² Burchell *op cit* (n75) 28-30; Joubert *op cit* (n76) 121-126. In American literature on criminal law this idea is sometimes referred to as "the principle of fair warning" – WR La Fave and AW Scott *Criminal Law* (1986) 92.

⁸³ Snyman *op cit* (n80) at 631.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

The same four rules must be applied for purposes of the *nulla poena sine lege*⁸⁶ principle⁸⁷, which comes into play only after an accused has been convicted of a crime. This principle is partially provided for by section 35 (3) (n) of the FC, which prohibits retroactive increases in prescribed punishments. Because this provision contains no reference to international law, it falls outside the ambit of this discussion. However, the crux of the rule, namely that even the prescribed punishment must be clear and accessible to the ordinary citizen, so that he or she may know the risk attached to certain criminal behaviour in order to be able to take an informed decision whether to regulate his or her conduct accordingly, is not addressed by the Constitution. As far as this principle is relevant it will, therefore be mentioned, in passing, *infra*.

International criminal law

According to international law, the *ius acceptum* and *ius praeivium* aspects of the principle are also recognised⁸⁸, although the ICCPR also authorises international prosecution for crimes recognised under the general principles of law recognised by civilized nations, which is strictly inconsistent with the principle.⁸⁹ That the *nullum crimen* principle is recognised by international law can also be seen from foreign case law on the subject. In *Polyukhovich v Commonwealth (War crimes Act case)*⁹⁰, Brennan J held as follows

“[I]nternational law not only refuses to countenance retrospective provisions in international criminal law; it condemns as offensive to human rights retrospective municipal criminal law imposing a punishment for crime unless the crime was a crime under international law at the time when the relevant act was done.”

It is, however, doubted whether international criminal law requires adherence to the *ius certum* and *ius strictum* principles. Those principles were apparently of no use to the war criminals tried at Nuremberg. In the words of Dugard⁹¹

“The tribunal, which sat in Nuremberg, was criticized for its composition – the judges were appointed by the victors to try the vanquished – and for its jurisprudence. In particular it was argued by legal positivists that the crime against humanity, hitherto largely unknown to international law, offended the principle of *nulla poena sine lege*. This argument takes no account of the fact that certain acts are *mala in se*. No legal system or superior order can justify the type of conduct denounced as a crime against humanity; nor is any positive law required to proscribe such acts.”⁹²

⁸⁶ Literally “no punishment exists (may be inflicted) unless authorised by law.”

⁸⁷ Snyman *op cit* (n79) 35.

⁸⁸ *Supra* (n73).

⁸⁹ Article 15 (2) – quoted in Annexure 2. See also Booysen *op cit* (n73) 184. See also CW van Wyk *Die Misdaad van Apartheid in die Volkereg* LLM Dissertation UNISA (1979) 73-4.

⁹⁰ (1991) 172 CLR 501.

⁹¹ *Op cit* (n29).

⁹² *Id* 235 – 6.

The difference between national and international law

Although there is no real difference in the nature of the principle recognised by both international and national law⁹³, the difference is to be found in the content of the rule. Whilst the *nullum crimen sine lege* principle in both systems provides that criminal conduct must be recognised by the law and may not be proscribed retrospectively, the principle as applied in South African national law (in the past) recognises the *ius certum* and *ius strictum* principles. As pointed out, *supra*, it is doubtful whether international law recognises those two principles, at least in respect of certain classes of offence such as crimes against humanity.

It is therefore necessary to take into account that South African national law pre-1994 did not necessarily recognise international law crimes. Apart from the international crime of piracy, which is part of South African criminal law⁹⁴, the other international crimes created by either international custom⁹⁵ or treaty law⁹⁶ hitherto did not form part of South African criminal law as crimes *eo nomine*⁹⁷, except in so far as they had been statutorily incorporated.⁹⁸ As the Convention on the Suppression and Punishment of the Crime of Apartheid⁹⁹ has, to date, not been acceded to by South Africa¹⁰⁰, it does not constitute (and certainly was not pre-1994) binding treaty law for South Africa. Dugard, however, points out that the international crime of apartheid as defined in numerous instruments of international law, possibly constitutes customary international law, at least as a crime against humanity.¹⁰¹ It is no secret that South Africa was a persistent objector to the crime of apartheid becoming binding custom. There is, however, a view that the prohibition on apartheid is not only part of customary international law, but in fact a norm of *jus cogens* from which no derogation is permitted and to which the rules of persistent objection do not apply. Dugard says in this regard

“Both judicial and academic opinion support the view that a ‘persistent objector’ is not bound in such a case. This question has been the subject of debate in the context of apartheid and international law as it is clear that states refused to accept South Africa’s persistent objection to treating apartheid as a violation of customary law. This is best explained on the ground that

⁹³ Booyesen *loc cit* (n73). See also Van Wyk *op cit* (n89) 73-7.

⁹⁴ AV Lansdowne & J Campbell *South African Criminal Law and Procedure Vol V 2nd Ed* (1982) 19-20. This crime is, however, not discussed by the other authors like Snyman *op cit* (n79) and JC De Wet & Swanepoel *Stafreg*.6th Ed (1985).

⁹⁵ E.g. slave trading; war crimes; crimes against humanity; etc.

⁹⁶ E.g. multilateral treaties created principally to punish human rights violators or international terrorists. See those discussed by J Dugard *op cit* (n29) 143-150. Some of these (like genocide and apartheid) now arguably form part of customary international law (or even *jus cogens* - see *infra*).

⁹⁷ The proscription of the international law crime of apartheid was, for instance, not recognised by South Africa as binding due to the Apartheid Government’s persistent objection. See Booyesen *op cit* (n73) 178 – 187 for a discussion in this regard, where the learned author argues, *inter alia*, that the crime of apartheid militates against the *nullum crimen* principle as recognised by international law. See also Van Wyk *op cit* (n89) who came to the same conclusion.

⁹⁸ E.g. those created by the Civil Aviation Offences Act 10 of 1972.

⁹⁹ (1974) 13 ILM 50; PM Mtshaulana *et alii Documents on International Law* (1996) 204.

¹⁰⁰ Dugard *op cit* (n29) 144 - 6.

¹⁰¹ *Ibid.* See, however, Booyesen *loc cit* (n97) and Van Wyk *op cit* (n89) for a different view.

the prohibition on apartheid is a peremptory norm, a norm of *jus cogens*, to which the normal rules relating to persistent objection are inapplicable.”¹⁰²

The fact that not all international law crimes were recognised at national level pre-1994, in essence, concerns the debate whether a monist or dualist view should be adopted regarding the two systems of law. But, as indicated earlier¹⁰³, the outcome of this debate usually depends upon the philosophy that reigns in the specific national system of law. It has already been pointed out that the Constitution supports a dualistic rather than monistic view of the relationship between the two systems, although it endeavours to harmonise the two systems to the maximum. With reference to the *nullum crimen sine lege* principle, however, it seems as if the drafters of the FC opted for a more monistic approach. It may, for instance, be noted that section 35 (3) (1) is strongly reminiscent of article 11 (2) of the Universal Declaration of Human Rights, which reads *inter alia*

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed...”

Save for the replacement of the word “penal” with “criminal”, article 7 (1) of the ECHR is identical. Therefore, section 35 (3) (1) of the FC represents an almost exact replica of the principle of legality as recognised in international instruments on human rights. (However, article 15 of the ICCPR differs as can be seen from the quotation thereof in Annexure 2.) This leans towards a monist rather than dualist view with reference to the principle of legality.

The effect of the provision

The effect of section 35 (3) (1) of the FC is to include all recognised international law crimes in South African criminal law for purposes of the *nullum crimen* principle. In other words, it advances a monist view of the two systems of law, at least in respect of the definition of crimes. Obviously this concerns binding international law only. Non-binding law cannot be included in South African criminal law for clear want of compliance with the *nullum crimen sine lege* principle. Non-binding law at international level cannot be binding at national level. A further question that arises, however, is whether this section also applies retrospectively so as to include prosecution for international law crimes committed before the FC became operative although they were not at the time recognised as crimes at national level.

The phrase “at the time it was committed or omitted” opens this subsection to differing interpretations. It could mean that criminal conduct recognised under international law at the time of commission (even if that was before the FC became operative) is both prosecutable

¹⁰² Dugard *op cit* (n29) 31.

¹⁰³ See the discussion of the ‘relationship’ and ‘application’ theories in Chapter I *supra* under 2.4.2.

and punishable in South African courts, although it was not recognised as criminal conduct under national criminal law at the time. It could, however, also mean that it is not so prosecutable or punishable because to do so would offend against both the *nullum crimen sine lege* principle, as it existed before the FC came into effect, and the presumption against retrospectivity of the Constitution. This issue will be discussed further, *infra*.

