

Ten years of international law in the South African courts : Reviewing the past and assessing the future

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Introduction

Ten years into South Africa's new democracy, it is trite that the new constitutional dispensation ushered in by the 1993 Constitution¹ and consolidated within the 1996 Constitution,² has wrought fundamental changes to the South African legal landscape. It may be argued that among the most far ranging and most striking of these changes have been in the sphere of international law which had been neglected, if not totally negated, under the previous dispensations. On paper at least, South African law must now be regarded as among the most progressive and international-law friendly in the world.³ However, international-law-friendly is, as international-law-friendly does, and ten years down the line seems a fitting point at which to reflect on whether the practice has lived up to the promise. Has international law become a vibrant force within our courts, or is it perhaps a 'paper tiger' – impressive in the viewing, but blowing in the wind?

In this article we focus on two aspects of the application of international law in terms of the constitutions through a chronological examination of the more

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³DJ Devine 'The relationship between international law and municipal law in the light of the interim South African Constitution 1993' (1995) 44 *ICLQ* 1; CJR Dugard 'South Africa's return to the international community and international law' paper delivered at the 5th Annual Conference of the African Society of International and Comparative Law, Accra September 1993 at 198; CJR Dugard 'International law and the Final Constitution' (1995) 11 *SAJHR* 241; CJR Dugard 'International law and the South African Constitution' 1997 *EJIL* 77; R Keightly 'International law and the Final Constitution' (1996) 12 *SAJHR* 405; 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* (1997) at 87 ff; N Botha 'International law and the South African interim Constitution' 1994 *SAPL/PR* 245; ME Olivier 'The status of international law in South African municipal law: Section 231 of the 1993 Constitution' (1993/94) 19 *SAYIL* 63.

important case law before South Africa's superior courts. The substantive application in terms of section 231 of the 1993 Constitution⁴ and sections 231 and 232 of the 1996 Constitution,⁵ and international law as an interpretive tool as provided for in section 35 of the 1993 Constitution and sections 39 and 233 of the 1996 Constitution, will be considered.

Reviewing the past

Selected judgments reported during 1995

1995 saw the first real 'crop' of cases in which international law featured. Predictably, these dealt mainly with international law in its interpretive role as embodied in section 35 of chapter 3 – the bill of rights – of the 1993 Constitution.

*S v Zuma 1995 4 BCLR 401 (CC)*⁶

Here the court was called upon to consider the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 which presumes that, unless the contrary is proven, a confession made by an accused has been made freely and voluntarily if this appears *ex facie* the document containing the confession. Delivering the judgment of the court, Kentridge AJ considered the provisions of section 25 of the 1993 Constitution relevant to the question,⁷ and stated that although the provisions of this section are more specific than many others in chapter 3, they nonetheless give rise to problems of interpretation.⁸ He proceeded to establish the principles upon which a constitutional bill of fundamental rights should be interpreted and cited authority that each constitution calls for 'principles of interpretation of its own'.⁹ The 1993 Constitution, therefore, 'must be interpreted so as to give clear expression to the values it seeks to nurture for a future South Africa'.¹⁰ Guidance in this regard is to be found in section 35 of the 1993 Constitution:

South African courts are indeed enjoined by section 35 of the Constitution to interpret Chapter 3 so as to 'promote the values which underlie an open and democratic society based on freedom and equality', and, where applicable, to have regard to relevant public international law. This section also permits our courts to have regard to comparable foreign case law.¹¹

⁴This section governed the domestic application of both treaties (international agreements) and customary international law in a single section.

⁵In the 1996 Constitution treaties are dealt with in section 231, while the application of customary international law earns a separate section, 232.

⁶For further discussion of this case see Botha 'International law in the Constitutional Court' (1995) 20 *SAYIL* 227 ff and Olivier 'International law in South African municipal law. Human rights procedure, policy and practice' LLD thesis Unisa (2002) at 189

⁷Par 12 at 410

⁸Par 12 at 410.

⁹Par 14 at 410.

¹⁰Froneman cited by Kentridge at par 17 at 412

¹¹Par 17 at 412.

No specific mention was made to the value the Constitution attached to international law on the one hand, and comparable foreign case law on the other – the consideration of international law being compulsory while that of comparable foreign case law merely optional.¹² In the judgment, Kentridge AJ referred to international law authority only once,¹³ rather choosing to rely heavily on foreign case law. Although the judge may be regarded as having missed an opportunity in this decision clearly to expound the role of section 35 – and specifically the distinction between international law and comparable foreign case law – in constitutional interpretation, he did lay the basis for a value oriented approach to interpretation which was subsequently to be more clearly conceptualised in what has become the South African *locus classicus* on the use of international law in interpreting the bill of rights.

S v Makwanyane 1995 6 BCLR 665 (CC)¹⁴

In this landmark decision, the Constitutional Court considered the constitutionality of the death penalty. Brought by two prisoners convicted of murder, sentenced to hang, and awaiting execution on death row, the case came at a time when a moratorium on the execution (as opposed to the imposition) of the death sentence had been introduced by the previous government. Numerous individuals were on death row awaiting the resolution of the issue. The 1993 Constitution is silent on the question of capital punishment. It was decided during the negotiating process neither to exclude nor to sanction the death penalty, but to leave it to the Constitutional Court to decide whether it represents a punishment consistent with chapter 3 of the Constitution.¹⁵ The opportunity presented itself in *Makwanyane*.

It was contended on behalf of the accused that the imposition of the death penalty for murder was a cruel, inhuman and degrading punishment that should be declared unconstitutional. This was a case that lent itself to international law influences and Chaskalson P seized the opportunity to make extensive and creative use of international law in his judgment.