2.2.3 Universal jurisdiction defined

What is universal jurisdiction

The jurisdictional competence of states to regulate and try both civil and criminal matters is often referred to as “sovereignty”, but is in fact only one (albeit important) aspect of sovereignty and refers to judicial, legislative and administrative competence regarding legal issues.¹⁰⁴ “Sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states.”¹⁰⁵ Dugard¹⁰⁶ discusses criminal jurisdiction of states, and especially that of South Africa, in terms of the following principles

- *Territoriality* – Implying that a state may assert criminal jurisdiction over all criminal acts that occur within its territory and over all persons responsible for such criminal acts, whatever their nationality.
- *Subjective and objective territoriality* – Whether the crime commenced within a state’s territory but was completed in another (subjective territoriality) or whether it commenced in another state’s territory but completed within its own territory (objective territoriality), a state can still exercise criminal jurisdiction.
- *Protection of the state* – A state may exercise jurisdiction over aliens who have committed acts extra-territorially that are considered prejudicial to its safety and security. Acts of treason by an alien resident committed in a foreign country, can, according to this principle, be prosecuted and punished by South African courts¹⁰⁷, although South Africa does not recognise trial *in absentia* as, for instance, Iran exercised in the trial of Salman Rushdie for his work “The satanic verses.”¹⁰⁸
- *Nationality* – A state may prosecute its own nationals for offences committed in a foreign country. However, South Africa and all countries influenced by Anglo-American common law will, generally, not exercise jurisdiction under this ground, unless national law expressly confers jurisdiction. South Africa and the other common-law countries, however, treat treason as an exception to this rule.¹⁰⁹
- *Passive personality* – A state exercises jurisdiction under this ground if it tries a person (even an alien) who committed an offence in another country, which harmed one of its own nationals.

¹⁰⁴ I Brownlie *op cit* (n65) 301.

¹⁰⁵ Dugard *op cit* (n29) 133.

¹⁰⁶ *Op cit* (n29) 135-42.

¹⁰⁷ *R v Neumann* 1949 (3) SA 1238 (Special court) at 1250. See also the decision of the House of Lords in *Joyce v Director of Public Prosecutions* [1946] AC 347; and other South African decisions like *R v Holm*; *R v Pienaar* 1948 (1) SA 25 (A) at 930 and *Nduli v Minister of Justice* 1978 (1) SA 893 (A) at 912-13.

¹⁰⁸ It is not suggested that Iran’s actions were good at international law, either on this ground or another. It is mentioned purely to illustrate the practice of some states to try people *in absentia*.

¹⁰⁹ *R v Holm*; *R v Pienaar supra* (n107) at 931.

- *Universality* – When conduct offends criminally not only against the national legal order, but also against the international legal order, one has to do with international law crimes.¹¹⁰ In such a case it is permissible (not obligatory) according to international law for states to exercise jurisdiction over “international crimes.”

It is this last mentioned principle, jurisdiction of individual states to try international law crimes (which are not necessarily national law crimes according to Brownlie¹¹¹) in their own national courts, which merits discussion under this section. This is called “universal jurisdiction”, a term coined by Cowles in 1945.¹¹² However, the need for universal jurisdiction does not arise where the international law crimes are recognised by a country’s own national law as criminal, for example murder; and where jurisdiction to prosecute and try individuals for such crimes is assumed under one or more of the other principles, for example territoriality. It is only where such crimes are not so recognised, and/or where jurisdiction cannot be claimed under one of the other principles, that universal jurisdiction has to be assumed by a country and its courts to try those crimes.

Justification

According to the Committee on International Human Rights Law and Practice: London Conference 2000, the justification for states to exercise universal jurisdiction is to be found in the concepts of

- *Justice* – “By qualifying certain crimes as being subject to universal jurisdiction the international community signals that they are so appalling that they represent a threat to the international legal order”
- *Deterrence* – “However, as always in the field of criminal law, this effect should not be overstated”, because practice has indicated that atrocities had in the past continued unabated after threats that atrocities will be prosecuted and punished.
- *As a side effect, states witnessing other states exercising universal jurisdiction in cases where they should have rather done so, might be shamed (internationally) into accepting universal jurisdiction* – Although this is not a ground of justification, state practice might have the effect (called “[a]n interesting spin-off”) of states assuming and exercising universal jurisdiction because other states do so.¹¹³

¹¹⁰ This is strictly according to Dugard *op cit* (n29) 141-142. Brownlie *op cit* (n65) 307-9 (correctly, it is submitted) differentiates between jurisdiction under the principle of universality and jurisdiction in respect of international law crimes. According to him jurisdiction under the universality principle is exercised when a state asserts jurisdiction to try common crimes (crimes commonly recognised by all civilized nations) such as murder. Other international law crimes are, however, not necessarily common crimes according to national legal systems.

¹¹¹ *Ibid.*

¹¹² International Law Association: Committee on International Human Rights Law and Practice “Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences” (2000) *London Conference* at 3.

¹¹³ At 3-4 of the report.

What crimes can attract universal jurisdiction

The crimes discussed by the committee in which case it is permissible (not yet obligatory at international law) for all states to exercise universal jurisdiction are

- *Genocide* – Although the 1948 Genocide convention does not specifically provide for the exercise of universal jurisdiction, it was suggested that it is widely accepted that the offence of genocide is subject to universal jurisdiction as a matter of customary international law.¹¹⁴
- *Crimes against humanity* – Article 7 of the Statute of the International Criminal Court (ICC) defines these crimes as “including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance and apartheid ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.’ No connection with an armed conflict is required.” Although the Statute of the ICC does not confer universal jurisdiction on individual states, it was once again suggested that customary international law provides for such practice.¹¹⁵
- *War crimes* – Two categories are discerned: “[G]rave breaches of the four Geneva Conventions of 1949”, including “wilful killing, torture or inhumane treatment, and wilfully causing great suffering”; and “serious violations of Common Article 3 of the Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts not of an international character.” In the case of the former, “[t]he exercise of universal jurisdiction [by parties to the Conventions] is not permissive but clearly mandatory.” In the case of the latter, it was remarked that such war crimes were traditionally not subjected to universal jurisdiction, but that the situation has changed according to recent state practice. Attention is also drawn to the fact that Article 8 of the Statute of the ICC which defines a longer list of war crimes, which will undoubtedly be recognised as crimes under customary international law with the principle of universal jurisdiction as its concomitant.¹¹⁶
- *Torture* – “Under the UN Convention against Torture, a state party is required to submit the case of an alleged torturer found in its territory to its competent authorities for the purpose of prosecution, if it does not extradite him. ... The obligation is limited to persons found in a state’s territory and therefore does not go as far as the Geneva Conventions which contain a duty to search for persons even when they are outside the territories of states parties. ... States not parties to the convention against Torture are entitled, but not obliged, to exercise universal jurisdiction in respect of torture on the basis of customary international law.”¹¹⁷
- *Other crimes* – The Committee seemed to recognise a dualistic approach to the relationship between international and national law by stating: “*By its very nature, the principle of universal jurisdiction can apply only in a number of instances. ... Nevertheless, the number of offences that are subject to universal jurisdiction in international law is likely to continue to increase. ... ‘forced disappearances’ (on a scale not amounting to a crime against humanity) has recently been identified as a crime subject to universal jurisdiction ...*”¹¹⁸

The need for and obstacles to the exercise of universal jurisdiction

After drawing a distinction between domestic (or national) courts exercising universal jurisdiction and International Criminal Tribunals like the International Criminal Court (ICC), which will only be able to exercise jurisdiction on basis of the territoriality and active personality principles, the Committee remarks that the gap can only be filled through the

¹¹⁴ At 5 of the report.

¹¹⁵ At 5-6 of the report.

¹¹⁶ At 6-7 of the report.

¹¹⁷ At 8 of the report.

¹¹⁸ At 8-9 of the report. Italics added.

exercise of universal jurisdiction by national courts.¹¹⁹ The Committee also discuss the following obstacles to the exercise of universal jurisdiction

- *Failure to incorporate crimes under international law [into national law]* – States, as a matter of practice, were reluctant to provide for universal jurisdiction in the absence of specific permission in international law. When asserting universal jurisdiction, states use mainly two methods: firstly, domestic legislation merely provides in general terms that crimes are subject to universal jurisdiction when the state is under international obligation to do so; and secondly, states under their domestic laws specifically define in precise terms which offences are subject to universal jurisdiction. (It is against this background that the reference to international law crimes in section 35 (3) (1) of the FC has to be investigated.)¹²⁰
- *Lack of specialised institutions* – As investigating and prosecuting crimes on the basis of universal jurisdiction requires specialised knowledge and skills regarding international criminal law and procedure, the lack of specialised institutions might pose a threat to the assertion and exercise of universal jurisdiction.¹²¹
- *Immunities* – The committee stresses that immunity on the basis of actions committed in official capacity is not available in most instances and, therefore, this should not pose any real threat to universal jurisdiction.¹²²
- *Amnesties* – The committee agreed in essence with domestic decisions like AZAPO-II¹²³ and opinions by Dugard¹²⁴ that amnesty like those under the truth and reconciliation process in South Africa is not incompatible with international law, and that even Protocol II to the Geneva Conventions provides for amnesty. However, the Committee was careful to point out that domestic amnesties, whilst not incompatible with international law, lack extra-territorial effect, meaning that another state may still exercise universal jurisdiction in the case of amnesty provided for by the territorial state.
- *Evidentiary problems* – When a state other than the one enjoying territorial jurisdiction exercises universal jurisdiction, the territorial state might be reluctant to be of assistance and the trying state might suffer grave difficulties in obtaining and presenting evidence necessary to secure a conviction. This is typified as the greatest difficulty in bringing proceedings under universal jurisdiction.¹²⁵
- *Ineffective international supervision*
- *Abuse of universal jurisdiction*

The Committee then provides a list of nine conclusions and recommendations of which the following three are of utmost importance for consideration in the South African perspective

- “1. Gross human rights offenders should preferably be brought to justice in the state in which they committed their offences. In the absence of such proceedings, full advantage should be taken of the possibility to bring perpetrators to trial on the basis of universal jurisdiction. The need to exercise such jurisdiction is not obviated by the existence of international criminal tribunals.
2. ...
3. ...

¹¹⁹ At 9-10 of the report.

¹²⁰ At 9-12 of the report.

¹²¹ At 12-13 of the report.

¹²² At 13-14 of the report.

¹²³ *Supra* (n21).

¹²⁴ J Dugard *op cit* (n24) at 267; and J Dugard Dealing with crimes of the past. Is amnesty still an option? (2000) 12 *Leiden Journal of International Law*.

¹²⁵ At 16-17 of the report.

4. No immunities based on the defendant's serving or having served in any branch of government apply in respect of gross human rights offences subject to universal jurisdiction.
5. The obligation or the entitlement of states to bring perpetrators of gross human rights offences to justice on the basis of universal jurisdiction is not affected by amnesties awarded in the territorial state. *Individual amnesties awarded as part of a legitimate legal process may however be taken into account by a prosecutor when exercising his or her discretion whether or not a prosecution would be in the public interest (assuming there is no treaty obligation to prosecute) and by a court when imposing sentence.*¹²⁶

Especially the 5th recommendation, as quoted, places the value of the amnesty process in South Africa as discussed, *supra*, in better perspective than did the *AZAPO-II* decision. However, it should be clear from the inclusion of international law crimes in the national definition of the *nullum crimen sine lege* principle¹²⁷ that the Constitutional Assembly intended to award national courts ordinary criminal jurisdiction to try such crimes, provided that the offence tried was an offence under international law at the time it was committed or omitted. It will therefore not be necessary for a South African court to assume *universal jurisdiction* in respect of international crimes that can be tried under one of the other principles, for example that of territoriality.

It therefore also follows naturally that, where amnesty has been granted in terms of the truth and reconciliation process, the validity of which was placed beyond doubt by *AZAPO-II*¹²⁸, normal prosecution at national level will not be possible. According to the 5th recommendation, *supra*, however, another state may still assume universal jurisdiction in order to try individuals for international crimes, regardless of whether they received amnesty in South Africa.

Although amnesty at national level might not be a bar to another state assuming universal jurisdiction, the amnesty process clearly intended to indicate to the whole world that South Africa's *bona fides* to promote peaceful and harmonious transition from the old to the new in the spirit of the global community (which rates international peace and stability foremost¹²⁹). Although successful applicants for amnesty, might just be favoured by the italicised proviso in the 5th recommendation of the Committee quoted, *supra*, this will not necessarily be the case. It is made clear that national amnesty does not preclude another state from assuming universal jurisdiction.

¹²⁶ At 20-22 of the report. Italics added. The rest of the recommendations omitted.

¹²⁷ Section 35 (3) (l) of the FC.

¹²⁸ *Supra* (n21).

¹²⁹ Dugard *op cit* (n29) Chapter 21.

Those who decided not to apply for amnesty, whilst they are (or may be) guilty of gross human rights violations, therefore, did so at their own peril. They clearly placed themselves beyond the protection afforded at national level as well as beyond the possibility that the proviso in the 5th recommendation of the Committee, *supra*, be taken into account during a decision whether to prosecute or sentence in foreign national courts assuming universal jurisdiction or in international courts such as the envisaged ICC. The latter type of prosecution will, however, not necessarily be under the principle of universal jurisdiction.¹³⁰

2.2.4 The Booyesen-Dugard debate revisited and the retrospectivity of section 35 (3) (l)

Reference has frequently been made in this dissertation to the debate between the Booyesen-school on the one hand (that customary international law did not automatically form part of South Africa's national law, although it was available for use by the courts as *lex fori* in certain circumstances); and the Dugard-school on the other (that international law formed part of the law of the land and that courts could invoke it, subject only to certain exceptions).¹³¹ This debate might still prove to be alive and well when the retrospectivity of section 35 (3) (l) is considered.

According to the Booyesen school, the argument would probably be that customary international criminal law did not automatically form part of South African law, and that, to make customary international law crimes part of national law, legislation would have been needed to outlaw such crimes. As, for example, the crime of apartheid was neither legislatively outlawed, nor recognised as binding customary international law, someone could therefore not have been prosecuted or convicted for that crime pre-1994.

It is generally accepted that the Constitution (and all the positive or negative rights and obligations created by it) does not operate retroactively¹³², unless the interests of justice require otherwise in respect of pending legal proceedings that commenced before the Constitution came into effect.¹³³ As indicated, *supra*, the *nullum crimen sine lege* principle provides, *inter alia*, that criminal conduct may not be proscribed retroactively.

Moreover, a study of the definitions of and possible punishment for the crime of apartheid in the Conventions and customary international law on the subject will prove that the crime and punishment are vaguely and ambiguously formulated.¹³⁴ A normal citizen in the pre-1994

¹³⁰ Dugard *op cit* (n29) 151- 4.

¹³¹ E.g. Chapter I *supra*.

¹³² J De Waal *et alii* *The Bill of Rights Handbook* (1998) 53 – 59.

¹³³ *Ibid.*

¹³⁴ Van Wyk *op cit* (n89) 77-90.

South Africa would, therefore, so goes the argument, not necessarily have known that his or her conduct was unlawful and punishable as crime, all the more so because his/her conduct was sanctioned by the state. Therefore, it may be argued by the Booysen proponents that section 35 (3) (l) of the FC now re-defines the *nullum crimen* principle by recognising crimes under international law that were not part of South African criminal law before the Constitution took effect, and that prosecution for international law crimes that were committed before that date is barred by either the rule against retrospective effect of the Constitution and/or the purpose of the *nullum crimen sine lege* principle.

Although this proposition sounds logical, it loses sight of the addition of the words “at the time it was committed or omitted” in section 35 (3) (l). In so doing, it is submitted the drafters of the FC clearly provided for retrospective operation of this section that re-defines the *nullum crimen* principle. Otherwise one would have expected the drafters of the Constitution to add something like: “provided that no one may be convicted of an offence under international law committed before this Constitution took effect.”

De Waal *et alii* seem to agree that section 35 (3) (l) provides for retrospective operation of legislation which may be passed in respect of the prosecution for international law crimes¹³⁵, although they are of the opinion that other enabling legislation than the Constitution, providing for such jurisdiction, will still be needed before a criminal court in South Africa will assume such jurisdiction.¹³⁶ This part of their argument does not ring true in the light of the plain language used in the text. The plain language of section 35 (3) (l) clearly recognises the existence of international law crimes and includes them in South African national law for purposes of the *nullum crimen sine lege* principle. No enabling legislation is needed to obtain this effect. Moreover, section 232 declares customary international law to be part of South African law, meaning that at least customary international criminal law forms part of South African criminal law. Coupled with the clear intention that the principle enunciated in section 35 (3) (l) should operate (or be recognised to apply) retrospectively, it would seem that individuals may be prosecuted for (and convicted of) customary international law crimes committed (through act or omission) before the FC came into effect.

On the other hand, the Dugard proponents may argue that customary international criminal law, like all other customary international law, formed part of national law, and that, because it was never expressly excluded through legal precedent, the courts could have applied it had they been called upon to do so.

¹³⁵ *Op cit* (n132) 460.

¹³⁶ *Ibid.*

Although Dugard, in the most recent edition of his textbook¹³⁷, which includes a discussion of the provisions of the FC, still states that the *nullum crimen sine lege* principle would probably constitute a bar to a national court assuming *universal jurisdiction* to try crimes that were not known to local criminal law in the absence of national legislation¹³⁸, it is not clear whether he reviewed the effect that section 35 (3) (1) of the FC might have on this prognosis. His old argument, that international law formed part of South African law may, as will be indicated, *infra*, still provide a basis for an assertion that the South African criminal law, as we knew it pre-1994, included international law crimes, even though they were not expressly referred to by authors of textbooks on criminal law.¹³⁹ Therefore, although tradition might be a bar to South African courts assuming *universal jurisdiction* in respect of international crimes, it might not necessarily be a bar to courts assuming *normal criminal jurisdiction* over customary international crimes committed in South Africa on the basis of territoriality.

For the same reason, however, it is submitted, the *nullum crimen sine lege* principle will no longer constitute a bar to South African courts assuming universal jurisdiction under the principle of universality if called upon to do so. If international law crimes are recognised as national criminal law, the principle of legality is satisfied. It is therefore conceivable that individuals from other countries may legitimately be charged and tried for international law crimes committed in neighbouring countries, provided that the individual is legitimately brought into South Africa and before court. However, although the High Courts of South Africa possess the inherent power to assume universal jurisdiction when called upon to do so, it is dubious, in the light of past traditions of particularly territorial exercise of jurisdiction, whether courts will assume universal jurisdiction without enabling legislation. Lower courts, as creatures of statute, have only territorial jurisdiction, and in their case, enabling legislation will be necessary.

One should also remember that, although the prosecution of customary international law crimes committed before 1994 is controversial in South Africa, customary international law was recognised by section 231 (4) of the IC as law in South Africa. Section 232 of the FC reaffirms this position. Therefore all customary international law crimes are recognised by South African criminal law at least since 1994 and prosecution for such crimes committed

¹³⁷ *Op cit* (n29).

¹³⁸ *Id* 142.