Turning first to the use of international law in interpreting the Constitution, Chaskalson held that documents used during the negotiating process (specifically those relating to the position of the death penalty), formed part of the context within which the Constitution should be interpreted.¹⁶ He considered circumstances existing

¹²It should be noted that s 35 contains the somewhat unfortunate phrase ‘where applicable’ which allowed courts an ‘out’ simply by finding that international law was not applicable. This phrase was fortunately omitted from s 39 of the 1996 Constitution.

¹³Consideration of the ‘reverse onus’ by *inter alia* the European Court of Human Rights at par 19 at 412.

¹⁴For further discussion of this case see Botha n 6 above at 223 ff and Olivier n 6 above at 190 ff.

¹⁵Par 25 at 682.

¹⁶Pars 12-17 at 677-679.

at the time the Constitution was adopted, in interpreting the relevant provisions of the Constitution Authority for the use of such evidence was sought in international law. The judge referred to the European Court of Human Rights and the United Nations Committee on Human Rights whose deliberations are informed by *travaux préparatoires* as set out in article 32 of the Vienna Convention on the Law of Treaties.¹⁷ Chaskalson also points out that in other countries where the constitution is the supreme law such as Germany, Canada, the United States and India, courts may have regard to circumstances prevailing during the drafting of the constitution.¹⁸ The judge also makes reference to the Vienna Convention on the Law of Treaties, which may assist the court in interpretation of the Constitution.¹⁹

The second point of relevance from an international law perspective, appears in Chaskalson's clear distinction between decisions of courts of foreign countries, and those of international tribunals (as expressions of international law), as directed by section 35.²⁰ As previously indicated, the consideration of the former is discretionary and of the latter obligatory.²¹ The judge however, stresses the importance of appreciating that the court is not bound to follow either international law or comparable foreign case law,²² and warned that a South African court must construe the South African Constitution and not an international instrument or the constitution of some foreign country. The use of international and foreign law can be a valid exercise only when due regard is had to South African realities.²³ On the role of international law, he stated

International agreements and international customary law accordingly provide a framework within which Chapter 3 can be evaluated and understood and for that purpose decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights, and in appropriate cases, reports

¹⁷Pars 16 and 17 at 679. Art 32 of the Vienna Convention provides under the heading 'Supplementary means of interpretation' 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of art 31 [general rule of interpretation], or to determine the meaning when the interpretation according to art 31, (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable. Since the present discussion is only aimed at the identification of trends, no arguments will be presented on whether art 32 of the Vienna Convention was correctly applied.

¹⁸Par 16 at 678-9.

¹⁹At 697 note 23. Ss 31 and 32 of the Vienna Treaty Convention contain factors which can be considered as aids to interpretation.

²⁰Par 34 at 686.

²¹Botha n 6 above at 224 points out that under s 35 courts must consider only international human rights law and not international law in general. He argues that the decisions of foreign courts on matters of international human rights law can also be considered as peremptory but only in so far as they indirectly reflect the position under international law. It is questionable whether this distinction holds true under terms of the amended s 39 of the 1996 Constitution.

²²Par 39 at 688.

²³Par 39 687.

of specialised agencies such as the international Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter 3.²⁴

The judge pointed out that public international law as referred to by section 35(1) includes both binding and non-binding law.²⁵ The reference to non-binding law immediately leads to the assumption that Chaskalson is following a progressive approach to include sources such as soft law which fall outside article 38 of the Statute of the International Court of Justice. As authority, however, he refers to Dugard's suggestion 'that section 35 requires regard to be had to "all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice ...".'²⁶ Dugard, however, is here referring only to the traditional sources of international law, a view he later confirmed in an article 'International law and the "final" Constitution' where he suggests that the following clause be considered for inclusion in the 1996 Constitution.²⁷

Public international law in section 35(1) is to be interpreted to include all the sources of international law referred to in article 38(1) of the Statute of the International Court of Justice. A court may have regard not only to treaties to which South Africa is a party but also to other treaties which may assist the court in ascertaining the relevant norm of international law.

One cannot but wonder whether in referring to non-binding sources, Chaskalson was not thinking of treaties to which South Africa is not a party, and the sources mentioned in article 38(1)(c) and (d) of the Statute. In international law terms, treaties to which South Africa is not a party can be regarded as non-binding international law as regards the Republic. The sources mentioned in article 38(c) and (d) are general principles of law recognised by civilised nations, judicial decisions and teachings of the most highly qualified publicists.²⁸ Chaskalson concluded that 'capital punishment is not prohibited by international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading within the meaning of section 11(2)'.²⁹

²⁴Par 35 at 686.

²⁵Par 35 at 686.

²⁶Note 46 at 686.

²⁷Dugard in *SAJHR* n 3 above at 242. Dugard's view on the relevance of soft law is clear from the following statement at 243: 'If South African courts are permitted to have regard to all these sources of international law (art 38 of the ICJ Statute), including international human rights treaties to which South Africa is not a party, they will be able to draw on the whole field of international human rights law'. In terms of this view there is no place for sources non-binding in terms of international law such as the Universal Declaration of Human Rights.

²⁸T Maluwa 'The incorporation of international law in its interpretational role in municipal legal systems in Africa: An exploratory survey' (1998) 23 *SAYIL* 45 at 59 argues to the contrary that there is no doubt that the scope of international law envisaged by Chaskalson P encompasses not only the 'hard' law of customary rules, treaty provisions and judicial decisions, but also 'soft' law contained in resolutions, declarations and guidelines drawn up by the appropriate international bodies, and also international law not binding on South Africa.

²⁹The section in the Constitution prohibiting cruel, inhuman or degrading treatment or punishment. Par 36 at 686.