¹³⁹ It was noted, *supra*, that some textbook writers do not discuss the international law crime of piracy, but that it is still recognised as a common law crime in South Africa seems beyond doubt. Therefore, the mere fact that international law crimes are not discussed by textbook writers cannot, in itself, mean that the crime wasn't recognised under criminal law.

after 1994 will be perfectly in order. Although, arguably, the international crime of apartheid may form part of the *corpus* of customary international law, it was created by treaty. It was pointed out in Chapter III, *supra*, that treaty law forms part of national law only if incorporated by means of legislative act, unless it is a self-executing treaty or where it (or a UN Resolution) has developed into a rule of customary international law, which would then be applicable in terms of Section 232. As pointed out by Dugard¹⁴⁰, South Africa is currently considering accession to the Convention on the Suppression and Punishment of the Crime of Apartheid. If that happens, and if the other treaties creating international law crimes are entered into force, all conventional international crimes binding on South Africa will also be prosecutable in South Africa.

As the horizons of national criminal law have broadened considerably, a need clearly exists for at least one authoritative treatise on international law crimes from a South African perspective. Both Burchell¹⁴¹ and Snyman¹⁴² include reference to section 35 (3) (l) in their latest works but, regrettably, fail to address the key issue, namely the effect that the recognition of international law crimes may have on the interpretation of this principle, for example

- whether customary international law crimes (especially the crime of apartheid) formed part of South African criminal law pre-1994 (in other words whether they support the Dugard school of thought); and
- if not (in other words if they support the Booysen argument), whether section 35 (3) (l) operates retrospectively to include prosecution for crimes committed pre-1994; or
- whether it operates retrospectively only until 1994 when section 231 (4) of the IC declared customary international law (and therefore the crime of apartheid) to be part of South African law; and
- attempting to define international law crimes and the possible punishment therefor; etc.

Although it is dubious whether a court (or author) under apartheid would have recognised the possibility that international crimes formed part of national criminal law, it is an open question whether this will still be the position today. It is, however, submitted that a purposive and generous interpretation (and even a mere literal one) will conclude that section 35 (3) (l) provides for retrospective national criminal jurisdiction to try international law crimes even though they were, strictly speaking, not recognised by national law at the time of commission. It is hard to see that the drafters of the FC had another purpose in mind when they decided to frame the provision in the way they did.

¹⁴⁰ *Op cit* (n29) 146.

¹⁴¹ *Op cit* (n75).

¹⁴² CR Snyman *Strafreg* 4th Ed (1999).

It is further submitted that, by inserting the words “at the time it was committed or omitted” without any qualification such as that the provision is only applicable to crimes committed post-1994, the drafters of the FC (perhaps unwittingly), lent support for the Dugard school of thought, namely that customary international criminal law was part of the pre-1994 South African criminal law. It should be kept in mind that section 35 (3) (1) is part of the Bill of Rights and so also subject to section 39. A court will therefore have no choice but to consider all available international law on the subject in interpreting the section. It is unlikely that a court, in promoting the spirit, purport and objects of the Bill of Rights in terms of section 39 (2), will come to a conclusion other than the one advocated above.

As section 35 (3) (1) can be described as ambiguous (in the sense that it is arguably not entirely clear whether it has retrospective effect), section 233 may also be invoked in interpreting it. A proposition such as the one advocated above will also most certainly be “any reasonable interpretation of the [Constitution] that is consistent with international law” which a court “must prefer ... over any alternative interpretation that is inconsistent with international law” according to section 233.

The only possible objection against such an interpretation may be that it frustrates the object and purpose of the *nullum crimen* principle, namely that the law regulating criminal conduct should be accessible to the ordinary person so that he or she can regulate his or her conduct accordingly.¹⁴³ In other words, retrospective application of the principle would offend against the *ius certum* and *ius strictum* principles.¹⁴⁴ However, as pointed out, *supra*, for purposes of the Nuremberg trials it was found to be irrelevant whether municipal legal systems recognised crimes against humanity as crimes before they were committed, and, accordingly, the perpetrators could be prosecuted and punished at international law. It is submitted that exactly the same argument applies to the South African situation, with special reference to the crime of apartheid. No legal system or superior order can justify the type of conduct denounced as the crime of apartheid; nor is any positive law required to proscribe such acts.

It is here of importance to take note of developments in international law with reference to retrospective proscription of criminal conduct. In both *CR v United Kingdom* and *SW v United Kingdom*¹⁴⁵, it was complained to the European Court on Human Rights¹⁴⁶ that common law

¹⁴³ Burchell and Joubert *loc cit* (n82).

¹⁴⁴ Snyman *loc cit* (n80).

¹⁴⁵ Both being judgments by the European Court of Human Rights delivered on 22 November 1995 – the reference and contents of the judgments obtained from L Johannessen “Foreign Cases: Prohibition of retrospectivity / marital rape: Article 7 (1) of the ECHR” (1996) 12 *SAJHR* at 340-343 because the reports on the matter could not be accessed.

development by means of judicial interpretation¹⁴⁷ of a rule of marital immunity for rape, through which the rule was found to have been whittled away over the past forty years to the extent that it no longer existed, offended against article 7 (1) of the ECHR. The Court dismissed both complaints (in separate judgments delivered on the same day) on the basis that it had to be recognised that in any system of law there is “an inevitable element of judicial interpretation, elucidation of doubtful points and adaption to changing circumstances”¹⁴⁸, and that it is not outlawed by article 7 (1) of the ECHR, “provided that the resultant development was consistent with the essence of the offence and could reasonably have been foreseen.”¹⁴⁹ In this light it is submitted that a fair argument can be made in the South African context that the international prohibition of the crime of apartheid is a sound development of the customary international law crime against humanity.¹⁵⁰

Moreover, as indicated, *supra*, there is room for a view that not only the crime against humanity, but also the crime of apartheid has developed into a *jus cogens* to which persistent objection cannot have the effect of exculpating a state (and individuals) from prosecution and punishment.¹⁵¹ It should also be remembered that at the time when South Africa was a persistent objector to the recognition of the crime of apartheid, a government that had not been democratically elected ruled the country. The state’s persistent objection in order to denounce the recognition of the crime as binding at international (and therefore national) criminal law was in itself, therefore, an illegality *per se*. There is therefore no reason why, if Dugard’s proposition that customary international law was part of pre-1994 South African law is accepted, the mere fact that South Africa objected to the idea of apartheid being a crime should have resulted in it not being recognised by international (and national) law. Just like crimes against humanity and war crimes, it is submitted, most inhumane actions proscribed as the crime of apartheid are *mala in se*, and no positive law is necessary to proscribe such actions before individuals are placed in a position to know (or at least suspect) that they might be punished therefor.

Gross human rights offenders should therefore, before they committed the offences, have acquainted themselves with international legal standards in this regard. A failure to have done

¹⁴⁶ The matters were referred to the Court by the European Commission on Human Rights upon complaints directed to it after unsuccessful appeals to the English Court of Appeal – in both cases – and the House of Lords - in CR’s case.

¹⁴⁷ Which always works retrospective – Snyman *loc cit* (n80).

¹⁴⁸ Johannessen *op cit* (n145) at 342.

¹⁴⁹ *Ibid.*

¹⁵⁰ In Article I 1. of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1974, *supra* (n99), it is stated *inter alia* that: “The States Parties to the present Convention declare that *apartheid* is a crime against humanity ...”

¹⁵¹ Dugard *loc cit* (n102).

so might lead to a finding of ignorance of the law (lack of *mens rea*), but whether this will be recognised at national (as opposed to international) criminal law as a valid defence is another matter altogether. It is however submitted that no person (but especially government officials and members of the security forces) from the old South Africa can with confidence and a clear conscience argue that he/she did not know (or suspect) that apartheid was abhorred by the international order to the extent that it was viewed as a crime. There is simply too much literature on this subject.

It would therefore seem that a monist proposition, where international law is regarded as the supreme law, is in order with reference to international criminal prosecutions from a South African perspective.

If, however, the courts elect to find that international law crimes were not part of national criminal law pre-1994, and that prosecution for such crimes committed pre-1994 is still barred by the *nullum crimen sine lege* principle and presumption against retrospectivity of the Constitution, such argument will only be true with reference to crimes committed pre-1994. As pointed out, *supra*, customary international law forms part of South African law at least since 1994. Therefore, customary international criminal law is part of South African law, and the so-called "closed-book" common law crimes in South African law were extended to include customary international law crimes. This will certainly pose a challenge for criminal law authors to include a chapter thereon in forthcoming editions (or revisions) of their textbooks on the subject.

2.2.5 Conclusion

For the reasons advanced above, those who did not apply for amnesty (or those to whom it was not granted) whilst they are (or might be) guilty of gross human rights violations might perhaps find, to their surprise, that they are prosecuted in national criminal courts under the redefined principle of legality as soon as the truth and reconciliation process has been completed¹⁵², and that courts will automatically assume and exercise such jurisdiction in

¹⁵² As a matter of interest, according to the Afrikaans newspaper *Beeld* of 30 October 2000 (at 9) the National Directorate of Public Prosecutions is preparing itself to start prosecuting individuals who have not applied for or received amnesty for gross human rights transgressions committed under apartheid as soon as the truth and reconciliation process is completed. This report was repeated in *Beeld* of 2 November 2000 (at 3). Most of these prosecutions will probably be for crimes that are already included in the list of common law crimes such as murder, assault and kidnapping (such as is the case with the Wouter Basson trial where he is tried for known common law crimes only), but it is imaginable that prosecution for crimes such as unfair racial discrimination (a species of the crime of apartheid) are also sought. It is, however, dubious whether such a decision will be good policy in the light of South Africa's statistics of serious crime rate. The police and the courts can be utilised much

terms of section 35 (3) (l). If that does not happen, national legislation may still confer courts with such jurisdiction and, in the light of section 35 (3) (l), such legislation will presumably be perfectly constitutional and valid even if it operates retrospectively.¹⁵³ And if this too does not happen, another state may still assume universal jurisdiction to prosecute, and such individuals will especially have to be careful not to travel abroad. It would therefore seem that section 35 (3) (l) of the FC is a “can of worms”, just waiting to be opened. It will be interesting indeed to see what the courts make of it.

more productive to focus on the present and future protection of the citizens of the country, than to try people for human rights violations that were not recognised as such when they were committed.