Although Chaskalson's judgment has become the most prominent – and certainly the most quoted when it comes to international law – judgments were in fact delivered by all the judges. In passing it should therefore be noted that judges Ackermann, Kriegler, O'Regan and Didcott made no mention of international law in their judgments but relied heavily on foreign municipal law cases. Kentridge AJ referred in passing to international law by saying that although the death penalty is not yet contrary to international law, international law is developing in that direction.³⁰ Mahomed J, too, emphasised that public international law is one of the factors that may be considered in interpreting the Constitution³¹ and referred to United Nations research findings on the death penalty in his judgment.³²

It is, however, in the judgments of Langa, Madala and Mokgoro JJ that an interesting slant on international law within South African society again emerges, and this time on a theoretical level showing a definite internationalist perspective. Langa J, took up the reference made by Chaskalson to *ubuntu*,³³ in pointing to the values reflected in the Constitution and the need to move from victimisation to *ubuntu*.³⁴ He elaborated on the meaning of *ubuntu* as a blueprint of the 'values we need to uphold'.³⁵ *Ubuntu* becomes relevant in a debate on the death penalty because of the value it attaches to life and human dignity.³⁶ Madala J, likewise, based his judgment on *ubuntu* and questioned the fact whether the death penalty complies with the precepts of this world view. Mokgoro J took the argument on the relationship between *ubuntu* and the right to life, and international law, further. She pointed out that balancing competing fundamental rights and freedoms can often only be done by reference to a system of values extraneous to the Constitutional text itself.³⁷ This is in accordance with the constitutional imperative to the courts in terms of article 35(1). These values, which are common values in South Africa, can form a basis on which to develop a South African human rights jurisprudence.³⁸ Mokgoro identified *ubuntu* as an example of such a value. In her view, life and dignity are two sides of the same coin. The concept of *ubuntu*

³⁰Par 199 at 744.

³¹Par 266 at 759.

³²Par 298 at 765.

³³Chaskalson states in par 131 at 718 that '[t]o be consistent with the value of *ubuntu* ours should be a society that 'wishes to prevent crime ... (not) to kill criminals to get even with them'. Mokgoro J par 308 at 771-772, translates *ubuntu* as humaneness, personhood and morality. The concept places group solidarity central to the survival of the community. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. For a discussion of *ubuntu* in South African law generally see Mokgoro 'Ubuntu and the law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 15ff.

³⁴Par 223 at 751.

³⁵Par 224 at 751.

³⁶Par 225 at 752.

³⁷Par 302 at 769.

³⁸Par 307 at 771.

embodies both.³⁹ She speculated about the similarities between the spirit of the African concept of *ubuntu* and the rights to life and dignity as embodied in the ICCPR.⁴⁰ Western ideals and African indigenous law need not differ in spirit.⁴¹

Ubuntu as value system, is of particular relevance within the context of section 35 of the 1993 Constitution. *Ubuntu* is a phenomenon with African roots, not limited to South Africa. The recognition by the court that South Africa subscribes to a value system followed internationally, albeit regionally, is to be welcomed and will hopefully manifest in more decisions. As such, one can only speculate on the extent to which *ubuntu* plays a role in African customary international law. Mokgoro's judgment further contributes to mainstreaming African values and gives them a legal content.

S v Williams 1995 7 BCLR 861 (CC)⁴²

Another perennially controversial issue, particularly in a patriarchal and discriminatory system such as that from which South Africa was attempting to emerge at this period, is that of corporal punishment. In *Williams*, judicially imposed corporal punishment in terms of section 294 of the Criminal Procedure Act 51 of 1977, was at issue. It was submitted that corporal punishment violates both the right to dignity in section 10 of the Constitution and the prohibition of cruel, inhuman or degrading punishment as provided for in section 11(2).

As far as section 11(2) is concerned, Langa J, who delivered judgment, remarked that its wording corresponds to that used in international instruments.⁴³ He referred to comparable wording appearing in article 5 of the UDHR, article 7 of the ICCPR, article 3 of the European Convention on Human Rights and Fundamental Freedoms, and article 5 of the African Charter on Human and Peoples' Rights.⁴⁴ He remarked that 'while our ultimate definition of these concepts must necessarily reflect our own experience and contemporary circumstances in the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law'.⁴⁵ The judge proceeded to examine interpretations of torture and inhuman or degrading treatment by the United Nations Human Rights Committee and the European Commission of Human Rights and domestic case law. All considered, he concluded that courts are constitutionally compelled to 'have regard' to the consensus contained in the authority referred to. He, however,

³⁹Par 311 at 773.

⁴⁰Par 309 at 772.

⁴¹For a discussion see Botha n 6 above at 227 and Mokgoro n 33 above.

⁴²For further discussion see Botha n 6 above at 229 and Olivier n 6 above at 197.

⁴³Par 21 at 869 n 24.

⁴⁴Note 24 at 869.

⁴⁵Par 23 at 870.

warned that 'we are not bound to follow it but neither can we ignore it'.⁴⁶ He continues to remark that through the Constitution South Africa can now join the mainstream of the world community that is progressively moving away from corporal punishment.⁴⁷ The constitutional provision must be interpreted with regard to the emerging consensus of values in the civilised international community.⁴⁸ The final definition must, however, ultimately reflect the South African experience and circumstances.⁴⁹ The court found corporal punishment inflicted on juveniles unconstitutional. No mention was, however, made of the fact that South Africa was at the time a signatory to the Convention against Torture and party to the Convention on Children's Rights, nor to the legal implication this holds for South Africa.

Selected judgments reported during 1996

A number of judgments were reported during 1996 where international law, particularly as it pertains to interpretation of section 35 rights, was in issue. It is impossible within the scope of this review to discuss these cases in detail. The cases and the main point at issue and international sources used will be briefly listed. The *Certification* case⁵⁰ will be used as a prototype reflecting the general trend during this period.