¹⁵³ De Waal *et alii loc cit* (n132).

CHAPTER VI

EPILOGUE

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From the preceding chapters it should be clear that 1994 evidenced a watershed shift from a perspective that international law was largely regarded as subordinate – both conceptually and in practical application – to all sources of South African national law¹, to a perspective that international law is regarded as a higher law than South African common law and subordinate legislation – subject only to the Constitution and constitutional Acts of Parliament. Given the solemn undertakings in the Preamble to the FC and most of the international law friendly provisions therein, it is clear that greater harmonization between national and international law than ever before is both envisaged and facilitated.²

Constitutional interpretation

As pointed out above, the main problem with conceptualising the international law terminologies in the post-1994 Constitutions and in determining the level of application of international law at national level manifest themselves in interpretation of the constitutional text.³ Constitutional interpretation has to be done against the background that the IC evidenced a decisive break with the past, giving rise to post-modernistic realism in the field of constitutional interpretation. However, the courts, still burdened under legal positivism and literalism from the pre-1994 dispensation, opted for a compromise approach to constitutional interpretation, namely that interpretation of constitutional texts should still be rooted in the ordinary and plain meaning of the text, but that the intention of the constitutional drafters should be ascertained where necessary and, in the case of ambiguity, a generous and purposeful interpretation method bordering on judicial law-making may (or rather should) be employed.⁴ This view has also influenced the courts' views regarding normal statutory interpretation in the light of the Constitution. In *Govender v Minister of Safety and Security*⁵ the Court said

“This method of interpreting statutory provisions under the Constitution [in terms of Section 39 (2) or 233 of the FC?] requires a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making.”⁶

Therefore, Whenever an international law friendly provision in the Constitution is found to be ambiguous (or capable of more than one interpretation), a court should attempt to

¹ See Chapter I *supra*.

² Chapters II-V *supra*.

³ Chapter II *supra* under 1.3.

⁴ *Ibid.*

⁵ 2001 (2) SACR 197 (SCA).

⁶ At par [11] of the judgment.

contextualise the meaning of the phrase both intra- and extra-textually and, where necessary, generous judicial law making should be practised so as to afford individuals the largest possible protection of rights. Naturally the drafting history of the new constitutional dispensation⁷ and the undertakings in the Preamble to the FC⁸ should always be borne in mind during this process. If this is done consistently, international law will continue to exert an influence on the national law of South Africa. However, in some instances⁹, even ingenious interpretation techniques will not necessarily lead to such influence of national law unless the international law is incorporated into national law.

Monism, dualism or harmonization

From the above it should be clear that both the post-1994 constitutions still contain traces of dualism, even though monism is advanced in some of the international law friendly provisions. Greater harmonization was envisaged by the drafters of both constitutions, but the lack of knowledge of international law and terminology and political compromise have led to sloppy drafting of some provisions, resulting in interpretational difficulties and survival of dualism as concept in the South African dispensation. However, as pointed out above, post-modernist interpretation techniques might, in some instances¹⁰, lead to an acceptance of monism, as opposed to dualism, which might, in turn, lead to a need for re-conceptualisation of the relationship/application theory of harmonization. With reference to some of the provisions in their current form¹¹, however, monism or greater harmonisation seems to be no more than a far-fetched dream.

Determining the meaning and scope of international law in a post-1994 South Africa

The fact that terminology and grammar may bedevil the interpretation process to determine the true meaning and scope of international law from a South African perspective according to terminology in the post-1994 constitutions has been thoroughly investigated in Chapter II, *supra*. Whilst it should be welcomed that the drafters of the FC opted to use the term “international law” as opposed to “public international law”¹², they could have been more clear on certain issues, such as which parts (sources and branches) of international law are included in the various provisions using the term¹³; and whether only binding or also non-binding (“soft”) law is included in the term¹⁴. Likewise they could have been more careful in

⁷ Chapter II *supra* under 1.2.

⁸ Chapter II *supra* under 2.1.

⁹ E.g. the application of treaty law at national level.

¹⁰ E.g. in the “interpretation provisions” – Chapter IV *supra*.

¹¹ E.g. by requiring incorporation of treaty law – Section 231 of the FC; and by subjecting customary international law to the Constitution and constitutional Acts of Parliament – Section 232 of the FC.

¹² Chapter II *supra* under 2.2.2.

¹³ Chapter II *supra* under 2.2.1.

¹⁴ Chapter II *supra* under 2.2.3.

their choice of terminology, such as “treaty” *versus* “international agreement”¹⁵; the terminology used to distinguish between treaties that require ratification/accession and those that do not¹⁶; “self-executing treaties”¹⁷; “principles of international law regulating the use of force”¹⁸; and “international obligation”.¹⁹ It is, however, submitted that, if the arguments and suggestions advanced in Chapter II, *supra*, are accepted, the meaning and scope of international law from a South African perspective can be readily ascertained without it being necessary to change the Constitution.

Application – treaty law

Subject only to the exceptional use of unincorporated treaties to interpret and influence national law²⁰, and the fact that “self-executing treaties” that have been ratified/acceded to by Parliament automatically become law in South Africa²¹, all other treaties have to be incorporated into national law before their provisions can be applied as law.²² This requirement draws no distinction between treaties to which South Africa is a party and those to which it is not. Furthermore, UN Resolutions, even those taken by the Security Council and which are deemed to be binding, have to be legislatively incorporated before they can become law in South Africa, because no constitutional or other statutory measures regulate their position. It has been argued above that, given parliamentary involvement in the ratification/accession process and the possibility of parliamentary and judicial control over executive action in terms of the Constitution, the distinction between treaty (to which South Africa is a party) and custom for purposes of national application thereof is no longer justified.²³

Furthermore, in order to ameliorate the need for legislative incorporation of treaties in some instances, the drafters de-entrenched the incorporation requirement in regulating the actions of the security forces and, in the process, distinguished between binding and non-binding treaty law so that only binding treaties should be observed in terms of Section 199(5) of the FC.²⁴ It is not clear why treaties regulating the actions of security forces become law upon

¹⁵ Section 231 of the FC. Chapter II *supra* under 2.3.

¹⁶ I.e. by juxtaposing treaties of “technical, administrative or executive nature” and treaties which do not require either ratification or accession with all other treaties – Section 231(3) of the FC. See the discussion in Chapter II *supra* under 2.3.2.

¹⁷ Section 231 (4) of the FC. See the discussion in Chapter III *supra* under 2.2.2.

¹⁸ Section 200 (2) of the FC. Chapter II *supra* under 2.5.

¹⁹ Section 201 (2) (c) of the FC. Chapter II *supra* under 2.6.

²⁰ Chapter III *supra* under 2.3.

²¹ Chapter III *supra* under 2.2.2.

²² Section 231 (4) of the FC.

²³ Chapter III *supra* under 2.5.

²⁴ See the discussions in Chapter II *supra* under 2.3.1 *b.*) at 89-90 and under 2.4 *a.*) at 111 as well as in Chapter III *supra* under 4.2.2 *b.*) at 180.

signature, ratification or accession for purposes of Section 199 (5) of the FC, but that they and other treaties do not become law for other purposes unless they are specifically incorporated.

It is clear from the above that the FC follows a strict dualist approach regarding treaty law. Section 231 of the FC can, therefore, be regarded as a step backward from the vision of greater harmonization of international and national law, especially regarding the position of treaties and UN Resolutions that are binding on South Africa.

A further point of concern is that the validity of the incorporation of treaties into national law must be determined according to the procedure that governed incorporation at the time, and a distinction can be drawn between the pre-1994 period, the period under the IC and the period under the FC.²⁵ This complicates the process of determining whether treaty law is directly applicable as law. The introduction of the vague, undefined concept of “self-executing treaties”, which had already provided problems in other jurisdictions, complicated matters even further.

Therefore, although the status of treaty law in the pre-1994 period was considered the easier of the two branches²⁶ of international law to ascertain and apply at national level, the drafters of the post-1994 constitutions succeeded in making it much more difficult. This, so it is submitted, supplies reason enough to change the Constitution to conform to modern calls for greater harmonization between the two systems of law.

Application – customary international law

First Section 231 (4) of the IC, and then Section 232 of the FC expressly incorporated customary international law into South African national law as required by the English theory of “transformation”²⁷, subject only to the Constitution and constitutional Acts of Parliament. This was clearly an attempt to settle the Booyesen/Dugard debate as to whether customary international law forms part of national law, but it did so ineffectively because it does not cater for the position of customary international law vis-à-vis national law in the pre-1994 period.²⁸ Nevertheless, the express incorporation of customary international law into national law, subject only to the Constitution and constitutional Acts of Parliament goes a long way towards harmonising the two legal systems and is to be welcomed. It could, however, cause problems in the recognition and application thereof, especially in the lower courts and other inferior tribunals or forums for want of training in international law and virtual non-

²⁵ See the discussion in Chapter III *supra* under 2.2.2.