Case v Minister of Safety and Security; Curtis v Minister of Safety and Security 1996 5 BCLR 609 (CC)⁵¹

Section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967 renders it an offence to possess 'any indecent or obscene photographic matter'. The question before the court was whether this provision contravenes the right to privacy as protected by section 13 of the Constitution if the erotic material was kept in a private home for personal use. The court ruled section 2(1) to be unconstitutional. In a separate judgment Mokgoro J remarked that:

Section 35 provides that this court 'shall, where applicable, have regard to public international law applicable to the protection of [chapter 3 rights]'. It is significant that at least four international human rights instruments provide specifically for the right to receive information under the general head of the right to free expression ... Section 35 of the Interim Constitution further permits this court to 'have regard to comparable foreign case law in interpreting Chapter 3'.⁵²

⁴⁶Par 50 at 878.

⁴⁷*Ibid.*

⁴⁸Par 22 at 870 and 39 at 874

⁴⁹Par 23 at 807

⁵⁰*In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) and the text accompanying n 68 below.

⁵¹For a further discussion of this case see Olivier n 6 above at 199 ff

⁵²Par 29 at 623-624

The four international instruments are identified in a footnote⁵³ as article 9 of the African Charter on Human and Peoples' Rights, article 10 of the European Convention on Human Rights, article 19 of the UDHR, and article 19 of ICCPR. Mokgoro, however, proceeded to examine foreign case law and decisions by the European Court of Justice interpreting the European Convention of Human Rights,⁵⁴ were dealt with as foreign case law rather than international law.

Brink v Kitshoff NO 1996 6 BCLR 752 (CC)

Provisions of the Insurance Act 27 of 1943 were challenged on the ground that they were in breach of section 8 of the Constitution which guarantees the right of equality before the law, and the right not to be unfairly discriminated against. In a separate judgment O'Regan J referred to various international instruments as well as foreign constitutions to clarify the concepts 'equality before the law' and discrimination.⁵⁵ She referred in this regard to article 7 of the UDHR, article 26 of the ICCPR, and also mentioned that there are other international conventions dealing with specific aspects of discrimination. After proceeding to consider constitutional provisions of other countries protecting equality in the same manner, O'Regan concluded:⁵⁶

This cursory consideration of the international conventions and the foreign jurisprudence makes it clear that the prohibition of discrimination is an important goal of both national governments and the international community. However, it also illustrates that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.

Bernstein v Bester NNO 1996 2 SA 751 (CC)

Here the court found sections 417 and 418 of the Companies Act,⁵⁷ providing for the summoning of individuals during a company's winding up, were constitutional. In considering the protection of privacy as provided for by section 13 of the 1993 Constitution, the court referred to the European Convention on Human Rights, a resolution by the Consultative Assembly of the Council of Europe, and conclusions reached by the Nordic Conference on the right to respect for privacy.⁵⁸ No distinction is made between these sources of international law not binding on South Africa and the 'German, European and American approach' which the court subsequently considered.

⁵³Note 41 at 624.

⁵⁴Pars 31-34 at 624-5.

⁵⁵'Section 35(1) of the Constitution requires us to have regard to international law to interpret the rights it entrenches'. Par 34 at 766.

⁵⁶Par 39 at 768.

⁵⁷Act 61 of 1973.

⁵⁸Pars 72-73 at 790-791.

*Ferreira v Levin NO; Vryenhoek v Powell NO 1996 1 SA 984 (CC)*⁵⁹

The court held that section 417(2)(b) of the Companies Act, requiring persons to respond to incriminating questions asked in judicial investigations of bankrupt companies, to be in violation of section 25(3) of the 1993 Constitution providing for a fair trial. The court further looked into the right to freedom and security of the person in terms of section 11(1) of the Constitution. In establishing the meaning of the provision the court had regard to the American Declaration on the Rights and Duties of Man, the ICCPR, the European Convention on the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and People's Rights, comments by Siegart, and findings of the European Commission of Human Rights and the European Court of Human Rights.⁶⁰

Ex Parte Gauteng Legislature: In Re Gauteng School Education Bill 1996 3 SA 165 (CC)

The petitioners submitted that the right to education protected by section 32(c) of the 1993 Constitution placed an obligation on the state to establish educational institutions based on a common culture, language and religion as long as there was no discrimination on the ground of race. Sachs J looked at universally accepted principles of international law in order to establish what bearing they could have on the interpretation of section 32(c).⁶¹ The historic roots of minority protection and group rights are traced from the inception of the League of Nations. Sachs traces the international law protection of minority rights to the UDHR, ICCPR, the UNESCO Convention on Discrimination in Education, and general comments of the United Nations Human Rights Committee. He specifically dwells on the views of international law proponents of minority rights such as Capotorti and Thornberry and their interpretation of section 27 of the ICCPR, which seeks to protect minority interests. The link between the affirmative action provision of the Constitution, CERD and the Afrikaner community as a minority group entitled to protection under international law, is evaluated. After drawing parallels between the Constitution and international law, Sachs concluded that international law is in accordance with the provisions of the bill under consideration.

Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa 1996 8 BCLR 1015 (CC)

In what is often regarded as a 'political' decision,⁶² the court had to decide on the

⁵⁹For further discussion of this case see Olivier n 6 above at 201 ff

⁶⁰See also CR Blake 'The world's law in one country: The South African Constitutional Court's use of public international law' (1998) 115 SALJ 668

⁶¹Par 54 at 190

⁶²See, eg, Z Motale 'Promotion of National Unity and Reconciliation Act, the Constitution and international law' (1995) 28 CILSA 338 and '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 To have decided otherwise in the South African climate of the

constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995, the provisions of which preclude civil and criminal liability on the part of persons granted amnesty in respect of acts, omissions or offences committed with a political objective prior to the cut-off date. The applicants contended that such amnesty infringed the fundamental rights of victims to seek civil redress and to have the perpetrators prosecuted and punished in ordinary courts as protected by the section 22 of the Constitution. The applicants further contended that under international law, more specifically the Geneva Conventions of 1949, and the two Protocols of 1977, the state was obliged to prosecute those responsible for gross human rights violations.⁶³