²⁶ The other being customary international law.

²⁷ Chapter I *supra* under 2.4.2 b.) at 35.

²⁸ See the discussion in Chapter III *supra* under 3.3.6 at 172-3.

accessibility of customary international law to the ordinary legal practitioner. As indicated in Chapter III²⁹, this provision creates considerably fewer problems in ascertaining the contents of customary international rules and their application at national level, as does the treaty provision.

*Application – international law and national security*³⁰

As it is mainly in the maintenance of national security that the apartheid government ignored international law and, especially IHRL, all international lawyers have indeed, welcomed these provisions. It is also a step in the right direction that the FC does not limit the observance and application of international law to the military, as did the IC. All security forces, including the military, and their superiors are expressly included in these provisions. Whilst sloppy drafting in some of the provisions can be criticised for their lack of clarity as to what international law should be observed, these provisions³¹ are most significant from a policy point of view to demonstrate a certain predilection for the law of nations as undertaken in the Preamble of the FC. As Dugard said

“First, they inform politicians, lawyers and the public of South Africa that the new constitutional state, unlike the apartheid state, aims to conform to the prescriptions of the international legal order. Secondly, they inform the international community of South Africa’s new commitment to international law and give notice of the manner in which South Africa will bind itself in future relations with states.”³²

They will also serve as an important reminder to the security forces and their overseers that their non-conformity to international legal principles might, apart from the state incurring international liability, lead to possible criminal and civil liability in local, foreign or international courts or tribunals. Furthermore, members of the security forces are now to be instructed and educated according to international legal standards, and a failure to do so might lead to appropriate action.

Another important fact should not be overlooked, which is clear from especially Sections 200 (2) and 201 (2) (b) and (c) of the FC, is that the Constitution authorises the use of the defence force primarily for defensive purposes and in accordance with the international principles regulating the use of force. The Constitution, therefore, observes and obeys the international prohibition on the use of force under unauthorised circumstances. The Constitutional Court will most probably, invalidate any executive action in contravention thereof. The Defence Force and members of the military, therefore, need not obey orders given in contravention of international legal standards.

²⁹ *Supra* at 173.

³⁰ Chapter III *supra* under 4 at 173-187.

³¹ Sections 198 (c), 199 (5), 200 (2) and 201 (2) of the FC.

³² J Dugard “International law and the ‘final’ Constitution” (1995) 11 SAJHR 241 at 241.

Indirect application – the “interpretation sections”

Sections 39 and 233 of the FC certainly constitute the most profound change from the pre-1994 position. International law is allowed to influence the interpretation and formulation of a national human rights jurisprudence in line with international standards, and, whenever the interpretation of human rights are in issue, courts, tribunals and forums must take relevant international law (even “soft” law) into account in terms of Section 39 (1) (b). It must also be taken into account when considering other human rights legislation, and a court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (which includes the undertakings to observe and recognise international standards in the Preamble) in terms of Section 39 (2) of the FC.

Whenever legislation is capable of more than one interpretation, the one consistent with international law, and the other inconsistent therewith, a court must choose the interpretation which is consistent with international law above any other in terms of Section 233. This provision, like Section 39, constitutes a giant leap towards the advancement of monism as relationship theory and certainly envisages (or rather mandates) greater harmonization between the two systems of law.

Even though Section 39 (2) seems to be either duplicating or contradicting Section 233, there is a clear difference between the two provisions. The former mandates courts, tribunals and forums to take all international law, including “soft” law into account when interpreting human rights legislation, although a court is not bound to follow it, whilst the other mandates courts to interpret legislation so as to conform to international law where such interpretation is possible. Therefore, as argued in Chapter V, *supra*, only binding international law is applicable in the interpretation process envisaged by Section 233 of the FC.

These provisions clearly promotes greater harmonization of the two systems of law and were widely welcomed as pointed out in Chapter V, *supra*. No change is needed in this regard.

*Miscellaneous provisions*³³

As pointed out above, these are the provisions that have proved (and are still bound to prove) the most controversial amongst the international law friendly provisions in the post-1994 constitutions. The **HRC** has been constituted, but is still to prove itself in the monitoring and management of human rights observance. The debate about the legitimacy of the **amnesty legislation** is already in full flight, but no new actions have been brought. The debate about whether **international law crimes**, such as the international crime of apartheid, committed

³³ Chapter V *supra*.

before 1994 are prosecutable either nationally or internationally, is about to start. It would, therefore appear that the can of worms presented by these provisions in the IC and FC has not yet been opened, or, if opened, the worms have not yet fully emerged.

In conclusion

Although a giant leap has been taken in the right direction of harmonising the two systems of law to greater extent, South Africa's perspective of international law still has wide scope for development, and we continue to live in interesting times.

ANNEXURE 1

(Quoted from W Amien & P Farlam (eds) *Basic human rights documents for South Africa* (1998) 5 Issues in Law, Race and Gender (Law Race and Gender Research Unit - UCT)

Article 1 of the International Covenant on Civil and Political Rights (ICCPR)

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

Article 20 of the African Charter on Human and Peoples' Rights (“Banjul Charter”)

“1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.”

ANNEXURE 2

(Quoted from W Amien & P Farlam (eds) *Basic human rights documents for South Africa* (1998) 5 Issues in Law, Race and Gender (Law Race and Gender Research Unit - UCT)

Article 15 of the International Covenant on Civil and Political Rights (ICCPR)

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

Bibliography

Books, thesis and treatises

- M Akehurst: *A Modern Introduction to International Law* 6th Ed (1987)
- P Alston & J Crafford (eds): *The Future of UN Human Rights Treaty Monitoring* (2000)
- W Amien & P Farlam (eds): *Basic human rights documents for South Africa* (1998) 5
Issues in Law Race and Gender (Law, Race and Gender
Research Unit – UCT)
- H Booysen: *Volkereg en sy verhouding tot die Suid Afrikaanse reg* 2nd Ed
(1989)
- M Bos: *A Methodology of International Law* (1984)
- NJ Botha: *The History, Basis and Current Status of the Right or Duty to
Extradite in Public International and South African Law*
Doctoral Thesis UNISA (1992)
- JL Brierly: *Law of Nations* 6th Ed (1963) - H Waldock ed
- I Brownlie: *Principles of Public International Law* 5th Ed (1998)
- JM Burchell: *South African Criminal Law and Procedure Vol I* 3rd Ed
(1997)
- G Carpenter (ed): *SUPREMA LEX Essays on the Constitution presented to
MARINUS WIECHERS* (1998)
- GM Cockram: *The Interpretation of Statutes* 3rd Ed (1983)
- J De Waal, J Erasmus &
I Currie: *The Bill of Rights Handbook* (1998)
- JC De Wet & S Swanepoel: *Strafreg* 4th Ed (1985)
- I Detter De Lupis: *The Concept of International Law* (1987)
- GE Devenish: *Interpretation of Statutes* (1992)
- J Dugard: *International Law: A South African Perspective* 1st Ed (1994)

International Law: A South African Perspective 2nd Ed
(2000)
- TO Elias: *The modern Law of Treaties* (1974)
- RA Falk: *Law in an Emerging Global Villiage: A Post-Wesphalian
Perspective* Ardsley, NY: Transnational Publishers (1998)
- L Gernandt: *The Protection of Water during Armed Conflict* LLM
(Curriculum B) dissertation UNISA (November 2000)

- HR Hahlo & E Kahn: *The South African Legal System and its Background* (1973)
- L Henkin: *The Age of Rights* (1990)
- WJ Hosten, AB Edwards,
F Bosman & J Church: *Introduction to South African Law and Legal Theory* 2nd Ed (1995)
- SP Huntington: *The Clash of Civilisations and the re-making of World Order* London: New York: Touchstone (1996)
- JJ Joubert: *Die Legaliteitsbeginsel in die Straffprosedesreg* Doctoral Thesis UNISA (1995)
- R Jennings & A Watts (eds): *Oppenheim's International Law* 9th Ed (1992) Vol I
- J Klabbers: *The Concept of Treaty in International Law* Kluwer Law International, The Hague (1996)
- WR La Fave & AW Scott: *Criminal Law USA* West Pub. Co. 2nd Ed (1986)
- AV Lansdowne & SJ
Campbell: *South African Criminal Law and Procedure Vol V* (1982)
- L Monroe (ed): *National Treaty Law and Practice* American Society of International Law (forthcoming)
- PM Mtshaulana, J Dugard
& NJ Botha: *Documents on International Law* (1996)
- T Nardin: *Law, Morality and the Relations of States* (1983)
- A Roberts & R Guelff (eds): *Documents on the Laws of War* 2nd Ed (1989)
- RP Schaffer: *A Critical Analysis of the Treaty-Making Powers of the Union of South Africa and the Republic of South Africa* – unpublished PHD thesis University of the Witwatersrand (1979)
- J Schneeberger: *A LABYRINTH OF TAUTOLOGY: The meaning of the term 'international agreement' and its significance for South African law and treaty making practice* LLM (Curriculum B) dissertation UP (April 2001)
- G Schwarzenberger & ED
Brown: *A Manual of International Law* 6th Ed (1976)
- IA Shearer (ed): *Starke's International Law* 11th Ed (1994)
- CR Snyman: *Criminal Law* 3rd Ed (1995)
- Straffreg* 4th Ed (1999)
- JG Starke: *Introduction to International Law* (1989)