The court recognised that the provisions of section 20(7) of the Promotion of National Unity and Reconciliation Act violated the right to obtain redress in the ordinary courts. It, however, held that such limitation of the section 22 right was permitted by section 232(4) of the Constitution, which stated that the so-called 'epilogue' was deemed to form part of the Constitution. The epilogue provided for national unity and reconciliation. In deciding the question Mohamed DP stated that:

International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law.⁶⁴

In the only case from this period to consider treaties in terms of section 231 as opposed to rights under section 35, the judge argued with reference to the international humanitarian law conventions relied on by the applicant, that on authority of section 231(3), express incorporation by way of legislation was required before a treaty could become enforceable as part of municipal law.⁶⁵ He cited the succession clause contained in section 231(1) as authority for the contention that parliament may by way of legislation override international obligations entered into before commencement of the Constitution. Mahomed concluded that these provisions are consistent with section 35(1), which directed courts to have regard to applicable public international law. He added that it was in any event doubtful whether the Geneva Conventions and Protocols applied to South Africa during the liberation struggle.⁶⁶

time would have been to risk derailing the fragile moves towards a peaceful transition. Had the case been decided under the 1996 Constitution, s 233 would, it is submitted, have demanded a more 'internationally liberal' approach and possibly a different outcome.

⁶³Par 25 at 1031B.

⁶⁴Par 26 at 1031.

⁶⁵Par 27 at 1032.

⁶⁶Par 29 at 1032.

It appears that the court confused the issue of incorporation into domestic law (section 231(3)) with the termination of international agreements (section 231(1)). In both cases parliamentary legislation plays a role, but with a different purpose. The court further took a very restrictive dualist view of international law by considering only incorporated treaties. This is contrary to the more monistic approach in *Makwayane* which interpreted section 35(1) to enable courts to consider both binding and non-binding international law.⁶⁷

*In re: Certification of the Constitution of the Republic of South Africa 1996 10 BCLR 1253 (CC)*⁶⁸

The last of the Constitutional Court decisions to be considered here, this case, in which the court was required to certify that the 1996 Constitution satisfied the constitutional principles agreed to in a 'solemn pact' under the 1993 Constitution, did not directly concern international law as such. However as Carpenter points out, Constitutional Principle II demanded that all persons must be accorded 'universally accepted fundamental rights, freedoms and civil liberties'.⁶⁹ The court had therefore to determine what was intended by 'universally accepted'. In the light of the *Makwanyane* judgments, and particularly those of Mokgoro, Langa and Madala,⁷⁰ the concept of fundamental rights etcetera, particularly when linked to universalism, cannot be divorced from their international law context. The constitutionality of the rights must therefore, even in the absence of the directive in section 39 of the 1996 Constitution,⁷¹ be seen to embody their international law dimension if they are to ensure that South Africa joins the 'mainstream of [the] world community' as advocated by Sachs J in *Mhlungu*.⁷² Although it is therefore clear that fundamental rights enshrined in a municipal bill of rights nonetheless retain their international context, the question remains as to which of these contexts is paramount. The universality of the rights was also an issue considered by the court. This is not a new debate in South African jurisprudence on international law.⁷³ Here, however, the

⁶⁷Motala n 62 above at 36-7.

⁶⁸For a full discussion of this case see G Carpenter 'Aliquid novi yet agam?' (1996) 21 *SAYIL* 163 ff. See, too, Olivier n 6 above at 204 ff.

⁶⁹*Id* at 170ff

⁷⁰See above

⁷¹Section 39 of the 1996 Constitution replaces s 35 of the 1993 version. Although the two sections are in essence the same the important 'clawback phrase' requiring consideration of international law only 'where applicable' in s 35, fortunately fell by the wayside in s 39

⁷²*S v Mhlungu* 1995 7 BCLR 793 (CC). As this was the only 'international law' related comment in the judgment it is not fully considered in this article. For its place in the early crop of Constitutional Court judgments, however, see Botha n 6 above at 228 and Olivier n 6 above at 196.

⁷³At 1279. This question of universality of consent was raised in the context of customary international law under the previous government with the decision in *Nduh v Minister of Justice* 1978 1 SA 893 (A) where universal was taken to mean 'all the nations of the world'. Not surprisingly, Rumpff J's judgment was subjected to severe criticism and does, one suspects, reflect South Africa's 'avoidance' attitude to international law at the time. It was, however, subsequently corrected in *Inter-Science Research and Development Services (Pty) Ltd v Republica de Mocambique* 1980 2 SA 111

court refused to apply a strictly literalist approach accepting rather that 'a wide measure of international acceptance' was the ruling criterion.⁷⁴

In assessing various specific rights, the court's approach is somewhat anomalous, particularly its reasoning in dismissing intellectual property rights as a universally accepted fundamental right. The court pointed out that although the right is recognised in certain universal human rights documents – notably the UDHR and ICESCR – it is not recognised in regional human rights instruments – the African Charter and the European Convention – or in many established constitutions. This implies, as Carpenter indicates,⁷⁵ that in establishing universality, regional conventions and individual constitutions weigh more heavily than truly universal conventions: the UDHR, after all is the most subscribed human rights document around and in many respects reflects customary international law. The customary international law route, which would represent perhaps the most convincing evidence of 'universal acceptance', was not considered by the court.

A further interesting 'trend' to emerge from this case, and one which seems to have taken root, is the international instruments the court failed to consider in its evaluation of specific rights in chapter three of the Constitution to which objections were lodged. Notable among these are labour rights which were evaluated with no reference to the approach of the International Labour Organisation.⁷⁶

The Akademik Fyodorov: Government of the Russian Federation v Marine Expeditions Inc 1996 4 SA 442 (C)

Lest we create the impression that in South Africa jurisprudence the application of international law is restricted to the Constitutional Court and that human rights and sections 35/39 are the only relevant issues, mention should be made of the present case which involved immunity from jurisdiction and served before the Cape Provincial Division of the High Court. The respondent company, a Canadian charterer of ships for tourist voyages, obtained an order for the arrest of the Akademik Fyodorov in 1995 in terms of South African law,⁷⁷ as security for the respondent's claims in arbitration proceedings pending in London between the respondent and the owner of the ship the Akademik Shuleykin. The respondent claimed that the two ships were associated ships. The respondent alleged that its claim in arbitration was against the Arctic and Antarctic Research Institute (AASRI) and Roshydromet as parties to the charterparty. The applicant in turn contended that AASRI had no independent legal existence as it was an organ of Roshydromet which, in turn, was

(T) where the more realistic approach, which is also the approach advocated by international law itself, of 'majority acceptance' was adopted.