- LC Steyn: *Die Uitleg van Wette* (1985)
- HA Strydom: *International Human Rights Standards Vol I (Administration of Justice)* (1997)
- AE van Blerk: *Jurisprudence: An Introduction* (1996)
- CW van Wyk: *Die Misdaad van Apartheid in die Volkereg* LLM Dissertation UNISA (1979)
- D Van Wyk *et al* (eds): *Rights and Constitutionalism: The New South African Legal Order* (1994)
- JP Verloren van Themaat & M Wiechers: *Staatsreg* 2nd Ed (1967)
- Staatsreg* 3rd Ed (1981) – M Wiechers (ed)

Articles and Essays

- A Aust: "The Theory and Practice of Informal International Instruments" (1986) 35 *ICLQ* 787
- GN Barrie: "Human rights and extradition proceedings; Changing the traditional landscape" (1998) 1 *TSAR* 125
- RR Baxter: "International law in her infinite variety" (1980) 29 *ICLQ* 550
- PN Bhagwati: "Judicial activism and public interest litigation" (1985) *Columbia Journal of Transnational Law* 561
- RC Blake: "The world's law in one country: The South African Constitutional Court's use of public international law" (1998) 115 *SALJ* 668
- H Booysen: "The South African Homelands and their Capacity to Conclude Treaties" (1982) 8 *SAYIL* 58
- "Has the act of state doctrine survived the 1993 Interim Constitution?" (1995) 20 *SAYIL* 189
- "International law as legal system: the quest and need for a private law leg" (1996) 21 *SAYIL* 60
- CJ Botha: "Leashing the dogs of war: The South African Defence Force under the new constitution" (1993-94) 19 *SAYIL* 137
- H Botha: "Democracy and rights: Constitutional interpretation in a post realist world" (2000) 63 (4) *THRHR (JCRDL)* 561
- N Botha: "Human rights, torture, customary international law" (1980) 6 *SAYIL* 150

- “The coming of age of public international law in South Africa” (1992-93) 18 *SAYIL* 36
- “Interpreting a treaty endorsed under the 1993 Constitution” (1993-94) 19 *SAYIL* 148
- “International law and the South African interim Constitution” (1994) *SA Public Law* 245
- “Incorporation of treaties under the Interim Constitution: A pattern emerges” (1995) 20 *SAYIL* 196
- “International law in the Constitutional Court” (1995) 20 *SAYIL* 222
- “Riding the tide: South Africa’s regular courts and the application of international law” (1996) 21 *SAYIL* 174
- “Treaties after the 1996 constitution: More questions than answers” (1997) 22 *SAYIL* 95
- “Lessons from Harksen: Constitutionality of Extradition” (2000) 33 *CILSA* 274
- “Treaty making in South Africa: A reassessment” (2000) 25 *SAYIL* 69 (An edited version of the contribution in L Monroe Ed *National Treaty Law and Practice: Vol III supra*)
- “Extradition on the basis of a treaty: section 5 of the Extradition Act 67 of 1962 considered” (2000) 25 *SAYIL* 245 – *Abel v Minister of Justice & Others* 2000 4 *All SA* 63
- “The foreign affairs prerogative and the 1996 Constitution” (2000) 25 *SAYIL* 265 – *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) *SA* 279 (TPD)
- C Braude & D Spitz: “Memory and the spectre of international justice: A comment on AZAPO” (1997) 13 *SAJHR* 269
- JW Bridge: “The relationship between international law and the law of South Africa” (1971) 20 *ICLQ* 746
- I Cameron: “Rights, constitutionalism and the rule of law” (1997) 13 *SAJHR* 504
- G Carpenter: “Prerogative Powers in South Africa – Dead and Gone at Last?” (1997) 22 *SAYIL* 104
- Jl Charney: “The Persistent Objector Rule and the Development of Customary International Law” (1985) 56 *BYIL* 1
- A Cockrell: “Rainbow jurisprudence” (1996) 12 *SAJHR* 1

- DM Davis: "The underlying theory that informs the wording of our Bill of Rights" (1996) 113 *SALJ* 385
- "The twist of language and the two Fagans: Please sir may I have some more literalism!" (1996) 12 *SAJHR* 504
- J de Ville: "Die legaliteitsbeginsel in die staats- en administratiefreg onder 'n nuwe grondwetlike bedeling: 'n vergelykende toekomspektief" (1993) 8 *SA Public Law* 68
- DJ Devine: "Qualifications on the incorporation of international customary law into South African municipal law" (1973) *Natal University LR* 58
- "The relationship between international law and municipal law in the light of the Interim South African Constitution of 1993" (1995) 44 *ICLQ* 1
- "Some problems relating to treaties in the Interim South African Constitution and some suggestions for the definitive constitution" (1995) 20 *SAYIL* 1
- "The National Defence Force: international operations, aggression, self defence, use of force and conduct in hostilities under the Interim Constitution" (1995) 20 *SAYIL* 182
- E de Wet: "The place of public international law in the new South African constitutional order: With special reference to international human rights law and humanitarian law" (1998) 1 *Recht in Afrika* (African Law Association)
- J Dugard: "The role of international law in interpreting the Bill of Rights" (1994) 10 *SAJHR* 208
- "International law and the 'Final' Constitution" (1995) 11 *SAJHR* 110
- "The influence of international human rights law on the South African Constitution" (1996) 49 *Current Legal Problems* 305
- "International law and the South African Constitution" (1997) 8 *EJIL* 77
- "Is the Truth and Reconciliation Process compatible with international law? An unanswered question" (1997) 13 *SAJHR* 258
- "The South African Judiciary and International Law in the Apartheid Era" (1998) 14 *SAJHR* 110
- "The role of treaty-based human rights standards in domestic law: The Southern African experience" in P Alston & J

- Crafford (eds) *The Future of UN Human Rights Treaty Monitoring* (2000)
- “Dealing with crimes of the past: Is amnesty still an option?” (2000) 12 *Leiden Journal of International Law*
- L du Plessis: “Legal academics and the open community of constitutional interpreters” (1996) 12 *SAJHR* 214
- LM du Plessis & JR de Ville: “Bill of Rights interpretation in the South African context (2)” and “(3)” (1993) 4 *Stell LR* 199 and 356
- A Fagan: “In defence of the obvious: Ordinary language and the identification of constitutional rules” (1995) 11 *SAJHR* 545
- E Fagan: “The longest Erratum note in history” (1996) 12 *SAJHR* 79
- J Fawcett: “The Legal Character of International Agreements” (1953) 30 *BYIL* 381
- G Ferreira: “Terugwerkendheid van wetgewing ongrondwetlik?” (1999) 14 *SA Public Law* 485
- RK Greenstein: “Text as tool: Why we read the law” (1995) *Washington & Lee LR* 105
- International Law Assoc: “Statement of Principles Applicable to the Formation of General Customary International Law” (2000) *Final Report by the Committee on Formation of [General] Customary International Law* – London Conference 2000
- “Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences” (2000) *Final Report by the Committee on International Human Rights Law and Practice* – London Conference 2000
- L Johannessen: “Foreign Cases: Prohibition of retrospectivity / Marital rape: Article 7 (1) of the ECHR” (1996) 12 *SAJHR* 12 – *SW v United Kingdom and CR v United Kingdom*
- R Keightley: “International human rights norms in a new South Africa” (1992) 8 *SAJHR* 171
- “Public international law and the final Constitution” (1996) 12 *SAJHR* 405
- J Klaaren: “Structures of Government in the 1996 South African Constitution: Putting democracy back into human rights” (1997) *SAJHR* 3
- J Kruger: “Is interpretation a question of common sense? Some reflections on value judgments and section 35” (1995) *CILSA* 1

- RB Lillich: "Sources of human rights law and the Hong Kong Bill of Rights" (1990-91) *Chinese Yearbook of International Law and Affairs* 27
- J Maritan: "Human Rights – Comments and Interpretations" *UNESCO* 1949 79
- M Mc Dougal, HD Lasswell & WM Reisman: "Theories About International Law: Prologue to a Configurative Jurisprudence" (1968) 8 *Virginia Journal of International Law* 188
- T Maluwa: "International human rights norms and the South African Interim Constitution" (1993-94) 19 *SAYIL* 14
- "Democracy and Human Rights – The Significance of Human Rights Law to Developing Countries" (1995) 6 (1) *ALR* 24
- D Moelendorf: "Amnesty, Truth and Justice: AZAPO" (1997) 13 *SAJHR* 283
- Z Motala: "The Promotion of National Unity and Reconciliation Act, the Constitution and International Law" (1995) 28 *CILSA* 338
- "The Constitutional Court's approach to international law and its method of interpretation in the 'Amnesty Decision': Intellectual honesty or political expediency" (1996) 21 *SAYIL* 29
- "The Constitution is not anything the court wants it to be: The Mhlungu decision and the need for disciplining rules" (1998) 115 *SALJ* 141
- M Olivier: "The status of international law in South African municipal law: section 231 of the 1993 Constitution" (1993-94) 19 *SAYIL* 1
- "Informal agreements under the 1996 constitution" (1997) 22 *SAYIL* 63
- The Presidency: "Manual on Executive Acts" (May 1999)
- O Schachter: "The twilight existence of non-binding international agreements" (1977) 71 *AJIL* 296
- RP Schaffer: "The inter-relationship between international law and the law of South Africa: An overview" (1983) 32 *ICLQ* 277
- E Schwelb: "The Influence of the Universal Declaration of Human Rights on International and National Law" (1959) *Proceedings of the American Society of International Law*