⁷⁴At par 51 of the judgment and see Carpenter n 53 above at 170.

⁷⁵*Id* at 172 and the quotation from the case at par 75.

⁷⁶See Carpenter n 68 above at 171 who points to the anomaly in this particular instance in that South African courts have, even before the constitutional imperative to do so, often referred to these standards.

⁷⁷Admiralty Jurisdiction Act 105 of 1983.

a department of the Russian government. The applicant alleged that both vessels were owned by the Russian government and claimed immunity as a foreign state from the jurisdiction of the court in the proceedings for the arrest of the Akademik Fyodorov in terms of the Foreign States Immunities Act.

In dealing with the matter the court pointed to the following exceptions under the Foreign States Immunities Act namely, acts relating to commercial transactions (section 4), relating to arbitration (section 10) and relating to admiralty proceedings (section 11). Decisions such as *Inter-Science Research and Development Services (Pty) Ltd v Republica Poplar de Mocambique*⁷⁸ and *Kaffraria Property Co (Pty) Ltd v Government of Zambia*⁷⁹ predating the 1993 Constitution, were considered by the court in clarifying the matter. After considering the various statutory exceptions to immunity, the court came to the conclusion that the ship at the time of arrest was not used for commercial purposes but for polar research from which the owner derived no commercial profit. The arrest was therefore set aside.

S v Melam 1996 2 BCLR (E)⁸⁰

The Eastern Cape Division of the High Court was, however, back on chapter 3 of the Constitution when it considered the admissibility of pointing-out evidence in the light of section 25 of the Constitution. Froneman J took up the now familiar *Makwanyane* dictum but referred to a number of soft law instruments and to decisions of international courts, clearly distinguishing these from 'foreign' law under section 35.

Fose v Minister of Safety and Security 1996 2 BCLR 232 (W)⁸¹

Dealing with damages resulting from torture and assault at the hands of the South African police, *Fose* is an unfortunate decision epitomising the legacy of the apartheid era and the mistrust of international law among the pre-Constitution judiciary. The judge failed to acknowledge the distinction between international and foreign law in section 35,⁸² and in fact when he referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms and judgments of the ECHR interpreting the relevant rights, showed a total misconception of the role of the Constitution and its effect in South African law in the following remarkable terms:

While the plaintiff has placed some reliance on these authorities they do not seem to me to be particularly helpful. The rights and their enforcement, all the product of international treaties, are so entirely distinguishable from an existing

⁷⁸1980 2 SA 111 (T)

⁷⁹1980 2 SA 709 (E)

⁸⁰For a more complete discussion of the case see Botha 'Riding the tide: South Africa's "regular courts" and the application of international law' (1996) 21 *SAYIL* 175ff

⁸¹*Id* at 176

⁸²At 237H

common law system ... that the precedent sought to be invoked is more likely to confound than enlighten.⁸³

Selected cases reported during 1997

McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd; McDonald's Corporation v Dax Prop CC; Mc Donald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC 1997 (1) SA 1(A)

The 1983 Paris Convention on the Protection of Industrial Property was considered by the court in interpreting domestic legislation incorporating an international agreement. The court however specifically mentioned that the convention provision in question (art 6 bis (1)) was only given legislative effect in South African law under the Trade Marks Act,⁸⁴ which came into effect in 1995.

Fraser v Children's Court, Pretoria North 1997 2 BCLR 153 (CC)

The court considered whether section 18(4)(d) of the Child Care Act 74 of 1983 was inconsistent with the 1993 Constitution and invalid insofar as it dispensed with the father's consent to the adoption of his illegitimate child. Instead of referring to the ample sources of international law on the topic, Mahomed DP, who delivered judgment, stated that 'In addressing itself to these matters the legislature might, however, have to consider the judicial and legislative responses in certain foreign jurisdictions ... but only as far as they may be relevant to our conditions'.⁸⁵ Under these 'foreign jurisdictions' he examined statutory responses and case law in various countries, but also the case of *Keegan v Ireland* by the European Court of Human Rights.⁸⁶

*President of the Republic of South Africa v Hugo 1997 6 BCLR 708 (CC)*⁸⁷

At his inauguration as South Africa's first democratically elected president on 10 May 1994, Nelson Mandela pardoned all females in prison at that date and who had children under twelve years of age. Hugo, a widower with an eleven year old child, was also serving a sentence in goal. He challenged the pardon on the ground of discrimination based on gender prohibited by section 8(2) of the Constitution. The President's pardon was based on the prerogative powers of the crown. Among these, and relevant for present purposes, is the prerogative in foreign affairs which had traditionally been sacrosanct and non-justiciable. This case represents the first 'crack' in the rigid application of the so-called 'act of state' doctrine and the non justiciability of acts involving other sovereign states.

⁸³At 242.

⁸⁴Act 194 of 1993.

⁸⁵Par 30 at 165.

⁸⁶Par 39 at 169.

⁸⁷This lengthy and involved case will not be discussed in detail. A full discussion can be found in Carpenter 'Prerogative powers in South Africa – dead and gone at last?' (1997) 22 SAYIL 104ff.