- CR Snyman: “Enkele opmerkings oor die legaliteitsbeginsel in die strafreg” (1991) 54 *THRHR (JCRDL)* 629
- JG Starke: “Monism and Dualism in the Theory of International Law” (1936) 17 *BYIL* 66
- HA Strydom: “The international law “openness” of the South African Constitution” in G Carpenter (ed) *SUPREMA LEX Essays on the Constitution presented to MARINUS WIECHERS* (1998) 87
- S Woolman & D Davis: “The last laugh: Du Plessis v De Klerk, classical liberalism, Creole liberalism and the application of fundamental rights under the interim and final Constitutions” (1996) 12 *SAJHR* 361

Table of cases

National Courts (Southern African)

A

- Abel v Minister of Justice & Others* 2000 (4) All SA 63 (CPD)
- Azanian People’s Organisation (AZAPO) v Truth and Reconciliation Commission* 1996 (4) SA 562 (C) – *AZAPO 1*
- Azanian People’s Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) – *AZAPO 2*

B

- Binga v Administrator General, South West Africa and Others* 1984 (3) SA 949 (SWA)

C

- CC Maynard et alii v The Field Cornet of Pretoria* (1894) 1 SAR 214
- Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 1997 (2) SA 97 (CC)

D

- Du Toit v Kruger* (1905) 22 SC 234
- De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC)

E

- Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC)

F

- Fedsure Life assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) – *Fedsure*.
- Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others* 1999 (2) SA 471 (CPD)

G

- Govender v Minister of Safety and Security* 2001 (2) SACR 197 (SCA)

H

- Haak and Others v Minister of External Affairs* 1942 AD 318
Hajaree v Ismael 1905 TS 451
Harksen v President of the Republic of South Africa 1998 (2) SA 1011 (C)
Harksen v President of the Republic of South Africa Case no A394/99 Unreported – Now
 2000 (1) SA 1185 (C)
Harksen v President of the Republic of South Africa 2000 (1) SACR 300 (CC)
Harris v Minister of the Interior 1952 (2) SA 428 (A)
Hoffmann v South African Airways 2000 (1) BCLR 1211 (CC)
Hugo v President of the Republic of South Africa 1996 (6) BCLR 867 (D)

I

- Inter-Science Development Services v Republica Popular de Mocambique* 1980 (2) SA 111
 (T)

K

- K v K* 1999 (4) SA 691 (CPD)
Kaffraria Properties v Government of the Republic of Zambia 1989 (2) SA 709 (E)
Kalla v The Master 1995 (1) SA 261 (T)
Kolbatschenko v King NO and Another 2001 (2) SACR 323 (CPD)

M

- Mohamed and Another v President of the Republic of South Africa and Others* 2001 (2)
 SACR 66 (CC)

N

- Nduli v Minister of Justice* 1978 (1) SA 893 (A)

P

- Pan American World Airways Inc v South African Fire and Accident Insurance Company Ltd*
 1965 (3) SA 150 (AD) – The Pan Am case
Pharmaceutical Manufacturers' Association of South Africa and Another: In re ex parte
President of the Republic of South Africa and Others 2000
 (2) SA 674 (CC) – Pharmaceutical manufacturers
Premier of KwaZulu-Natal v President of the Republic of South Africa 1996 (1) SA
 984 (CC)
President of South Africa v Hugo 1997 (4) SA 1 (CC) – Hugo
President of the Republic of South Africa and Others v South African Rugby Football Union
and Others 2000 (1) SA 1 (CC) – Sarfu 3

S

- S v Acheson* 1991 (2) SA 805 (NmHC)
S v Adams; S v Werner 1981 (1) SA 187 (A)
S v Baloyi 2000 (1) BCLR 86 (CC)
S v Banda 1989 (4) SA 519 (B)
S v Bhulwana 1995 (1) SA 388 (CC)
S v Bull 1967 (2) SA 636 (T)
S v Devoy 1971 (3) SA 899 (A)
S v Dodo 2001 (1) SACR 594 (CC)
S v Eliasov 1965 (2) SA 770 (T)
S v Khanyile 1988 (3) SA 795 (N)
S v Kwalase 2000 (2) SACR 135 (CPD)
S v Makwanyane 1995 (3) SA 391 (CC)
S v Manamela 2000 (1) SACR 414 (CC)
S v Mhlungu and Others 1995 (3) SA 867 (CC)

S v Oosthuizen 1977 (1) SA 823 (N)
S v Petane 1988 (3) SA 51 (C)
S v Rudman 1989 (3) SA 368 (E)
S v Rudman 1992 (1) SA 343 (A)
S v Twala (Human Rights Commission Intervening) 2000 (1) BCLR 106 (CC)
S v Werner 1980 (2) SA 313 (W)
S v Zuma 1995 (2) SA 642 (CC)
Sobukwe v Minister of Justice 1972 (1) SA 693 (A)
South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC)
South African Defence Union v Minister of Defence and Another 1999 (2) SA 735 (TPD)
South African Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC)
Swissborough Diamond Mines v Government of the Republic of South Africa 1999 (2) SA 279 (T)

R

R v Holm; R v Pienaar 1948 (1) SA 25 (A)
R v Neumann 1949 (3) SA 1238 (Special Court)

Foreign Courts**B**

Banco National de Cuba v Sabbatino 376 US 398 (1964)

G

Government of the Republic of Spain v SS 'Arantzazu Mendi' [1939] AC 256 (HL)

J

Joyce v Director of Public Prosecutions [1946] AC 347

L

Laker Airways v Department of Trade 1977 2 All ER 182 (CA)

R

R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No3) [1999] 2 All ER 97 (HL)
R v Secretary of State for the Home Department, ex parte Bentley [1993] 4 All ER 442 (QB)

T

Trendtex Trading Corporation v Central Bank of Nigeria (1977) QB 529 (CA)

International Courts and Tribunals**A**

Anglo-Norwegian Fisheries Case 1951 ICJ Reports 115
Asylum Case 1950 ICJ Reports 266 (Columbia v Peru)

B

Barcelona Traction, Light and Power Company Limited 1970 ICJ Reports 3

F

Filartiga v Pena Irala 1980 ILM 966
Fisheries Jurisdiction (UK v Iceland) Jurisdiction of the Court 1973 ICJ Reports 3
Fisheries Jurisdiction (Merits) (UK v Iceland) 1974 ICJ Reports 3

R

Reparation for Injuries Suffered in the Service of the United Nations 1949 ICJ Reports 174

M

McCann and Others v UK [1996] 21 EHRR 97

N

Nicaragua Case – Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) Merits 1986 ICJ Reports 14

North Sea Continental Shelf Cases 1969 ICJ Reports 3

O

Opinion 1 of the Arbitration Commission re Dissolution of Yugoslavia 92 ILR 162

S

South West Africa Cases 1966 ICJ Reports 6

Table of statutes

The Union of South Africa Act 1909

The Interpretation Act 33 of 1957

The Republic of South Africa Act 32 of 1961

The Extradition Act 67 of 1962

The Civil Aviation Offences Act 10 of 1972

The Status of Transkei Act 100 of 1976

The Status of Bophuthatswana Act 89 of 1977

The Status of Venda Act 107 of 1979

The Status of Ciskei Act 110 of 1981

The Constitution of South Africa Act 110 of 1983

The Diplomatic Immunities and Privileges Act 74 of 1989

The Aliens Control Act 96 of 1991

The Prevention of Family Violence Act 133 of 1993

The Constitution of the Republic of South Africa Act 200 of 1993 (The Interim Constitution – IC)

The Human Rights Commission Act 54 of 1992

The Promotion of National Unity and Reconciliation Act 34 of 1995

The International Co-operation in Criminal Matters Act 75 of 1996

The Constitution of the Republic of South Africa Act 108 of 1996 (The Final Constitution – FC)

Table of International Documents, Instruments and Conventions

The African Charter on Human and Peoples Rights (Banjul Charter)

The American Convention on Human Rights

Arab Charter of Human Rights

The Charter of the Organisation of American States

The Charter of the United Nations

The Conference on Security and Cooperation in Europe: Final Act (Helsinki Accords)

Convention on the Elimination of All Forms of Discrimination against Women

Convention on the Rights of the Child

The European Convention on Human Rights of 1958

The General Treaty for the Renunciation of War of 1928 (Pact of Paris or Kellogg-Briand Pact)

The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970

The International Covenant on Civil and Political Rights of 1966 (ICCPR)

The International Covenant on Economic, Social and Cultural Rights of 1966 (ICESC)

International Convention on the Elimination of All Forms of Racial Discrimination

International Convention on the Suppression and Punishment of the Crime of Apartheid

The Law of Geneva - The Four Geneva Conventions of 12 August 1949 and the Two Additional Protocols of 1977

The Law of The Hague - The Various Conventions and Regulations of 1907 in A Roberts & R Guelff (eds) *Documents on the Laws of War* 2nd Ed (1989)

The Montevideo Convention of 1933

The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971

The Statute of the International Court of Justice

The Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft of 1963

The United Nation's Basic Principles on the Use of Force and Firearms by Law Enforcement officials

The Universal Declaration of Human Rights of 1948

The Vienna Convention on Consular Relations of 1961

The Vienna Convention on Consular Relations of 1963

The Vienna Convention on the Law of Treaties of 1969

The Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 1986