Welkom Municipality v Masureik and Herman t/a Lotus Corporation 1997 3 SA 363 (SCA)⁸⁸

The status of the Chicago Convention on Civil Aviation and its annexes in domestic law was considered by the Supreme Court of Appeal in an appeal from the decision in the Free State Provincial Division of the High Court. The Convention itself is incorporated into domestic law in terms of section 1 of the Aviation Amendment Act⁸⁹ but not annex 14 made pursuant thereto. Without making any reference to the constitutional provisions regarding the status of international agreements in domestic law, the court points out that⁹⁰:

While the Convention itself has been adopted and enacted as if it were domestic legislation (s 1 of the Aviation Amendment Act 42 of 1947), any recommendations which may be made pursuant to it by ICAO are not automatically, and without more, invested with the status of a municipal law binding upon the citizenry of South Africa. Apart from the fact that they are no more than recommendations, the Convention itself does not impose upon parties to it an absolute obligation to implement them.

Section 22A of the Aviation Act makes it clear that unless an international aviation standard is incorporated in the regulations by ministerial notice in the *Gazette*, it will not be deemed to be a regulation made in terms of the Act. Despite the correct conclusion reached by the court, one would have hoped that the Supreme Court of Appeal would set an example for dealing with a matter such as the one at hand by indicating how the Aviation Act lines up with Constitutional provisions and clarifying the status of the annexes both in terms of the Constitution as well as international law (on recommendations of international organisations).

Selected judgments reported during 1998*Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC)

In considering section 39 of the 1996 Constitution, Kriegler J makes the following statement:

I wish to repeat a warning I have expressed in the past. Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies. Both the interim and the final Constitutions, moreover, indicate that comparative research is either mandatory or advisable.⁹¹

⁸⁸This case is an appeal from *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 4 SA 745 (O) which was decided before the Constitution/s came into force. For a discussion of both cases see Botha 'Municipal application of annex 14 to the Chicago Convention: the role of recommended international practices And procedures in South African municipal law' (1997) 22 *SAYIL* 112.

⁸⁹Act 42 of 1947.

⁹⁰Pars D-E at 371.

⁹¹Par 26 at 53.

This would seem to imply that, despite the provisions of sections 231 and 232, international law is still regarded as foreign law. After this general warning, and having cited sections 35 and 39 of the respective Constitutions, the judge embarks on an analysis of foreign case law.

De Lange v Smuts NO 1998 3 SA 785 (CC)

The court made passing reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms in an analysis of the 'right to freedom and security of the person.'⁹² The court pointed out that the description of these rights in the European Convention differs from that in the South African Bill of Rights in that the latter provides protection in broad unqualified terms, whilst the former explicitly excludes certain forms of detention. No further conclusion was drawn from this difference and the court switched to an in depth analysis of foreign law.

*Harksen v President of the Republic of South Africa 1998 2 SA 1011 (C)*⁹³

Jurgen Harksen, a German national wanted for fraud in Germany, fled the country and settled in South Africa. This is the first of a series of cases spanning a number of years in which he attempted to oppose his extradition to Germany. As much in the decision turned on the South African Extradition Act, only the general international law issues involved will be identified.

First, the court was called upon to decide on the existence or otherwise of an extradition treaty between Germany and South Africa. The foreign affairs departments of both countries had issued certificates stating that there was no treaty. Pre-constitution, this would have been the end of the matter as the executive certificate has traditionally been regarded as embodying a non-justiciable act of state.⁹⁴ In this instance the court was faced with two certificates – one representing a South African act of state, the other a foreign (German) act of state. The court proceeded to establish the existence of the treaty for itself. Although it concurred with the views expressed in the certificates, the fact that it conducted an independent enquiry which could have been decided otherwise, shows a widening of the crack in the absolute nature of executive prerogative – and this time the foreign affairs prerogative – after the enactment of the Constitutions first identified in *Hugo*.⁹⁵ The case consequently sheds light on the interplay between South Africa's supreme

⁹²Par 45 at 804.

⁹³For a full analysis of this case see Botha 'International law in the South African courts' (1999) 24 *SAYIL* 331. See too Botha 'Lessons from Harksen: A closer look at the constitutionality of extradition in South African law' (2000) 33 *CILSA* 274 ff where all the Harksen cases are discussed.

⁹⁴*Id* at 331-334 and the authorities there cited.

⁹⁵See above.

constitution and traditional approaches held by the courts to the justiciability of South Africa's relations with foreign states on the international plane.⁹⁶

The court also pronounces on succession to treaties, treaty termination, suspension and revival.⁹⁷ Furthermore, the judge was prepared to accept the principle of 'speciality' as part of customary international law although he did not find finally on the matter.⁹⁸ The case therefore also represents an acknowledgment of the applicability of customary international law in South African municipal law.

*Langemaat v Minister of Safety and Security 1998 4 BCLR 444 (T)*⁹⁹

A female member of the South African police service who was in a long term same-sex relationship, challenged regulations under the Police Act in terms of which the service's medical aid had been established. In terms of the regulations, the term 'dependant' did not provide for partners in same-sex unions. Instead of relying on section 39(1) as is generally the case, the court here categorised section 39(2) of the interpretation clause as designed 'precisely to meet such a case'.¹⁰⁰ The court found that this was indeed a case of discrimination although without considering the international law position (foreign case law was considered) or the role of international law in promoting the 'spirit' of the Constitution.

*CGM Industrial v KPMG 1998 3 SA 638 (T)*¹⁰¹

The Foreign States Immunities Act was before the Transvaal Provincial Division of the High Court. The government of the Kingdom of Lesotho (fourth respondent) initiated an investigation into allegations of customs fraud against a clothing manufacturer in Lesotho (appellant) who imported fabrics, manufactured garments from the fabric, and then re-exported the garments to stores, *inter alia*, in South Africa. In order to conduct the investigation, the third respondent, who conducted the investigation on behalf of the government of Lesotho, seized documents from the appellant. The court *a quo* dismissed an application by the appellants for restitution of the documents. The appellants lodged an appeal against the entire judgment. The appellants

⁹⁶Although it is conceded that there is some controversy as to whether the 'act of state' doctrine is indeed part of international law, it is accepted as such for present purposes.

⁹⁷Botha n 93 above at 334 ff.

⁹⁸The validity of the arguments raised by Harksen in this regard are discussed in Botha n 93 above 340-41.

⁹⁹For a full discussion of the case see Beukes 'The recognition of sexual orientation as a ground for (unfair) discrimination: A South African reading' (1998) 23 *SAYIL* 266 ff.

¹⁰⁰At 448I. This provision provides: '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'.

¹⁰¹For further discussion of this case see Labuschagne 'Scope of foreign state immunity' (1998) 23 *SAYIL* 262 ff.

contested the power of the Attorney-General of Lesotho to represent the Kingdom in the legal matter, arguing with reference to Oppenheim, that the action should be brought by an accredited envoy of Lesotho. They further argued that the Attorney-General may not act in legal matters abroad as it would accord extra-territorial effect to the Constitution of Lesotho. Both these arguments were considered and dismissed by the court.

Selected judgments reported during 1999

*Harksen v President of the Republic of South Africa case A394/99 (CPD) (29.9.1999 unreported)*¹⁰²

In a further attempt to stall or prevent his extradition, Harksen afforded the courts an opportunity to consider the role of treaties in South African law in terms of section 231 of the constitution. He argued that a declaration by the President in terms of section 3(2) of the Extradition Act,¹⁰³ amounted to the conclusion of a bilateral treaty and had, therefore, to comply with the provisions of section 231 of the Constitution. The nature of a treaty in terms of South African law is considered and the definition in the Vienna Convention endorsed with the intention of the parties identified as the cardinal element.¹⁰⁴ The court further acknowledged certain provisions in the Vienna Convention on the Law of Treaties as customary international law binding on the Republic in terms of section 232 of the Constitution.¹⁰⁵

*K v K 1999 4 SA 691 (C)*¹⁰⁶

Although the Hague Convention on the Civil Aspects of International Child Abduction was incorporated into South African law by the Hague Convention on Civil Aspects International Child Abduction Act 72 of 1996, when the present case arose the Convention was not yet part of our law. The applicant, who requested the court to order the return of his child to the United States, referred the court to 'the best interest of the child' principle enshrined in both constitutional and international law. The court ruled that, as that the removal had taken place before the Convention came into force for South Africa, this should be regarded as a 'non-Convention case'.¹⁰⁷ The court, however, none the less considered the United

¹⁰²The case is fully discussed in Botha 'Lessons from Harksen: A closer look at the constitutionality of extradition in South African law' (2000) 33 *CILSA* 274 at 287 ff.

¹⁰³Act 67 of 1962. This section empowers the President to declare a person 'liable to be extradited' where no treaty exists between South Africa and the requesting state.

¹⁰⁴At par 3 of the judgment.

¹⁰⁵For a discussion of the court's application of section 232 see Botha n 93 above at 291 ff.

¹⁰⁶For a discussion see C Nicholson 'The Cape Provincial Division of the High Court makes a determination under the Hague Convention on the Civil Aspects of International Child Abduction (1980) *K v K* 1999 4 SA 691 (C)' (2001) 64 *THRHR* 332; Labuschagne 'Application of the Hague Convention on Civil Aspects of International Child Abduction in South Africa' (2000) 25 *SAYIL* 255.

¹⁰⁷At 702H.

Nations Convention on the Rights of the Child, ratified by South Africa, as well as comments emanating from the Committee on the Rights of the Child to determine the 'best interest of the child' as directed by section 39 of the Constitution¹⁰⁸ It found that although the Convention was not directly applicable, the paramount consideration remained the best interests of the child and that the principles of the Convention were thus applicable to the extent that they indicated what was normally in the interest of such a child¹⁰⁹ It was ordered that in the present instance, the best interest of the child dictated that his future be determined by the United States court

Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999 2 SA 279 (T)¹¹⁰

The court was here confronted with a number of international law issues This case arose against the background of treaties between Lesotho and South Africa providing for the construction of the Lesotho Highland Water Project (LHWP) and related matters The LHWP is designed to effect the delivery of water by Lesotho to South Africa and to generate hydro-electric power in Lesotho In executing the LHWP, mining rights granted to Swissborough to mine in Lesotho, were infringed Swissborough approached the Lesotho High Court for an interdict restraining the authority appointed by the treaty to oversee the implementation thereof (LHDA), from carrying out its operations in the area in question Shortly hereafter, Lesotho revoked all mining leases and excluded the court's jurisdiction The revocation was set aside on application by Swissborough, who claimed in excess of R945 million for unlawful interference with its rights under the leases It was alleged by Swissborough that South Africa in fact controlled the various bodies created to implement and administer the project The LHWP is further seen as a partnership dominated by South Africa The court therefore had to decide whether it had jurisdiction to determine the nature of the agreement between South Africa and Lesotho The court cites with approval the standard passage from *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*¹¹¹ indicating the pre-1993 position that the conclusion of a treaty is an executive and not a legislative act which cannot affect the rights of subjects except by legislative process

Since the treaties in question had not been incorporated into South African municipal law, it is clear that the rights of subjects had not been affected¹¹²

¹⁰⁸At 703E-J

¹⁰⁹At 693C

¹¹⁰For a discussion of this case see Botha 'The foreign affairs prerogative and the 1996 Constitution' (2000) 25 *SAYIL* 265 ff See too in general K Lehmann 'The act of state doctrine in South African law Poised for reintroduction in a different guise?' (2000) 15/2 *SAPL/PR* 337 and 'The foreign act of state doctrine Its implications for the rule of law in South Africa' (2001) 16/1 *SAPL/PR* 68

¹¹¹1965 3 SA 150 (A) at 161B-D

¹¹²At 327G